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THE COMMISSION PROPOSAL FOR A "REGULATION ON A COMMON EUROPEAN SALES LAW (CESL)" – TOO BROAD OR NOT BROAD ENOUGH?

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project "European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation" (ERPL).
The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new–orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

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Abstract

The paper which was commissioned by the Austrian Ministry of Consumer Affairs but written under the exclusive responsibility of the authors consists of three parts:

The first part written jointly by the authors gives an analysis of the so-called "*chapeau*" of the Commission proposal on a Regulation (EU) for a "Common European Sales Law" (CESL), published as COM (2011) 635 final of 11.10.2011. The *chapeau*, that is the legal instrument putting into effect the eventual CESL, concerns such fundamental questions as legal basis, namely Art. 114 TFEU on the internal market, importance of the subsidiarity and proportionality principles, personal, territorial and substantive scope of the proposal, the mechanism of "opting-in" in cross-border B2C (business to consumer) transactions, its relation to the "*acquis*", in particular the recently adopted "Consumer Rights Directive" (CRD) 2011/83/EU of 25.10.2011, to existing Member State law under conflict-of-law provisions of Art. 6 on consumer protection of Regulation (EU) 593/2008, and to options left to them.

The second part, written by Hans Micklitz, analyses the substantive provisions of the so-called Annex I, namely the text of the CESL itself which with some modifications took over over the results of the EU expert group on a "feasibility study on an optional instrument" of 3.5.2011. It is concerned with B2C provisions on so-called "off-premises" and distance contracts with respect to information obligations of traders and withdrawal rights of consumers which are particularly relevant in e-commerce. Also the new proposals on unfair terms are discussed which go beyond the existing *acquis* of Dir. 93/13/EEC.

The third part, written by Norbert Reich, is concerned with provisions on consumer sales and related service transactions, also based on the feasibility study with an extension to "digital content". Some of them go beyond the existing *acquis* of Dir. 99/44/EC, while the concept of "related service contracts" remains rather obscure and controversial.

Both authors take a rather critical view towards the Commission proposal, even though they do not reject the Commission initiative *ab ovo*. The most important points of their detailed analysis concern the following questions:

- The extension of the CESL to B2B (business to business) transactions has not been explained by the Commission and does not fit well into the proportionality requirement of Art 5 TFEU.
- The concept of "consumer" in B2C transactions is too narrow and may create an incentive of traders to circumvent mandatory provisions in borderline cases, especially mixed purpose contracts (part B2C, part B2B) where the CESL does not contain any "safety net".
- The scope of precluding existing Member state law by the simple "choice" of the CESL which for the consumer is usually done on a "take-it-or-leave-it" basis should be seen as problematic; it involves a complete shift in jurisdiction on contract and consumer law matters and results in the end in a de facto "full harmonisation" which had just been rejected in the debate on the CRD.
- The authors give a detailed account on those areas where the CESL seems to improve the position of the consumer – in contrast to those where the opposite is the case – questions which need a thorough debate by the European public.

Keywords

EU internal market competence, subsidiarity and proportionality; Common European Sales Law CESL); scope of the proposed instrument; “opt-in”; impact on Member State consumer law; off-premises and distance sales, e-commerce; unfair terms in B2C transactions, consumer sales and related service contracts, Consumer Rights Directive (CRD).

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PART I

The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?[*]

Hans-W. Micklitz[**] / Norbert Reich[***]

Overview

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[*] Study prepared for the Austrian Ministry of Consumer Affairs, Vienna. The opinions expressed therein are exclusively those of the authors.

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I. Introduction (1.-3.)

1.- On 11.10.2011 the Commission published its long awaited "Proposal for a Regulation of the European Parliament (EP) and the Council on a Common European Sales Law (CESL)"[1] (in the following: "the proposal") drafted in record time, which is normally not typical for the work of the EU-Commission, unless in cases of high priority. It is the result of a long and controversial discussion process in the EU which has been analysed elsewhere.[2] It resulted in the Commission Green Paper of 1.7.2010 which put an implicit priority on adopting an "Optional EU Instrument (in the following OI)" of contract law, which had found the lively attention of academia, of lobby groups and of the European Institutions themselves.[3] The Commission appointed an Expert Group which delivered a "Feasibility Study" on 03.05.2011 after less than a year's intense work, proposing a detailed instrument of an EU contract law, mostly limited to sales and related services law. It also covered matters of general contract law and included both B2B (business to business) and B2C transactions.[4] However, it did not make any proposals on the legal basis and instrument to be chosen. It did not define its territorial scope either – that is whether it could be used for cross-border transactions only or also for "internal matters" in one Member state, depending on the consent of the parties. Nor was it concerned with the process of opting-in or with the relation of the instrument to the new EU regime on conflict matters in contracts (Rome I-Regulation 593/2008)[5] or non-contractual obligations (Rome II-Reg. 864/2007).

2.- The Commission has with some modifications – particularly concerning the inclusion of "digital content" – more or less taken over the structure and the concrete proposals of the Expert group (after a hearing of interested parties which was terminated in the short time span of 2 months (!!), namely on 1.7.2011). The proposal has a double headed structure:

- The Regulation as such will cover such "general EU law matters" (the so-called "chapeau"), like the legal basis and instrument, the definitions, the scope of application, the agreement to and enforcement of a fair and transparent "opt-in"-procedure in particular with consumers, with obligations and remaining powers of Member States, and with miscellaneous technical issues;
- *Annex I* containing the detailed provisions of the "Common European Sales Law – in the following CESL", *Annex II* with a "Standard Information Note" relating in particular to an eventual consumers' opt-in in business to consumer (B2C) transactions. No recitals or explanations are attached to the Annex.

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1 COM (2011) 635 final of 11.10.2011.

2 N. Reich, Harmonisation of European Contract Law – with special emphasis on Consumer Law, China-EU Law Journal 2011, 551; H.-W. Micklitz, A 'Certain' Future for the Optional Instrument, in R. Schulze/J. Stuyck (eds.), Towards a European Contract Law, 2011, p. 181.

3 COM (2010) 348 of 1.7.2010; see Study by BEUC, Towards a European Contract Law for Consumers and Businesses, 2010; C. Herrestahl, Ein europäisches Vertragsrecht als Optionales Instrument, EuZW 2011, 7; K. Tonner, Das Grünbuch der Kommission zum Europäischen Vertragsrecht für Verbraucher und Unternehmer – Zur Rolle des Verbrauchervertragsrecht im europäischen Vertragsrecht, EuZW 2010, 767; H. Rösler, Rechtswahl und optionelles Vertragsrecht in der EU, EuZW 2011, 1; M. Tamm, Die 28. Rechtsordnung der EU: Gedanken zur Einführung eines grenzüberschreitenden B2C Vertragsrecht, GPR 2010, 281; J. Cartwright, ‚Choice is good' Really? Paper presented at the Leuven conference on an optional contract law, ERCL 2011, 335. A comprehensive study with detailed recommendations has been prepared by a working group of the Hamburg Max Planck-Institute for Comparative and International Private Law, "Policy Options for Progress Towards a European Contract Law", 2011, MPI paper 11/2 = RabelsZ 2011, 373 (in the following: MPI-study); see also: ESC, position paper on options for a European contract law, OJ C 84/1 of 17.3.2011.

4 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. http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf; see the contributions in: Schulze/Stuyck,supra note 2; text on pp 223 ff. A first evaluation of the part on consumer sales law has been presented in N. Reich, Variationen des Verbraucherkaufrechts in der EU, EuZW 2011, 736.

5 OJ L 177, 4 July 2008, 6. Valid in all EU countries with the exception of Denmark.

The following contribution will not go into an analysis of the provisions of the CESL itself, which will certainly find attention among the concerned political, business, consumer and legal community – the debate has just started and will, as the discussion on the Consumer Right's Directive (CRD) has shown, probably take several years. The outcome is less than sure, and it may not even result in the instrument proposed by the Commission. Details will be given in separate contributions by Hans Micklitz on "modalities" and Norbert Reich on "sales law".

3.- This paper is interested in the "chapeau" – that is the EU legal framework - which contains many "bold" new legislative approaches which are not only important in contract law but may demonstrate a new phase in the exercise of EU competences under the system of shared conferred powers of Art. 5 TEU/4 TFEU in relation to matters of contracting in the internal market and consumer policy. Four areas should be assessed somewhat more in depth:

- Legal basis of the instrument proposed (II);
- Scope of the proposal with regard to persons (III,1), subject matters (III,2), and territory (III,3);
- The agreement to opt-in (IV);
- Effects of the opt-in on Member states, residual competences and obligations of and their courts of law, the position of third countries (V).

Matters not covered are those relating to specific questions in B2B relations; the focus will be mostly on B2C transactions, where in the words of the Commission a particular need for the proposed instrument has been found to exist.[6]

[6] See already earlier communications by the Commission, cited in the explanatory memorandum to the proposal.

II. Legal Basis of the Proposal: Art. 114, not 352 TFEU (4.-17.)

1. Arguments in Support of Art. 114 TFEU

4.- The legal basis of the proposal is Art. 114 TFEU on the (broad) Union powers relating to the establishment and functioning of the internal market. In the explanatory memorandum, this basis is justified because the proposal removes:

> "obstacles to the exercise of fundamental freedoms which result from differences between national law, in particular from the additional transaction costs and perceived legal complexity experienced by traders when concluding cross-border transaction and the lack of confidence in their rights experienced by consumers when purchasing from another country – all of which have a direct effect on the establishment and functioning of the internal market and limit competition".[7]

At the same time the Commission insists that it wants to guarantee a high level of consumer protection as required by para 3 of Art. 114 TFEU, in particular through a set of mandatory rules. This objective can, in the opinion of the Commission, only be reached by a Regulation under Art. 288 (2), and not by a non-binding recommendation or by a directive, because this would not eliminate the country specific differences particular to consumer contract law. In the eyes of the Commission, this instrument – the CESL as attached in the Annex I – meets both the proportionality and the subsidiarity principles of Art. 5 (2) and (3) TFEU – appoint to be discussed in detail later (paras 9-16).

Such plain language may come as a surprise to the many critics of the "EU competence creep",[8] to other authors proposing a regulation based on Art. 352 for an optional instrument (OI) like the MPI-study, not on Art. 114 TFEU,[9] or scholars who think that the EU has only a very limited competence in contract law matters anyhow, perhaps with the exception of rather narrowly defined directives for specific problem areas in B2C (the so-called *consumer-acquis*) and (even less) B2B transactions,[10] or to improve and enhance cross-border judicial co-operation, Art. 81 TFEU.

It is certainly true that the adoption of the proposal as an EU regulation would set an important precedent, both with regard to the instrument chosen which in contract and consumer law matters usually resulted in the adoption of directives, only exceptionally in regulations, and with regard to the scope of the instrument which, as will be shown later, intrudes deeply into the "reserved area" of Member state contract law – provided there had been a valid choice of the parties. At the same time, it has to be recalled that the EU used Art. 114 TFEU (then Art. 95) as the legal base for adoption the regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.[11]

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7 At p. 9.

8 St. Weatherill, European Private Law and the Constitutional Dimension, in Cafaggi (ed.), The Institutional Framework of European Private Law, 2006, p. 79; same, EU Consumer Law and Policy, 2005, p. 245; see also by K. Gutman, The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of Proposed Options, European Review of Contract Law (ERCL) 2011, 151.

9 MPI-study supra fn. 4, at paras 56 ff.: „not an approximation measure", but an „alternative to existing national regimes".

10 For a discussion W.-H. Roth, Kompetenzen der EG zur vollharmonisierenden Angleichung des Privatrechts, in B. Gsell/C. Herresthal (Hrsg.) Vollharmonisierung im Privatrecht, 2009, p. 13 ff.; H. Grigoleit, Der Verbraucheracquis und die Entwicklung des Europäischen Privatrechts, AcP (Archiv für die civilistische Praxis) 2010, 354; J. Schilling, Materielles Einheitsrecht und Europäisches Schuldvertragsrecht, EuZW 2011, 776 at 777. An example would be Directive 2011/7/EU of 16.11.2010, OJ L 48, 23.2.2011, 1 on late payments.

11 Reg. (EC) 2006/2004 of 27.10.2004 OJ L 364 of 9.12.2004, 1.

Basedow[12] has argued that with the existing wording of Art. 114, the optional instrument cannot be regarded as a "measure for the approximation of the provisions laid down by law ...in Member States..." because no prior national "law" existed before the adoption of the CESL which could be regarded as an independent EU legal instrument. This rather formal argument does not seem to be convincing. In cross-border transactions which are the subject-matter of the CESL, national law would not be applicable on its own anyway, but only by way of the conflict provisions of the Rome I-Regulation. Therefore, the CESL goes beyond the law of Member States only if considered in an isolated manner, but in reality it affects in its combination conflict and substantive rules. The proposed measure under Art. 114 must be seen as originating from a mixture of provisions and practices of different origin, and, therefore, results in the "approximation" of legal provisions (on contract law) existing in Member States in a dynamic sense.

5.- Art. 308 EC (now Art. 352 TFEU) was used as the legal basis of the *Societas Europaea (SE)*[13] and the *Societas cooperativa Europaea (SCE)*[14] which established a "28th regime" for public companies and cooperatives. The companies and cooperatives can choose the law of the "28th regime" instead of the existing national regimes; those choosing the EU regime will have certain advantages in doing business all over the EU without the need to re-register or to establish subsidiaries. A more ambitious proposal is now before the EU legislator concerning a European private company (EPC) based on Art. 308 EC.[15]

In a dispute between the European Parliament and the Council, the European Court of Justice (ECJ)[16] was asked to decide on the correct legal basis for the SCE. In its judgment of 2.5.2006 it held that Art. 308 EC and not Art. 95 EC (now Art. 114 TFEU) was the correct basis:

> "It is apparent from the provisions in Article 9 of the contested regulation, pursuant to which a European cooperative society is to be treated in every Member State as if it were a cooperative formed in accordance with the law of the Member State in which it has its seat, that the European cooperative society is a form which coexists with cooperative societies under national law. In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms" (paras 43-44).

However, neither the mentioned EU regulations nor the judgment of the ECJ of 2.5.2006 can, in our opinion, be regarded as precedents concerning the adoption of an EU-CESL in the area of contract law. Company law is concerned with the *permanent creation of a new "supranational"*[17] *legal entity* not replacing but adding to national entities. It intrudes deeply into the institutional framework of state-like property rights, corporate governance, co-determination, creditor protection, taxation and social security jurisdiction, bankruptcy and the like. However, contract law is concerned with promoting and regulating transactions of limited time and scope, usually only between two partners (whether B2B or B2C) without third party effects (see recital 20 of the proposal), not with setting up a completely new legal entity and not requiring a complex legal infrastructure. Such an OI, if accepted by the parties, would run parallel to existing Member State contract law and the EU *acquis*. Under the proposal of the Commission, it is designed as a second legal order for cross-border transactions only. This limitation takes away much of the concerns that a second order would completely replace national consumer laws. Its concrete impact on consumer protection of Member State law would have

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12 J. Basedow, Fakultatives Unionsprivatrecht, in Festschrift F. Säcker, 2011, 29 at pp. 38; same, editorial EuZW 2012, 1.

13 Reg. (EC) 2157/2001 of 8.10.2001, OJ L 294 of 10.11.2001.

14 Reg. (EC) 1435/2003 of 22.7.2003, OJ L 207, 18.8.2003, 1.

15 COM (2008) 396/3.

16 Case C-436/03 EP v Council [2006] ECR I-3733.

17 For a theoretical discussion see H. Fleischer, Supranational corporate forms in the EU, CMLRev 2010, 1671.

to be clarified in the OI and will be discussed under paras. Therefore, with regard to competence, it seems conceivable that an OI can be based on the internal market competence of Art. 114 TFEU even in the form of a regulation,[18] as the ECJ recently judged with regard to the so-called Roaming-regulation (EU) No. 717/2009 which was based on Art. 95 EC.[19]

2. A Plea for a More Pragmatic Approach

6.- Finally, a more pragmatic argument would support the use of Art. 114 TFEU and the choice for a regulation in the proposal. As the debate about the CRD has shown, technological, social and legal developments require frequent changes of (EU-) law. This has been particularly true with regard to including *digital content* in the provisions on consumer information in the final version of the Consumer Rights Directive (CRD) 2011/83/EU of 25.11.2011[20] which has been extended by the CESL and which now has a complete set of provisions tailored to the specifics of transactions with digital content.[21] As a consequence, the CRD and the CESL (once adopted) will have to be "updated" continuously and in parallel to avoid discrepancies in the protective ambit of the two instruments, and to prevent "cherry picking" by traders switching from one instrument to the other to avoid higher levels of protection. This requires the use of the same legislative mechanism to obtain an analogous level of protection. This should be the "ordinary legislative procedure" of Art. 114 TFEU which allows majority voting with the full participation of the EP, while the procedure of Art. 352 TFEU as proposed by the MPI study requires unanimity in the Council "after obtaining the consent of the EP" and with a special opt-in procedure for Germany imposed by the Lisbon-judgment of the German Bundesverfassungsgericht[22] which makes parallel legislation on consumer matters in an eventual CESL and in special B2C directives almost impossible because of the veto power of every Member state.

3. Art. 81 TFEU as a Safety Net

7.- As the European Commission is focusing on cross-border consumer sales, one might wonder whether and to what extent Art. 81 might be the appropriate and maybe even the 'safer' legal basis. Whether or not Art. 81 TFEU could be used as a basis for the harmonisation of substantive rules is far from clear and has never been tested.

Art. 81 para 1 and 2 provide as follows:

> 1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. *Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States* (emphasis H.-W.M./N.R.)
>
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper

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18 See N. Reich, EU Strategies in Finding the Optimal Consumer Law Instrument, ERCL, forthcoming.

19 Case C-58/08 Vodafone [2010] ECR I-4999; critical comment M. Brenncke, CMLRev 2010 (47), 1793 who would have preferred Art. 308 EC (now Art. 352 TFEU).

20 Art. 5/6 of the CRD (OJ L 304, 22.11.2011, 64) concerning information requirements without any substantive rules which are now included in great detail in Art. 87 (d), 91 (a), 97, 98-102 etc. of the CESL.

21 Details will be studied in the part on sales law.

22 See the critique of J. Basedow, Editorial EuZW 2010, 410.

> functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff.

There seems to be a contradiction between the detailed list in para 2 which is exhaustive and very much in line with Art. 81 para 1, and the much larger second sentence in Art. 81 para 2. It seems hard to build a link between CESL and the different issues explicitly enumerated in para 2. However, even the wider formula of Art. 81 para 1 sentence 2, which allows for the "approximation" – not harmonisation – of the laws of the Member States, is linked to the overall objective of developing judicial co-operation. The legislative history of Art. 81 provides ample evidence that the Member States were keen to specify the fields in which the EU is granted to power to take legislative action.

4. Impact of the Subsidiarity and Proportionality Principles under Art. 5 (3, 4) TEU – Limiting the Scope of the CESL

9.- Even if competence of the EU to adopt a Regulation on an "optional sales law" can be established under Art. 114 TFEU, such an instrument still has to respect the subsidiarity and proportionality criteria under Art. 5 TEU. This is the case because such competence relating to internal market and consumer protection matters is not an exclusive, but merely a shared one under Art. 4 (2) TFEU.

Several National Parliaments have objected to the Commission proposal expressly based on the argument that it does not meet the subsidiarity and proportionality requirements of the Treaty. They have invoked the procedure according to Art. 6/7 of the Protocol on the "Application of the Principles of Subsidiarity and Proportionality".

10.- The UK House of Commons gave a detailed reasoned opinion on 7 December 2011[23] which to some extent was based on an assessment by UK consumer organisations:

- The proposal does not comply with the essential procedural requirement of giving detailed reasons;
- The proposal and the attached impact statement do not prove the necessity of such an instrument for improving cross-border trade;
- There is concern about the clear benefits by reason of its scale and effect because of the legal complexity, a lack of legal certainty and a danger of consumer confusion about their legal rights.

The German Bundestag, voting in favour of a resolution of its legal committee of 30.11.2011,[24] came to a similar conclusion after an expert hearing, arguing that:

- The principle of subsidiarity must be broadly understood, including EU competence for and proportionality of EU action in the field of contract law,
- Existing differences in Member State contract law do not have an appreciable negative effect on cross border economic activity in the internal market,
- The draft regulation will create increased legal uncertainty in the European legal space.

The "EU Ausschuss" (EU-committee) of the Austrian Bundesrat (Parliament) adopted a resolution of 30.11.2011 in a similar direction, rejecting the proposal on subsidiarity arguments.[25] In particular, it found a large amount of unclear legal terminology and concepts which would lead to more uncertainty in cross-border contracting. This could in the end also increase transaction costs. An adoption of the proposed regulation could result in discrepancies between consumer protection in harmonised national law and in the optional EU instrument. In any case, the optional instrument could not be regarded as a

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[23] Published in Council Doc. 18547/11 of 14 Dec 2011.

[24] BT-Drucksache 17/800.

[25] 8609 der Beilagen zu den stenographischen Protokollen des Bundesrates.

measure for the "approximation" of Member States legal provisions in the sense of Art. 114 TFEU, but rather as a free standing legal instrument which would require unanimity of Member States under Art. 352 TFEU as a legal basis.

11.- These are obviously important arguments against the Commission proposal. So far as they are found in the political debate to invoke the special proceedings under the Protocol, it is not the intention of this paper to make a contribution in this direction. The proposal does indeed not give an explanation of why specific rules of the CESL have been chosen, but simply relies on the preparatory work of the Expert Group and its feasibility study of 3.5.2011, which again does not contain a detailed set of explanatory notes. However, we would not regard this deficit as being of such seriousness as to put the whole project under risk, because the reasoning in the form of recitals, which are normally attached to a Commission proposal, can easily be remedied at a later stage of the legislative process. The same is true with regard to arguments about legal certainty and clarity, which can also be checked during the legislative process by improving the language, structure and impact of the final text of the instrument. The transaction cost argument which figures high in the Commission explanatory memorandum has found some empirical and statistical evidence in the attached Commission staff "Impact Assessment" of 11.10.2011.[26] It has to approached with caution, as the IA confirmed exactly what Commissioner Reading had announced in her speech at the University of Leuven in June 2011.[27]

12.- From a legal perspective, three clearly separated steps should be distinguished, even though they are sometimes confounded in the above mentioned resolutions of National Parliaments and in the following debate:

- First, the correct legal basis has to be established. This must be based on objective criteria following ECJ case law;[28] it has already been insisted that Art. 114 TFEU can be used for an optional EU sales law in the form of the proposed CESL (para 4).
- Second, the subsidiarity principle in Art. 5 (3) TEU must be respected by the proposed CESL, showing that the objectives of the Union act can, "by reason of the scale or effects of the proposed action, be better achieved at Union level".
- Third, the proportionality principle in Art. 5 (4) must comply with the "necessity" test regarding "content and form of Union action".

13.- With regard to the subsidiarity argument, it should be recalled that it does not concern the existence but rather the exercise of EU competence ("...shall act only and insofar as..."). It limits the current competences of the Union and wants to leave room to Member States to achieve similar objectives on their own. It is difficult to argue that the objectives of a CESL can better be achieved by Member State action. The CESL will be applicable only to cross-border transactions to be defined in some detail later (para 26)). Member States obviously have no possibility to achieve a similar result; they must rely on provisions of Private International Law (PIL) which have already found its transfer to an EU-instrument by the Rome I-Reg. 593/2008. PIL is based on the diversity of national contract law – including provisions of consumer protection unless harmonised –, not on a uniform instrument of contract law as proposed to a limited extent by the CESL.

The ECJ, when asked to rule on a Community, now Union measure, under the subsidiarity principle, usually takes a "light judicial approach."[29] That is to say, it will allow the EU legislator a wide margin of discretion.[30] Its pronouncement in the *Tobacco manufacture judgment* of 10 Dec. 2002[31] on the one

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[26] SEC (2011) 1165 final of 11.10.2011, attached to the BT-Drucks. 17/800 at p. 11.

[27] H.-W. Micklitz, in Schulze/Stuyck, supra note 2, 182.

[28] See for instance case C-301/06 Ireland v EP and Council [2009] ECR I-593 para 60.

[29] Harbo, ELJ 2010, 158 at 166.

[30] Case C-58/08 Vodafone note 20 at para 77.

side made clear that the Community does not have exclusive competence to avoid distortions of competition under the internal market proviso. Nevertheless, the directive could be justified because it avoided different rules for the marketing of tobacco products and at the same time achieved a high level of health protection:

> Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level ... (para 182).

14.- Somewhat more complex may be the question of whether the proposal complies with the proportionality criteria, with the "necessity" test concerning "content and form" of Union action. As a starting point, the case law of the ECJ concerning control of Union measures under this principle should be remembered: unlike subsidiarity, it provides a relatively strict test to challenge and evaluate the legality of, for example, Community directives. It was used extensively in the Tobacco advertising judgment as an argument for annulment.[32] In the above mentioned judgment, the Court took a more cautious approach, insisting on the broad discretion of the EU legislature:

> Consequently, the legality of a measure adopted in that respect can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (para 123).

The Court has recognised that "the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments", even though it was bound by the proportionality principle according to Art. 5 (2) EC.[33] According to Harbo,[34] the Court uses a very "moderate" approach in controlling Community and in the future Union law measures under the proportionality test, while it uses much more restrictive language with regard to Member State measures allegedly restricting fundamental freedoms – an approach which can be criticized if compared to the strict proportionality control of Member State measures restricting the fundamental freedoms.[35]

To some extent, the proposal seems to pay respect to the necessity test despite the supposed need for a comprehensive instrument covering most matters of contracting. There remains a broad area where (different) Member State law may still be applicable, e.g. rules on representation, unconscionability, discrimination, transfer of title, certain types of mixed contracts etc (recital 23). Moreover, matters relating to non-contractual obligations, like product liability and *culpa in contrahendo*, are not covered by the CESL as they do not relate to contractual obligations, but to obligations arising out of non-contractual matters under the Rome II Regulation 864/2007 (para 35).

15.- Even under the "manifestly inappropriate" criteria, it could be argued against the Commission that it has not explained why the CESL should also cover general contract law matters like the conclusion, defects in consent and interpretation of a contract, which are not specific to sales (and related services) law, and certain areas of the general law of obligations like damages, restitution, and prescription. Almost all of them must be qualified as default rules in business to business transactions (B2B) which can be modified by party agreement; very few provisions of the CESL contain mandatory rules, for instance concerning good faith (Art. 2 (3) CESL), "grossly" unfair contract terms (Art. 86), damages

(Contd.)

31 Case C-491/01 The Queen v Secretary of State for Health *ex parte*: British American Tobacco (Investments) Ltd. *et al.* [2002] ECR I-11453.

32 Case C-376/98 Germany v EP and Council [2000] ECR I-8419 at paras 98-104.

33 Case C-380/03 Germany v EP and Council, [2005] ECR I-11573at para 145; C-344/04 IATA and ELFAA v Department for Transport, [2006] ECR I-403 at para 80, referring to earlier cases like case C-84/94 United Kingdom v Council [1996] ECR I-5755, para 58; Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, paras 55 and 56; case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, para 61, recently confirmed in case C-58/08 Vodafone supra note 20 para 69 referring to the objective of directly protecting consumers.

34 T.-I. Harbo, supra note 19 at 166, 172, 177.

35 See N. Reich, How proportionate is the proportionality principle, in FS G. Roth, 2011, 615 at p. 633.

(Art. 171), prescription (Art. 186). These very broad and general rules which differ among Member States have had no proven impact on cross-border transactions so far. The "impact assessment" of the Commission staff seems to be highly speculative on this point.

In any case, this can be solved by the B2B parties' freedom of choice under Art. 3 of the Rome I-Regulation within the limits of mandatory provisions of paras 3 and 4 of Art. 3 which also apply to B2B transactions. With regard to provisions specific to sales law, most of them are already covered by the Convention on the International Sale of Goods of 1980 (CISG – the Vienna Convention) which will be applicable either under an "opt-out" mechanism of Art. 1 (1) (a), or – for traders not established in the CISG Member States, namely in the UK, Ireland, Portugal, and Malta, by an "opt-in"-possibility under lit. (b). Why put a second level on cross-border contracting in a related matter when the parties to a B2B transaction already have an instrument at their disposal? Why artificially separate international and EU cross-border trade, which will make transactions more complex, instead of giving the parties more legal certainty as promised by the Commission? Therefore, it seems highly doubtful whether under the "necessity"-test the EU has jurisdiction at all to regulate cross-border B2B sales (and related service) transactions at all by adopting the CESL instrument.

16.- In B2C transactions matters are more complex because of the mandatory nature of provisions protecting the consumer under EU and national law. In cross-border transactions this problem is referred to in Art. 6 of the Rome I-Regulation 593/2008, which will be discussed below (para 33). The still existing differences between Member State consumer protection laws despite harmonisation at the EU level may warrant the adoption of a more coherent and uniform EU regulation focusing on establishing uniform standards of cross-border B2C transactions with regard to information in general and for specific types of marketing like distance or off-premises contracts, as well as standards and remedies for sales and related services contracts, according to the discretion of the EU legislator under the "manifestly inappropriate" test. However, the proposed provisions of the CESL must be "necessary" with regard to "content and form". In our opinion, this is not the case with regard to the above mentioned general provisions on contracting and on obligations, but only with those provisions which try to regulate problems specific to B2C transactions and which have already been the object of EU regulation, lately the Consumer Rights Directive 2011/83/EU of 25.10.2011.

17.- As a result, a strict application of the proportionality criteria for a cross-border CESL would result in a substantial reduction of its scope:

- It should exclude B2B transactions at all because of party freedom of choice and because of the existence of instruments, which are already optional, like the CISG.
- In B2C transactions, it should cover only those areas which have an impact on the internal market by imposing mandatory rules on the parties to a contract either by EU or by Member State law, whether implementing EU directives or autonomously protecting consumers.
- Such a narrowing down of the scope of the CESL may require a rethinking of the concept of consumer itself which will be discussed in the next sections (infra para 20).

III. Scope of the Proposal (18.-27.)

1. Personal Scope: Trader v. Consumer/Ttrader v. KMU

a) The problem of "mixed-contracts" (partly B2B, partly B2C)

18.- As is implicit in the proposal, the CESL can be used in (cross-border, para 26) contracts between traders, or between traders and consumers. With regard to contracts between traders, Art. 7 (1) provides for a personal restriction of the parties to a contract under the CESL, namely that one party must be a "small and medium-sized enterprise" (SMU) as defined in para 2; a Member State may extend its personal scope to any trader. However, we will not go into details of this rule which seems to give some additional protection against unilateral contract imposition without going into detail and without discussing such Member State laws which also extend consumer protection principles and provisions to SMUs – a practice especially legitimised now by recital 13 of the CRD which reads.

> Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive or certain of its provisions in relation to transactions that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not "consumers" within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises.

19.- The applicability of contracts between traders and consumers (B2C) is more important because the CESL contains "a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders": para 3 of Art. 1. Therefore, the CESL can only be chosen in its entirety: Art. 8 (3) of the proposal. As a result, the CESL is meant to be a package of comprehensive rules in transactions between traders and consumers, insofar as they fall within the scope of the instrument. By choosing the CESL to govern their contract relations, traders as well as consumers give up their autonomy to negotiate the applicable law. The role and importance of shaping contractual relations, for instance by applying general contract terms, will be discussed under para 31. Obviously, in practice this autonomy only exists for traders, not so much for consumers who are usually put in a take-it-or-leave position when contracting in consumer markets.

As a consequence, the definition of "trader" and "consumer" is decisive to determine the exact personal scope of the proposal. Art. 2 (e) of the proposal provides the definition of trader as "any natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession". It does not take into account the somewhat different and broadened version of the CRD, which is to be regretted for reasons of legal certainty:

> 'trader' means any natural *person* or *any* legal person, *irrespective of whether privately or publicly owned*, who is acting, *including through any other person acting in his name or on his behalf*, for *the* purposes relating to his trade, business, craft or profession *in relation to contracts covered by this Directive*'

The definition of "consumer" has been copied from the *acquis*. It was repeated in Art. 2 (3) of the feasibility study of 3.5.2011:

> 'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession'.

The definition Art. 2 (f) of the proposal is slightly modified:

> " 'consumer' means any natural person who is acting for purposes which are outside the person's trade, business, craft, or profession."

However, it should be noted that the definition of consumer is quite different from the Draft Common Frame of Reference of 2009 (DCFR) and an earlier version of the CRD:

Art. I.-1:105 (1) of the DCFR provides:

> A "consumer" means any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession.

Art. 2 (1) of the CRD in its consolidated version of March 2011 had the following wording:

> 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are *primarily* outside his trade, business, craft or profession;

However, the final version of the CRD 2011/83 returned to the traditional narrow definition of consumer in the *acquis*. Nevertheless, Recital (17) contains an "opening clause":

> The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.

This narrow wording of the *acquis* was confirmed by the ECJ in its *Gruber* judgment, at least with regard to the Brussels instruments on jurisdiction,[36] while the wording in the DCFR and the earlier version CRD was broader by adding the adverb "*primarily*", thereby giving a wider application to consumer protection rules in case of so-called *mixed contracts*.

b) No power of Member-states to extend the definition of "consumer" under the CESL

20.- In the process of implementing the consumer contract directives of the EU, Member States have tended to extend the definition of the "consumer" and thereby the personal scope of consumer law considerably. We need not go into details.[37] This was possible under the minimum harmonisation principle as interpreted by the ECJ in the *Buet* and *di Pinto*[38] cases, and which even survived the Commission's attempt at "full harmonization, as can be seen in the above mentioned recital 13 of the CRD.[39]

However, since the proposal contains a "fully harmonised definition" of consumer, and since this definition has an extremely narrow scope of application, it could lead to the paradoxical result that an extension to contracts involving a consumer interest in the broad sense as private users or customers would probably not be possible due to its preclusionary effects on national law. Since the CESL will be adopted as an EU regulation, Member States will lose any legislative power on its definitions and scope of application. For instance, Member States could no longer provide that only self-employed professional activities exclude the application of consumer law, not those related to dependent work like in Germany.[40] French law has extended it to "professionels agissant en dehors leur spécialité professionelle", distinguishing between "un rapport direct" et un "rapport indirect" which may trigger

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[36] C-464/01 Johann Gruber v BayWa AG [2005] ECR I-439; but see DCFR Vol. I (supra note 1) comment to Art. I.-1:105, insisting that this is not a precedent for the application and interpretation of substantive consumer law.

[37] See H. Schulte-Nölke et al., Consumer Law Compendium, 2007, pp. 670 ff.

[38] Case 382/87, Buet, [1989] ECR 1235; C-361/89, di Pinto, [1991] ECR I-1189.

[39] Against the much critique voiced against the Commission proposal of 8.10.2008 attempting full harmonisation of consumer law, Art 4 of the final CRD fully harmonised only the information obligations and provisions on off-premises and distance contracts, but did not substantially modify Directive 93/13/EC and 99/44/EC

[40] H.-W. Micklitz, in Münchener Kommentar, 5th edition, § 13 BGB para 46.

the application of consumer protective provisions.[41] English law also took a broader approach to the concept of consumer in the Unfair Contract Terms Act 1997.[42] Some countries even included non-profit organisations in the definition of the consumer - an extension rejected by the ECJ which insisted that consumer can by definition only be "natural persons".[43] However, this definition is subject to the minimum harmonisation principle and, therefore, allows an extension to legal persons. By opting-in the CESL, consumers would "voluntarily" abandon their protection in situations where Member State law contains a broader definition of consumer.[44] As a result, there would be inconsistency in the application of Member State consumer law, implementing EU directives, and the scope of the CESL, and traders could be invited to use the CESL to avoid national consumer protection measures which allow a broader definition of the concept of consumer!

It has to be recalled that the CRD puts much emphasis on drawing a line between the concept of the consumer harmonised under EU law and the leeway granted to Member States. Therefore, one might wonder whether a clarification during the legislative process would overcome that problem.

c) Enlargement of the concept of the consumer?

21.- European consumer law is largely based on the famous/infamous concept of the "average consumer". This is not the place to embark on the question whether and to what extent the ECJ has applied different standards in primary and secondary Community law as suggested by Johnston/Unberath[45] but challenged by the authors of this study. What matters is that the average consumer in their typical form resembles to a large extent the small and medium-seized company which the European Commission intends to integrate into the scope of the CESL, but only in the context of B2B transactions. The linkage between the average consumer and the SME or at least the smallest SMEs (Kleinstunternehmen/Kleinstunternehmer) is obvious and subject to divergent case-law in the Member States, turning around the question whether and to what extent consumers who are on the edge of losing their status as classical consumers e.g. like start-up companies which may come under the personal scope of the current national consumer protection laws (para 20). The de facto full harmonisation design of CESL eliminates this leeway, thereby lifting the issue from the Member States to the European level. The proposed concept of SMEs in the CESL is, however, far too large and cannot really cure the problems resulting from the narrow concept of the consumer.

22.- There are good reasons to challenge the extension of the CESL to B2B contracts. There is, however, a need – and in so far the proposal and the European Commission deserves support – to look for an appropriate legislative approach to provide for some sort of protection for SMEs, in particular the smallest of the SMEs. The proposed solution in this study starts from the premise that it might be easier to extend the notion of the consumer than to introduce a new category of "business in need of protection". The existing secondary Union law in the field of telecommunication, energy and financial services indicates the direction into which the concept of the consumer might be developed. EU law uses the notion of the "customer", which is distinct from the consumer and which intends to integrate exactly those SMEs which merit protection into the scope of application. Any proposal which points to an enlargement of the concept of the consumer might be more promising than the predictable conflict over defining SMEs.[46]

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41 J. Calais-Auloy/H. Temple, Droit de la consommation, 10ème éd., 2010, para 13.

42 G. Howells/St. Weatherill, Consumer Law, 2005, at para 5.6.2.

43 Joined cases C-541 + 542/00 Cape et al v Idealservice [2001] ECR I-9040.

44 N. Reich, EuZW 2011, 736 at 737.

45 The Double-Headed Approach of the ECJ concerning Consumer Protection, CMLRev. 2007, 1237.

46 See in more detail, H.-W. Micklitz, Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts, Gutachten für den 69 Deutschen Juristentag 2012 in München, still unpublished.

2. Substantive Scope: Sales, Digital Content, Related Service Contracts

a) Sale of movables

23.- In its substantive scope, the proposal is limited to sales contracts: Art. 5 (a). The definition is similar to Art. 1 (b) of Directive 99/44/EC (which was only concerned with consumer goods)[47] and is limited to the transfer of ownership of movables: Art. 2 (k). This excludes the transfer of immovable property, as defined by Member States, where usually formality requirements have to be respected which make the use of the internet impossible.

b) Digital content

24.- Provisions on digital content, as defined in Art. 2 (j), which were not yet included in the Feasibility Study have been added to the proposal: Art. 5 lit (b). It seems that the EU legislator is treating the supply of digital content like software, music, video, electronic games – with or without consideration, whether supplied on-line or on a tangible medium like a disc – as a sort of "quasi-sales contract". The CRD has begun with this new development by including definitions and information requirements on digital content: Recital 19, Art. 2 (12), 5 (1) (g), 14 (4) (a), 16 (m). This seems to be a departure from the classical approach of licensing of intellectual property rights, which was regarded as a contract of its own in most Member States.[48] It can be justified by the "commodification" (Verdinglichung) of digital content through modern technologies, in particular through downloading on the Internet which makes them a candidate for a standardised transaction similar to the traditional sales concept. There are some exceptions to this new approach to digital content, in particular financial services and gambling: Art. 2 (j) (i) – (vi) of the proposal. Details will be discussed in the study on sales law.

c) Related services and exclusions

25.- As a third variant, "relates services" are included in the CESL, irrespective of whether a separate price was agreed for it or not: Art. 5 lit (c) of the proposal. They are defined in Art. 2 (m). The definition, which was already contained in the Feasibility Study, has given rise to some doubt and critique.[49] It must be distinguished from a separate service contract relating to the product, like servicing, installation, repair, which is not linked to the original transaction, and, consequently, does not come under the provisions of the CESL. The proposal uses two different criteria which do not seem to be consistent:

- The service is concluded under the sales contract – that is depending on its conclusion and execution;
- it was concluded "at the same time" as the sales contract.

In the first case, the service "contract" is clearly subordinated to the sales contract and in reality only an extension to ancillary services; in the second case, there are two separate contracts where the only connecting factor is the time of conclusion, even if the service provider is a third person. It is difficult to understand why these two different legal transactions are treated under one common heading.

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47 H.-W. Micklitz/N. Reich/P. Rott, Understanding EU Consumer Law, 2009 at para 4.3.

48 See the study of P. Rott, Extension of the Proposed Consumer Rights Directive to Cover the Online Purchase of Digital Products, Study for BEUC, 2009; U. Grübler, Digitale Güter und Verbraucherschutz, 2010. See also the detailed "Amsterdam Study" on Future Rules for Digital Content Contracts, 2011, done for the Commission.

49 See the critique of F. Zoll, The Influence of the Chosen Structure of the Draft for the Optional Instrument on the Functioning of the System of Remedies, in Schulze/Stuyck, supra note 4 at pp. 151 at 154 ff.

26.- There are some exclusions where the provision on "related services" does not apply, in particular "financial services". This exception is not convincing from a contracting point of view, at least in those cases in the first alternative where the service is ancillary to the sales contract and offered by the seller himself or by an agent instructed by him. However, Art. 6 (2) of the proposal expressly excludes the "use" of the CESL "for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit...". This exclusion is not explained in Recital 19. If the seller offers financing in the form of an instalment contract or leasing to the consumer, the Consumer Credit Directive 2008/48/EC[50] may be applicable, but this should not rule out that the sales and the financial part of a transaction can (and in practice will be) be combined, and that non-performance of the "sales" part of the transaction may be have consequences for the credit part and vice-versa, as foreseen by Art. 15 of Directive 2008/48/EC.[51] It should be possible for the parties to "combine" the consumer protection provisions of the CESL with those of the Consumer Credit Directive.

Usually internet transactions will be paid via credit card or a similar type of payment like PayPal. It is hard to understand why the CESL does not spend a single word on the payment modalities, an issue which is of crucial importance for the success of the new regulatory device. Art. 124 of the CESL talks about "means of payment" only in general terms and leaves details to the contract terms, without any regard to the existing problems in internet transactions. In addition it must be recalled that, despite strong lobbying from the consumer side, and despite rules in some Member States, e.g. the United Kingdom, the Directive 2007/64/EC[52] on payment services does not provide for rules which would allow the consumer to use her credit card as a remedy against non-delivery or defective-delivery.[53] The CESL leaves the gap open and downgrades the feasibility of the new regulatory scheme.

3. Territorial Scope: Cross-Border Only

27.- The proposal makes the CESL applicable to cross-border transactions as defined in Art. 4, but allows Member States to extend them to purely "internal" contracting: Art. 13 (1) – a provision which will be commented on below (para 40).

As far as traders are concerned, the decisive criteria for determining the cross-border context is the habitual residence, that is the place of "central administration": para 3. If a transaction is concluded by a branch or agency, its location will be regarded as the trader's habitual residence. These concepts are well known from the EU rules on conflict of laws in Art. 19 of the Rome I Reg. 593/2008, referring to Art. 22 of the prior Brussels Reg. 44/2001.

With regard to the location of the consumer, the proposal seems to reject the concept of residence as used in Art. 6 (1) of Rome I since it may be difficult to determine in a cross-border setting. It uses three criteria:

- The address indicated by the consumer (whether or not it is identical with the habitual residence!);
- the delivery address for goods;
- the billing address.

Instead of the objective criteria used in EU conflict of laws, the proposal seems to prefer the use of purely *subjective criteria* which depend on the information given by the consumer to the trader, whether this information is right or wrong. It is not clear either what criteria should be regarded as decisive if they contradict each other. Take the following example: the billing address refers to the

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50 OJ L 122 of 22.5.2008, 66.

51 For details see in H.-W. Micklitz/N. Reich/P. Rott et al, supra note 45 at para 5.23.

52 OJ L 319 of 5.12.2007, 1.

53 See on the existing rules in the UK and the US, D. Voigt, Die Rückabwicklung von Kartenzahlungen, 2007, pp. 239 ff.

consumer's home country, the delivery address to an address abroad, for instance in a contract in favour of a third person. It seems that the proposal would regard this transaction as a "cross-border" contract, but this would not be the case under applicable conflict rules as the link to a foreign jurisdiction is rather weak and usually will not suffice to make its law applicable.

IV. The Agreement to "Opt-In" (28.-33.)

1. Both Parties Residing within the EU, but in Different Countries

28.- The CESL is supposed to be an "optional" instrument, that is to say allow the parties to a (sales or related) contract to use it in their (cross-border) transactions. This repeats a technique well known to the CISG. However, the CISG has, insofar as businesses established in Member states to the Convention are concerned, provided for an "opt-out" mechanism, which is supplemented by an "opt-in" mechanism for businesses established in non-Convention countries (Art. 1 (1) (b),[54] e.g. those established in the UK, Ireland, Malta or Portugal. This mechanism is not applicable to consumer contracts, but only to B2B transactions, Art. 1 (4) CISG.[55] Therefore, it could not be used as a model for an EU-specific instrument which particularly wanted to include B2C transactions.

Another choice-model was used in Art. 3/10 of Rome I-Reg. 593/2008, thus following the earlier Rome Convention of 1980 and its Art. 3. It allows freedom of choice also for consumer contracts, with some limits provided in Art. 6.[56] However, there seemed to be an overwhelming opinion in legal writing that a choice similar to Art. 3 would not be appropriate in an OI because it would leave unresolved Art. 6's supposed "negative effects" on the internal market. Therefore, it was argued that the OI should define its own rules on application.[57]

The proposal basically follows these reflections, in particular with regard to B2C contracts, which are particularly relevant to our study. The explanatory memorandum insists that the CESL "will be a second contract regime" to which the choice provisions of Rome I do not apply.[58] Recital 10 very clearly states that:

> The agreement to use the CESL should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

29.- Therefore, it was of prime importance for the Commission to develop its own rules on the agreement to opt-in which now figure in Art. 8/9 of the proposal. They have been accompanied by Annex II containing a "Standard Information Notice" with the necessary description of the CESL and the consequences of a valid agreement, in particular for consumers. Recital 23 explains this rather heavy procedure, at least in respect of B2C transactions, with the requirements of a "conscious" and an "informed choice"; it insists on the necessity of an "explicit", not merely an implied, agreement: Art. 8 (2). Failure or impossibility of this qualified information will not bind the "consumer by the agreement (which would be no agreement anyhow, HM/NR!) until the consumer has received the confirmation referred to in Art. 8 (2), accompanied by the information notice and has expressly consented subsequently to the use of the CESL".

This is quite a complicated mechanism, consisting of several parts:

- prior qualified information by submitting the notice of Annex II;

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54 See supra para 15; for more details the commentaries on the relevant articles of the CISG, U. Magnus, Wiener Kaufrecht – CISG, 2005, Art. 1 paras 58 ff.; for a discussion on its relation to Rome I-Reg. see J. Schilling, supra note 12 at 779: precedence of uniform international contract law, thus excluding the conflict provisions of Rome I.

55 U. Magnus, UN-Kaufrecht, ZEuP 2011, 881 at 886 for details not to be discussed here.

56 For details see N. Reich, EU Strategies in Finding the Optimal Consumer Law Instrument, ERCL 2012 forthcoming.

57 MPI-Study supra note 4 at paras 73 ff.; C. Busch, Kollisionsrechtliche Weichenstellungen für ein Optionales Instrument im Europäischen Vertragsrecht, EuZW 2011, 655.

58 At p. 6.

- existence of an agreement: to be determined by EU or national law?
- in case of impossibility of prior information: later confirmation accompanied by the information notice;
- express consent.

An earlier non-published version of the proposal contained a para 3 of Art. 9, which made the agreement valid even where the trader "has failed to provide the information, but allowing the consumer to terminate the contract within a short period of two months". This seemed to allow for an agreement by "non-action" (Unterlassen) – a rather surprising extension of, or rather a contradiction to, the principle of informed consent which came close to an "opt-out"-provision against the very intention of the proposal.[59]

The new version in Art. 9 has eliminated this possibility, but suspends the binding effect of the contract unless the parties have explicitly agreed to the contract. This variant applies equally to the circumstances in which the contract is concluded "by telephone or by any other means that do not make it possible to provide the consumer with the information notice".

30.- However, the new Art. 9 has not solved the problem of how to determine the validity of the agreement under contract law rules. Even if the valid agreement would set aside national rules applicable under the Rome I Regulation, this principle is not valid for the prior agreement. On the other hand, it may be possible to refer by analogy to Art. 10 of the Rome I-Regulation 593/2008 whereby the *law hypothetically chosen* determines the validity of the agreement on the choice of law, which in this case would be the law of the CESL which contains detailed rules on consent in Art. 30.

The proposal starts with the typical situation that the trader wants to conclude the contract by using the CESL, and that the consumer is put in a *take-it-or leave-it* situation. Despite the requirement of informed consent, if the consumer does not accept the offer to contract under the CESL, the trader will probably refuse contracting with him. On the other hand, if the consumer wants the trader to conclude the contract by using the CESL, because of its perceived high level of consumer protection, he cannot force it upon him.

2. One Party Resides in a Non-EU Country

31.- The proposal wants to make the CESL also available to cross-border transactions where one of the parties is residing in a non-Member country.[60] Two situations must be distinguished:

- The trader is established outside the EU, and the consumer has given in the acceptance his address, his delivery address or his billing address in the EU; if the trader wants to use the CESL, he has to comply with the requirements of Art. 8/9 of the proposal; otherwise the normal provisions on conflict of laws will be applicable. Since the Rome I-Reg. 593/2008 is universally applicable, Art. 3/6 would also be relevant for consumer transactions with traders from third countries.[61]
- In the reverse situation, where the trader is established in the EU and the consumer in a third country, the trader may want to use the CESL and get the consumer's consent, but this must qualify under the law of the residence of the consumer as a valid choice.

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[59] This has been suggested for a later stage by O. Lando, On a European Contract Law for Consumers and Businesses – Future Perspectives, in Schulze/Stuck, supra note 4, pp. 200 at 212.

[60] Explanatory memorandum at p. 7.

[61] N. Reich, in ERCL 2012, p. 26.

3. What Role for Standard Contract Terms?

32.- The CESL does not discuss the role and function of standard terms. Two issues must be distinguished:

- The use of standard contract terms as defined under Art. 2 (d) within the opt-in procedure;
- the use of standard contract terms to complement the CESL.

In the light of the mechanism provided for in Art. 8/9 traders are not in a position to use standard terms in order to comply with the onerous legal requirements. An express consent requires a separate act distinct from the recognition of standard terms. This is the famous 'blue button' so strongly advocated for by members of the study and acquis group.

However, the use of standard terms meant to complement the CESL might be of high relevance.. These contract terms have to be agreed upon by the consumer, otherwise they cannot become part of the contract. Answers are needed to the following questions:

- Can the integration of standard terms be combined with the express consent procedure,
- Is a separate act of integration needed, and if yes, what are the requirements for the integration of standard contract terms in B2C relations?
- Which law governs the question whether the parties to a contract have agreed on the standard contract terms?

33.- The CESL regulates the conditions under which standard contract terms become part of the contract in Art. 70:

> *Duty to raise awareness of not individually negotiated contract terms*
>
> 1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
>
> 2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.
>
> 3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Art. 70 (2) does not positively define what is needed but it prohibits behaviour which might be relevant in B2B transactions. The message is rather cryptic. A consumer friendly interpretation of the rule implies that the trader expressly informs the consumer of his intention to base the contract on standard contract conditions. However, "explicit" consent in Art. 70 seems to be different from the "express" consent provided for in Art. 8 of the proposal. The draft remains silent on the applicable law. However, one might read Art. 70 as a self-standing rule, which does not leave leeway for the reference to the Rome I regulation and the set of issues which would arise if Rome I applied.[62]

The pre-final version of the CESL intended in Art. 15 to pave the way for the elaboration of "European model contract terms". It provided as follows:[63]

> Within three months of the entry into force of this Directive, the European Commission shall set up a Group of Experts to assist the European Commission in developing European model contract terms' based on and complementary to the Common Sales Law for the European Union as well as to foster its practical application.

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62 See H.-W. Micklitz, § 12, in Reich/Micklitz, Europäisches Verbraucherrecht, 4. Auflage 2003.

63 Non-published version of 19. September 2011.

> The Expert Group referred to in paragraph 1 shall comprise members representing in particular the interests of the users of the Common Sales Law for the European Union. It may decide to set up specialist sub-groups for separate areas of commercial activity.

This article, which was deleted in the published version of the CESL, obviously intended to revitalise an old ideal of the European Commission, held since the early days of the debate on a codified European contract law. This was the idea to initiate the elaboration of European standard contract terms via the co-operation between traders and consumers.[64] Such an attempt would presuppose a regulatory frame set by the European Commission in which the elaboration of such model terms could be embedded. The proposed Art. 15 remained far behind in comparison to what would be needed for a successful consumer friendly standardisation of contract terms. However, it must be regretted that it was eliminated from the final version of the proposal.

[64] See H. Collins (ed.), Standard Contract Terms in Europe, A Basis for and a Challenge to European Contract Law, 2008.

V. Relation of the proposal to national law (34.-48.)

1. The Preclusionary Effect on National Consumer Law

a) Art. 6 Rome I

34.- Once the parties – the trader and the consumer – have reached a valid agreement on the use of the CESL, it will have the effect setting aside the national consumer law provisions applicable under Art. 6(2) Rome I. This is the explicit justification of the Commission for proposing a special OI for cross-border B2C contracting. These *preclusionary effects* on national consumer law are clearly spelled out in Art. 11 and in recital 12:

> Since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the law of the Member States in this area, where the parties have chosen to use the CESL. Consequently, Art. 6 (2) Reg. 593/2008 which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the CESL.

This is a "smart" justification for setting aside national law, on the condition that the level of consumer protection is sufficiently high to warrant such an effect. It had been already suggested by prior voices in the legal debate.

The proposals of the recent MPI-study[65] went in this direction. They insisted that, in order to "establish a set of uniform rules of contract law…, the optional instrument will have to take precedence over national mandatory rules" (para 75) and thereby set aside Art. 6 (2) of the Rome I-Regulation 593/2008. This instrument would contain its own rules on choice. It would be applicable to B2B and B2C transactions, whether cross-border or merely "national" (para 120). The authors of the MPI-study insisted that "the level of protection should not fall below the level afforded by the future Consumer Rights Directive" (para 83) – which in other words would mean that even in those areas where the compromise version of the CRD was limited to a "targeted" full harmonization only and still allowed minimum harmonisation in the area of unfair terms and consumer sales, the optional instrument would result in "complete" full harmonisation via the back door! Could this be regarded as *too broad* an intrusion into national law?

Indeed, the explanatory memorandum insisted that the CESL "would contain fully harmonised consumer protection rules providing for a high standard of protection throughout the whole of the EU."[66] Whether this far-reaching preclusionary effect is politically feasible cannot be evaluated here. From a legal point of view, it seems to be the consequence of the precedence of the CESL as an EU Regulation over national law still applicable under Art. 6 Rome I, once its conditions for application, in particular the opt-in provisions (supra paras 27-32) have been met. In the end it means that the CESL achieves full harmonisation within its scope, even where the Consumer Rights Directive 2011/83/EC only achieved "half harmonisation", that is only in the area of distance and off-premises contracts, not with regard to general information obligations under Art. 5 (4), unfair terms and sales law, with some rather minor exceptions not to be discussed here. The impact of this de facto "full harmonisation" will to some extent be "softened" because it only relates to Art. 6 Rome I, not to Rome II (para 36).

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65 Supra note 4; see also C. Busch, supra note 51 at p. 655.

66 P. 4.

35.- We will not discuss Art. 9 Rome I on "overriding mandatory provisions of the law of the forum". Art. 9 follows the case law of the ECJ in *Arblade*,[67] referring to such provisions which are regarded "as crucial by a country for safeguarding its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under his Regulation". This is quite a narrow definition which must be interpreted strictly according to Recital 37, thus excluding most consumer protection norms of Member States beyond EU law.[68] It is no subject to interpretation by the ECJ.

b) Rome II – product liability and *culpa in contrahendo*

36.- Specific problems exist with regard to Rome II Reg. 864/2007 because it regulates conflict of law situations out of non-contractual obligations – that is those where the parties cannot choose the applicable law or can do so only to a very limited extent after the harmful event occurred. Therefore, Rome II does not contain a provision similar to Art. 6 Rome I, but makes national law applicable according to the objective criteria established by it. As far as the CESL is concerned, it only regulates contractual relations, not those deriving from non-contractual provisions. Therefore, they do not come within its scope of application, and the preclusionary effects of the regulations cannot accrue. This also seems to be recognized by the Commission in its explanatory memorandum which refers to Rome II,[69] but does not mention any such far reaching effect.

The problem of this rather formal and simplistic approach lies in an overlap between contractual and non-contractual obligations in two important areas relating to the proposal and the CESL, namely

- Product liability;
- *culpa in contrahendo (cic).*

Art. 5 and Art. 12 of Rome II regard them as non-contractual obligations, while Member state law differs or takes a hybrid approach to their qualification, for instance:

- In German law, extensive pre-contractual information and cooperation duties have been developed under *cic* principles particularly vis-à-vis (but not exclusively!) consumers, qualified as "quasi-contractual" obligations, while other Member States like France have relied on their general clauses on tort liability like Art. 1382 Code civil; common law does not seem to recognise such broad principles of pre-contractual liability.[70]
- Product liability has been harmonised to a limited extent by Dir. 85/374 and 99/34, but Art. 13 allowed Member State liability under contract and tort law-provisions to continue to be applicable, despite the rather narrow interpretation of this clause by the ECJ.[71]

The CESL contains detailed mandatory rules on pre-contractual information obligations of the trader. Art. 11 of the proposal extends the preclusionary effect of the CESL also to "the compliance with and remedies for failure to comply with the pre-contractual information duties". This seems to suggest that the establishment of *additional* pre-contractual duties, particularly vis-à-vis consumers is *not*

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67 Joined cases C-369 + 276/96 [1999] ECR I-8453 para 30.

68 D. Martiny, ZEuP 2010, 777 with references to differing German (BGH NJW 2009, 762 at 764) and French (Cass. Civ 23.5.2006, ZEuP 2008, 845, comment Mankowski) case law. Critique P. Mankowski, IHR 2008, 147; see also the discussion in the BEUC-Study supra note 4 at p. 12. It must be seen whether the German or the French approach can be maintained under the new Rome-I Regulation; we think that the state of consumer protection rules must now be exclusively determined by reference to Art. 6, not Art. 9; in this sense F. Garcimartin Alférez, The Rome-IRegulation: Much ado about nothing? The European Legal Forum, 2008, I-61 at 77.

69 P. 6 and Recital 27.

70 See C. Twigg-Flesner/Th. Wilhelmsson, Pre-contractual inforamtion in the acquis communautaire, ERCL 2006, 441.

71 See case C-402/03 Skov et al v Jette Mikkelsen et al [2006] ECR I-199; for a discussion see H.-W. Micklitz/N. Reich/P. Rott, supra note 29, para 6.30.

precluded by the CESL, a principle which has been expressly confirmed in Art. 5 (4) of the recent CRD by providing:

> Member States may adopt or maintain additional pre-contractual information requirements for contracts other than off-premises or distance contracts.

37.- With regard to product liability, it is not clear whether the CESL really is concerned with damages resulting out of defective products, notably to third persons. It only regulates matters of liability for non-conforming goods delivered to the consumer (Art. 88). Due to the strictly contractual approach of the CESL in Art. 116 (1) (e), there is no extension of liability to third persons in the chain of distribution or to bystanders, even though some Member States have used contract law as the relevant legal doctrine which can be maintained against the harmonisation effect of Directive 85/374/EEC if based on fault.[72] On the other hand, the Court has recognised in *Handte*[73] that the French principles of the *action directe* in product liability extending liability within the chain of distribution beyond the contracting parties must be regarded as being based on law, not on party autonomy.

As a result of this discussion, the scope of *cic* with regard to extending pre-contractual information obligations by national law, and the provisions on the specific liability of the trader/professional seller under product liability regimes will not be – even indirectly – "fully harmonised" by the CESL. Therefore, the potential impediments to cross-border trade in the internal market will not be solved by the parties choosing the CESL to govern their contractual relations.

c) Autonomous Interpretation

38.- The principle of "autonomous interpretation" is not written in the proposal itself, but in Art. 4 of the CESL:

> *Art. 4: Interpretation*
>
> The CESL is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.
>
> Issues within the scope of the CESL but not expressly settled by it are to be settled in accordance with the principles underlying it without recourse to the national law that would be applicable in the absence of an agreement to use the CESL or any other law.
>
> Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

Art. 4 has its equivalent in Art. I.-1:102 of the DCFR, but with some important differences:

- The DCFR also insists on the autonomous character of its provisions which has a certain equivalent in Art. 7 (1) of the CISG. The insistence on the autonomy of the instrument is consistent with the case law of the ECJ, in particular with regard to the interpretation of the concepts of the Brussels Convention of 1968/Regulation 44/2001.[74]
- The CESL does not make any reference to human rights and applicable constitutional laws, like para (2) of Art. I.-1:102. The Charter of Fundamental Rights in the EU which forms part of primary EU law from 1. December 2009 is referred to only in Recital 37, but not in the proposal or the CESL itself.
- The CESL excludes any reference to national law in case of gaps, while para (4) of Art. I.-1:102 DCFR does not go that far. However, there are however some exceptions, e.g. Art. 84 (d) on

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72 See ECJ Case Skov para 47.

73 C-26/91 Handte [1992] ECR I-3967.

74 For example: case C-334/00 Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik (HWS) [2002] ECR I-7357 and later cases, C-509/09 + 161/10, eDate et al. [2011] ECR I-(25.10.2011), para 38.

unfair arbitration clauses, Art. 85 (a) on unfair clauses concerning burden of proof and Art. 148 (2) on care and skill which "a reasonable service provider would exercise .... in conformity with any statutory or binding legal rules which are applicable to the related service".

2. Effects on the Law of Non-Member States

39.- As was mentioned above, the CESL can also be used only if one party to the contract – whether the trader or the consumer – is residing in a Member State (as defined in Art. 4 (2) and (3) of the proposal). Art. 11 provides that "(w)here the parties have validly agreed to use the CESL for a contract, only the CESL shall govern the matters addressed in its rules". Therefore, the preclusionary effect depends on a *valid agreement* as defined in Art. 8/9 of the proposal. With regard to one party residing in a non-Member country, eventually the conflict of law rules of either the trader or the consumer residing in a third country must be consulted whether they recognise the validity of the agreement. If the trader resides in a third country, usually his home law will re*cognise freedom of choice of laws, and the chosen law would* then be the CESL as a Union instrument, including its consumer protection provisions. The effects would the same as with an "EU-internal" *cross border B2C contract.*

40.- *If the trader resides in the EU and offers consumers in third countries to* conclude a contract under the CESL, a valid agreement must be established which should be recognised by the conflict of law rules of the consumer's home country. The agreement to use the CESL will preclude the application of the consumer protection rules of the consumer's home country only if its conflict rules will allow it. Since the Rome I-Reg. 593/2208 enjoys universal application, it may result in the application of Art. 6 (2) whereby the consumer cannot lose the protection of the provisions of his country of residence if they are more favourable for him than those in the CESL, once the trader established in the EU has directed his activity to his country of residence under the criteria developed by the ECJ in its *Pammer*-judgment.[75] EU law cannot have the effect of precluding Art. 6 (2) Rome I for cross-border transactions with consumers residing in a third country as well. The argument of Recital 12, that in EU-transactions Art. 6 (2) is not applicable because no differing protection exists due to the uniformity of the CESL, does not apply to cases where the provisions in the consumer's country of residence allow a more favourable level of protection.

3. Member State Options and Obligations

a) Extending the territorial scope of the CESL

41.- Art. 13 of the proposal lists two Member State options, namely the extension of the CESL to transactions taking place "within" one Member state, and to B2B transactions without the participation of a SMU. With regard to the first option, it is not clear whether the Member States can limit it to B2C or B2B contracts, or whether the option is only possible for both B2C and B2B transactions.

In allowing the parties to agree on the use of the CESL for their "internal" transactions, the question comes up whether the Member states can impose additional requirements, or whether they are under an obligation to opt for the CESL *in toto* without any modifications, e.g. by improving consumer protection in conformity with national standards, or by extending the concept of "consumer" as mentioned above in paras 18-21? Art. 13 (a) of the proposal is not clear in this respect, because it allows Member States to "decide to make the CESL available...". What does "*available"* mean: as such or with the necessary modifications under national law? We prefer the second reading, because

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75 Joined cases C-585/08 and C-144/09 Peter Pammer et al v Reederei Karl Schlüter et al. [2010] ECR I-(7.12.2010) at para 93; similar now case C-324/09 L'Oréal et al. V. eBay Int. [2011] ECR I-(12.7.2011), insisting on the relevance of "the geographical area to which the seller is willing to dispatch the product" (para 65).

the parties themselves may choose the CESL in B2C transactions only "in its entirety"; nothing is said with regard to Member States' options. Since the EU legislative impact of the proposal is limited to cross-border transactions, Member States are free to modify the EU model within their own jurisdiction. The CESL is then transferred into *an (alternative) instrument of national law* within their exclusive jurisdiction; but different levels of consumer protection must always be in conformity with EU imperatives under primary and secondary law.

b) ADR/ODR mechanisms (alternative or on-line dispute resolution) – sanctions

42.- The final version of the proposal does not say anything about ADR/ODR-systems, quite contrary to many recent EU directives and regulations.[76] In our opinion, this is regrettable, because effective ADR/ODR system would really help regulating cross-border transactions and solving disputes where access to courts is not feasible, or just too costly. Consumer confidence in cross-border transactions could be enhanced by providing adequate and effective ADR/ODR mechanisms.[77] This is even more surprising as strong promoters of CESL, Commissioner Viviane Redding and the Vice-President of the European Parliament Diana Wallis are publicly arguing that the CESL is not designed for litigation, here being understood as litigation in courts. The CESL shall, this is the overall message, increase the efficiency of cross-border transactions via simplifying the contractual setting. Whilst this intention might be notable and might even be supportable, one wonders why the final draft has omitted to refer to the official announcement of Commissioner Reding on the 3rd June 2011 in Leuven, where she had announced that two additional pieces of EU legislation would be presented by the end of the year: a draft regulation on ODR (online dispute settlement) and a directive on ADR, which shall obviously transform the two Recommendations on 98/257 and 2001/310/EC into binding law.

On 29.11.2011 the Commission published two Proposals, namely a Directive on ADR for consumer disputes, and a Regulation on consumer ODR.[78] The first is meant to create a general framework which is then concretised for online dispute resolution. The Proposals aim at transforming the two Recommendations 98/257 and 2001/310/EC into binding law. They were both drafted by DG Sanco –, they, therefore, bear a strong consumer protection focus. What really matters is that both are not connected to the CESL as it now stands.

43.- One might therefore refer to an earlier, unpublished version of the proposal[79] which contained an Art. 13 which read:

> 1. Member States shall ensure that where the parties have validly agreed to use the CESL for a contract, they shall also be considered to have consented to submitting their disputes arising from that contract to an existing ADR system.
> 2. Member States shall ensure that the consent referred to in para 1 shall not exclude the parties rights to refer their case to court instead of submitting their dispute to an existing ADR system.

Art. 13 is very much in line with existing ECJ case law as expressed in *Alassini*:[80]

> „...the imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem... disproportionate in relation to the objectives pursued.

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76 H.-W. Micklitz/N. Reich/P. Rott, Understanding EU Law, supra note 29, para 8.17-8.23; this has been criticised by H.-W. Micklitz, A "Certain" Future for the Optional Instrument, in Schulze/Stuyck, supra note 4, at p. 201 against the proposals of the „feasibility study" of 3.5.2011.

77 For a detailed analysis see H.-W. Micklitz/Z. Novy, in BEUC-Study, 2011.

78 COM (2011) 793 + 794/2.

79 This is again the pre-final version of September 2011, as quoted with reference to the development of European contract model rules.

80 C-317-320/08 Rosalba Alassini et al. v. Telecom Italia. [2010] ECR I-2213.

> In the first place ... no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives" (para 65).

It seems that the imposition of an ADR/ODR procedure upon consumers in a valid agreement before going to court does not violate the principle of effective judicial protection under Art. 47 of the Charter if it meets the fairness and transparency standards set out in Commission recommendation 98/257.[81]

44.- *Sanctions* must be provided following Art. 10 of the proposal. Unfortunately, the proposal talks of "penalties" for breaches of the information obligations under Art. 8/9 of the agreement to opt-in the CESL for B2C transactions. The proposal does not mention collective actions (injunctions) possible under Directive 2009/22/EC,[82] but it seems that Member States can provide for this remedy, if it is "effective, proportionate and dissuasive" – which may not be the case with mere injunctions which are directed at the future but do not sanction illegal behaviour of the past. It may be necessary to "upgrade" the injunction by a collective action for damages[83] against the trader who has not complied with his obligations under the proposal.

c) Reporting obligations

45.- Under Art. 14 of the proposal, Member States "shall ensure that final judgments of their courts applying the rules of this regulation (both the proposal and the CESL) shall be communicated with undue delay to the Commission". The Commission has to set up a publicly accessible information system which means that the judgments have to be translated into at least the most frequently used languages of the EU, namely French, English and German.

4. Tasks of Member State Courts of Law and of the ECJ – No Arbitration Clauses

46.- Questions about the application and interpretation of the CESL – including the questions whether it has been validly agreed in a B2C transaction – will have to be solved by Member State courts. These tasks will be even more important in light of the principle of autonomous interpretation of the CESL under Art. 4 (para 37).

Binding arbitration clauses in standard contracts against consumers seem to be excluded under the black list of unfair terms of Art. 84 (d) CESL, even though the text in its unusual reference to Member State law leaves open some ambiguities. The critical appraisal of the ECJ in *Claro* concerning arbitration clauses will have to be considered in this context.[84]

47.- The reference procedure will be applicable to questions about the interpretation of the CESL under Art. 267 TFEU. Since the CESL requires uniformity under the principle of "autonomous interpretation", Member State courts will be under an obligation to seek guidance by the ECJ much more frequently than before, particularly to interpret the many general clauses on "reasonableness" (Art. 5), good faith and fair dealing (Art. 2), unfairness of contract terms in B2C (Art. 83) and in B2B

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81 OJ L 115, 18.4.1998, 39.

82 OJ L 158, 1.5.2009, 30; H.-W. Micklitz, in Schulze/Stuyck, supra note 4, pp. 190 at 201.

83 See the contributions in F. Cafaggi/H.-W. Micklitz (eds.), New Frontiers of Consumer Protection, 2009.

84 C-168/05 Elisa Maria Mostaza Claro v Centro Movil Milenium, [2006] ECR I-10421; see N. Reich, Negotiation and Adjudication – Class actions and arbitration clauses in consumer contracts, in: Cafaggi/Micklitz, pp. 345.

contracts (Art 86). The earlier restrictive case law of the ECJ in *Freiburger Kommunalbauten*,[85] following which the ECJ cannot interpret the general clause of Art. 3 of the Unfair Terms Directive 93/13/EEC, because it requires an assessment of Member State contract law, cannot be upheld any longer.[86] Art. 83 CESL refers to the "nature of what is to be provided under the contract" which must be determined by the general provisions on the law of (contractual) obligations of the CESL.

This obligation to interpret the CESL autonomously (and the provisions of the "chapeau", e.g. on the validity of the agreement under Art. 8/9 of the proposal) may lead to an overburdening of the resources of the ECJ and to long delays in the application of the CESL to disputes before national courts, particularly in B2C transactions which may contradict citizens' fundamental right to judicial protection under Art. 47 of the EU Charter of Fundamental Rights. In the existing literature, some rather "light-handed" proposals to adapt the existing, rather "heavy" judicial architecture of the EU, by reconsidering the existing court structure,[87] by creating specialised courts under Art. 257 TFEU[88] or by an EU specific arbitration procedure[89] have been put forward. However, they do not give any details, in particular on how to coordinate the "normal" reference procedure under Art. 267 TFEU with eventual procedures before specialised courts under Art. 257 TFEU in order to guarantee the uniform application of EU law and the effective judicial protection of citizens.[90]

48.- It also remains to be discussed whether the simplified legislative procedure under Art. 291 (2) TFEU on implementing measures by the Commission can be used for this purpose – which seems highly unlikely due to the "sensitive issue" of a "dynamic consumer protection" element which goes beyond a mere "implementation" of existing legislation. It is not certain either how a "drifting apart" of the application and interpretation of secondary EU law in the form of directives on the one hand and of the CESL on the other can be avoided. The problem would even be aggravated if EU directives were still – at least in some areas like in the CRD concerning unfair terms and sales law – based on minimum harmonisation, while the CESL would set aside conflicting Member State rules by excluding any reference to Art. 6 (1) and (2) Rome I Regulation 593/2008 as discussed above in para 33.

As a result of this discussion, the scope of the CESL should be limited to those provisions which are really necessary for the functioning of the internal market in the sense of Art. 114 TFEU and should not be "upgraded" into a general EU contract law with many provisions which only have a marginal impact on B2C transactions and an even more limited impact on B2B transactions.

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85 C-237/02 Freiburger Kommunalbauten GmbH Baugesellschaft & Co.KG v Ludger Hofstetter und Ulrike Hofstetter [2004] ECR I-3403.

86 See the recent judgment of the Grand Chamber in case C-137/08 VP Penzügiy Lízing v. F. Schneider [2011] ECR I-(9.11.2011) para 39 without citing Freiburger Kommunalbauten.

87 See in this sense MPI-Study supra note 4 at para 153 without giving details.

88 C. Herrestahl, Ein europäisches Vertragsrecht als Optionales Instrument, EuZW 2011, 7 (11); J. Basedow, Der EuGH und das Privatrecht, AcP 2010, 157 (192).

89 C. Twigg-Flesner, Time to do the Job Properly – the Case for a New Approach to EU Consumer Legislation, JCP 2010, 355.

90 See the critique by N. Reich/H.-W. Micklitz, Wie "optional" ist ein "optionales" EU-Vertragsrecht, EWS 2011, 113 at 119.

VI. Conclusion: Too Broad – Not Broad Enough? Instead: A Need to Readjust the Scope of CESL (49.-52.)

49.- The paper started with the somewhat provocative question of whether the proposal, together with the CESL, could be regarded as being "too broad" or, conversely, "not broad enough". Both readings of the existing material seem to be possible *and must be critically scrutinised under the proportionality criteria (supra 14-16)*:

- *"Too broad"* by including general rules of contract law and the law of obligations which are not specific to sales law, which do not meet specific problems of cross-border transactions in the internal market, and, therefore, need not be included in the CESL. As a result, this may amount to an "overextension" of its preclusionary effect on national law and may in that respect be contrary to the principles of proportionality.
- On the other hand, it may be "*not broad enough*" in respect of the extremely narrow definition of the "consumer". This will create conflicts with national law under the still existing minimum harmonisation principle. Moreover, the exclusion of financed sales and lease contracts does not seem to meet the realities of modern marketing. The service sector which takes up about 70 % of the EU-BSP has found very little attention in the CESL, with the exception of the somewhat unfortunate regulation of "linked service contracts".

50.- This paper did not discuss the substantive provisions of the CESL, neither with regard to B2B nor with regard to B2C contracts; this will be done in separate contributions on "modalities" (by Hans-W. Micklitz) and "sales law" (Norbert Reich). While there may be a perceived need to have a specific EU instrument for cross-border B2C contracting, this is not necessarily the case with regard to B2B contracting where already the (somewhat narrower) CISG exists and where hardly any mandatory provisions can be regarded as an impediment to trade. Contracts with SMUs which CESL regards as B2B transactions may well be put under the cover of B2C, at least to a limited extent as far as protective objectives similar to consumer transactions should be pursued. It may also be difficult to clearly distinguish between B2B and B2C contracts, particularly with regard to the applicability of general contract law.[91]

51.- The proposal, as has been shown throughout the analysis in this paper, will raise a *"basket of uncertainties"*, many of which are new to EU law and will require judicial answers by the ECJ in the spirit of uniformity. This need has been provoked by the principle of autonomous interpretation within the scope of the CESL with sometimes difficult borderlines. However, the possibility of uniform interpretation is certainly an advantage of the CESL against other international instruments in contract and commercial law, in particular the CISG, but will create its own *transaction costs* like search costs of traders and consumer – respectively their associations – of finding right and tenable solutions for unsettled questions, length and expenses of proceedings before the ECJ under Art. 267 TFEU, the need to reformulating contract terms, the adaptation of the CESL to new technological and economic developments. Whether the CESL as an optional instrument in whatever form will be an attractive legal model for traders cannot be predicted now; it must still pass its practice test. Whether consumers will be better off if they contract with traders under the CESL, or whether they risk losing familiar protection under national law also waits to be seen.

52.- The authors of this study suggest to rethink the much too broad and to some extent unconvincing approach, as has been shown throughout this paper, of the CESL in a somewhat more narrow and at the same time more realistic direction:

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[91] In this sense the MPI-study, supra note 4 at 114-117.

- It should be limited to cross-border B2C transactions, thus excluding B2B contracting where other instruments exist (either freedom of choice under Rome I, or CISG) which do not seem to cause problems to the functioning of the internal market.
- *The concept of B2C transactions should be extended in its personal scope as envisaged in Recital 17 of the CRD. Therefore, the definition of "consumer" in Art. 2 (f) of the Proposal should be supplemented by the following paragraph:*"If the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer".
- It requires further discussion on whether and how far transactions with SMEs should also to a limited extent be included. The current concept of customer protection in telecommunication, energy and financial services might serve as the starting point for the development of appropriate concepts.

VII. Zusammenfassung der Ergebnisse

1. Der Kommissionsvorschlag vom 10.11.2011 einer EU-VO zum Kaufrecht zeichnet sich durch eine „flexible“ Herangehensweise an die Kompetenzaspekte unter primärem EU-Recht aus, die die neue Rechtsprechung des EuGH (zuletzt etwa das „roaming“-Urteil v. 8.6.2010) aufnimmt und weiterführt. Er beschränkt sich bewusst auf lediglich grenzüberschreitende Transaktionen, bei denen der Binnenmarktbezug offenkundig ist
2. Art. 114 AEUV kommt u.E. eher als Kompetenzgrundlage in Betracht als etwa die sog. „Abrundungskompetenz“ des Art. 352, wie von der MPU-Studie vorgeschlagen, die auch für rein interne Transaktionen die Verwendung des OI ermöglichen wollte. Art. 114 in der hier vertretenen Lesart erlaubt eine „Angleichung“ der Rechtsvorschriften der Mitgliedstaaten auch in der Form einer optionalen, von den Parteien zu wählenden EU-Verordnung, die eine Alternative zur klassischen Harmonisierungstechnik durch Richtlinien bietet. Vor allem macht Art. 114 eine Mehrheitsentscheidung im „ordentlichen Gesetzgebungsverfahren der Union“ ohne Vetorechte einzelner Mitgliedstaaten möglich, die besonders durch den deutschen „Lissabon“-Vorbehalt problematisch geworden sind, und gibt dem Europäischen Parlament (EP) ein volles Mitentscheidungsrecht. Sollte der VO-Vorschlag auf Art. 352 AEUV gestützt werden, so ist mit einer Nichtigkeitsklage des EP zu rechnen.
3. U.E. kann das Instrument der EU-VO EU-rechtlich nicht unter Subsidiaritätsgrundsätzen angegriffen werden, da im Bereich des Binnenmarktes dem EU-Gesetzgeber ein weiter Prognose- und Gestaltungsspielraum zukommt, der nur bei groben Überschreitungen des Art. 5 (3) EUV vor dem EuGH erfolgreich angefochten werden kann. Da die EU-VO nur für grenzüberschreitende Transaktionen gilt, behalten Mitgliedstaaten im Bereich B2C die Kompetenz für Maßnahmen in ihrem Zuständigkeitsbereich, wobei sicherlich Einzelheiten der konkreten Abgrenzung noch zu klären sind. Die EU greift u.E. nicht in unverhältnismäßiger Weise in die Zuständigkeiten der Mitgliedstaaten ein; dem Subsidiaritätsprinzip dürfte es nicht widersprechen, für grenzüberschreitenden Transaktionen neben den Regeln der Rom I-VO 593/2008 auch ein optionales EU-Einheitsrecht vorzusehen.
4. Im B2B-Bereich ist – auch bei Beschränkung auf die Beteiligung von KMU - die Notwendigkeit eines EU-Tätigwerdens unter dem „Erforderlichkeits“-Kriterium des Verhältnismäßigkeits-prinzips des Art. 5 (4) EUV weniger einsichtig, weil hier bereits das Wiener Übereinkommen (CISG) von 1980 ein für grenzüberschreitenden Kaufverträge anwendbares Rechtsinstrument enthält, an dem allerdings die EU nicht beteiligt ist, und das von Großbritannien, Irland, Portugal und Malta nicht ratifiziert wurde und ansonsten die Parteien – auch KMU – das Recht gem. Art. 3 VO 593/2008 frei wählen können. Es erscheint daher berechtigt und u.E. auch durch das Verhältnismäßigkeitsprinzip gefordert, auf die Regelung von B2B-Verträgen durch das CESL ganz zu verzichten.
5. Höchst problematisch ist u.E. jedoch im B2C-Bereich der zu enge personelle Anwendungsbereich auf Verbraucher i.S. von Art. 2 (f) des VO-Vorschlages. Die schafft nicht nur Probleme bei sog. „gemischten Verwendungszwecken“ (eine Sache wird sowohl privat als auch geschäftlich benutzt – siehe die Gruber-Entscheidung des EuGH v. 20.1.2005), sondern präkludiert gleichzeitig die Möglichkeit der Mitgliedstaaten, einen erweiterten Verbraucher-begriff wie im dt. und öst. Recht im Anwendungsbereich der VO vorzusehen. Dies könnte für Anbieter die Verwendung des EU-Kaufrechts insoweit „attraktiv“ machen, als sie sich der Anwendung zwingender Verbraucherschutzvorschriften einfach dadurch entziehen können, dass sie ihre Vertragspartner als „überwiegend geschäftlich oder professionell“ einstufen oder sich über entsprechende Klauseln als solche einstufen lassen.
6. Vorgeschlagen wird eine Ergänzung von Art. 2 (f) des VO-Vorschlages mit der aus dem Erwägungsgrund 17 der Richtlinie 2011/83/EG übernommenen Formulierung für gemischte

Verträge: „Wird der Vertrag teilweise für gewerbliche und teilweise für nichtgewerbliche Zwecke abgeschlossen (Verträge mit doppelten Zweck) und ist der gewerbliche Zweck im Gesamtzusammenhang des Vertrages nicht überwiegend, so wird diese Person als Verbraucher betrachtet."

7. Ob der sachliche (nur Kaufverträge über bewegliche Sachen, Verträge über digitale Inhalte, sog. gemischte Kauf- und Dienstverträge, aber unter weitgehender Einbeziehung allgemeiner Vertrags- und Schuldrechtsregeln) und territoriale (unklare Begriffsbestimmung der „Grenzüberschreitung" beim Verbraucher anhand subjektiver und damit manipulierbarer, nicht objektiver Kriterien) Anwendungsbereich „zu weit" oder „nicht weit" genug ist, bedarf der genaueren Prüfung. Hier scheinen noch weitere Untersuchungen angebracht. U.E. würde ein Verzicht auf Regeln des allgemeinen Vertrags- und Schuldrechts der Zielsetzung der VO eher entsprechen.
8. Besondere Aufmerksamkeit verdient der Mechanismus der „Einwahl" in das EU-Kaufrecht im B2C-Bereich nach den Art. 8/9 der VO und dem Annex II mit dem Standard-Informationsblatt des VO-Vorschlages. Eine – auch indirekte – „opt-out"-Praxis oder eine „stillschweigende Einwahl" ist in jedem Fall zu vermeiden. Allerdings gilt dieser Mechanismus nur im engen B2C-Bereich, nicht im Grenzbereich B2C/B2B eines erweiterten Verbraucherbegriffes bzw. bei Verträgen mit gemischten Zwecken (oben Ziff. 5). Die Gültigkeit dieses besonderen Vertrages, der nicht mit der kollisionsrechtlichen Rechtswahl nach Art. 3 Rom I verwechselt werden darf, dürfte sich analog nach dem gewählten Recht, also nach dem EU-Kaufrecht der VO selbst bestimmen.
9. Der Präklusionseffekt des einmal gewählten EU-Kaufrechts im Bereich B2C ist zwar weitgehend, aber vom Ansatz her konsequent. Dies verlangt eine genaue Bestimmung des sachlichen Anwendungsbereichs, der sich auf vertragsrechtliche Bestimmungen i.S. der Rom I-VO beschränkt; gleichzeitig entfällt damit der Schutzmechanismus des besseren Rechts nach Art. 6 (2) Rom I für den in seinem Heimatland umworbenen Verbraucher. U.E. sind allerdings die Regeln über die Produkthaftung und zu allgemeinen Aufklärungspflichten nach culpa in contrahendo-Grundsätzen, die der Rom II-VO 864/2007 unterfallen, hiervon nicht erfasst.
10. Da das EU-Kaufrecht autonome Auslegung verlangt, eine Fülle von offenen Begriffen enthält und einen außerordentlich komplexen persönlichen, sachlichen und territorialen Anwendungsbereich aufweist, bedarf es zwingend einer einheitlichen Auslegungsinstanz, was nach geltendem EU-Verfassungsrecht nur der EuGH im Rahmen des Vorabentscheidungsverfahrens nach Art. 267 AEUV sein kann. Die Fülle der erwartbaren Rechtsfragen und Streitigkeiten, die über die mitgliedstaatlichen Gerichte dem EuGH vorgelegt werden, dürften diesen aber in seiner jetzigen Struktur völlig überfordern. Dies kann zu einer gegen Art. 47 der EU-Grundrechtscharta verstoßenden Rechtsschutzverweigerung führen. Die bisherigen Überlegungen der EU-Kommission sind jedoch in dieser Frage völlig unergiebig und bedürfen dringend einer Vertiefung.
11. In jedem Fall ist sicherzustellen, dass das Problem einer möglichen Überlastung der europäischen Gerichtsbarkeit nicht auf dem Umweg über bindende Schiedsgerichtsklauseln „gelöst" wird, die jedenfalls im B2C Bereich u.E. unzulässig sind und auch im Grenzbereich B2B/B2C nicht zulässig sein sollten.
12. Der VO-Entwurf enthält leider keine Überlegungen zur zwingenden Einrichtung von vereinfachten Schlichtungs- und Güteverfahren (ADR/ODR) gerade auch im Bereich des grenzüberschreitenden elektronischen B2C Geschäftsverkehrs. Diese sind inzwischen durch die Kommissionsvorschläge v. 29.11.2011 zu einer ADR-Richtlinie und einer ODR-VO gleichsam nachgereicht worden.
13. Ungeachtet des VO-Vorschlags der Kommission sollten u.E. Arbeiten an freiwilligen Verhaltenskodeci bzw. Allgemeinen Vertragsbedingungen der Anbieter unter Beteiligung von

Verbraucherorganisationen für grenzüberschreitenden B2B-Verträge vorangetrieben werden, für die bereits Vorüberlegungen von europäischen Verbraucherorganisation BEUC vorliegen.

14. Eine rechtspolitisch durchaus erwünschte „Verschlankung“ des VO-Vorschlages könnte wie folgt aussehen und in die politischen Diskussion eingebracht werden. Uns ginge es um folgende Fragenkreise:
    - Den völligen Verzicht auf ein „allgemeines Vertrags- und Schuldrecht“; Regelung nur kaufrechtsspezifischer und damit verbundener Fragen, vor allem der Rechtsbehelfe (remedies),
    - Beschränkung auf B2C unter einem erweiterten Verbraucherbegriff, der Mischformen und in noch zu diskutierenden Grenzen KMU einschließt. Ansätze in diese Richtung finden sich in den einschlägigen EU Richtlinien zum Energie-, Telekommunikation und Finanzmarktrecht, das den Kleinunternehmer wie den aufgeklärten Verbraucher behandelt,
    - Herausnahme von B2B Transaktionen, die hinreichend durch das CISG geregelt sind.
    - Hier könnten Verhältnismäßigkeitsargumente stärker ins Spiel gebracht werden. U.E. ist die Diskussion sowohl politisch als auch juristisch zu führen, da der EuGH den EU-Organen einen (manche meinen: zu) weiten Spielraum überlässt.

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PART II

An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?

The Feasibility Study of the Expert Group on European Contract Law (FS) compared with the Consumer Rights Directive (CRD) 2011/83, the Doorstep, Distance Selling and Unfair Contract Terms

Hans-W. Micklitz

Overview

A. Off-premises and Distance Sales

1. Generalities

1.- Part II "Formation of contract and rights to withdraw and avoid" contain rules on pre-contractual information (Chapter 2 Section 1), on remedies for breach of information duties (Chapter 2 Section 4), on contracts to be concluded by electronic means (Chapter 2 Section 5) and on rights to withdraw (Chapter 4).

The FS is largely based on three directives related to modalities of contract conclusion, the Directive 85/577/EEC on doorstep selling, the Directive 97/7/EC on distance selling and Directive 2000/31/EC on e-commerce. The FS does not deal with commercial practices, it entirely focused on contract conclusion and contract modalities. This means that the FS is aiming at separating what the EU consumer legislation has tied together, contract law and unfair commercial practices, substantive rights and legal remedies, individual and collective rights.[92] Consumer law therefore is indeed on the way to be absorbed by different sub-disciplines. One may wonder whether this is to the benefit of the consumer protection or to the detriment. I fear it is the latter. The protective outlook of consumer protection is fading away, the FS is just another step into this direction.

The three directives all deal with particular circumstances of how a contract maybe concluded outside business premises, either "off-premises" or via the internet. There is a long standing concern in legal doctrine[93] that the three directives are not really interlinked and that a more consistent approach to the regulation of modalities of contract conclusion has to be found. In so far the FS could rely on decade long research largely sponsored by the EU Commission which pinpoint to the weaknesses and inconsistencies. It should not be forgotten that the Directive 85/577/EEC belongs together with Directive 85/374/EC on product liability to the first generation of consumer contract law directives. Its revision is long overdue. The same cannot be said to the other directives which have been adopted to promote the development of internet sales. Although the technology has tremendously changed since 1997, the rules are by and large feasible to manage the intricacies of internet sales. The spirit which guides the FS is much more one of striving for greater homogeneity, for bringing three approaches closer to each other and filling gaps where they are felt necessary. This means the FS does not provide for true innovation, with one important exception. The FS introduces information specific remedies. The reason is that the FS is meant to be self-standing.

On 11th October 2011 the Commission published a proposal for a Regulation on a Common European Sales Law (hereafter "CESL"). Each part will have a short paragraph which sets out the differences between the FS and the CESL.

In terms of the general structure, the CESL is very similar to the FS. Part II is called "Making a binding contract" and deals with the Pre-contractual information duties (Sections 1 and 2), the remedies for breach of information duties (Section 5) and contracts concluded by electronic means (Section 3). Chapter 4 deals with the right to withdraw.

2.- Part II provides for a rather complex structure which is not always convincing. One might e.g. wonder why Art. 15 and 16 have not been integrated in Art. 13 FS

- Section 1 deals with pre-contractual information,
- Art. 13 lays down *general* information duties,
- Art. 14-18 lay down information duties both forms of contract conclusion – off-premises and distance contracts – have in common, Art. 14 information, Art. 15 price and additional charges,

92 See Ch. Twigg-Flesner (ed.), The Cambridge Campanion to European Union Private Law, 2010.

93 M. Schirmbacher, Verbrauchervertriebsrecht, 2005.

Art. 16 address and identity, Art. 17 terms of the contract, Art. 18 information about withdrawal rights,

- Art. 19-20 then provide modality specific information, Art. 19 on off-premises contracts, Art. 20 on distance contracts,
- Art. 21 formulates rules on the burden of proof
- Section 4 deals with remedies for breach of information duties,
- Section 5 with contracts to be concluded by electronic means.

A comparative evaluation of the FS with the DCFR and in particular the CRD can only remain tentative, as the FS was drafted before the finalisation of the CRD. Two issues have to be distinguished: (1) the question whether and to what extent the CRD and the FS are/should/ could be worded in a clearer and more comprehensible way and (2) whether and to what extent the FS might/should go beyond the CRD to create additional incentives for the consumer to choose the FS as the "applicable law"[94] and not simply rely on the transposed rules of the CRD. In the light of these uncertainties, I will refrain from going into the frightening details of the information requirements and focus on major differences between the three pieces under review, the FS, the DCFR and the CRD.

The structure of the CESL is slightly different.

- Section 1 still deals with pre-contractual information
- Art. 13 creates a duty to provide information when concluding a distance or off-premises contract
- Art. 14-17 provide specific information duties for both forms of contract – Art. 14 is about the price and additional charges, Art. 15 about the identity and address of the trader, Art. 16 about the terms of contract and, finally, Art. 17 provides a right to information about rights of withdrawal
- Arts 18-19 create modality specific information – Art. 18 provides additional requirements for off-premises contracts and Art. 19 is specific to distance contracts
- Art. 20 creates a general information duty for contracts which are not distance or off-premises contracts
- Art. 21 sets out the burden of proof

The general information duty in Art. 13 CESL applies only to distance and off-premises contracts. This is different from the FS, which had a general information duty as its starting point. That general information duty for contracts which are not distance or off-premises contracts can now be found in Art. 20 CESL

3.- Chapter 4 of Part II FS provides for four articles on the right to withdrawal which are clearly structured:

- Art. 40 lays down the right to withdrawal,
- Art. 41 the exercise of the right to withdrawal,
- Art. 42 the withdrawal period and
- Art. 43 the effects of the rights to withdrawal.

In a more general perspective, the rules in the FS, in the DCFR Art. II. 5:102 to 5:106 and in the CRD resemble each other to a large extent. This does not mean that the three pieces do not differ in detail. Again the question arises whether and to what extent the CRD sets the benchmark for the shaping of the right to withdrawal in the FS. The major *conceptual* difference between the FS and the CRD is that

[94] See on this matter, H.-W. Micklitz, A Certain (gewisse) Future for the FS, in R. Schulze/J. Stuyck (eds.).

the latter deals extensively with services, also with services that are not related to the sale of goods. This extension in scope entails a number of complicated issues which have all to do with the particular character of services that are unrelated to goods. On the other hand the CRD, however, provides for a long list of services, which are exempted from the scope of the CRD, Art. 3, 3(a). It demonstrates the very limited scope of application of the type of services covered by the FS.[95]

The CESL follows the same structure, but divided the former Art. 43 FS in three articles. Art. 43 CESL sets out the effects of withdrawal. Art. 44 CESL specifies the obligations of the trader in the event of withdrawal. Art. 44 CESL provides the obligations of the consumer in the event of withdrawal.

Another change is that the withdrawal period now expires after one year instead of six months.

2. Off-premises and Business Contracts

4.- The drafters of the FS obviously relied on previous discussions around the adoption of the CRD. Art. 2 (8) FS and Art. 2 (7) CRD are literally identical. The same is more or less true for the regulation of off-premises contract in Art. 2 (13) FS respectively Art. 2.8 CRD. Here is one innovation to be reported which is equally present in both documents. The supplier cannot avoid the applicability of the off-premises rules if he addressed the consumer outside the business premises and then make him conclude the contract in the business premises. The law even goes one step further in that a conclusion via electronic means does not alter the character of an off-premises contract. The law therefore puts much emphasis on the pre-contractual phase, on the conditions under which the contract is prepared. Recitals 20-21 of the CRD provide for some further examples on how contracts which contain elements of off-premises and distance contracts should be treated. All in all it seems as if the rules on off-premises contracts function as a safety net.

From a consumer perspective the notion of business premises is rather broad. Art. 2 (2) FS and Art. 2 (9) CRD are literally identical. What is really meant comes clear in recital 22 of the CRD:

> Business premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. *Market stalls and fair stands* should be treated as business premises if they fulfil this requirement. Retail premises where the trader carries out his activity on a *seasonal basis*, for instance during the tourist season at a ski or beach resort, should be treated as business premises as the trader carries on his activity on a usual basis. The spaces accessible to the public, such as streets, shopping malls, beaches, sports facilities and public transport, that the trader uses on an exceptional basis for his business activities as well as private homes or workplaces should *not* be regarded as business premises *(emphasis added H.-W. M.)*.

The new definition sets aside long standing discussions in Member States on whether and to what extent, market stalls and fair stands should be brought under the scope of the doorstep selling legislation. The CRD sets an end to all attempts in Member States to advocate for a broader definition.

Art. 2 (p) CESL includes “under an organised distance sales scheme” in the definition of off-premises contracts. Art. 2 (q) is similar to Art. 2 (13) FS. Furthermore, the definition of business premises in Art. 2 (r) follows Art. 2 (2) FS.

3. Pre-contractual Information Duties

5.- The FS just like the DCFR and the CRD rely on information as an appropriate means of consumer protection. The image behind all regulatory efforts is the idea or the ideology of the omnipotent market-citizen, the person who is circumspect, well-informed and eager to compare prices, to look for

[95] See for a closer analysis of the rules, N. Reich, loc. cit.

the best offer and to "reap the benefit of the markets", to use the preferred formula the European Commission refers to since the Lisbon declaration 2000.[96] This crude economic model has long been questioned theoretically and empirically. Politically the European Commission, in particular DG Sanco, invests into the findings of behavioural economics. However, the complicated reality of consumers who do not behave like they should, has not yet reached the level of law-making. I am well aware of the difficulty and the problematic implications to hammer down into law what the reality implies thereby giving up any educational function of the legal system.[97] On the other hand, it seems necessary to seriously attempt to develop a more sophisticated approach on consumer law.

The FS is missing the point fully. The addressee of the rule is the internet consumer, the one who is spending her time before the computer, comparing prices, setting aside social, local ties, the one who is ready to look at money first. Indirectly the FS, in line with the European Commission, is promoting a particular form of sales promotion, to the benefit of e-commerce and to the detriment of the regional/local retailers. The Directive 2005/29/EC as well as the third general directives on energy and telecommunication draw a distinction between the "normal" and the "vulnerable consumer". However complicated this distinction might be, it does neither show up in the FS nor in the DCFR. The CRD provides for the following in recital 34:

> The consumer should be given clear and comprehensible information before he is bound by any distance or off-premises contract, any contract other than an off-premises or a distance contract or any corresponding offer. In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.

This is really a strange message. How can the trader differentiate without distinguishing levels of protection? Relying on the vulnerable consumer on her and his particular needs, lowers the level at which the law intervenes. This means that the remedies are available to a vulnerable consumer earlier than to a normal consumer. This is the approach chosen in the Directive on unfair commercial practices. However, in energy and telecommunication, the vulnerable consumer benefits of "vulnerability-specific" remedies. Thinking along these lines seems to be the much more promising approach.

a) Requirements beyond off-premises and distance contracts

6.- Art. 13 FS is a relict of the concept promoted in the Green Paper on the revision of the consumer acquis.[98] It still shows up in Art. 5 CRD, a rule which does not really make sense in a directive which deals with off-premises and distance contracts. The main idea behind this approach is that the supplier is obliged to make basic contractual information available before the contract is concluded. Neither of the articles defines what "before" the conclusion – or being bound in the CRD – means.

All in all the CRD is more comprehensive than the FS:

- Scope of information: Art. 13 FS 5 items, CRD 8 items,
- Guarantees and after sales services: The FS is lacking appropriate rules in Art. 13.[99] Traders are only obliged to supply information on commercial guarantees and after sales services in off-

96 http://www.europarl.europa.eu/summits/lis1_en.htm.

97 See the special issue under the general editorship of H.-W. Micklitz/L. Reisch/K. Hagen, Journal of Consumer Policy 2011 Vol. 34 (3), 271-276, which contains a whole series of articles dealing with the feasibility of using behavioural economics in law-making and law enforcement.

98 COM (2006) 744 final.

99 See N. Reich, loc.cit.

premises and distance contracts, Art. 14 (1) (f). CRD refers in Art. 5.1 (e) to commercial guarantees and after sales services. Here the CRD is more favourable to consumers.

- Digital content: Art. 5.1 (g) and (h) CRD provide for new rules on digital content, functionality and interoperability. These are missing in Art. 13 FS, although they are highly relevant.[100]
- Telephone number of the trader: Art. 5.1 (b) CRD requires the trader to make a telephone number available. Such a rule is missing in Art. 13 FS. There has been much discussion on this issue, already under Art. 5 (1) of the e-ecommerce Directive. The ECJ[101] finally decided against the information needs of the consumer, although it advocated for "information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner". The now adopted Art. 5.1 (b) CRD corrects the ECJ to the benefit of the consumer, however, not with regard to internet sales, see Art. 6.1 (b) CRD. This means that business is allowed to refer to all other means of communication in an area where the telephone number is mostly needed. A rather strange consequence.
- Services: Art. 13 FS is less problematic as it does not cover services per se but only services related to products. Art. 5.4 CRD underlines that the Member States may adopt stricter standards. The maintenance of the minimum requirement formula goes back to strong critique voiced against the full-harmonisation approach in the 2008 CRD proposal.[102]

In the CESL the general duty of information is provided in Art. 20. With regard to the scope of the information right, Art. 20 contains 6 items, one more than the CRD. Art. 20.1 (g) now includes a provision on the interoperability of digital content. In addition, an obligation to provide the trader's telephone number can now be found in Art. 20.1 (c). There is also a specific obligation in distance and off-premises contracts in Art. 15 (c).

b) Requirements in off-premises and distance contracts

7.- The approaches in the FS and the CRD differ considerably which renders any comparison difficult.[103] Art. 14 is composed as a sort of umbrella rule which structures the references to subject related information requirements as well as to type of business specific requirements. This might indeed be a much more transparent way of guiding the parties through the information jungle.

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[100] See N. Reich, loc.cit.

[101] ECJ, 16.10.2008, C-298/07, Bundesverband Verbraucherzentralen v. deutsche internet versicherung AG, ECR 2008, I-7841.

[102] See G. Howells/R. Schulze, Overview of the proposed Consumer Rights Directive, in Howells/Schulze (eds.), Modernising and Harmonising Consumer Contract Law, Sellier 2009 pp 6-8; N. Reich, Von der Minimal- zur Voll- zur Halbharmonisierung, ZEuP 2010, 7-39; H.-W. Micklitz/N. Reich, Cronica de una muerta anunciada – The Commission Proposal on a Directive of Consumer Rights, CMLRev 2009 471-519; H.-W. Micklitz/N. Reich/P. Rott, Understanding EU Consumer Law, 2009, Intersentia –Antwep, 376 pp (Japanese translation in preparation); see also P. Rott/E. Terryn, The Proposal for a Directive on Consumer Rights – No Single Set of Rules, ZEuP 2009, 456; B. Gsell/C. Herresthal (eds.), Vollharmonisierung im Privatrecht, 2009; H.-W. Micklitz, The Targeted Full Harmonisation Approach: Looking Behind the Curtain, in Howells/Schulze, Modernising and Harmonising Consumer Contract Law, 2009, 47 ff.; C. Huguenin/M. Hermann/Y. Benhamou, Konsumentenvertragsrecht in der Gesetzgebung, GPR 2009, 159; M. Artz, Die „vollständige Harmonisierung" des Europäischen Verbraucherprivatrechts, GPR 2009, 171; A. Jud/Ch.Wendehorst (Hrsg.), Neuordnung des Verbraucherprivatrechts in Europa, 2009; Ch. Twigg-Flesner/D. Metcalf, The proposed Consumer Rights Directive – less haste, more thought? ERCL 2009, 368; M.W. Hesselink, The Consumer Rights Directive and the CFR: two worlds apart? ERCL 2009, 290; same, Towards a Sharp Distinction between b2b and b2c? ERevPrL 2010, 57; S. Whittaker, Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation", ERCL 2009, 223; J. Smits, Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights, in Festskript till Thomas Wilhelmsson, 2009, 573 = ERevPrL 2010, 5; more positive (with the exception of unfair terms): E. Hondius, The Proposal for a European Directive on Consumer Rights – A Step Forward, ERevPrL 2010, 103.

[103] See under (2) above.

However, one might wonder whether or not a further step is needed. Looking not through the rose-tinted glasses of academics who crafted the rules, but through the eyes of those who have to apply them, business in particular one might wonder whether it would not have been easier to develop a series of model contracts which contain the relevant legal requirements and which deprive SMEs from the need to hire lawyers to check the compliance of respective contracts with the legal requirement. This is all the more strange as the FS is designed so as to make life for SMEs easier what in practice they do not.

The detailed rules enshrined in Art. 14-18 FS, i.e. the umbrella rule as complemented by requirements on the price Art. 15 FS, on the address and identity of business, Art. 16 FS, Art. 17 on the terms of the contract and Art. 18 on the information to withdrawal are all merged in Art. 9 CRD. If one takes into consideration that the scope of the CRD is broader than the FS as it covers product unrelated services, little fantasy is needed that the structure of the FS is preferable, despite the remaining complexity. One might wonder how the envisaged OI will solve the issue of information duties. Whether it will copy and pace the CRD or whether it will stick to the structure foreseen in the FS which would mean to break down the CRD into a set of more detailed rules. What might be practical and manageable may legally end up in a mess, as fine differences in language may produce far reaching effects in practices. The risk then is a different set of rules for the same type of business.

In the CESL the general information duty when concluding a distance or off-premises contract can be found in Art. 13. Articles 14-17 CESL then set out a number of specific obligations. Art. 18 provides for additional information requirements for off-premises contracts and Art. 19 does the same for distance contracts.

8.- Two aspects deserve particular attention: how the consumer can contact business and in which language. Both Art. 16 c) FS and Art. 6.1 (c) CRD aim at transposing the above mentioned judgment of the ECJ on Art. 5 (1), though the wording differs. Here both rules remain behind what consumer organisations have been advocating for ever since.

Art. 15 (c) CESL appears to be a similar provision to Art. 16 (c) FS. However, it should be noted that this article seems to be more about efficient means of communication (i.e. telephone/e-mail) than about the language in which the communication should take place.

Normally language requirements belong to the non-issues of European (consumer) policy. The FS is different. Art. 26 (3) (d) FS obliges business to indicate the languages offered for the conclusion of the contract. This is what Art. 10 (d) FS of the e-commerce Directive requires. However, with the perspective in mind to establish a self-standing set of rules, the FS had to tackle the issue. It does so in a rather straight forward way in Art. 59 Language Discrepancies and Art. 73 Language:

> Art. 59 FS Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, there is a preference for interpretation according to the version *in which the contract was originally drawn up (emphasis added, H.-W.M.)*.
>
> Art. 73 FS Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is *that used for the conclusion of the contract (emphasis added, H.-W. M.)*.

All then depends on how the opt-in mechanism will be regulated in the "chapeau" which is still missing in the FS. If business may "choose" what in the end means may be authorised to "impose" the FS on the consumer, then the language would be the one business believes to be appropriate. This seems to be a rather harsh mechanism which in no-way takes the practical importance or the legal difficulties to define the language under the Rome Regulations into account.[104] One might wonder

[104] P. Rott, Informationspflichten in Fernabsatzverträgen als Paradigma für die Sprachenproblematik im Vertragsrecht, Zeitschrift für vergleichende Rechtswissenschaft 1999, 382-409.

whether consumers should not be given the opportunity to choose the language first and then look for a safety net, which can but must not be the language in which the negotiations have taken place. The FS seems to start from the premise that the content of the rules are so favourable to consumers that they are well protected anyway and that they must not necessarily understand the language in which the contract is concluded. Even if such an assumption turns out to be correct at both levels, one might wonder whether such a message is politically appropriate.

The European Commission sticks to its policy. It avoids tackling the issue as if language differences do not exist and if "language" may not be the most important barrier in cross-border sales. The rules in the CRD are very much in line with this policy. This is what Recital 15 tells us:

> This Directive should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law linguistic requirements regarding contractual information requirements and contract terms.

In Art. 24.3 (c) CESL a duty is imposed on the trader to disclose the language offered for the contract in distance contracts concluded by electronic means.

Art. 61 CESL provides that "[w]here a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one".

Art. 76 CESL states that "[w]here the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract."

c) Additional requirements in off-premises contracts

9.- Art. 19 FS paves the way for shifting the communication between the parties from paper to electronic means. If the consumer does not request receiving the information and confirmation on paper, the supplier can submit the information via email. This begs the question of the inter-relationship between off-remises and distance contracts.[105] The FS is obviously ready to accept mixing the two concepts. Art. 7 CRD turns the logic upside down. The consumer has to receive a paper copy, unless he agreed on another durable medium. It lies within the logic of off-premises contracts that they are concluded in a rather old fashioned way, this means via the exchange of paper. Insofar Art. 7 CRD seems to come closer to what is needed in a standard off-premises transaction.

Art. 18 CESL follows the CRD in that the trader is obliged to provide a paper copy, unless the consumer agrees to a different durable medium. Furthermore, there is an addition in Art. 18.2 which provides that "[w]here the consumer wants the provision of related services to begin during the withdrawal period provided for in Art. 42 (2), the trader must require that the consumer makes such an express request on a durable medium".

10.- There is one particularity in Art. 7.4 CRD which deserves attention. The article provides for a particular mechanisms for repair or maintenance work below 200 €. However, Member States are free to transpose this rule. The FS does not provide for such a differentiation. That is why the rather broad definition of services in Art. 2 (16) FS in combination with Art. 2 (12) FS covers all sorts of repair and maintenance work.[106]

Art. 2 (m) CESL defines related services as including maintenance, installing and repair.

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[105] See above (4).

[106] With regard to repair and maintenance in the Part V, see N. Reich loc. cit. (26).

d) Additional requirements in distance contracts

11.- The relevant provisions in Art. 20 FS and Art. 8 CRD resemble each other. Both devote particular attention to the use of the telephone in distance contracts, be it as a (limited) means to transfer information, be it to conclude the contract. There are, however, two differences between the two pieces which deserve a closer look.

Contrary to Art. 20 FS, Art. 8.2 CRD provides for a consumer friendly rule in order to make sure that the consumer realises when exactly he places an order:

> The trader shall ensure that the consumer, when placing his order, explicitly confirms that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words "order with duty of payment" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to make a payment to the trader. If this subparagraph is not complied with, the consumer shall not be bound by the contract or order.

A similar mechanism is missing, although Art. 20 (5) FS points into the same direction. It requires an explicit confirmation from the side of the consumer to make the contract binding which entails payment modalities. Art. 8.2 CRD is more consumer friendly than Art. 20 (5).

Quite the opposite is true with regard to the possibility of concluding a contract over the phone. Here Art. 20 (6) FS provides for a more consumer friendly solution as it requires business to send the consumer a written confirmation, whereas Art. 8.6 CRD leaves the introduction of such a rule to the discretion of the Member States. In the light of the experience consumers had to make with contracts concluded over the phone,[107] a clear cut requirement such as the one provided for in Art. 20 (6) FS seems desirable.

Art. 25.2 CESL provides that: [t]he trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words "order with obligation to pay" or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order. This is a copy of Art. 11 (1a) CRD.

Art. 19.4 CESL provides that "[a] distance contract concluded by telephone is valid only if the consumer has signed the offer or has sent his written consent indicating the agreement to conclude a contract. The trader must provide the consumer with a confirmation of that agreement on a durable medium.

e) Burden of proof

12.- Art. 21 FS puts the burden of proof that it has provided the information on business. Art. 6.9 CRD reiterates the same message.

CESL: This has not been changed in Art. 21 CESL.

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[107] Germany had introduced a right to withdrawal. The consumer is entitled to withdraw from a contract she has concluded over the phone, irrespective of whether the consumer had called or the consumer had been called, Gesetz zur Bekämpfung unerlaubter Telefonwerbung und zur Verbesserung des Verbraucherschutzes bei besonderen Vertriebsformen, 4.8.2009, but see the critical account of the German consumer organisation: http://www.vzbv.de/start/index.php?page=presse&bereichs_id=&themen_id=&mit_id=1346&task=mit&PHPSESSID=5a40a19114ef6b72baa02b5d05202987

f) Exemptions

13.- The adoption of Directive 97/7/EC has been regarded as a benchmark in the lobbying activities of business organisations during the legislative process. The complex structure of the CRD has limited the lobbying activities. So has the decision of the European Commission to entrust an expert committee with the task to elaborate the FS. However, the FS as well as the CRD is full of exemptions. It might be useful to distinguish between exemptions from the scope per se, from the information duties imposed on off-premises and distance selling activities and from the right to withdrawal. The latter issue will be discussed separately.[108]

Art. 14 (3) FS reiterates three major exemptions where no information has to be given, all three have already been provided for in the Directive 85/577/EEC and the Directive 97/7/EC, a) supply of foodstuff, beverages, household goods, b) automatic vending machines and automated commercial practices and c) off-premises contracts below the threshold of €15. This is an amazingly short list which can only be explained by the rather narrow purpose of the FS which aims mainly at consumer sales and covers services only if they are related to the sale of goods. That is why e.g. all issues around financial services are not covered whose marketing via the internet raises all sorts of issues.

The CRD takes a very different approach. Art. 3.3 CRD contains a long list of exceptions for types of services and contracts that are exempted from the scope. The list as well as the rather comprehensive recitals Nos. 29-31 which explain why this and that service is not covered, is indicative for the rather limited scope of the CRD. There are so many important services that are neither covered by the FS nor by the CRD such as financial services or travel services, just to mention a few.

The structure of the CESL follows the FS. The only difference is that the threshold for off-premises contracts has now been raised to €50.

g) Payment modalities

14.- The FS aims at internet sales and internet product related services. Payment modalities are crucial for the success or failure of internet transactions. The drafters of the FS as well as the CRD start from the premise that payment modalities are "solved" in the payment services directive 2007/64. From a consumer perspective, this seems rather strange, as the consumer organisations were vainly promoting the introduction of charge back systems.[109] The finally adopted version of the payment service directive does not tackle the issue if and how the credit card issuer could be held responsible for the non-delivery, the late-delivery or the delivery of defective products. The Directive 97/7/EC which introduces minimum standards on distance contracts left leeway for Member States to restrict advance payments, in practice via credit cards. Some Member States had even totally prohibited advanced payments. In *Gysbrechts*,[110] the ECJ held that the total verdict violates the proportionality principle and that business must be allowed to take the credit card number as a security measure.

The FS is rather crude on the regulation of payment modalities. Art. 17 (1) (a) FS obliges business to include into the contract rules on payment, Art. 17 (1) (d) to inform the consumer on a deposit or on any other financial security, Art. 15 (3) FS releases the consumer from paying additional charges if she is not been properly informed. Art. 20 (5) FS entitles the consumer to recover any payment made if she elected to treat the contract or a contract offer as non-binding.[111] The CRD does not go much

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[108] See above under 3.b.

[109] See Z.S. Tang, Electronic Consumer Contracts in the Conflict of Laws, 2009, pp. 157-159; D. Voigt, Die Rückabwicklung von Kartenzahlungen, Auswirkungen der Existenz oder Ausübung von Vertragslösungsrechten des Kreditinhabers gegenüber dem Vertragsunternehmen auf Kredit- und ec-Kartentransaktionen, 2007, p. 267 et seq.

[110] Case C-205/07 Gysbrechts [2008] ECR I-9947.

[111] See in this context (11).

further. Art. 6.1 (g) CRD requires information on payment modalities, Art. 6.1 (q) CRD requires information on the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader, Art. 8.2 CRD deals with the placement of an order and the possible payment obligations. This means that *Gysbrechts* has set the standard of consumer protection.

Art. 16 (a) CESL obliges the trader to include the arrangements for payment and Art. 16 (c) deals with the existence and conditions of a possible deposit. The equivalent to Art. 15 (3) FS can now be found in the Art. 29.2. A similar provision to Art. 20 (5) FS can be found in Art. 25.1 and 25.2.

h) Remedies for breach of information duties

15.- Art. 25 FS sets a new standard in the discussion on how appropriate remedies for breach of information duties look like. Due to its innovative character it deserves to be quoted in full:

> (1) Where a business has failed to comply with any duty to provide information under the preceding Articles of this Chapter and a contract has been concluded, and as a result of the incorrect information or the absence of information the other party reasonably understood that the business was undertaking an obligation, the business will have that obligation.
>
> (2) In cases not falling within paragraph (1), where a party has failed to comply with any duty imposed by the preceding Articles of this Chapter and as a result a contract has been concluded which the other party would not have concluded, or would not have concluded on the same terms, the first party is liable for loss caused to the other party by the failure. Articles 165, 166 and 167 apply with appropriate adaptations.
>
> (3) The remedies provided under this Article are without prejudice to any remedy which may be available under Articles 42 (3), 45 or 46.
>
> (4) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Art. 25 FS seems inspired by the DCRF: Article II.-3:109 and Article II.-3:501 deal with remedies for the breach of information duties, Article II.-3:105 contains rules on the formation of contract by electronic means. Art. 25 (1) FS seems inspired by the respective rules introduced first in the Austrian, later in the German Civil Code meant to fight sweepstakes by turning promotion techniques into binding obligations. The idea is that the omission of information obligations might produce contractual obligations. This is indeed highly innovative. Art. 25 (2) FS establishes a general duty to pay compensation in case the lack of information has produced a loss on the side of the consumer. The FS leaves us alone with the problem of how that loss might look like. Is the loss not the conclusion of an unwanted contract? Where is then the borderline between the right of withdrawal and the claim for compensation under Art. 25 (2) FS. The definition given under Art. 2 (12) FS is rather broad. The conclusion of an unwanted contract must be regarded as an "economic loss".

The CRD remains *far* behind the approach of the FS. It does not provide for information specific remedies, setting aside the prolongation of the period available of the exercise of the right of withdrawal, Art. 10 CRD which will be discussed later. Already the 2008 proposal was quite deficient with regard to information specific remedies. What are all these information requirements for, if appropriate remedies are lacking? The CRD leaves us with the general formula in Art. 24 that "the penalties provided for must be effective, proportionate and dissuasive".

Art. 29 CESL provides for the following remedies:

> 1. A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.
>
> 2. Where the trader has not complied with the information requirements relating to additional charges or other costs as referred to in Art. 14 or on the costs of returning the goods as referred to in Art. 17 (2) the consumer is not liable to pay the additional charges and other costs.

> 3. The remedies provided under this Art. are without prejudice to any remedy which may be available under Art. 42 (2), Art. 48 or Art. 49.
>
> 4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Art. or derogate from or vary its effects.

i) Formation of contract by electronic means

16.- Art. 26 FS integrates the contract related rules of the e-commerce directive into the body of rules. But it does not stop there. Art. 26 (5) reaches far beyond Art. 9-11 of the e-commerce directive as it links the breach of information duties to the right of damages under Art. 25 and it even introduces a right to withdrawal, which is missing in the e-commerce Directive. The CRD is of little help, although Art. 8 CRD might be read so as to cope with some aspects of contracts concluded by electronic means. However, the CRD leaves the e-commerce directive unaffected. Insofar Art. 26 FS must be regarded as an important step forward, in particular through the introduction of information related remedies.

Articles 24-25 CESL specifically deal with contracts concluded by electronic means. Art. 24 sets out additional duties to provide information in distance contracts concluded by electronic means. Art. 25 provides additional requirements in distance contracts concluded by electronic means (see also above at para 14).

3. Right to withdrawal

17.- The right to withdrawal is regarded as the central pillar of consumer protection devices. The justification differs and varies according to the subject matter concerned. In off-premises contracts it is usually the surprise element, in distance selling the missing opportunity to compare quality and price before the conclusion of the contract.[112] The European Union as well as legal doctrine has put much emphasis during the reform debate on the need to harmonise the withdrawal period which differed considerably in the various consumer protection directives. Consistency and coherence linked to legal certainty were the arguments brought forward to justify the fight for uniformity. This overall tendency clearly demonstrate that the law making remains disconnected from reality, i.e. from research undertaken in the field of behavioural economics. Uniformity sets aside the differences between the various transaction. Why should the withdrawal period in internet sales last 14 days? The consumer needs no more than a couple of days to decide whether he wants to keep the things he has ordered via the internet. 14 days, however, in case of consumer credits, are rather useless. The economic effects of a credit contract are only felt after a couple of months. The drafters of the FS as well as the EU legislator take it for granted that a right of withdrawal or the threat of the exercise of the right to withdrawal guarantees a "high level" of consumer protection. What is missing in a debate which last for more than a decade now is a more facts based analysis on when and for whom and under what circumstances the right to withdrawal really matters.

a) Right to withdrawal

18.- Art. 40 (1) FS grants the consumer a right to withdrawal in off premises and distance contracts without giving reasons and *at no costs* – except those provided for in Art. 43 FS. Art. 9 CRD contains the same message, here the exceptions are laid down in Art. 16 CRD. Two types of costs have to be distinguished.

Art. 43 (5) FS holds the consumer liable for the direct costs of returning the goods after the exercise of the right to withdrawal, unless the business has agreed to bear that cost. Under Art. 14 (3) FS and Art. 14 (1) CRD the consumer does not have to bear the costs if the trader failed to inform him. The

[112] In this direction now explicitly recital 37 of the CRD.

Directive 97/7/EC provided for minimum standards only. That is why Member States were free to set restrictions to the economic burden resulting from the return of the goods. Some Member States charged the trader, others set a cap on the costs. Traders themselves were sometimes ready to accept to pay for the return costs. The new rule is much more straight forward than the former Art. 4 (1) (d) of Directive 97/7/EC. It shifts the burden to the consumer. A rather amazing consequence in light of the overall intention to encourage consumers to engage in trans-border internet sales.

But this is not all. Both Art. 43 (7) FS as well as Art. 14.2 CRD hold the consumer liable for any diminished value of the goods, unless the trader failed to provide information on the right to withdrawal. The new rules deviate dramatically from the former as interpreted by the ECJ. On reference the ECJ held that no costs means no costs and that the consumer does not have to bear the costs for using the product within the withdrawal period, unless provided by general principles of good faith or unjust enrichment.[113] We will not deny that such a generous rule might invite consumers to misuse their rights. However, business never complained that the costs resulting from the return of used goods prevented them from engaging in the business. If any business complained about consumers who misused the right – granted by some distance selling companies – to return the goods free of charge. Some consumers ordered products shamelessly in different seizes just to test whether the trousers or shirts fitted. Under the new rules, consumers are only allowed to do what is necessary to "establish the nature, characteristics and functioning of the goods". The vague wording will certainly lead to litigation and to differences in the interpretation of how the diminished value will be calculated.

Art. Art. 40.1 CESL creates a similar right to Art. 40(1) FS. However, in the case of off-premises contracts, the threshold for its application is now €50.

Obligations similar to Art. 43 (5) FS and Art. 43 (7) FS can now be found in Art. 45.2 and 45.3.

b) Exceptions to the right to withdrawal

19.- Art. 40 (2) and (3) FS provide for a long list of exceptions in which the right to withdrawal does not apply. This is by and large a reiteration or continuation of the list already adopted under the Directive 97/7/EC. Art. 16 CRD mirrors what has been decided in the FS. However, the list is more detailed and more specific. Two exceptions deserve attention. Art. 16 (k) exempts public auctions from the scope of the right to withdrawal. The FS does not cover such services. Here the CRD stays away from establishing a lex "eBay". The decision of the German Supreme Court to submit eBay to the rules of the distance selling directive remains therefore unaffected. On the other hand Art. 16 (l) CRD transposes *Easy Car*[114] into binding law. Car rental services do not have to fear the risk of being faced with a consumer exercising her right to withdrawal. The FS does not deal with such type of services.

Art. 40.2 and 40.3 CESL provide a longer list of exceptions than Articles 40 (2) and (3) FS. Art. 40.2 (h) now specifically excludes public auctions from the scope of Art. 40.1.

Art. 40.3 (d) and (e) are also new, and exclude the application in cases "where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and with the acknowledgement by the consumer of losing the right to withdraw" (Art. 40.3 (d)) and where "the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than

[113] ECJ C-489/07 Pia Messner v Firma Stefan Krüger [2009] ECR I-7315.

[114] ECJ C-336/03 easyCar ECR 2005 I-1947.

replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods" (Art. 40.3 (e)).

c) Exercise of the right to withdrawal

20.- Art. 41 FS gives the consumer the right to withdraw from off-premises and distance contracts. The right is exercised via notice to the business at the address business has to provide to the consumer. The Directive 97/7/EC left it to the Member States how the notice should be shaped. For years politicians and stakeholders were discussing the feasibility of developing a standard format. The German government was one of the first who introduced a standard format but looked foolish when it turned out that the format designed by the ministry of justice did not meet the legal requirement as stated by German courts.[115] Art. 41 FS now relies on such a standard format which should give legal certainty to the business and to the consumer. The consumer may fill out the standard format on paper or electronically. In the latter case, business has to confirm receipt. However, the consumer is not bound to use the standard format. She is free to notify his decision to business via any other means. The burden of proof for the exercise of the right to withdrawal lies with the consumer. The regulation of the exercise of the right to withdrawal in the FS and in the CRD is more or less identical. Recital 44 underlines that the standard format is just a recommendation and that the consumer is free to use her own words, the telephone or may simply decide to send the products back.

In practices the electronic version of the standard form will play the key role. At first hand this standard format looks extremely complex and might have a deterrent effect on the consumer. The resemblance to standard contract conditions is striking. I seriously wonder whether a consumer is ready and willing to go through a couple of pages just to study where exactly she has to tick a box or fill in certain categories. So it might well be that the standard format produces legal certainty – on the side of business, but that consumers will use "their own words" to express dissatisfaction.

Art. 41 CESL is an almost exact copy of Art. 41 FS. It includes a definition of "timely" in Art. 41.4 CESL.

d) Period of withdrawal

21.- The withdrawal period has been fixed to 14 days, Art. 42 (1) FS. The consumer has to make sure that she exercises the right to withdrawal within that period, this means she must either fill in the standard format electronically or dispatch a letter within that period, Art. 42 (4) FS. Art. 11 (2) (a) FS provides for a definition of what a day means: a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period. This is very much in line with Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits[116] which calculates in calendar days, to which the CRD refers in recital 41.

The details of when exactly the period start to run is laid down in Art. 42 (2) FS with regard to goods and sales related to services. In essence the solution is rather simple. In case the consumer has concluded a contract over the sales of goods, the period starts "when the consumer has taken delivery of the goods", in case the contract for related services has been made after the goods have been delivered it is the day of the conclusion of the contract. The CRD complies with the FS, however, it uses a different terminology. Instead of delivery, Art. 9.2 (b) (i) CRD requires "physical possession", a

[115] References of the discussion in H.-W. Micklitz/M. Schirmbacher, § 312 c, Rdnr. 195 et seq, in Spindler/Schuster, Recht der elektronischen Medien, Kommentar, 2. Auflage, 2011.

[116] OJ L 124, 8.6.1971, p. 1.

term which has already raised concern when it was first presented in the 2008 proposal.[117] The recitals of the CRD do not define what is meant. Art. II.-5:103 (1) (c) DCFR again uses a different terminology. Here it is the time when "the goods are received".

CESL: In the CESL both Art. 42 (1) FS and Art. 42 (2) FS are incorporated in one single provision, Art. 42.1.

e) Extension of withdrawal period in case of failure to inform

22.- Since *Heininger*[118] the problem is well known to all consumer lawyers in Europe. What shall happen in case the consumer has not been informed on her right to withdrawal? The ECJ gave a very consumer friendly answer: the withdrawal period may run ad infinitum. The consumer therefore could exercise her right to withdrawal years after the conclusion of the contract provided that the parties had not mutually fulfilled their obligations.[119] Since then there is discussion in legal doctrine and politics on whether the *Heininger* doctrine should be corrected. Art. 42 (3) (b) FS cuts down the period drastically. The maximum time period in case of failure to provide information on the right to withdrawal is cut down to six months, from the moment the withdrawal period begins to run, this means in essence after the goods have been delivered to the consumer. The CRD introduces a promising Article 10 under the heading of omission of information on the right to withdrawal. The content is slightly more consumer friendly than in Art. 42 (3) (b) FS as it limits the time period to one year, instead of six month, but the CRD just as the FS corrects the *Heininger* doctrine to the detriment of the consumer.

The reason given for the decision to cut down and to correct the *Heininger* doctrine is "legal certainty", recital 27. Art. II.- 5:103 DCFR has paved the way for such a solution.[120] In whose interest is legal certainty here? Obviously it is the trader who has not met the requirements the law imposes on him. Is it really legitimate to remunerate the trader who does not comply with the law by depriving the consumer of her rights? And if legal certainty is an argument to set an end to possible litigation, why not chose the solution the ECJ favoured – no withdrawal after the full completion of the contract? The true problem in *Heininger* and the follow on cases was not the length of the withdrawal period, but the legal effects of the right of withdrawal on the linked sales and credit contract. It is here where consumer advocates had hoped for a more courageous decision of the ECJ, for providing clearer guidance to national courts on how the linked contracts should be unbundled and the consumer be compensated for the failure to be properly informed.[121]

CESL: The CESL follows the CRD in that it provides for a period of one year in Art. 42.2 (a).

f) Effects of withdrawal

23.- The potential effects of the exercise of the right to withdrawal on the contractual relationship between the consumer and the trader as formulated in Art. 43 FS can be broken down along the line of the following logic:

- Art. 43 (1) FS *termination*: The withdrawal "terminates" the contractual relationship. This means the right to withdrawal produces legal effects only from the moment onwards from which it is

[117] COM (2008) 614 final.

[118] ECJ, 13.12.2001, Case C-481/99) 2001 ECR I-9945.

[119] ECJ, 4.10.2008, C-412/06 Hamilton, 2008 ECR I-nyr.

[120] E. Terryn, Rhe Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference, in R. Schulze (ed.), Common Frame of Reference and Existing EC Contract Law, 2008, 145.

[121] There is an overwhelming literature on Heininger.

exercised. The effects are "ex nunc". The unclear terminology has created much concern in former consumer law directives.

- Art. 43 (2) and (3) and (6) FS *mutual return/reimbursement*: The parties to the contract have to return to each other within 14 days what they have received. The consumer has to return the goods, in principle at her own costs, the trader has to reimburse payment. There is a slight imbalance in the way the rights and duties are conceived. The trader may withhold payment until he has received the goods or until the consumer supplied evidence of having sent the products back. The FS, however, does not provide for a similar right to the consumer. Why should she not be entitled to require evidence that payment is under way at the time she returns the goods?
- Art. 43 (7) and (9) FS *compensation*: the consumer is obliged to compensate the trader for the diminished value which results from the use of the product beyond mere testing. The difficulties resulting from the insertion of this rule have already been mentioned.[122] She is equally obliged to compensate the trader if the provision of the service has already begun prior to the exercise of the right to withdrawal on request of the consumer.
- Rights and duties beyond Art. 43 FS: The FS does not mention this possibility explicitly. However, the consumer may refer to the remedies foreseen in the FS, in particular the right to claim compensation in case there is need.

The CRD needs three articles 12, 13 and 14 what is summed up in Art. 43 FS. The content and the message are largely identical, although sometimes more detailed. What really matters is the lack of remedies outside and beyond termination, return, reimbursement and compensation of diminished value. The CRD does not contain a rule similar to the incriminated Art. 5 (2) of the Doorstep Selling Directive 85/577 which stated: "The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract". One may wonder whether termination comes close to Art. 5 (2) or whether the vague formula presented in Art. 12-14 CRD is even meant as a correction of the *Heininger* doctrine. The CRD leaves the consumer with a meagre reference in recital 53, saying:

> In addition to the consumer's right to terminate the contract where the trader has failed to fulfil his obligations to deliver in accordance with this Directive, the consumer may, in accordance with the applicable national law, have recourse to *other remedies, such as to allow an additional time for delivery, enforce the performance of the contract, withhold payment, and seek damages (emphasis added H.-W. M.)*

However, Member States are at least required to "lay down detailed rules on the termination of such contracts, Art. 15.2 CRD". The recital as well as Art. 15.2 should be linked to the obligation of the Member States to provide for penalties that are "effective, proportionate and dissuasive", Art. 24, a formula the practical importance of which is still unclear.

The structure of the CESL is different. Art. 43 CESL simply provides that a withdrawal shall have the effect of terminating the obligations to perform the contract or to conclude the contract where an offer was made. Art. 44 CESL then sums up the obligations of a trader:

> 1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw from the contract in accordance with Article 41. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

[122] See above (18).

> 2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.
>
> 3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.
>
> 4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

The obligation in Art. 44.4 CESL is new and does not feature in the FS. A significant number of obligations are imposed on the consumer in Art. 45 CESL:

> 1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 41, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.
>
> 2. The consumer must bear the direct costs of returning the goods, unless the trader has
>
> agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.
>
> 3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 17 (1).
>
> 4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.
>
> 5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.

An identical provision to Art. 43 (6) FS cannot be found in the CESL. Art. 45.5 appears to be a reformulation of Art. 43 (9) FS, but is slightly different in its wording.

g) Ancillary and linked contracts

24.- Art. 44 FS deals with ancillary contracts only. They are defined in Art. 44 (1) second sentence as "a contract by which a consumer acquires goods or services related to a distance contract or an off-premises contract with a business and these goods or services are provided by the business or a third party on the basis of an arrangement between that third party and the business". This is a rather narrow definition which does not cover credit financed internet transactions within the scope of the FS. Linked agreements are referred to in Art. 44 (3) FS. The drafters bounce the issue back to "the applicable law". This is not really convincing not even in the eyes of SMEs or business at large. Traders must have an interest in getting internet transactions financed, not only via credit or debit cards which are equally not covered by the FS.

This ruling is similar in Art. 46.1. CESL.

The CRD regulates ancillary and linked agreements in Art. 15. Ancillary contracts are defined in Art. 2.15 CRD, literally identical. They are equally subject to immediate termination in the meaning of Art.

12 CRD. Linked contracts, e.g. credit financed transactions shall be covered by the Directive 2008/48. The CRD does in no way discuss the potential lessons to learn from the *Heininger* Saga. The obligation laid down in Art. 15.2 CRD concerns only the termination of normal off-premises and distance selling contracts, as well as ancillary contracts. It does not refer to linked agreement so that the rules provided for in the fully harmonised consumer credit directive remain unaffected.

B. Unfair contract terms

1. Generalities

25.- Chapter 8 of the FS regulates the control of unfair contract terms. There is no counterpart in the CRD. In the very last minute during the inter-institutional agreement, the European Commission, the European Parliament and the Council agreed to restrict the CRD to the regulation of off-premises and distance contracts. What remains is a reporting duty of the Member States to inform the European Commission on deviating standards in particular with regard to the inclusion of the adequacy, price or remuneration and the list of clauses which are considered to be unfair, Art. 32 CRD. From a consumer point of view there is no disadvantage in the exclusion of unfair terms from the scope of application of the CRD. The draft CRD was much more an attempt to transform minimum into maximum standards than to tackle the truly important questions, such as the extension of the control even to individually negotiated terms, to the interlink between collective and individual control and to the introduction of a skimming-off procedure which supplements the action for injunction.[123] In 2010 the European Commission asked for explicit advice on the integration of individually negotiated terms into the control mechanism.[124] The current debate within the FS is focused on the question – which was raised and answered in the affirmative by the DCFR – whether and to what extent unfair terms control should follow a double headed approach, a higher yardstick of control for consumers b2c and a lower one for b2b transactions.[125] This approach has been introduced also in CESL.

The FS as it stands might best be read as a way of fine-tuning the existing European private law *acquis* rather than as an attempt to come up with ground breaking ideas. The draft as it stands is a solid stock-taking of the current debate, it is helping the consumer in that it provides contrary to Directive 93/13/EC not for an indicative but for a black and grey list. The expert committee invested into the re-wording of the black and grey clauses, even of prolonging and extending the list. Whether this work is based on a systematic analysis of the Member States laws or is a more haphazard product of the exchange of ideas and concepts, is not evident. The FS, however, is detrimental to the consumer protection level in a number of Member States insofar as it is limited to the control of standard terms outside adequacy and price of the performance. What is entirely missing in the FS is any link between the collective control mechanism and the individual control of contract terms. The FS does not even mention the action for injunction, let alone the question whether judgments in collective litigation should be granted an *erga omnes* effect.

CESL: The CESL follows the same structure as the FS. However, it should be noted that the CESL is only applicable to contracts where one of the parties is a SME.

2. Scope of Application

26.- Art. 2 (17) defines standard terms as terms "which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties". This formula contributes another variant to a decade old debate in that the addressees must be "different" parties. Art. 2 (7) should be read in connection with Art. 78 (2) which excludes the main subject matter and the price from the scope of application, but allows for submitting these terms to the

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123 H.-W. Micklitz, Reforming European Union Unfair Terms Legislation in Consumer Contracts, ECRL 2010, 347-383.

124 COM (2010) 348 final.

125 H.-W. Micklitz/N. Reich, Unfair Terms in the Draft Common Frame of Reference Comments on the Occasion of the Tartu Conference on Recent Development in European Private Law, Juridica International, Law Review University of Tartu, 2008, 58-68.

transparency test. Here the expert committee had relied more or less completely on the work undertaking in the development of the DCFR, Art. II.-9:403 – 410, thereby setting aside the decision of the ECJ in *Caja de Ahorros*[126] where it confirmed the minimum character of the respective rules in the Directive 93/13. This means, excluded are:

- Individually negotiated terms,
- Terms related to the main subject matter of the contract and to the appropriateness (not adequacy) of the price.

The formula shows that those who drafted it are far away from the reality in the Member States. The crucial questions today turn around the degree to which price clauses at the borderline between standard terms and "pure" prices or seemingly negotiated terms can be submitted to the control. Here consumer protection really matters! A recent judgment of the Supreme Court of the UK provides an ample example on the uncertainties of the control on non-transparent price clauses which allow banks to raise a considerable amount of money via bank charges in order to cover the costs of current bank accounts.[127] As long as Directive 93/13 is in place and allows Member States to set higher standards, the proposal in the FS does not really matter. However, this is only half the truth. FS turned into practice would considerably reduce the level of protection for consumers, at least in those Member States where the courts are willing to take an active stand against non-transparent price clauses and individually negotiated terms "in disguise".[128]

CESL: The definition of standard terms has not been changed in Art. 2 (d). Art. 2 (d) makes express reference to Art. 7, which provides that a contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.

Art. 7 CESL is the equivalent of Art. 5(1) FS, which provides that a term supplied by one party has not been individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.

The difference between the two articles is that the FS article has the "in particular because it has been drafted in advance" addition. This part has not found its way into the new Article 7 CESL.

Both articles have four other subsections which deal with choice from a selection (subsection 2), burden of proof (subsections 3 and 4) and terms drafted by third parties (subsection 5). These four subsections are exactly similar in the CESL and the FS.

3. Insertion of Terms and Surprising Terms

27.- Art. 86 FS does not regulate the conditions under which standard terms may become part of the contract. Art. 86 FS declares unfair terms non-binding if the other party was not aware of them or if the party supplying the term did not take reasonable steps to draw the other party's attention to them, before or when the contract was concluded. This article is inspired by Art. II.-9:103 DCFR. The terms are subject to a fairness control. The insertion of standard terms shall not be made possible via the use of non-transparent and unfair terms which tie the consumer without making her clear what the purpose of the standard term is. Such a term was not foreseen in the Directive 93/13.

27.- Art. 87 FS prohibits surprising terms. They belong to the standard repertoire of at least some Member States' legislation, although they do not show up in the Directive 93/13. Both Art. 86 and 87 FS document that the drafters have not considered the relationship between individual and collective

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[126] ECJ, 3.6.2010, C-484/08 Caja de Ahorros y Monte de Piedad de Madrid, 2010 ECR I-nyr.

[127] Judgment, 25.11.2009, Office of Fair Trading (Respondents) v. Abbey National plc & Others (Appellants), Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116.

[128] See reference in Fn. 36.

control of standard contract terms. Whether and to what extent insertion and surprise terms can also be submitted to collective judicial control is subject to controversy ever since. The drafters make clear in Art. 77 (1) FS that terms which violate Art. 86 or Art. 87 FS are not binding the consumer.

CESL: Art. 70.1 provides that "contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded". This is similar to Art. 86 FS. However, there is an additional provision in Art. 70.3 which provides that the parties may not exclude the application of this article.

There does not appear to be a provision equivalent to Art. 87 FS.

4. Yardstick of Control

a) Transparency principle

29.- According to Art. 80 FS incomprehensible and non-transparent terms are regarded to be unfair. They do not bind the consumer. Art. 80 FS refers also to the accessibility of the terms, thereby referring explicitly to wide-spread strategies in "hiding" terms at a place where the consumer does not expect to find them. This is a highly welcome clarification. Accessibility taken seriously opens up new pathways for exercising control over complex standard contract terms where even lawyers have difficulties to understand how the bits and pieces spread over lengthy pages fit together in the context of the contract concluded.

Contrary to what Art. 80 FS seems to suggest, the main subject matter and the appropriateness of the price are subject to the transparency control. This comes clear via Art. 78 (2) FS.

The wording of Art. 82 CESL is different from Art. 80 FS:

> Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language

The accessibility requirement has disappeared.

b) Fairness

30.- Art. 81 provides for a modern wording of the fairness doctrine. It combines in line with Art. II:9:403 DCFR the continental good faith doctrine with the common law principle of fair dealing. This is further spelt out in Art. 2 (10) FS. It means a standard "of conduct characterised by honesty, loyalty and consideration for the interests of the other party to the transaction or relationship in question". At first hand sight it provides for a new undertone, a spirit of co-operation between the parties, which is certainly not commonly agreed in the Member States' private legal orders.[129] The question is whether the formula may pave the way for a common European understanding, an understanding that allows for merging continental substantive control of standard terms with common law procedural control. From an academic point of view this formula requires deeper reflection. However, whether it may lead to common European standards in practice remains to be seen.

[129] See already B. Lurger, Vertragliche Solidarität – Entwicklungschance für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union, 1998.

Again, the wording is different in Art. 83 CESL. The focus of the article is on the "significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing".

Good faith and fair dealing are defined in Art. 2 (b) CESL as "a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question". The word loyalty has been replaced by openness.

5. Black and Grey Lists

31.- Art. 83 FS defines terms which are always unfair and Art. 84 FS terms which are presumed to be unfair. Here the FS goes far beyond the Directive on unfair terms and even the DCFR which advocated for a grey list only. Annex I to this report compares in form of a table the FS, the DCFR and the proposal within the CRD before it was set aside. Only the reporting duty in Art. 32 (no. 25) survived the final round of negotiation in the Council and between the Commission and the Parliament.

What is really needed is a guide in a European perspective of the content and the scope of each term as well as its context as highlighted by examples. A similar problem, unsolved until today, is the black list of incriminated commercial practices in the Directive 2005/29 on unfair commercial practices. However, the European Commission has announced that rather soon access to a data file will be available which collects the decision of national courts. A similar data-file sponsored by the European Commission for 7 years contains a couple of thousand of judgments on unfair contract terms from a number of Member States. However, the European Commission decided not to continue its investment. It remains to be seen whether "Clabus"[130] – this was the name – can be revitalised.

CESL: The CESL follows the FS and provides a black list in Art. 84 and a grey list in Art. 85. Nevertheless, there are some differences to the FS.

In the black list, there is no longer a provision similar to Art. 83 (h) FS, which prohibited terms that have as their object to "make the initial contract period, or any renewal period, of a contract for the protracted provision of goods or services longer than one year, unless the consumer may terminate at all times with a termination period of no more than one month". That term has now become part of the grey list in Art. 85 (w).

[130] M. Radeideh, *CLAB Europa* – Die europäische Datenbank mißbräuchlicher Klauseln in Verbraucherverträgen, ZEuP 2003, 85-113.

C. Zusammenfassung der Ergebnisse

Die Ergebnisse der Untersuchung zu den Haustürgeschäften und zum Fernabsatz können wie folgt zusammen gefasst werden:

1. Der FS bemüht sich um ein hohes Niveau an Verbraucherschutz. Die Gegenüberstellung des CESL, der FS mit der CRD zeigt ein ambivalentes Bild. Manches Mal liegen die Standards im CESL bzw. der FS höher, ein anderes Mal in der CRD. Jedoch sind die Regelungen in CESL und der CRD nicht immer identisch. Die Rechtsanwendung und die Rechtsinterpretation werden unübersichtlich.
2. Die generelle Kritik richtet sich gegen die Individualisierung der Schutzregeln und gegen die immer weitere Aufspaltung von Regelungen, die inhaltlich zusammen gehören wie die Fernabsatzrichtlinie dokumentiert hat. Das Auseinanderfallen von Vertragsregeln und Regeln über den Schutz vor unlauteren Geschäftspraktiken ist nicht im Interesse der Verbraucher. Die Zusammenschau gerade auch unter dem Blickwinkel des kollektiven Rechtsschutzes muss das Ziel in der Ausgestaltung des OI sein.
3. Aus der Sicht der Verbraucher problematisch sind die vielfältigen Verschlechterungen, mit denen verbraucherfreundliche Entscheidungen des EuGH zurück genommen werden. Das betrifft die Verkürzung der Laufzeit auf 1 Jahr im Falle der Nichtbelehrung, vor allem aber die Einführung eines Anspruchs auf Entschädigung für die Nutzung des Produkts während der Laufzeit der Widerrufsfrist. Auch die Kostenregelung über die Rücksendung ist nicht gerade im Sinne des Verbrauchers. Man fragt sich, ob so Verbraucher zum grenzüberschreitenden Kauf bewogen werden.
4. Problematisch ist die Regelung der Sprache. In der Sache läuft der Vorschlag im FS darauf hinaus, dass der Unternehmer die Sprache bestimmen kann. An diesem Ausgangspunkt hat das CESL nichts geändert.
5. Keinerlei Regelungen finden sich im FS bzw. im CESL über verbundene Verträge. Offensichtlich sollen nur Verträge mit einem begrenzten Volumen erfasst werden, die über Kreditkarten finanziert werden können. Selbst dann wäre es aber geboten gewesen, sich über die Zahlungsmodalitäten Gedanken zu machen. Dazu findet sich im FS bzw. CESL kaum etwas, außer der Umsetzung des *Gysbrechts*-Urteils des EuGH. Ansonsten scheinen die Autoren davon auszugehen, dass die Zahlungsdienstleistungsrichtlinie alles wesentliche regelt, was aber nicht der Fall ist. Denn die Zahlungsdienstleistungsrichtlinie befasst sich ebenfalls nicht mit den Folgen der Kartenzahlung. Hier bietet das chargeback System wichtige Anhaltspunkte.

Die Ergebnisse der Analyse der Regelungen zur AGB-Kontrolle zeigen folgendes Bild:

1. Der FS ist auf eine Konsolidierung der Diskussion um die AGB-Kontrolle gerichtet. Bahnbrechende Neuerungen waren bei der Ausarbeitung des CESL nicht zu erwarten. Damit blieben zentrale Belange des Verbraucherschutzes von vornherein von der Diskussion ausgeklammert, wie die wachsende Bedeutung von Preisklauseln, insbesondere im Finanzmarkt, die verschwimmende Abgrenzung von individuell ausgehandelten und Standardklauseln, die nach wie vor völlig defizitäre Verschränkung der Rechtswirkung von Unterlassungsklauseln in Individualverfahren. Man wird den Eindruck nicht los, dass die AGB-Kontrolle umso effizienter ist, desto weniger wichtig sie ist und desto weniger sie die Unternehmensseite kostet.
2. Positiv an der Regelung der AGB-Kontrolle in der FS fällt auf: Die Neuformulierung der Generalklausel, – die das CESL jedoch erneut korrigiert hat –, die aber gleichwohl Potenzial für die Verschmelzung unterschiedlicher Rechtskulturen beinhaltet, sowie die Aufstellung von

schwarzen und grauen Listen, auch wenn deren Bedeutung ohne nähere Erläuterung im europäischen Kontext vage bleibt. Negativ zu vermerken ist die Beschränkung auf Standardklauseln sowie die Ausklammerung der Kontrolle der Hauptleistung und des Preises.

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PART III

An Optional Sales Law Instrument for European Businesses and Consumers?

Comments on the "Commission proposal of a Common European Sales Law (CESL)" of 11.10.2011 concerned only with *consumer sales and related service contracts (B2C),* compared with the *acquis*, the DCFR, and "Feasibility Study of the Expert Group on European Contract Law" of 3 May 2011 (in the following; FS)

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Overview

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Preliminary Remarks

This study updates an earlier paper of Summer 2011 on the "Feasibility Study" (FS) of the Expert Group of 3.5.2011 on an EU Optional Instrument of Contract Law. It is contrasted with the recent Commission proposal of 11.10.2011 on a Regulation for a Common European Sales Law[131] (in the following: CESL). The general provisions on the legal basis, the scope of the proposal, the opt-in mechanisms and other general provisions are discussed by Micklitz/Reich in Part I of this part. Part III of this study compares the original proposals contained in the *acquis* of Directive 99/44/EC[132] and the FS with the rules specific to consumer sales (B2C) contained in the Annex, namely the CESL-text. It will be shown in this analysis that the Commission has proposed only minor modifications to the FS, with the exception of having included special rules on so-called "digital content" which need to be evaluated separately (overview paras 6a, 20a). The paper also refers to the recently published Consumer Rights Directive 2011/83/EU of 25 October 2011[133] (in the following: CRD) in comparison with an earlier consolidated version of the European Parliament of 24 March 2011. Reference has also occasionally been made to the Draft Common Frame of Reference (DCFR).[134]

Commenting on the detailed provisions of the FS and the follow-up CESL was difficult insofar as neither the authors of the FS nor the Commission has added any comments, memoranda or recitals to the proposed provisions.

A. Sales Contracts

1. Generalities (1.-2.)

1.- *FS:* Part IV of the FS as well as part IV of the CESL regulate sales contracts in general and are not limited to B2C transactions as the proposed CRD is. A sales contract is defined in Art. 2 (15) FS as

> "any contract under which a business transfers or undertakes to transfer the ownership of goods to another person (the buyer), and the buyer undertakes to pay the price; it includes a sales contract under which the seller is to manufacture or produce goods for the buyer."

According to Art. 2 (4), "a 'consumer sales contract' means a sales contract where the seller is a business and the buyer is a consumer", that is any natural person who is acting for purposes which are outside his or her trade, business, craft or profession": Art. 2 (3) FS.

The concept of "goods" as "corporeal movables" is defined in Art. 2 (11) and seems to exclude "electronic goods" or "digital content", like music, DVDs, data sets etc, which may be downloaded from the Internet. Sales law in the FS is limited to B2B and B2C transactions, including the narrow definition of "consumer" mentioned above which means that frequently in "mixed contracts" B2B and not B2C provisions will apply – a problem that has to be decided on an individual case-by-case basis and may create additional uncertainties about which legal regime applies between the parties of a sales contract.

Interestingly, the concepts of the *DCFR* are much broader:

- Consumer according to Art. I.-1:105 (1) "means any natural person who is acting *primarily* (italics NR) for purposes which are not related to his or her trade, business or profession."

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131 COM [2011] 635 final.

132 OJ L 171/12 of 7.7.1999.

133 OJ L 304/64 of 22.11.2011.

134 Ch. v. Bar/E. Clive/H. Schulte-Nölke, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference DCFR, Outline Edition, 2009.

- The provisions of Art. IV.A. on "Sales" apply not only to contracts for the sale of goods, but also to "*associated consumer guarantees*".
- The concept of "good" in Art. IV.A.-1:101 is not limited to movables, but applies inter alia with "appropriate adaptations" to the sale of "electricity", sale of "investment securities", sales of "other forms of incorporeal property", contracts for "rights in information or data, including software and databases", and "barter of goods". It is only the sale of immovable property or rights in immovable property which is excluded.

CESL: Art. 2 (k) of the proposed Regulation provides that a "sales contract means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer') and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority".

The definition of consumer sales contract in Art. 2 (l) is similar to the FS but uses the term "trader" instead of business. The definition of consumer in Art. 2 (f) is exactly similar to the FS.

The CRD also uses a narrow definition of "consumer", but allows Members States to extend it to "... legal persons or to natural persons who are not consumers within the meaning of the Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises...": Recital 13. This would not be possible under the CESL which contains complete harmonisation if the parties in a B2C transaction have validly agreed to its use. Concerning mixed purpose contracts, Recital 17 reads – an extension unfortunately not taken over in the CESL:[135]

> The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer.

The term "goods" is defined in Art. 2 (h) and means "any tangible movable items". It excludes electricity and natural gas and water and other types of gas (unless they are put up for sale in a limited volume or set quantity). This definition seems to exclude "electronic goods" in the form of "digital content", like music, DVDs, data sets etc, which may be down loaded from the Internet. This is surprising insofar as later provisions on conformity (6a.-) and remedies (20a.-) include "digital content" as well as provisions on pre-contractual information.[136]

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[135] See the study for the MKA by H.-W. Micklitz/N. Reich, The Commission Proposal for a Regulation on a Common European Contract Law (CESL) – too broad or not broad enough? 2012, paras 21-22.

[136] See the study for the MKA by H.-W. Micklitz, Comments on the "Proposal for a Common European Sales Law (CESL), the "Feasibility Study of the Expert Group on European contract law" (FS) compared with the Consumer Rights Directive (CRD) 2011/83, the – doorstep, distance selling and unfair contract terms, 2012, para 5.

2.- Part IV of the FS and the CESL are divided into six chapters:

- Chapter 9 contains "General Provisions"
- Chapter 10 is concerned with "The seller's obligations", divided into the three sections
    - General
    - Delivery
    - Conformity of the goods and of digital content (only CESL)
- Chapter 11 contains "Buyer's remedies", namely
    - General
    - Cure by the seller's
    - Requiring performance
    - Withholding performance of the buyer's obligations
    - Termination
    - Price reduction
    - Requirement of examination and notification in a contract between traders
- Chapter 12: The buyer's obligations
- Chapter 13: The seller's remedies
- Chapter 14: Passing of risk

A comparative evaluation of the proposals of the FS followed in the CESL is somewhat difficult due to the non-transparent structure of Part IV. For the purpose of these comments, a different analytical scheme is taken as a basis for B2C transactions:

- Consumer's (buyer's) rights
- Consumer's obligations
- Consumer's remedies
- Damages
- Commercial guarantee
- Prescription and time limits

2. Consumer's Rights under a Sales Contract (3.-6a.)

a) Overview

3.- *FS:* Art. 94 FS defines the obligations of the seller in general and, therefore, the "reverse" rights of the buyer-consumer, namely

- Delivery
- Transfer of ownership
- Delivery of documents
- Conformity

General pre-contractual information requirements are laid down in Art. 13 FS, following the earlier version of Art. 5 of the CRD of 24.3.2011.

These obligations can be performed by a third person, but in B2C transactions the seller always remains responsible for performance himself: Art. 95 (3) FS – a provision not contained in the CRD but certainly to be welcomed.

CESL: Art. 91 follows a structure similar to Art. 94 FS. It includes the following main obligations:

- Delivery
- Transfer of ownership
- Conformity
- Right to use digital content
- Delivery of documents

Art. 92 CESL deals with performance by a third party and Art. 92(2) states that "a seller who entrusts performance to another person remains responsible for performance".

General pre-contractual information obligations for "contracts other than distance or off-premises contracts are to be found in Art. 20, including digital content (definition in para 6a.), similar to Art. 5 of the CRD. It provides that the consumer with regard to digital content must be informed about

> "the functionality, including applicable technical protection measures, of digital content, where applicable;
>
> where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of."

b) Delivery/ownership

4.- *FS:* The rules on delivery in Art. 96-100 FS follow closely Art. IV.A.-2:201-204 of the DCFR. They have their B2C equivalent in Art. 22 of the CRD – they were not contained in the original Directive 99/44 and, as a result, subject to differing Member State sales laws. While uniform provisions on delivery seem advisable in the EU, in particular in case of cross-border transactions, it is not clear how far they are mandatory. This does not seem to be the case in either the FS or the DCFR. With regard to Art. 22 (1) CRD, only the *time* – limited to *30 days* after conclusion of the contract – but not the place and/or method of delivery is subject to the agreement of the parties. The parallel provisions in Art. 96 (1) (a) and 97 (a) FS on place and method of delivery in distance or off-premises contracts – as well as in any other sales contact – contain only *default rules*.

As a result of the rather detailed rules on delivery in the FS, it is more of less up to the business practice of the seller, as documented in his terms of contract, how to determine place, method and time of delivery, thereby indirectly being able to restrict consumer's rights arising out of non- or late delivery. They may be subject to control of the unfairness test in Art. 84 FS. The protective ambit of the rules on delivery is rather limited and will contradict the parallel, more protective rules in the CRD which allow contractual arrangements only with regard to time, not to place and method of delivery.

The seller also has to transfer *ownership* – a concept not defined in the FS and thus subject to Member State law - of the goods under the FS and the DCFR; the CRD mentions this general rule of sales law of every EU Member State only within the definition of a sales contract in Art. 2 (5). However, its practical importance is quite limited by the rules on retention of title which are not included in the FS, and on retention of performance by the seller (Art. 135 FS) in case of non-payment by the buyer (para 18.-).

Remedies for non- or late delivery will be discussed in paras 10.- et seq.

CESL: The rules on delivery are dealt with in Articles 93-97. In Art. 95 there is a new subsection on the time of delivery which does not feature in the FS. Art. 95 (2) provides that "[i]n contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract". The term *ownership* remains undefined in the CESL.

c) Conformity

5.- *FS:* The right of the consumer to receive goods conforming to the contract was first included in EU law by Art. 2 of Directive 99/44 and is generalised in Art. 102-103 FS/ Art. IV.A.-2:302 DCFR. The relevance of public statements of the seller or any other person in the chain of marketing has been recognised in Art.103 (f)/67 of the FS.

In B2C transactions, these provisions are mandatory and cannot be waived in the contract: Art. 102 (3). The only exception occurs when the consumer knew of the "specific condition of the goods and accepted the goods as non-conforming with contact when concluding it." This formulation is *narrower* and hence more "consumer friendly" than Art. 2 (3) of Directive 99/44, where lack of conformity existed not only when the consumer knew of it at the time of contracting, but also when he "could not reasonably have been unaware of (it) ...". In a different formulation, Art. 106 FS contains this provision only in B2B transactions. Therefore, the FS seems to be more consumer protective than the CRD. As a consequence, a *congruence* between the two provisions has to be attained to avoid different levels of consumer protection in the CRD and CESL based on the FS.

With regard to time-limits, Art. 107 (2) FS provides for a presumption that the lack of conformity existed at the time of the passing of the risk to the consumer, if it becomes apparent within six months. A similar rule was already included in Art. 5 (3) of Directive 99/44 and will be maintained due to the new minimum protection clause contained in Art. 33 of the CRD.

CESL: The CESL follows the exact structure of the FS. However, there are some additions in that Art. 102 provides for a number of specific third party rights in digital content cases (details para 20a.-). Furthermore, Art. 105 on the relevant time for establishing conformity has two additional subsections – one which deals with digital content (Art. 105 (4) and one which provides for a non-derogation clause in consumer contracts (Art. 105 (5)).

d) Installation

6.- *FS:* Frequently, the parties to a B2C sales contact will agree on the installation of a good. If this is part of a separate but linked service contract under Part V of the FS, it will be studied in this context (para 28.-). If it is to be done by the seller or the consumer himself in accordance with the contract, an incorrect installation can result in a lack of conformity and can give rise to the remedies discussed under para 14.-. Art. 104 of the FS and Art. IV.A.-2:304 of the DCFR, by following Art. 2 (5) of Directive 99/44, extend the concept of "conformity" also to incorrect installations by the seller if this forms part of the contract (which can be implied by interpretation according to Art. 66 FS), or if the "incorrect installation is due to a shortcoming in the installation instructions". These provisions are mandatory in B2C transactions. They will require conforming interpretation in both the CRD and the CESL based on the FS, for instance with regard to "*shortcomings*" of instructions which refer in this author's opinion not only to technical defects, but also to their lack of comprehensibility.[137]

CESL: Art. 101 is similar to Art. 104 FS.

[137] Ch. v. Bar/E. Clive (eds.), DCFR Vol. 2, Art. IV.A.-2:303 Comment C: shortcomings in the installation instructions "if a reasonable user would not have been able to comprehend the instructions".

e) Use of digital content

6a.- The CESL has modified the FS insofar as it has included "use of digital content" in the rights of a consumer and in the remedies for non-performance (para 20a.-). This follows trends in Member State law,[138] in particularly in Germany where the transfer of software was regarded as a sales contract in cases of standardised content (which will be the normal case in B2C transactions) "by analogy", while individually developed software followed the rules on work contracts.[139]

The final version of the CRD contains a definition of "digital content" in its Art. 2 (11)

> "digital content" means data which are produced and supplied in digital form;

Art. 2 (j) of the Proposal is much more specific in its definition:

> "digital content means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware of software; it excludes
>
> i) financial services, including online banking services:
>
> ii) legal or financial Advice provided in electronic form
>
> iii) electronic healthcare services
>
> iv) electronic communication services and networks, and associated facilities and service;
>
> v) gambling;
>
> vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creation of other users."

It is surprising that digital content, which was done according to the buyer's specifications, is also included in the definition which relates specifically to sales law. This is different from German law which would have classified it as rules of work contracts. The exclusions, on the other hand, usually do not relate to a sales or combined service transaction (see para 27.-).

Art. 100 CESL extends the concept of conformity expressly to "digital content". Art. 102 contains rules on third-party claims, some of which are specific to digital content in B2C transactions, namely (with exceptions for digital content supplied without a price, Art. 107)

- "...the digital content ...must be cleared of any right or not obviously unfounded claim of a third party..." under the law of the contract or, in case of absence of such agreement, under the law of the buyer's residence, provided "...the seller knew or could be expected to have known of at the time of the conclusion of the contract".
- liability of the seller is excluded only in cases of positive knowledge of the consumer;
- the provisions of this article may not be derogated from in B2C transactions.

It is not quite understandable why the seller's obligation on conformity, which normally is a strict one, surprisingly depends on fault in contracts of digital content. It is also not clear how *use restrictions* in general contract terms, allegedly justified by the so called "Copyright in the Information Society"

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[138] An overview of the state of law in the Member countries has been given in the Study by the University of Amsterdam, Comparative analysis, Law and Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts, 2011 (the Amsterdam study) which has been used by the Commission for its inclusion of provisions on digital content which were not contained in the FS. They need to be assessed separately which cannot be done in the context of this study.

[139] BGHZ 102, 135, (140); BGH NJW 2000, 1415; for details see the study by P. Rott for BEUC, Extension of the Proposed Consumer Rights Directive to Cover the Online Purchase of Digital Products, 2009. For French law see the remarks by J. Calais-Auloy/H. Temple, Droit de la consommation, 10ème éd. 2010, para 229.

Directive 2001/29/EC[140] of the consumer-buyer, which are quite frequent and extensive in contracts for the downloading of digital content, have to evaluated on a "*fairness"*-test.[141] Abuses seem to be frequent, but this needs to be studied separately, combining intellectual property with contract law aspects.

Art. 105 (4) contains a specific mandatory clause on an updating obligation of digital content whereby the trader "must ensure that the digital content remains in conformity with the contract throughout the duration of the contract." This right to an update depends of course on its (express or implied) terms and thereby may simply be avoided but by omitting such a clause in the contract.

3. Consumer's (Buyer's) Obligations (7.-9.)

a) Payment

7.- *FS:* Art. 125-142 FS contain detailed rules on the buyer's central obligation of payment and the remedies of the seller following non- or late payment by the buyer. They are not specifically tailored to B2C transactions and, therefore, need not be discussed in detail here. Usually the methods, time and place of payment will be determined by the contract, depending on the applicable law.

Art. 22 of the CRD contains an important rule on "additional payments" which reads

> *"Before the consumer is bound by the contract or offer, the* trader shall seek the express consent of the consumer to any *extra* payment in addition to the remuneration *agreed upon* for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment."

CESL: This rule was not contained in the FS. However, the provision has been taken up in Art. 20 (1) b) and 29 (2) of the CESL. The consumer is not liable to pay the additional costs or charges if she has not been correctly informed about them; however, there is no requirement of "express consent" as in the CRD.

8.- Payment is also possible in a *subscription type* manner which is used quite frequently by distance sellers: the consumer will have an account with the seller, may regularly order goods and services from a (paper or electronic) catalogue, and will have to pay the balance due within a certain time span. Usually these contractual arrangements will be "open-ended" and are intended to last for a longer period, thus establishing a regular business relationship between the professional (mostly distance) seller and the consumer. These methods will frequently be combined with bonus or premium schemes depending on the marketing strategy of the seller who is interested in a long term relationship with the consumer. It is again a matter of contracting to determine the manner and effects of payment. Art. 14 (2) CESL concerns information about payment in contracts of indeterminate duration or subscriptions.

Art. 124 CESL deals with "means of payment" and is different from the equivalent provision in the FS (Art. 126). Art. 124 (4) provides that "[i]n a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trade for the use of such means", a provision also included in Art. 21 of the CRD. This provision cannot be found in the FS. Furthermore, Art. 124 (3) on extinguishment states that "[t]he buyer's original obligation is extinguished if the seller accepts a promise to pay from a third party with whom

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[140] OJ L 167/10 of 22.6.2011.

[141] For a discussion of the problems under contracts term legislation in Germany see U. Grüber, Digitale Güter und Verbraucherschutz, 2009, p. 116. The US-law situation which allows a near to complete control by copyright owners over users, particular with regard to so called "virtual worlds" (games etc.) has been critically discussed in the excellent study by G. Lastowka, Virtual Justice, Yale UP 2010, 93, 179 ff.

the seller has a pre-existing arrangement to accept the third party's promise as a means of payment". The FS provided for two additional situations which are not covered by the CESL.

b) Financing of consumer sales

9.- *FS:* The seller may offer, and the parties may agree to, a financing of the sales transaction, e.g. by an instalment contract, by leasing, by a subscription type contract with deferred payment, or by a linked credit transaction. Under EU law, these issues are regulated by Directive 2008/48/EC,[142] containing mandatory provisions on pre-contractual information and contract formation of credit agreements for consumers, including deferred payment, hiring and leasing agreements when they do not contain an (implied) obligation to purchase, Art. 2 (2) (d), and on linked agreements under the conditions of Art. 15. However neither the FS nor the CRD contains any provisions on financed sales contracts which would have to refer to the applicable Member State laws implementing Directive 2008/48/EC.

CESL: This has not changed in the CESL. Art. 6 (2) of the proposal expressly excludes the "*use*" of the CESL "...for contracts between a trader and a consumer where the trader grants or promises to grant the consumer credit in form of a deferred payment, loan or other similar financial accommodation" – an exception not quite understandable as has been shown in the general part of this study.

4. Remedies of the Consumer-Buyer (10.-20a.)

a) Overview of the different remedies for non- or late delivery, or for non-conformity

10.- The generous consumer rights described in section 2 would be nugatory if they were not combined with effective remedies in EU or applicable Member State law. This was indeed one of the main objectives of Art. 3 of Directive 99/44 which provided for a differentiated set of remedies of the consumer in case of non-conformity,[143] divided into a two-level hierarchy, namely

- repair /or replacement as the first level;
- reduction of the purchase price vs. rescission of the contract in case of "non-minor"-defects as the second level.

Actions for damages were left to the discretion of Member States under the minimum protection clause (Art. 8, to be maintained by Art. 33 (2) of the CRD). Directive 99/44/EC did not provide for a right of the consumer to withhold payment (*Zurückbehaltungsrecht*); this depended on applicable Member state law. The remedies of the consumer were to be directed against the seller; there was no provision for an "*action directe*" against the producer, importer, or franchisor as in French law, unlike originally proposed in the Commission Green Paper "Guarantees for Consumer Goods and After Sales Services" of 15.11.1993.[144] As a compensation for the strict liability, the seller has a right of redress against the producer or any other person in the chain of distribution, Art. 4 Directive 99/44/EC.

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[142] Directive 2008/48/EC of the EP and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 122/66.

[143] Details see H.-W. Micklitz/N. Reich/P. Rott, Understanding EU-Consumer Law, 2009, paras 4.23-4.28.

[144] COM (93) 509 final; see M. Bridge in S. Grundmann/C.M. Bianca (Hrsg.), EU-Kaufrechtsrichtlinie, 2002, Rdnr. 5; this was not taken up in the Commission proposal of 1995, COM (95) 520 final nor in the final text of Directive 99/44, see the critique by H.-W. Micklitz, EuZW 1999, 485, 487. The French "action directe" is based on law, not on contract, according to the ECJ judgment in Case C-26/91 Handte [1992] ECR I-3967, as far as jurisdiction under the Brussels Convention was concerned, see H.-W. Micklitz/N. Reich/P. Rott, supra note 13 at para 7.42.

Directive 99/44/EC did not contain any express rules on remedies in case of non- or late delivery, unless this is regarded as part of the "conformity" concept.[145] The consumer protection objective of the remedies was stressed by the ECJ in its *Quelle*-judgment;[146] the question of whether the costs for de-connecting or removing non-conforming goods have to be borne by the seller if this has not expressly agreed in the contract reached the ECJ in the *Putz/Weber* case.[147] In its judgment of 16.6.2011, the ECJ, against the opinion of AG Mazak, clearly placed those costs on the seller, because he delivered a non-conforming good. The seller's responsibility towards the consumer, who installed in good faith the non-conforming goods himself, is not based on fault, but rather on the simple consequence of the non-fulfilment of the seller's contractual obligations (paras 46-47, referring to *Quelle*). The Court also refers to the consumer protection objective of Directive 99/44/EC and to the express statement in Art. 3 (3), that repair or replacement should be effected "free of charge" and without "any significant inconvenience to the consumer". The seller's strict liability is not excluded even if the costs of replacement are disproportionate, because the seller may not refuse the only remedy (replacement for impossibility of repair) which allows the goods to be brought into conformity with the contract (para 71). The costs may be limited to a "proportionate amount" (para 76), to be determined by the national court by reference to the purchase price. Within the limits of the proportionality principle the choice of remedies usually depends on the consumer.

11.- This scheme of remedies is subject to the "*minimum harmonisation*" principle of Directive 99/44 which meant that Member states could impose and have imposed more protective remedies on the seller in favour the consumer,[148] for instance

- a "right of rejection" of a non-conforming good within a short time-span like in English law resulting in the termination of the contract;
- free choice for the consumer between the first and second level remedies, like in many new Member States;
- parallel application of the remedies under Directive 99/44 and traditional remedies under contract law like in the French rules on *vice caché* in Art. 1641 et seq. *Code civil* and Art. L. 211-1-18 *Code de la consommation*.

12.- In its Proposal for a CRD of 8.10.2010, the Commission wanted to abolish the "minimum harmonisation principle" in favour of full harmonisation and leave the choice of remedies to the seller. The proposal, which met strong resistance in Member States and in academic writing, has not been taken up in the current version of the CRD.

Art. 33 of the CRD indirectly reaffirms the minimum harmonisation principle of Art. 8 (2) of Directive 99/44 with a duty on Member States to report on "more stringent consumer protective provisions" with regard to time-limits (see para 26.-).

The consequences of this *opening clause in the CRD* – providing for a dynamic adaption of consumer sales law – for the FS/CESL, which do not seem to provide for a similar possibility, will be discussed below. Or to put the question the other way around: is the level of protection offered by the CESL based on the FS high and flexible enough to compensate for an eventual preclusion of Member State law?

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[145] See S. Grundmann, in S. Grundmann/C.M. Bianca (Hrsg.), EU-Kaufrechtsrichtlinie, 2002, Art. 2 Rdnr. 5.

[146] C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen [2008] ECR I-2685.

[147] Joined cases C-65/09 Weber and C-87/09 Putz [2011] ECR I-(16.6.2011) against the opinion of AG Mazak of 18.5.2010.

[148] See the discussion in H.-W. Micklitz/N. Reich, CMLRev 2009, 471 (501 et seq.); details H. Schulte-Nölke et al, Consumer Law Compendium, 2008, p. 674.

b) Remedies in case of non- or late delivery – termination

13.- *CRD:* Art. 22 (2) of the CRD in the version of 24. 3. 2011 contained a very straightforward rule on termination of the contract in case of non- or late delivery, including a grace period offered to the seller by the consumer which shall not exceed 7 days – a period which may be regarded as rather short and inflexible. The consumer shall give notice of a new delivery period including his intention to terminate the contract if delivery has not taken place by the end of this period.

Art. 18 (2) of the final version of the CRD has somewhat modified these proposals. The consumer now has an obligation to call upon the trader to make "the delivery within a period appropriate to the circumstances". This period is not determined in the new text, not even by a default rule. Only if delivery does not take place within the appropriate time, then the consumer is entitled to *terminate the contract*. The consumer does not need to set a specific period for delivery if that time is *essential* to the contract or the consumer.

FS: The FS is somewhat ambiguous on that point. Art. 116 provides, as a mandatory rule in B2C transactions, that a consumer may terminate the contract for "delay in performance which in itself is not fundamental if the buyer gives a notice fixing an additional period of time of reasonable length for performance and the seller does not perform with that period". This period is not fixed and will certainly lead to much controversy which cannot be specified by applicable Member State law since a "notice which fixes a period of time which is unreasonably short is ineffective". In such a case, the consumer may even be obliged to pay damages for breach of contract on his part based on Art. 163 FS – a rather strict consequence of a provision which intends to protect the consumer in cases of late delivery!

CESL: Articles 114 and 115 are similar to Articles 115 and 116 FS. However, the non-derogation clause which could be found in Art. 116 (4) FS cannot be found in the CESL. Following Art. 117 (2) (a), the consumer-buyer does not lose their right to terminate "...if notice of termination is not given within a reasonable time form when the right arose…"

c) Remedies in case of non-conformity – first level (repair or replacement)

14.- Art. 3 (3) of Directive 99/44 leaves the choice between repair and replacement to the consumer, restricted by the *proportionality principle*. Such proportionality is presumed if "it imposes costs on the seller which, in comparison with the alternative remedy, are reasonable", by giving indications in this direction. They shall take place "within a reasonable time and without significant inconvenience to the consumer". Art. 3 (2, 4) provides that the consumer shall be entitled to have the lack of conformity remedied "free of charge", which includes the "necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials". According to the above mentioned *Quelle* judgment of the ECJ, this also excludes any compensation for the *use* of a non-conforming good. In the case of an incorrect installation under Art. 24 (5) CRD in the version of 24.3.2011 – not repeated in the final version of the CRD – the same remedies apply but they do not solve the *Putz/Weber*-type claims (supra para 10.-), because there the problems were due to the non-conformity of the good, not the installation.

15.- *FS:* The FS takes a somewhat different approach to the consumer-buyer's remedies in case of non-conformity. Art. 108 (1) a) contains a right to "require performance". Since the seller does not have a right of "cure" in B2C transactions (Art. 108 (3) a), 110 FS), the consumer may choose freely between repair and replacement, subject to a slightly differently worded proportionality limitation. Art. 112 (2) indirectly sets a specific time limit for performance through repair or replacement (para 16.-), namely "a reasonable time, not exceeding one month", a clarification certainly to be welcomed in the interest of legal certainty against the quite vague and unspecific formulation on a "reasonable time" in Art. 3 (3) last sentence of Directive 99/44/EC.

Somewhat mysteriously, Art. 108 (5) FS completely excludes the consumer's right to performance (not only his right to choose!) "if the seller's non-performance is excused". This also applies to damages (critique infra para 22.-). With regard to "excuse", the FS refers to Art. 111 (3) stating that "performance cannot however be required where

- "performance would be unlawful or impossible; or
- the burden or expense of performance would be disproportionate to the benefit the buyer would obtain."

In the opinion of this author, this test should be interpreted strictly as an exception to the general right of the consumer to require performance. In any case it should interpreted in conformity with Art. 3 (3) of Directive 99/44/EC.

Notwithstanding this exception, the consumer should as a minimum have a *right to damages* following Art. 108 (5) FS if the circumstances for "excusing" the seller fell into his area of responsibility.

CESL: The CESL closely follows the FS. The consumer-buyer's rights are not subject to cure by the seller: Art. 106 (3) (a) CESL. The only difference can be found in Art. 110 (3) (a) which provides that performance cannot be required where performance would be impossible or has become unlawful. The "has become" is different from Art. 108 (5) FS.

d) "Right of rejection" – "rescission" resp. "termination" as a second level remedy

16.- *CRD:* Art. 3 (5) of Directive 99/44 provides that the "rescission" (= termination or cancellation) of the contract in case of non-conformity is subject to a number of restrictive conditions which attempt to ensure that the professional seller has a chance to remedy the defect by repair or replacement if this is possible or does not cause significant inconvenience to the consumer. In case of a minor lack of conformity, the buyer does not have a right to rescind the contract, but may have the price reduced: Art. 3 (6) Directive 99/44. If the seller does not meet his obligation to repair or to replace a non-conforming good "within a reasonable time", or if the remedying of the lack of conformity has caused "significant inconvenience to the consumer" the consumer may rescind the contract: Art. 3 (5) Directive 99/44. A similar result would be reached by a refusal of the seller/trader to remedy the non-conformity of the good. In these cases, the seller is deemed not to have performed his obligations under the contract, and the consumer should not be bound by it any more.

The "right of rejection" had been expressly maintained as an option in Art. 26 (5b) CRD in the version of 24.3.2011 which provides that "Member States may adopt or maintain provisions of national law giving consumers, in the event of non-conformity, the right for a *short period* (italics NR) to terminate the contract and receive a full reimbursement...". This proviso was not contained in the original Commission proposal of 8.10.2008.[149] In Art. 33 of the CRD the *minimum protection principle* of Directive 99/44 is maintained, subject to a reporting obligation on Member States concerning time limits, which do not seem to be applicable to a right of rejection within a short period. However, they may be imposed by Member State law.

FS: In the FS, a right of *termination (= rescission*) is contained in Art. 108 (1) c)/115 (2). The right of termination does not exist if the non-conformity is *insignificant*. It is not subject to a right of cure of the seller. Art. 108 (3) (a) implies that, notwithstanding the remedies of repair and/or replacement, the consumer may terminate the contract by *rejection as in English law*. This right does not seem to be subject to any time limit, but the wording of the FS is not clear in this regard. Art. IV.A.-4:201/III.-3:502-508 DCFR contain a similar rule, but the debtor/seller has a right to cure under Art. III.-3:508

[149] See the critique by H.-W. Micklitz/N. Reich CMLRev 2009 at 503.

(2), 3:202, with some limitations in Art. III.-3:203 DCFR, which do not seem to be in conformity with the right to rejection in English law.[150]

In relation to a prior choice of the consumer for repair or replacement, Art. 112 (2) FS provides:

> "If the consumer has required the remedying of the non-conformity by repair or replacement..., the consumer may resort to other remedies, except withholding performance, only if the business has not completed repair or replacement within a reasonable time, not exceeding one month."

In this case, the "threat" with termination by the consumer may serve as an incentive for the seller to repair resp. replace within a relatively short time span. This provision must be regarded as mandatory, similar to the other remedies of the consumer, Art. 109 FS.

CESL: Art. 114 (2) has more or less taken over the proposals of the FS (no termination where the lack of conformity is *insignificant*).

e) Other remedies (reduction of price, right to withhold payment, right of self-help, no notice requirement)

17.- *FS:* Both the Directive 99/44 (Art. 3 (5) and the FS (Art. 122) contain the second level remedy of *price reduction* as an alternative to rescission (= termination). This may particularly be relevant when rescission or termination is excluded in cases of minor or insignificant defects.

CESL: Art. 120 is similar to Art. 122 FS.

18.- *FS:* A right to *withhold payment* was not contained in Directive 99/44 and has not been introduced in the CRD. It will usually follow from the applicable contract law of Member states and may be subject to restrictions which have to be compatible with general contract terms legislation. Its importance seems to be rather limited anyway due to the practice of pre-payment clauses in B2C transactions (see supra para 7.-). Art. 114 FS (similar to Art. III.-3:401 DCFR) gives the consumer-buyer a right to withhold payment under certain conditions. This rule must be regarded as mandatory under Art. 109 FS.

CESL: The right to withhold performance is now contained in Art. 113. It is different from Art. 114 FS, in that Art. 113 (3) provides that the performance which may be withheld is "the whole or part of the performance to the extent justified by the non-performance". This is different from the "reasonableness test" in Art. 114 (3) FS. Furthermore, the "adequate assurance or security" defence can no longer be found in Art. 113 (2) of the CESL.

19.- A right to "*self-help"* concerning a repair of the product of the consumer in case of a non-conforming good is neither contained in the CRD nor the FS/DCFR. However, some Member States like Poland and Hungary had introduced such a right which allows the consumer to recover the costs of repair from the seller under certain conditions, without having to wait for action by the seller.[151]

20.- *FS:* A *notice requirement*, coupled with a duty of examination of the good, is quite common in B2B transactions and is explicitly provided in Art. 38/39 CISG. Similar rules are contained in Art. 123-124 FS and Art. IV.A-4:301/302 DCFR. Consumer contracts are expressly excluded: Art. 108 (3) FS. Art. 5 (2) of Directive 99/44 gave Member States the option to introduce such an obligation on consumers also in B2C transactions[152] which was implemented differently.[153] The Commission

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[150] See Ch. v. Bar/E. Clive (eds.), DCFR Vol. 1, 2009, Art. III.-3:203 Comment B (right to cure only in case of fundamental non-performance).

[151] N. Reich, Contract Law and Civil Justice in the New Member States, in F. Cafaggi (ed.), The Institutional Framework of European Private Law, 2007, p. 271 (295).

[152] For a critique see H.-W. Micklitz/N. Reich/P. Rott, supra note 5 at para 4.29; E. Hondius, in S. Grundmann/C.M. Bianca (Hrsg.), EU-Kaufrechtsrichtlinie, 2002, Art. 5 Rdnr. 11.

proposal of 8.10.2008 made this optional rule mandatory for Member States, but it was dropped after serious criticism[154] in the CRD version of 24.3.2011, and not repeated in the final version of the CRD. There seems to be agreement that the duty of examination and notice is not suitable for B2C contracts, but it is regrettable that under the CRD Member States or business terms are not expressly precluded from introducing this restriction of consumer remedies into their general contract terms.

CESL: The requirement of notification is contained in Art. 122. However, it is limited to B2B transactions. It is not clear whether its introduction in standard contracts terms with consumers would be unfair or not. Art. 85 (b) CESL, which forbids limitations clauses concerning remedies of the consumer against the trader may provide an answer.

f) Remedies for non-conforming digital content

20a.- The CESL does not seem to contain any specific remedies for non-performance of B2C contracts relating to the use of digital content even though the "digital buyer" enjoys a "right to require performance" under Art. 110. Some remedies may relate to corporal goods only like repair. The right of termination in case of non-insignificant non-performance is expressly extended also to "the supply of digital content" in Art. 114 (2) CESL.

If there has been a breach of information duties on digital content (Art. 20 (1) (g/g), supra 3.-), Art. 29 (1) CESL provides for liability of the trader "for any loss caused to the other party by such failure". This provision cannot be derogated from: Art. 29 (4). The concept of loss has been defined in Art. 2 (c) of the Proposal. On the other hand, once the professional seller has supplied the information as required, eg on lack of interoperability, the consumer will not have a remedy against the seller. The information requirement *de facto functions as an exclusion clause* under Art. 99 (3).

5. Damages (21.-24.)

a) General rules

21.- The remedy of compensation for losses caused by a non-conforming good, or by late or non-delivery was not part of Directive 99/44/EC, but known to most Member States under different conditions.[155] Art. 27 (2) of the CRD (version of 24.3.2011) contained a provision on damages:

> "In accordance with the provisions of applicable national law ...the consumer may claim damages for any loss not remedied in accordance with Art. 26".

As the wording makes clear, this remedy would be rather limited as a minimum standard under EU law, namely

- it is not concerned with late- or non-delivery;
- it is not concerned with damages resulting to property and personal interests of consumers or his kind as a consequence of non-conforming goods (in German: *Mängelfolgeschäden*);
- it is not clear whether it also covers costs of repair which the consumer had done by himself (right of self-help?, see supra para 19.-).
- The legal nature of the remedy (based on a fault presumption which may be rebutted by the seller, as in German law, or strict liability under French law) depends on applicable national law.

(Contd.)

153 H. Schulte-Nölke et al, Consumer Law Compendium, 2008, at p. 643.

154 H.-W. Micklitz/N. Reich, supra note 19 at p. 503.

155 H. Schulte-Nölke et al. p. 661.

The CRD has not taken up this provision, but simply refers to the minimum harmonisation principle as reaffirmed in its Art. 33 (1).

22.- *FS:* Art. 108 FS referring to its Chapter 17 takes a much broader approach following the rules on damages in the DCFR. Art. 163 (1) provides:

> "A party … is entitled to damages for loss caused by the non-performance of an obligation by the seller ... unless the non-performance is excused."

As mentioned before, the main obligations of the professional seller – and the rights of the consumer resulting from these obligations – concern delivery and conformity. Since these obligations exist under law *strictu iuris* (Art. 94 FS), liability for breach is not based on fault. Art. 164 FS contains a provision on how to calculate damages in order to allow full compensation. Liability for non-performance cannot be excluded or reduced by contract terms: Art. 109 FS.

Art. 108 (5) seems to exclude damages if the seller's non-performance is excused according to Art. 111 (3) (supra para 15.-). However, this defence should be interpreted strictly, especially if the reasons for excuse fall into the area of responsibility of the seller.

CESL: The CESL follows the FS. The right to damages is now provided for in Art. 159, which uses the terms creditor and debtor instead of party and seller.

b) No "action directe" – claims of the seller in the chain of distribution

23.- Neither Directive 99/44/EC nor the FS/DCFR contain an express provision similar to the French "*action directe*". Since, according to the case law of the ECJ, this action is derived from law, not from contract,[156] it is not precluded by the CRD, regardless of the harmonisation principle, and not by an OI which would be limited to purely contractual provisions either. Therefore, French law and the legal systems which contain a similar rule would not be prevented from giving the consumer a direct claim not only against the seller, but also against any other person in the chain of distribution.

24.- As a sort of substitute for the absence of an "*action directe*" in EU law, Art. 4 of Directive 99/44 provides for the right of redress of the seller against his prior contract partners, including the producer (supra para 10.-). However, this provision was eliminated in the Commission proposal of a CDR of 8.10.2008,[157] but has been retained in Art. 27a of the CRD in the version of 24.3.2011. The final version of the CRD does not mention it, but confirms it by re-enacting Directive 99/44 in Art. 33. The right of redress of the seller indirectly improves the protection of the consumer, because his "seller" will not be stuck with the costs of remedying a non-conforming good whose lack of conformity is caused by the producer or another person in the chain of distribution. Therefore, it should be made mandatory.[158]

FS: The FS is silent on this point. On the other hand, the broad scope of its provisions makes them applicable to any sales contract, whatever the chain of distribution. Therefore, the last seller who incurred additional costs, because he had to repair, replace or compensate the consumer for non-conforming goods due to non-performance of the obligations of his prior seller, has a right to damages under Art. 108/163 FS. However, his potential claim may be subject to exclusion or limitation clauses which are not banned by Art. 109, but may be *unfair* under the general test of Art. 85 FS/86 CESL in B2B transactions, for instance by "*grossly* deviating from good commercial practice, contrary to good faith and fair dealing". This may be the case if the seller is part of a distribution chain and has no influence on the quality of the goods sold to the consumer.

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[156] Supra note 14.

[157] H.-W. Micklitz/N. Reich, supra note 13 at p. 505.

[158] See in this sense H.-W. Micklitz/N. Reich/P. Rott, supra note 13 at 4.22, supported now by the Putz/Weber judgment of the ECJ, supra note 17 at para 58.

CESL: The CESL does not add anything to what is provided for in the FS.

6. Commercial Guarantees (25.)

25.- Guarantees are a widely used commercial practice. They depend on the marketing decisions of the trader, whatever his place in the distribution of consumer goods as seller, producer, importer, franchisor, or third party guarantor. Art. 6 of Directive 99/44 contains some minimum rules on "commercial guarantees", aiming at transparency and at avoiding any confusion with existing consumer's rights in law. Art. 29 CRD (version 24.3.2011) wanted to maintain, with some slight modifications, these provisions. They are however not repeated in the final version of the CRD which, as was mentioned before, simply reaffirms Directive 99/44, including the provisions on guarantees.

FS: The sales part of the FS does not seem to contain any rules on commercial guarantees, but they may be indirectly covered by the general part on contract law, especially freedom of contract in Art. 7, and legal relevance of unilateral statements in Art. 12. Art. 67 (3) emphasises the relevance in B2C contracts of public statements by the producer or other persons in earlier links of the chain of transactions. It seems that this special provision is not so much concerned with commercial guarantees, but rather with extending the concept of conformity as mentioned above.

Quite in contrast to the FS, the DCFR extends the concept of sales contract also to "associated consumer guarantees" (supra para 1.-) and contains relatively detailed rules on "consumer goods guarantees", Art. IV.A.-6:101-108.[159] It is not clear why the FS has not made reference to them, not even partially.

CESL: The equivalent provision to Art. 67 (3) FS can now be found in Art. 69 (3). There are no differences.

7. Prescription and Time Limits (26.)

26.- Both Art. 7 of Directive 99/44 and Art. 28 CRD (version of 24.3.2011) contain a two-year time limit for consumer claims, and time starts to run from the moment of the passing of the risk to the consumer. National law can shorten the period to one year in case of second-hand goods. Art. 33 of the CRD provides that Member States have a reporting obligation when they want to introduce "more stringent consumer protective provisions", in particular longer prescription periods going beyond those provided in Art. 5 and Art. 7 (1) of Directive 99/44. A non-performance of this obligation by the relevant Member State would result in the non-applicability of such provisions against a trader according to the case law of the ECJ.[160]

FS: Neither the FS nor the DCFR contains similar rules. Art. 182 FS distinguishes between short and long periods of prescription. With regard to remedies for non-performance of a sales contract, a "short" period of 3 years which begins to run from the time when the creditor (in our case the consumer) "knows or could be expected to know the facts as a result of which the right can be exercised" is provided. A similar three-year rule can be found in Art. III.-7:201, but the beginning of this period has been regulated somewhat differently by Art. III.-7:203. Art. 189 (4) FS forbids any shortening of this period in B2C contracts.

CESL: Art. 179 (1) now provides for a short period of *two years* instead of three years, without giving any explanation, in particularly in those cases which are not related to remedies for non-conformity which were originally governed by the two-year prescription period of Art. 5 (1) of Directive 99/44. The period begins to run when the creditor (in our case: the consumer) "has become, or could be

[159] DCFR supra note 12, Vol. 2, comment to Art. IV.A.-6:101.

[160] C-194/94 CIA Security International SA v Signalson SA and Securitel SPRL [1996] ECR I-2201.

expected to have become, aware, of the facts as a result of which the right can be exercised" – which depending on the case at hand can be much longer than the two-year period in Directive 99/44 and will extinguish only 10 years from the time when the seller has to perform, Art. 180 CESL. Furthermore, Art. 186, which deals with agreements concerning prescription, has an additional subsection 4 which provides that "[t]he parties may not exclude the application of the Article or derogate from or vary its effects".

B. Related Service Contracts

1. General Approach (27.)

27.- Part V on "*Obligations and remedies of the parties to a related services contract*" does not have any predecessor in the *acquis* nor in the DCFR. Only the Commission Green Paper of 1993[161] had mentioned the after-sales service issues relating to the purchase of consumer goods, but this was not concerned with contractual but rather with competition issues, particularly in so far as the producer should be obliged to inform about a certain time span within which spare parts and services would be available.[162] This proposal was not taken up in the legislative process leading to Directive 99/44.

The so-called Services Directive 2006/123 does not contain any contractual provisions on the obligations of the provider, but refers them to a still unclear standardisation process.[163] It is not known whether such standards exist for services relating to the purchase of consumer goods.

The DCFR contains a detailed part on services (Book IV.C.) which is not limited to services linked to a sales contract. Art. IV.C.-1:101 defines the scope of these provisions as follows:[164]

> (1) This part of Book IV applies:
>
> > To contracts under which one party, the service provider, undertakes to supply a service to the other party, the client in exchange for a price
> >
> > With appropriate adaptations, to contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price.
>
> (2) It applies in particular to contracts for construction, processing, storage, design, information or advice, and treatment.

It seems that the authors of the FS somewhat haphazardly used some of the provisions of the DCFR for the proposed rules on services linked to a sales contract, but no details or explanations of these comments have been available to the authors.

2. Scope (28.)

28.- *FS:* Art. 150 of the FS defines the scope of the provisions as follows:

> (1) This Part applies to contracts under which a seller of goods (the "service provider") undertakes to provide the buyer ("the customer") with services related to goods, such as installation, maintenance or repair ("the service") whether under the sales contract or under a special service

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[161] Supra note 14; comment by A.K. Schnyder/R.M. Straub, Das EG-Grünbuch zu Verbrauchsgütergarantien und Kundendienst, ZEuP 1996, 8.

[162] A.K. Schnyder/R.M. Straub, 73.

[163] Directive 2006/123/EC of the EP and the Council of 12. Dec. 2006 on services in the internal market, [2006] OJ L 376/36; for details see H.-W. Micklitz, The Service Directive – Consumer contract law making via standardisation, in Ciacchi et al. (eds.), Liability in the Third Millenium – Liber amicorum G. Brüggemeier, 2009, p. 483.

[164] For an explanation see DCFR, supra note 12, Vol. 2, Art. IV.C.-2:106 comment A.

contract which was concluded at the same time as the sales contract or provided for, even if only as an option, in the sales contract.

(2) This part does not apply to transport services, training services, telecommunication support services, or financial services.

(3) This part applies whether or not a separate price was agreed for the service.

Therefore, the scope of application is rather *limited*. It may be questioned whether it deserves a special part in the FS and whether it should be included in a later OI at all:

- There must be a *link* of the service to a sales contract *de iure* or *de facto*, which can be implied by interpretation, e.g. identical timing or similar object of the two contracts.
- There must be *two separate (but linked) contracts*, which will not be easy to determine if the seller has the obligation to provide installation services himself or by using a third party (supra para 6.-). In case of a "mixed" contract, Art. 3 (2) FS makes Part IV applicable to the sales elements and Part V to the service elements.
- Certain services which are frequently concluded in relation to a sales contract, like financing, are expressly excluded (see supra para 9.-). This is surprising because in modern marketing practice, particularly for complex consumer goods like cars, campers, mobile homes, recreation gear, electronic goods, the professional will "sell a package" consisting of the good itself, its financing, insurance, training when needed, installation and after sales service etc. Only a small part of this package will be covered by the FS while some other parts will refer to (harmonised as well as non-harmonised) national law. In a cross-border context the special provisions of Rome I, in particular Art. 6 on consumer protection and Art. 7 on insurance, will remain applicable and continue to be regarded as a "restriction" to trade which the Commission attempts to abolish with its initiative.
- Part V applies to B2B and B2C transactions, with some mandatory rules in B2C contracts like Art. 152 (5), 154 (3), 162 (3) FS. The "right to cure" which is excluded in sales transactions in favour of the consumer (supra notes 15.-16.-), is expressly re-established for the service provider also a B2C contracts, Art. 159 (2).

CESL: The CESL refers to the definitions on "related services" contained in Art. 2 (m) of the Commission Proposal of 11.10.2011. Part V of the CESL starts immediately with the application of certain general rules on sales contracts in Art. 147.

3. The Consumer-Customer's Rights and Remedies (29.-31.)

29.- *FS:* The rights and remedies of the consumer-customer in a service contract linked to a sales contract follow closely sales law (Art. 151 FS), but provide for some specific rules tailored to the service part of the contract. They seem to have been borrowed from the broader provisions of the DCFR.

Art. 152 defines the obligations of the provider – and the reverse rights of the customer – as achieving "any specific result required by the contract." This obligation is known in French law as "*obligation de résultat*", in German law as "*Herbeiführung eines bestimmten Erfolges*". A similar rule is contained in Art. IV.C.-2:106 (1) DCFR.[165]

However, this is not an "absolute obligation", but depends on the "care and skill which a reasonable service provider would exercise under the circumstances and in conformity with any statutory or other

[165] For an overall discussion of the unclear differentiation between the „obligation to achieve result" and the „duty to exercise professional skill and care" see Th. K. Graziano, Dienstleistungsverträge im Recht der Schweiz, Österreichs und Deutschlands im Vergleich mit den Regelungen des DCFR, in Zimmermann (ed.), Service Contracts, 2010, 59 at pp. 67-69.

binding legal rules which are applicable to the service". Indirectly, the contract contains elements of an "*obligation de moyen*" in French, or of a "*Dienstleistungs*-vertrag" under German law. The FS refers here expressly to national law which it wanted to exclude in its opening Art. 1. The DCFR seems to contain a similar rule in Art. IV.C-2:105. However, this reference puts an element of uncertainty in the achievement of a *specific result* depending on "reasonableness", as defined in Art. 4 FS, which is subject to divergent legal and judicial interpretation. Despite the attempts of the FS and the DCFR to impose an objective element onto the obligation of skill and care, it may in the end still depend on the subjective capacities of the service provider as known to or expected by the customer. It is not clear either how this "subjective" element relates to the otherwise strict liability of the professional seller for conformity (supra para 5.-).

CESL: Art. 147 (2) states that "[w]here a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated". A similar provision could not be found in the FS.

The obligation to achieve result and obligation of care and skill is now provided in Art. 148 CESL. It is exactly similar to Art. 152 FS.

30.- *FS:* Art. 156 FS contains an obligation of the provider to *warn the consumer* of unexpected or uneconomic cost, a default rule which does not seem to be mandatory in B2C relations, despite its importance for the rights of the consumer/customer. Such a clause may be regarded as "grey-listed" according to Art. 84 (i) FS/Art. 85 (i) CESL. It would certainly be advisable to make it mandatory in B2C transactions. It is not clear either whether the customer has a right to terminate the contact in cases of price increases, as provided for in Art. IV.C.-2:111 DCFR. Art. 159 (2) creates some doubts in this respect, because it refers only to non-conformity, and not to the price element of the service contract. Art. 156 (2) provides for a sanction only in case of a lack of consent of the customer following a warning of unexpected costs. It says nothing about termination.

CESL: Art. 152 is identical to Art. 156 FS.

31.- *FS:* The *remedies of the customer* in cases of non-performance of an obligation by the service provider in Art. 159 FS are shaped according to sales law. There are some specific provisions:

- The provider is entitled to a "right to cure" even in the case of non-conforming B2C contracts.
- The consumer/customer does not have a right to choose between repair and replacement, and normally the provider will remedy a non-conforming service by taking a "second chance" to perform it according to the contract. Nothing is said about a reasonable time limit not exceeding one month because reference to Art. 112 (2) (supra para 15.-) is excluded.
- As provided in Art. 160, an obligation of notification on non-conformity is only imposed in B2B service contracts, not in B2C transactions. A similar rule favouring consumers is contained in Art. III.-3:107 (4) DCFR.
- Nothing is said about the consequences to the sales contract if the customer terminates the service contract.
- The rules on damages follow closely those on sales contracts: Art. 159 (1) e).

CESL: The remedies of the customer can now be found in Art. 155. There is one additional subsection (Art. 155 (3), which states that "[i]n the case of incorrect installation under a consumer sales contract as referred to in Article 101 the consumer's remedies are not subject to a right of the service provider to cure".

For the rest, the CESL's provisions are similar to those of the FS. Art. 9 CESL contains rules for "mixed purpose contracts", based on a separation of the remedy of termination for non-performance in the sales and the service part, if the two contracts can be divided. If the obligations of the seller and the

service-provider are not divisible, termination is possible only "if non-performance is such as to justify termination of the contract as a whole".

This clause will certainly give rise to different interpretations and is, therefore, contrary to the very objective of the CESL, namely to guarantee certainty of (cross-border) B2C transactions. Critical voices have been raised against the inclusion of "related services contracts" in the CESL.[166]

[166] H.-W. Micklitz/N. Reich, supra note 5 at para 23.

C. Conclusions (32.)

32.- The following conclusions may be drawn from the discussion of parts IV and V of the CESL based on the FS:

1. As a general observation, it must be stated that the FS and the CESL try to attain a "*high level of consumer protection*", usually closely following the *acquis* where it exists or is in the offing.[167] Certain differences in Member State consumer protection law do not seem to be of such great importance that they actually challenge the entire project of the FS/CESL. However, there are many examples where a discrepancy between the *acquis* and the FS has been found to exist, some achieving a *higher level* of protection (examples in paras 5.-, 20.-, 22.-, 26.-), other implying a "lowering" of protective standards without giving a reasonable explanation for that (paras 4.-, 7.-, 13,-, 15.-, 25.-.) The reduction of the prescription time from three to two years (para 26.-) has not been explained. It must be made sure that the final version of the CRD, and the CESL based on the FS, are made *compatible* with each other and provide for an equally high level of protection. The trader should not be given an incentive to use the CESL in order to lower consumer protection standards, at least in cross-border transactions.

2. As a consequence of this objective, most (but not all) provisions on B2C relations are *mandatory*. If not expressly determined as mandatory, certain terms with an impact on B2C contracts will have to be evaluated by referring to unfair terms legislation (examples in paras 4.-, 24.-, 30.-), which does not meet the *standard of legal certainty* needed particularly in cross-border transactions. The FS uses a rather inchoate technique as it lists separately each and every provision which is mandatory, instead of providing in its opening articles that all B2C provisions are mandatory as such, unless specifically formulated as default rules.

3. As a more fundamental critique, it has been shown that the scope of application of part IV and even more so part V is simply too *narrow* and will not attain the practical relevance the EU Commission is hoping for, in particular in cross-border transactions, in that:

   - the concept of the "consumer" is too restricted, particularly in the (frequent) case of "mixed contracts" (supra para 1.-) ; in the CESL setting, it could probably not be extended by Member State law, as has been explained in the Chapeau-paper by Micklitz/Reich (paras 21-22);
   - the concept of "sales contract" has been shaped by the somewhat dated concept of a single "*spot contract*", while in practice businesses in consumer markets use more and more complex arrangements, e.g. "subscription" type contracts as long-term "open-end" arrangements (supra para 8.-), complex "contract packages" containing elements of financing and service (supra paras 9.-, 28.-), or a combination of both;
   - in contrast to Directive 99/44 and the DCFR, the FS does not contain explicit rules on "consumer" resp. "commercial guarantees" (supra para 25.-);
   - the scope and content of part V on "Services related to a sales contract" seem to be incomplete, contradictory and will not provide legal certainty of cross-border B2C transactions (paras 28.- 31.-).

4. The special and rather sketchy rules on "*digital content*" which have a broad application must still undergo a test to see to what extent they are compatible with aggressive marketing techniques of right holders which may not conform to consumer choice and needs, in particular with regard to unfair use restrictions by contract clauses seemingly legitimised

[167] For an evaluation see N. Reich, EU-Verbraucherkaufrecht in neuen Dokumenten und in einem Optionalen Instrument, Zeitschrift für Rechtsvergleichung 2011, 196.

under copyright reasons. Mere information rights may not suffice to strengthen the rights of the consumer who acquires in good faith digital content. On the other hand, once the professional seller has supplied the information as required, eg on lack of interoperability, the consumer will not have a remedy against the seller. The information requirement *de facto functions as an exclusion clause* (paras 6a.-, 20a.-).

5. The *technical language* of the FS and the CESL is rather complex by making isolated references to the DCFR. It is regrettable that the terminology of the CRD and the FS/CESL has not been coordinated (for instance the terms “rescission” in the CRD and “termination” in the FS/CESL; the term “reasonable” is frequently used in the FS/CES, but much less in the CRD). Many other ambiguously worded provisions will create additional interpretation problems both for national and finally for EU courts under the requirements of the reference procedure. As an overall assessment, the FS/CES do *not meet the requirements of legal certainty* as a prerequisite of making transactions –whether B2C or B2B – easier and less costly in the internal market.

D. Zusammenfassung der Ergebnisse (33.)

33.- Die Ergebnisse der Untersuchung zum Kauf und des verbundenen Dienstleistungsrechts des „Gemeinsamen Europäischen Kaufrechts" (hier abgekürzt mit der englischen Bezeichnung CESL) auf der Basis der FS hat folgende vorläufige Ergebnisse ergeben.

1. Dem auf dem FS weitgehend deckungsgleich aufbauenden CESL kann attestiert werden, dass er sich um ein *hohes Maß an Verbraucherschutz* bemüht,[168] das sich im allgemeinen an den EU *acquis,* wie er existiert oder sich in der Richtlinie über die Rechte der Verbraucher v. 25.10.2011 (im Text wird die englische Abkürzung benutzt: CRD) befindet, anlehnt. Bestimmte Unterschiede zum mitgliedstaatlichen Verbraucherrecht scheinen nicht so relevant zu sein, dass sie das gesamte Projekt des CESL in Frage stellen. Allerdings haben sich eine Reihe von unerklärten Diskrepanzen zwischen CRD und CESL ergeben. Diese gehen manchmal „zu Gunsten" (Ziff. 5.-, 20.-, 22.-, 26.-), manchmal „zu Lasten" eines hohen Verbraucherschutzniveaus (Ziff. 4.-, 7.-, 13.-, 15.-, 25.-) aus, wie im einzelnen in der Untersuchung dargelegt wird. Beide Instrumente – die CRD mit den erfolgten Änderungen im EU-Gesetzgebungsprozess einerseits und der CESL als ein darauf basierendes „Optional Instrument" (OI) andererseits – müssen im B2C-Bereich stärker miteinander verzahnt und koordiniert werden. Die generelle Verkürzung der Verjährungsfrist im EU-Kaufrecht von 3 auf 2 Jahre bleibt unerklärt und problematisch.

2. Dementsprechend sind die meisten, aber nicht alle Vorschriften mit Bedeutung für Verbraucherkaufverträge (sog. B2C-Verträge) *zwingend ausgestaltet*. In einigen Fällen ergibt sich dies allerdings erst aus einem Verweis auf die Regeln zu missbräuchlichen Vertragsklauseln. Die Regulierungstechnik des CESL ist insoweit unbefriedigend, als die zwingenden Vorschriften im Bereich B2C jeweils einzeln aufgelistet werden, statt umgekehrt eine allgemeine Regelung zu treffen, die ausnahmsweise die dispositiven Regeln gesondert auflistet.

3. Als generelle Kritik bleibt festzuhalten, dass der Anwendungsbereich von Teil IV des CESL und mehr noch von Teil V *zu eng* ist; er ist nicht geeignet, die von der Kommission verfolgte praktische Relevanz und Rechtssicherheit bei grenzüberschreitenden Transaktionen zum erreichen, zum Beispiel

   - der *Begriff des „Verbrauchers*" ist reduziert auf Verträge, die „nicht (statt: „überwiegend nicht", wie im DCFR und der CRD [Fassung v. 24.3., nicht aber in der endgültigen Version] vorgeschlagen) zur geschäftlichen oder beruflichen Tätigkeit einer Privatperson gehören", und deshalb bei sog. „gemischten Verträgen" (Elemente von B2C und B2B = business to business) wenig hilfreich; die Mitgliedstaaten können unter dem einmal von den Parteien gewählten CESL diesen Begriff nicht (mehr) erweitern (Ziff. 1.-);
   - der Begriff des Kaufvertrages geht immer noch von einer einzelnen Transaktion (*spot-contract*) aus, während in der heutigen Wirklichkeit der Verbrauchermärkte vor allem im Fernabsatz und E-Geschäftsverkehr komplexere, vor allem längerfristige Vertragssysteme existieren, die zudem durch Finanzierungs- und Dienstleistungselemente angereichert werden;
   - im Gegensatz zur Richtlinie 99/44 und zum DCFR enthält der FS keine ausdrücklichen Regeln zu Garantien;
   - Teil V erscheint insgesamt als wenig glücklich redigiert und muss wegen des extrem reduzierten Anwendungsbereiches als *fragwürdig* angesehen werden.

4. Die neuen Vorschriften über sog. „digitale Inhalte" haben einen weiten, noch nicht erprobten Anwendungsbereich und müssen ihren Praxistest noch bestehen; problematisch erscheint die

[168] Vgl. dazu N. Reich, EU-Verbraucherkaufrecht in neuen Dokumenten und in einem Optionalen Instrument, Zeitschrift für Rechtsvergleichung 2011, 196.

Regelung von Drittrechten. Zu kritisieren ist die Nichtregelung von Nutzungsbeschränkungen, die auf aggressives, auf *copyright*-Klauseln gestütztes Marketing der digitalen Anbieter zurückgehen und den gutgläubigen Verbraucher in der nicht-gewerblichen Nutzung seiner erworbenen „digitalen Güter" erheblich behindern. Die von der CRD übernommenen Informationsrechte des Verbrauchers scheinen keinen hinreichenden Ersatz für die schwache Rechtsstellung des Verbrauchers zu bieten, sondern wirken sich eher als Haftungsausschlussregeln aus (Ziff. 20a.-).

5. Die Rechtstechnik des FS, die insoweit dem DCFR folgt, ist *überkomplex* und nur schwer nachzuvollziehen. Der EU *acquis* einerseits und der FS andererseits verwenden unterschiedliche Begrifflichkeiten, die vermutlich zu erheblichen Auslegungsschwierigkeiten führen. Dies wiederum steht dem Ziel eines OI im Wege, Rechtssicherheit vor allem für grenzüberschreitende Transaktionen zu schaffen.

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