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E Pluribus Unum – Out of Many, One Common European Sales Law?

Viktor Előd Cserép

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E PLURIBUS UNUM – OUT OF MANY, ONE COMMON EUROPEAN SALES LAW?

Viktor Előd Cserép*

ABSTRACT

In light of the fragmentation due to the nationalization of civil and commercial law and the growing intensity of cross-border trade in manufactured goods, arguments for the unification of private law surfaced already from the early 20th century. Such attempts resulted in, among others, the CISG, the UPICC or the PECL. In line with this pattern, as an attempt to make Out of Many, One Common European Sales Law, a Proposal for a Regulation on a Common European Sales Law (CESL) was published in 2011. The aim of the present contribution is to explore the background of the Proposal and to assess its significance for the future, with specific attention to the challenges of the digital age.

Section I of the paper provides an overview of the process in the first decade of the 21st century leading to the publication of the Proposal, identifying the various stages of making an instrument. This is followed by the description of the Proposal and its evaluation in Section II.

Although the immediate implementation and application of the instrument are not feasible, the text contains some promising elements to build on. According to the main findings of the paper, in the new millennium no longer merely international trade in manufactured goods is a chief factor triggering the implementation of international instruments of contract law. The innovations which pose new challenges and regulatory needs, also addressed in the CESL, are trade in digital content and e-commerce. Considering a digital key to the success of regulatory aspirations, the paper thus outlines ways European and international legislation might go in terms of regulating cross-border trade in the age of information technology. Accordingly, the areas to focus on for a start are transactions for the supply of digital content and e-commerce transactions.

* Juris Doctor, Eötvös Loránd University Faculty of Law, summa cum laude, 2016. The paper was written for and awarded First Prize in the 2014 Clive M. Schmitthoff Essay Competition. For the purposes of the present publication, the text has been shortened and footnotes have been updated.

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Introduction

It is a fact that international trade is built on a multitude of contracts governed by different national contract laws.¹ Recognizing that diverging contract law rules create obstacles to international trade, various international and regional organizations have been working to reduce such obstacles by providing uniform model rules.²

The unification of contract law at the international level has become a reality in the form of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), developed by the United Nations Commission on International Trade Law ("UNCITRAL"), governing international contracts of sale.

The CISG has attained the status of a "world sales law" and has met with resounding acceptance across the globe, serving as a stimulus for the development, revision and interpretation of domestic laws and international instruments.³ CISG principles have also guided the drafting of global and regional instruments including the Principles of International Commercial Contracts ("PICC") developed by the International Institute for the Unification of Private Law ("UNIDROIT") and the Principles of European Contract Law ("PECL") drafted by the Commission on European Contract Law.⁴

A recent attempt at an optional instrument has been undertaken at the regional level in the European Union with the purpose of strengthening the internal market by making progress in the area of European contract law. In October 2011, a decade of discussion and joint research resulted in the publication of a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law by the European Commission.⁵

This paper starts with an overview of the development of contract law in the European Union in the first decade of the twenty-first century. The aim of this section is to describe the background, context and objectives of the CESL, exploring the road leading to its publication.

¹ *Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses*, at 2, COM (2010) 348 final (July 1, 2010) [hereinafter *Green Paper*].

² *Id.* § 2.

³ INGEBORG SCHWENZER, CHRISTIANA FOUNTOLAKIS & MARIEL DIMSEY, *INTERNATIONAL SALES LAW*, xli-xlii (Hart Publishing 2012).

⁴ *Id.* at xlii.

⁵ *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct.10, 2011) [hereinafter COM (2011) 635 final].

Section Two focuses on the text published by the Commission. Following an overview of the proposed regulation the paper turns to the promising innovations in the text, with specific regard to transactions for the supply of digital content and e-commerce transactions.

Considering a digital key to the success of regulatory plans, the paper also outlines ways European and international legislation might go in terms of creating new sets of rules for cross-border transactions in the twenty-first century of information technology.

I. Overview of the Past - The Way to the CESL

The 19th century witnessed the nationalization of civil and commercial law.⁶ Soon, the fragmentation of law, together with the increasing international trade in manufactured industrial goods, called for a secure, fair and culturally-neutral international regime for sales contracts that would enhance cross-border business.⁷

The “global unification of the substantive law of professional international sales of movable goods”⁸ was achieved with the CISG, which was adopted on 11 April 1980 and came into force on 1 January 1988,⁹ to become “the most significant piece of substantive contract legislation in effect at the international level.”¹⁰

The European Commission also accentuated the need to consider the CISG in the process leading to the adoption of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law published in October 2011.¹¹ The aim of this section is to provide an overview of the

⁶ STEPHAN KRÖLL, LOUKAS A. MISTELIS & MARIA DEL PILAR PERALES VISCASILLAS, UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2, para. 3 (2011).

⁷ *Id.* ¶¶ 3-4.

⁸ Ulrich Magnus, *CISG and CESL*, MAX PLANCK PRIVATE LAW RESEARCH PAPER NO. 12/27, October 2012, at 226, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165758; see Ulrich Magnus, *CISG vs. CESL in CISG vs. REGIONAL SALES LAW UNIFICATION: WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 98* (Ulrich Magnus ed., Sellier European law Publishers 2012).

⁹ U.N. COMM’N ON INT’L TRADE LAW, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Sales No. E.10.V.14 (2010).

¹⁰ JOSEPH LOOKOFSKY, THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, IN INTERNATIONAL ENCYCLOPEDIA OF LAWS – CONTRACTS 1, 17 (J. Herbots & R. Blanpain eds., 2000 & Supp. 29). To date, the CISG has over 80 Contracting Parties all over the world including most of the EU Member States with the exception of the United Kingdom, Portugal and Ireland. See U.N. COMM’N ON INT’L TRADE, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. (last visited Apr. 7, 2017) (list of Contracting States).

¹¹ *Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law - An Action Plan*, COM (2003) 68 final (Feb. 12, 2003) [hereinafter COM (2003) 68 final]. See also *Communication*

motivating factors and the process in the first decade of the twenty-first century leading to the publication of the proposal.

A. The Unification of Contract Law in the European Union– The Way to the CESL

1. The Beginnings

1.1. A European Civil Code

The beginnings of the work on the possibility of drawing up a common European Code of Private Law can be traced back to 1989 and 1994,¹² when the European Parliament first approached the idea of codifying and rationalizing European norms relating to contract law with two resolutions.¹³ The Parliament stated that the harmonisation of certain sectors of private law was essential to complete the internal market and saw a European Civil Code as its most effective means.¹⁴

The economic arguments concerned the Single Market.¹⁵ The existence of a uniform law would thus make it easier to make and perform contracts and remove the obstacles to cross-border trade posed by the differences between contract laws. The legal arguments included the fact that private international law rules¹⁶

from the Commission to the European Parliament and the Council - European Contract Law and the Revision of the Acquis: The Way Forward, § 2.1.1, COM (2004) 651 final (Oct. 11, 2004) [hereinafter *COM (2004) 651 final*].

¹² *Communication from the Commission to the Council and the European Parliament on European Contract Law* COM (2001) 398 final, [hereinafter *COM (2001) 398 fin*] para.1; referring to O.J. C 158, June 26, 1989, at 400 (Resolution A2-152/89 on action to simplify the private law of Member States) and O.J. C 205, July 25, 1994, at 518 (Resolution A3-0329/94 on the harmonization of certain sectors of the private law of Member States).

¹³ Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law*, 21 PENN ST. INT'L L. REV. 569, 577 (Spring 2003).

¹⁴ COM (2001) 398 fin, para. 2., citing O.J. C 205 February 4, 1994, at 518 (Resolution A3-0329/94 on the harmonization of certain sectors of the private law of Member States).

¹⁵ See Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter *TFEU*], for a definition of the internal market. (Accordingly, the European Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, which shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. This provision corresponds to the earlier Article 14 of the Treaty Establishing the European Community (TEC)); Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter *Treaty of Lisbon*].

¹⁶ See Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6-16. (The Rome I Regulation sets out EU-wide rules for determining which national law should apply to contractual obligations in civil and

cannot entirely solve the problems, and that harmonisation in case of a Community private law based on European regulations and directives would remain incomplete if they only provided single rules.¹⁷ The major argument against such a European Civil Code was that the common law and European civil law belong to such different cultures and traditions that they are irreconcilable.¹⁸

The early arguments were intensively discussed with their essence unchanged throughout the process leading to the CESL, a proposed opt-in instrument. Although the idea of a European code was mentioned several times during the process, the proposed instrument, being restricted in scope, constitutes a significant departure from the initial idea.

1.2. Communication on European Contract Law

In its resolution of 16 March 2000 concerning the Commission's Work Program 2000, the Parliament repeated the necessity of the harmonisation of civil law in the internal market and called on the Commission to draw up a study in this area.¹⁹ In its reply of 25 July 2000 to the European Parliament, the Commission stated that it would present a communication to the other institutions and the general public to launch a discussion by 2001, the date set by the European Council at Tampere.²⁰

The Communication on European contract law²¹ released by the European Commission in 2001 was the first step towards the implementation of the Tampere conclusions.²² The Communication concerned contracts of sale and all kind of service contracts, including financial services,²³ and focused on two areas: on possible problems resulting from divergences of national contract law and on options for the future of contract law in Europe.²⁴

commercial matters involving more than one country. Pursuant to Article 24 of the Rome I Regulation, the Regulation replaced the 1980 Rome Convention on the law applicable to contractual obligations, 1980 O.J. (L 266) 9.10 (in Member States; Denmark is not bound by the regulation.)).

¹⁷ THE HARMONISATION OF EUROPEAN PRIVATE LAW 64 (Mark V. Hoecke & Francois Ost eds. 1st ed. 2000).

¹⁸ *Id.* at 65 (citing Pierre Legrand, *Against a European Civil Code*, MOD. L. REV. 60 (Jan. 1997)).

¹⁹ COM (2001) 398 final, *supra* note 12, ¶ 3; Resolution B5-0228, 0229 – 0230 / 2000 on the Commission's annual legislative programme for 2000, Dec. 29, 2000, O.J. (C 377) 323 at 326, point 28).

²⁰ *Id.*; see Presidency Conclusions, Tampere European Council (Oct. 15-16, 1999) ¶ 39 (concluding that, “[a]s regards substantive law, an overall study on the need to approximate Member State's legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings.”).

²¹ COM (2001) 398 final, *supra* note 12.

²² *Id.* ¶ 4.

²³ *Id.* ¶ 13.

²⁴ *Id.* ¶ 15.

The Commission also suggested some solutions including leaving the solution to the market (I), the development of non-binding common contract law principles (II), the review and improvement of existing EC legislation in the area of contract law (III), or the adoption of a new instrument at EC level (IV).²⁵

The Communication also mentioned the negotiation of an international treaty in the area of contract law comparable to, but broader in scope than the CISG. As it goes beyond the level of a European initiative, it was not discussed. However, the Communication mentioned that the CISG could be integrated into options II and IV, increasing its acceptance in practice.²⁶

1.3. The Situation of Contract Law in Europe at the Beginning of the 21st Century

Option III was the review and improvement of the quality of legislation already in place. The Communication named the 1980 Rome Convention²⁷ and the CISG as the existing international instruments offering solutions to problems related to differences in national contract law.

The Rome Convention was ratified by all Member States and guaranteed the application of uniform private international law rules to determine which law is applicable to the contract.²⁸ While the CISG provides uniform rules for the international sale of goods,²⁹ its material scope is restricted.

The Communication also described the Community *acquis*, comprising directives specifying different aspects of contracting.³⁰ Proposed ways of improvement were modernization of the existing instruments by simplifying, clarifying, and adapting existing legal instruments.³¹

In sum, the existing *acquis* was thus not only fragmentary and uncoordinated, but it also lacked general principles.³²

²⁵ *Id.* ¶ 4.

²⁶ *Id.* ¶ 48.

²⁷ 1980 Rome Convention on the law applicable to contractual obligations, 1980 O.J. (L 266) 34; *See supra* note 16.

²⁸ COM (2001) 398 final, *supra* note 12, ¶ 16.

²⁹ *Id.* ¶¶ 18-19.

³⁰ *Id.* ¶¶ 21-22. In this regard, the three Annexes to the Communication are remarkable. In Annex I the Communication provided a list of directives relevant to private law, in particular to contract law while Annex II listed international instruments relating to substantial contract law issues, indicating their status. Annex III was a synthesis of the other two, aiming to put together the picture, or rather the mosaic, of the structure of the *acquis* and relevant binding instruments.

³¹ *Id.* ¶¶ 57-60.

³² Anastasia Vezyrtzi, *The Way Towards the Unification of Civil Law in the European Union: Reflections and Questions Raised*, 15 COLUM. J. EUR. L. F. 13 (2009).

1.4. Principles of European Contract Law

Option II set out by the Communication was the promotion of the development of common contract law principles leading to more convergence of national laws.³³ The Commission on European Contract Law, an independent body of experts from each Member State of the European Union supported by the European Commission and other organizations and chaired by Professor Ole Lando,³⁴ had already been working to establish Principles of European Contract Law since 1982.³⁵ The first two parts were published in 1999, to be supplemented by an additional third part in 2003.³⁶

The PECL is a Restatement³⁷ of general contract law in the form of articles with a commentary to each one shedding light on its purpose and operation, also including examples of cases and comparative rules. With its content close to that of the UNIDROIT Principles, the PECL can also be regarded as a companion to the CISG³⁸ and a tool in interpreting law.

Art. 1:101(2) provides for an opt-in system by setting forth that the PECL will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. Further to this, pursuant to Art. 1:101(3) the PECL may also be applied when the parties have agreed that their contract is to be governed by “general principles of law,” the “*lex mercatoria*” or the like, or when they have not chosen any system or rules of law to govern their contract. Finally, in light of Art. 1:101(4), the PECL may play a gap filling role as well. Pursuant to this provision, the PECL

³³ COM (2001) 398 final, *supra* note 12, ¶¶ 52-56.

³⁴ See generally Commission on European Contract Law, LEX MERCATORIA (last visited November 6, 2016) <https://www.law.kuleuven.be/personal/mstorme/CECL.html>.

³⁵ *Introduction to the Principles of European Contract Law*, THE COMMISSION ON EUROPEAN CONTRACT LAW (Institute of International Commercial Law at the Elisabeth Haub School of Law at Pace University) (last visited November 6, 2016), <http://www.cisg.law.pace.edu/cisg/text/peclcomments.html>.

³⁶ Part I of the PECL was published already in 1995. A combined version of Part I and II was finalized in 1998, the full text and comments were published in 1999 by Kluwer Law International. Part III containing additional chapters to the 1999 version was finalized in 2001-2002 and was published with full text and comments in 2003. See generally Commission on European Contract Law (1998), http://filj.lawreviewnetwork.com/files/2011/10/EU_Citation_Manual_2010-2011_for_Website.pdf.

³⁷ *Observations on the use of the Principles of European Contract Law as an aid to CISG research*, ANNOTATED TEXT OF THE CISG, (Institute of International Commercial Law at the Elisabeth Haub School of Law at Pace University), <http://www.cisg.law.pace.edu/cisg/text/peclcomp.html> (last visited November 6, 2016).

³⁸ *Id.*

may provide a solution to the issue raised where the system or rules of law applicable do not do so.

A follow-up project of the PECL was undertaken by the Study Group on a European Civil Code, an independent group created against the background provided by the first resolutions of the European Parliament to research the practical viability of the codification of European private law.³⁹

2. Actions to Take: Improving the *acquis* and Drafting a Common Frame of Reference

Continuing the process launched by the Communication on Contract Law, the Commission released an Action Plan on 12 February 2003,⁴⁰ presenting the conclusions drawn from the first round of consultation and proposing a mix of non-regulatory and regulatory measures, including the establishment of a Common Frame of Reference containing clear definitions of legal terms, fundamental principles and coherent model rules of contract law.

2.1. The Problem Areas

The Action Plan identified the uniform application of Community law and the implications for the internal market as problem areas.

It pointed out several inconsistencies intrinsic to European legislation like the absence of common definitions or the existence of overly broad ones resulting in a very large implementation discretion. It also referred to discrepancies in national implementations,⁴¹ and assessed the disadvantageous implications of divergent national laws on cross-border transactions and the functioning of the internal market.⁴²

According to the Action Plan, neither choosing the applicable law, nor drafting complex contracts covering all potential legal questions can help regarding mandatory rules of the law that have not been chosen as applicable, but which nevertheless apply. Already at this early stage, it was specifically mentioned that the problem was gaining even more significance due to the growth of e-commerce.⁴³

³⁹ *Background: The stimulus to action*, STUDY GROUP ON A EUROPEAN CIVIL CODE (2003), <http://www.sgecc.net/pages/en/home/index.welcome.htm>.

⁴⁰ COM (2003) 68 final, *supra* note 11.

⁴¹ COM (2003) 68 fin, *supra* note 11, ¶¶ 16-24.

⁴² *Id.* ¶ 25.

⁴³ *Id.* ¶ 27.

The Action Plan also highlighted the disadvantaged position of SMEs⁴⁴ and consumers⁴⁵ in cross-border settings due to lack of knowledge of foreign law.

2.2. Steps to Take

The Action Plan summarized the reactions to the four options proposed in the Communication on European Contract Law. The overwhelming majority supported the improvement of the existing EC *acquis* in the area of contract law. There was also considerable support for the development of common principles of European contract law. Only a small minority favored leaving the solution of the problems to the market, while a majority was against the development of a new instrument on European contract law.⁴⁶

2.2.1. A Common Frame of Reference

The Commission saw a common frame of reference establishing common principles and terminology in the area of European contract law as an important step towards the improvement of the contract law *acquis*⁴⁷ and intended it to serve as a model in European contract law.⁴⁸

The objectives of this common frame of reference were threefold: first, to provide for best solutions in terms of common terminology, rules; and definitions, with contractual freedom being the guiding principle; second, to achieve a higher degree of convergence between the contract laws of EU Member States and third-party countries; and third, to help the Commission judge whether non-sector-specific measures such as an optional instrument may be required to solve the problems of European contract law.⁴⁹

The Commission proposed that the common frame of reference should essentially deal with the relevant cross-border types of contracts such as contracts of sale and service contracts and include general rules on the conclusion, validity, and interpretation of contracts as well as performance, non-performance, remedies, credit securities on movable goods, and unjust enrichment.⁵⁰

⁴⁴ *Id.* ¶¶ 29-30. Taking advice on the applicable law means legal costs. This can dissuade SMEs from cross-border activities or at least put them at a competitive disadvantage compared to domestic operators, not just because the costs are higher for them, but also because they do not have sufficient bargaining power to impose their choice of law.

⁴⁵ *Id.* ¶ 31.

⁴⁶ *Id.* ¶ 7.

⁴⁷ COM (2003) 68 fin, *supra* note 12, ¶ 59.

⁴⁸ *Id.* ¶¶ 60, 63.

⁴⁹ *Id.* ¶ 62.

⁵⁰ *Id.* ¶ 63.

The Commission listed existing national legal orders, the case law of national courts, the existing EC *acquis* and “above all the UN Convention on the International Sale of Goods (CISG)” as sources to be analyzed.⁵¹

2.2.2. An Optional Instrument in the Area of European Contract Law

During the consultation, some arguments have been made in favour of a modern body of rules adapted to cross-border contracts in the internal market in the form of an optional instrument,⁵² which would, over time, facilitate the active participation of SMEs and consumers in the internal market and the cross-border exchange of goods and services.⁵³

3. The Way Forward: The 2004 Communication

The follow-up to the 2003 Action Plan was the Commission’s 2004 Communication,⁵⁴ which contained a detailed outline of the proposed Common Frame of Reference (CFR), a description of activities planned concerning the promotion of EU-wide standard contract terms as well as further reflection on an optional instrument.⁵⁵

The Commission drew the picture of a CFR providing clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders.⁵⁶

The Commission intended to use the CFR as a toolbox when presenting proposals to improve the quality and the coherence of the existing *acquis* as well as future legal instruments in the area of contract law.⁵⁷

The two annexes to the Communication are also remarkable. Annex I to the Communication suggested a possible structure of the CFR. Accordingly, the CFR could be divided into three parts:

⁵¹ *Id.*

⁵² *Id.* ¶ 90.

⁵³ *Id.* ¶ 91.

⁵⁴ COM (2004) 651 final, *supra* note 11.

⁵⁵ *Id.* ¶ 1.

⁵⁶ *Id.* § 2.1.1. As in the 2003 Action Plan, the Commission again listed national contract laws (case law as well as established practice), the EC *acquis* and international instruments, particularly the CISG as sources to be taken into account when preparing the CFR. *See Id.* § 3.1.3.

⁵⁷ *Id.* § 2.1.1. Other possible roles of the CFR mentioned in the Communication included the use of the CFR by national legislators when enacting EU directives or enacting other contract law legislation, use in arbitration, use as the basis for the development of standard contract terms and an optional instrument, and the assistance of the European Court of Justice in interpreting the *acquis* on contract law. *See Id.* § 2.1.2.

fundamental principles of contract law; definitions of the main relevant abstract legal terms; and model rules of contract law.⁵⁸ Annex II concerned the optional instrument and presented parameters like general context, binding nature, legal form, content, scope, and legal base, to be taken into account during further discussion.⁵⁹

3.1. Draft Common Frame of Reference

In 2002 the European Economic and Social Committee⁶⁰ already emphasized the need to look for solutions with regard to the approximation of legislation in civil matters on a global scale. Until this was possible, it suggested the creation of a uniform, general European contract law, which could take the form of a regulation with an opt-in solution in the medium-term and an opt-out solution in the long-term.⁶¹

The preparatory legal research in view of the adoption of the CFR was carried out by an international academic network, resulting in the publication of the Draft Common Frame of Reference (DCFR),⁶² containing model rules, principles and definitions further elaborated in comments and examples for the application of the rules supplemented by comparative notes on national laws. The DCFR thus brings together rules derived largely from the legal systems of the Member States and Community law.⁶³ One purpose of the academic text was to serve as a model for drawing up a Common Frame of Reference (CFR) called for by the Commission's Action Plan of February 2003.⁶⁴ Without regard to the regulatory goal, the DCFR is surely a highly useful collection of rules from a comparative private law perspective, without regard to the fate of the CFR.⁶⁵

B. Matryoshka Dolls - The Stages of Making an Instrument

When examining the process of making an instrument, Matryoshka dolls⁶⁶ may come to mind. As one removes the dolls, it

⁵⁸ *Id.* Annex I.

⁵⁹ *Id.* Annex II.

⁶⁰ A consultative body of the European Union.

⁶¹ COM (2003) 68 final, *supra* note 11, ¶ 11.

⁶² PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE (DCFR) FULL EDITION (Von Bar, *et al.* eds., Sellier, 2009. [hereinafter *Principles, Definitions and Model Rules*]. Outline editions already appeared in 2008 and 2009 containing principles, definitions and model rules. The Full Edition of 2009 also contains comments and comparative notes under the model rules.

⁶³ *Id.* at 1-4.

⁶⁴ *Id.* at 2-4; *see also* COM (2003) 68 final, *supra* note 11.

⁶⁵ PRINCIPLES, DEFINITIONS AND MODEL RULES, *supra* note 64, at 4.

⁶⁶ A set of traditional Russian wooden dolls of differing sizes, designed to nest in

is like moving from the general to the specific of an instrument; the biggest doll could be a strategy; the second one is a policy; the next one is a first draft of experts; and the smallest doll is an instrument refined in light of the feedback given to the preliminary draft.

1. Strategy

1.1. Stockholm Programme of 2010 May

The Stockholm Programme for 2010-2014 dealt with the benefits of a European judicial area for citizens which should serve to support economic activity in the single market.⁶⁷ The European Council reaffirmed that the common frame of reference for European contract law should be a non-binding set of fundamental principles, definitions, and model rules used by the lawmakers at Union level to ensure greater coherence and quality in the lawmaking process, and accordingly, invited the Commission to submit such a common frame of reference.⁶⁸

The European Council also found it necessary to create a clear regulatory environment allowing small and medium business enterprises to take full advantage of the internal market growing and operating across borders.⁶⁹

1.2. Communication "Europe 2020"

On 3 March 2010, the European Commission proposed a new political strategy in the form of the Communication "*Europe 2020 A European strategy for smart, sustainable and inclusive growth*" to support employment, productivity and social cohesion in Europe.⁷⁰

The three priorities of the strategy are smart, sustainable and inclusive growth. The Commission put forward seven flagship initiatives to catalyse progress under each priority theme.⁷¹

The Commission addressed the problem of bottlenecks to cross-border activity in the single market, and mentioned that businesses and citizens could still need to deal with 27 different legal systems during one transaction. The Commission mentioned that while EU

each other; Oxford English Dictionary, <http://www.oxforddictionaries.com/definition/english/matryoshka> and <http://www.oxforddictionaries.com/definition/english/russian-doll>.

⁶⁷ *The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J (C115), § 3.4.2 (The text was Annex I to Council act of 2 December 2009, No. 17024/09) [hereinafter *Stockholm Programme*].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Communication from the Commission, *Europe 2020 - A Strategy for Smart, Sustainable and Inclusive Growth*, at 5, COM (2010) 2020 final, (Mar. 3, 2010) [hereinafter COM (2010) 2020 final].

⁷¹ *Id.* § 1.

companies are confronted with fragmentation and diverging rules, competitors from China, the U.S. or Japan can strongly rely on their large home markets.⁷²

As the Commission pointed out, the single market was conceived before the arrival of the Internet and before information and communication technologies were one of the main drivers of growth. Reference was made to the huge potential inherent in the emergence of new services, e.g., content and media. Further, the Communication highlighted that Europe will only exploit this potential if it overcomes the fragmentation that currently blocks the flow of on-line content and access for consumers and companies.⁷³

According to the Communication, to serve *Europe 2020*, the single market requires well-functioning and well-connected markets where

competition and consumer access stimulate growth and innovation.⁷⁴ The Commission also set forth that access for SMEs to the single market must be improved. Likewise, citizens must also be empowered to play a full part in the single market, which requires strengthening their ability and confidence to buy goods and services cross-border, in particular online.⁷⁵

The Commission specifically indicated that it would propose action to tackle bottlenecks in the single market. For example, by “[m]aking it easier and less costly for businesses and consumers to conclude contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law,” the Commission sought to eliminate barriers to business.⁷⁶

2. Policy: The 2010 Green Paper

In July 2010, the Commission indeed launched a public consultation by publishing a Green Paper⁷⁷ on policy options for progress towards a European Contract Law for consumers and businesses.

The Paper consisted of five sections. The first section started by referring to the problems already discussed, i.e., problems caused by the divergence of contract laws in the internal market, namely additional transaction costs and legal uncertainty for businesses, as well as a lack of consumer confidence, which have dissuaded in

⁷² *Id.* § 3.1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Green Paper, *supra* note 1.

particular consumers and SMEs from engaging in cross-border transactions, thereby hindering cross-border competition.⁷⁸ This section identified the purpose of the Paper, i.e., to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law and launch a discussion on them.⁷⁹

Section Two described the background of the Green Paper, listing what had already been undertaken in the field concerned, namely the DCFR, the PECL, the CISG and the UNIDROIT PICC.⁸⁰

The core argument in favour of an optional instrument was still the proposition that divergences between national contract laws are among the greatest barriers hindering the completion of the internal market. To justify this, the Commission referred to the consultation launched with the 2001 Communication on European Contract Law, surveys and other studies.⁸¹ With regard to B2C transactions, specific reference was made to Article 6 of the Rome I Regulation ensuring the application of the mandatory rules of the country of the consumer even when another law is chosen, which not only protects consumers, but can also prevent businesses from engaging in cross-border trade due to high legal costs.⁸²

Section Four of the Paper sets out the options concerning the best instrument for European Contract Law regarding legal nature, scope of application and material scope.

2.1. Planning an Instrument – Legal Form

For a better understanding of the proposed forms for the instrument, reference must be made to Art. 288 TFEU.⁸³ Accordingly, to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. Only the first three have binding force. A regulation has general application, which means that it is binding in its entirety and directly applicable in all Member States. A directive is also binding, but only as to the result to be achieved. Directives are binding only upon the Member States to which they are addressed, but they leave to the national authorities the choice of form and methods. This means that national legislators must adopt a transposing act or national implementing measure to transpose directives and bring national law into line with their objectives. Consequently, individual citizens are given rights and are bound by

⁷⁸ *Id.* § 1.

⁷⁹ *Id.*

⁸⁰ *Id.* § 2.

⁸¹ *Id.* § 3.

⁸² *Id.* § 3.1.

⁸³ *Supra* note 15.

the National Implementing Act. A decision is binding in its entirety, but only upon the addressees.

The Green Paper provided a wide range of options as regards the legal form of a European instrument.

The baseline scenario was merely the publication of the results of the Expert Group,⁸⁴ followed by a toolbox or reference tool for the EU legislators.⁸⁵ Another option was a Commission Recommendation encouraging Member States either to replace national contract laws with the European instrument following the example of the Uniform Commercial Code or to incorporate the instrument as an optional regime, offering an alternative to national law.⁸⁶ This latter option was already similar to the solution of the CESL, apart from the fact that a Recommendation is not binding upon Member States and thus allows them discretion in how and when to implement the instrument into their national laws.⁸⁷

The next option in the list was the approach later to be taken by the CESL, i.e., a regulation setting up an optional instrument of European Contract Law, which would be conceived as a “2nd Regime” in each Member State, providing parties with an option between two regimes of domestic contract law. The instrument would form part of each Member State’s national law as a self-standing set of contract law rules which could be chosen by the parties as the law governing their contracts.⁸⁸

The Commission also added that the instrument would have to affect the application of the mandatory provisions, including those on consumer protection, to be operational. In the view of the Commission, this is what would constitute the added value in comparison with the existing optional regimes, such as the CISG, which cannot restrict the application of mandatory rules.⁸⁹

The Commission indicated the necessity of a manifestly high level of consumer protection and highlighted that a single body of rules would spare the investigation of foreign laws. According to the Commission, an optional instrument would be in line with the principle of subsidiarity of the European Union and constitute a proportionate alternative to the full harmonisation of national laws.⁹⁰

However, the Commission also considered one disadvantage of the optional instrument, namely, that it would add a parallel system, further complicating the legal environment.⁹¹

⁸⁴ *Green Paper*, *supra* note 1, § 4.1.

⁸⁵ *Id.* § 4.1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Other options mentioned included a directive on European Contract Law harmonising national contract law on the basis of minimum common standards,⁹² a regulation establishing a European Contract Law in the form of a single set of rules replacing national laws,⁹³ and a European Civil Code, covering not only contract law, but also other types of obligations.⁹⁴ However, while minimum harmonisation directives have their limitations in reducing regulatory divergences, the latter two options would raise questions as regards the European Union principles of subsidiarity and proportionality.

2.2. Planning an Instrument - Scope of Application

The Paper considered whether one instrument should cover both B2C and B2B transactions, cross-border and domestic contracts. Namely, there are general contract law provisions relevant to all contracts without distinction, but the instrument could also have specific provisions, e.g., mandatory provisions ensuring consumer protection. While it is unreasonable to deny businesses the opportunity to choose a European instrument in their domestic transactions, an instrument covering both cross-border and domestic contracts would impact consumers who wish to preserve national levels of protection instead of venturing into the internal market.⁹⁵

Concerning the material scope of the instrument, the Paper proposed a narrow and a broad interpretation. While the first version would focus on general contract law provisions, the latter could also cover related topics, e.g., restitution, non-contractual liability, acquisition and loss of ownership of goods and proprietary security in movable assets.⁹⁶

At this stage, still not a body of sales law was proposed. The Paper was still talking about general contract law provisions, in addition to which specific provisions for the most prevalent types of contracts could be included. It was, however, mentioned that the most common and relevant type of contract from the internal market perspective is the contract for the sale of goods.⁹⁷

The Paper also referred to the scope of a European civil code, which, beside contract law including specific types of contracts, would need to cover tort law, unjustified enrichment, and benevolent intervention.⁹⁸

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Green Paper, supra* note 1, § 4.1.

⁹⁵ *Id.* § 4.2.

⁹⁶ *Id.* §§ 4.3.1., 4.3.2.

⁹⁷ *Id.* § 4.3.3.

⁹⁸ *Id.* § 4.3.4.

The conclusion of the Paper stated its aim to launch a public consultation to “gather orientations and views from relevant stakeholders regarding policy options in the area of European Contract Law.”⁹⁹

3. Expertise

3.1. Expert Group

On 26 April 2010, the Commission set up an expert group on a Common Frame of Reference (CFR).¹⁰⁰ The group consisted of specialists from scientific and research organisations and academia, and legal practitioners and experts representing the civil society,¹⁰¹ and was chaired by the Commission.¹⁰²

The task of the group was to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European Contract Law, including consumer and business contract law. In particular, the group had to select those parts of the Draft Common Frame of Reference that were of direct or indirect relevance to contract law, and to restructure, revise, and supplement the selected contents, also considering other research work conducted in this area as well as the Union *acquis*.¹⁰³

The result of the work was a Feasibility study for a future instrument in European Contract Law consisting of 189 articles delivered on 3 May 2011 (“Feasibility Study”). The draft constituted a complete set of contract law rules, covering issues relevant in a contractual relationship in the internal market at a practical level.¹⁰⁴ Consultation on the Feasibility Study was open between 3 May and 1 July 2011.

3.2. Group of Key Stakeholder Experts

The Commission also wanted to ensure that the practical problems of businesses and the legitimate interests of consumers were fully taken into account. To this end, the Commission invited key stakeholders from across Europe to provide input into the Expert Group's work, including representatives of consumers,

⁹⁹ *Id.* § 5.

¹⁰⁰ Commission Decision 233/2010 of Apr. 26, 2010, Setting Up the Expert Group on the Common Frame of Reference in the Area of European Contract Law, 2010 O.J. (L 105) 109-11 [hereinafter *CFR*].

¹⁰¹ *Id.* art. 4.

¹⁰² *Id.* art. 5.

¹⁰³ *Id.* art. 2.

¹⁰⁴ European Commission Press Release IP/11/523, Cross-border Transactions: European Commission Publishes Expert Group's Feasibility Study on European Contract Law (May 3, 2011), http://europa.eu/rapid/press-release_IP-11-523_en.htm.

business and the legal profession at the European level, with the exact composition of the group changing in accordance with the topic under discussion. The stakeholders also met on a monthly basis before the meeting of the Expert Group.¹⁰⁵

4. The Feasibility Study

The Commission Expert Group on European Contract Law Feasibility Study for a future instrument in European Contract Law 3 May 2011 (hereinafter referred to as Feasibility Study) is Annex IV to the publication titled, "A European Contract Law for Consumers and Businesses: Publication of the Results of the Feasibility Study Carried Out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners' Feedback" ("Publication").¹⁰⁶

Already in the introductory paragraph, the Publication indicated a special emphasis on sales transactions and related services.¹⁰⁷

The Publication referred to the already well-known arguments justifying the initiative to make contract law more coherent across the EU and summarized the situation of contract law in Europe since the 2001 Communication.¹⁰⁸

The Publication also summarized the reactions to the Green Paper. Accordingly, many respondents perceived value in the publicity of the Expert Group and the introduction of a toolbox, whereas there was little support for a Commission Recommendation on European contract law. Several Member States and a large number of respondents said they could support an optional instrument, while others preferred a regulation establishing a European contract law that would replace Member States' national contract laws. With regard to the scope of a potential European contract law instrument, the majority seemed to prefer an instrument on cross-border B2C sales contracts.¹⁰⁹

Section II of the Publication supplied concrete examples illustrating how differences in national contract laws could lead, in practice, to additional transaction costs and increased legal uncertainty for businesses as well as a lack of consumer confidence.¹¹⁰

¹⁰⁵ *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, at 3 (Apr. 13, 2011), http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (For the composition of the 'Sounding Board' of key stakeholder experts see Annex III) [hereinafter Publication].

¹⁰⁶ Publication, *supra* note 105.

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *Id.* at 1-3.

¹⁰⁹ *Id.* at 2-3.

¹¹⁰ *Id.* at 3-5.

Section III described the mandate of the Expert Group on European contract law and outlined the Commission's preferences concerning the draft instrument.¹¹¹ According to the Commission's requests, the instrument should be applicable to B2C and B2B contracts, it should cover sales contracts and service contracts associated with sales provided by the seller or under the seller's responsibility, it should be self-standing and comprehensive covering most aspects of a contractual relationship relevant for cross-border situations, it should be user-friendly and clear in language and structure, and it should afford a high level of consumer protection. For B2C contracts, the consumer protection rules would need to be mandatory once the instrument was chosen, while freedom of contract would prevail for B2B contracts, with most provisions being default rules from which parties could derogate.¹¹²

Section IV described the text of the Feasibility Study, while Section V summarized steps to take. The Feasibility Study was to serve as a "toolbox" in the preparation of a possible future initiative on European contract law. One of the main concerns in the stakeholders' responses to the Green Paper was the lack of clarity in relation to the substantive content of a possible instrument. The Commission gave stakeholders the opportunity to comment on the Feasibility Study as well. Accordingly, the publication of the text provided an additional opportunity for the Commission to receive input, as all interested parties were invited to submit feedback on the issues listed by 1 July 2011.¹¹³

The last issue concerned whether a European contract law instrument should also cover digital content.¹¹⁴ The related questions are discussed below in the section on online transactions.

5. Parliamentary Support

The European Parliament also expressed its support towards progress in European contract law in its resolution of 8 June 2011.¹¹⁵ The Parliament welcomed the "recent publication of the results of the feasibility study carried out by the Expert Group" and urged the Commission to continue the discussion with stakeholders.¹¹⁶ The Parliament also expressed its opinion, amongst others, on the legal form, scope and application of the

¹¹¹ *Id.* at 5-6.

¹¹² *Id.* at 6.

¹¹³ Publication, *supra* note 105, at 7-8.

¹¹⁴ *Id.* at 9.

¹¹⁵ Resolution of 8 June 2011 on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses, EUR. PARL. DOC. (P7_TA (2011/0262) (2011).

¹¹⁶ *Id.* ¶ 4.

optional instrument. Notably, the Parliament considered the legal form of a regulation appropriate.¹¹⁷

II. The Present and Future of the CESL

Following a description of the result of the above process, i.e., the Proposal of the European Parliament and of the Council on a Common European Sales Law published by the Commission on 11 October 2011,¹¹⁸ the present Section focuses on the innovations in the text of the Commission, with specific regard to transactions for the supply of digital content and e-commerce transactions. In light of this analysis, the paper outlines ways European and international legislation could go about creating new legal regimes for twenty-first century cross-border transactions.

A. Common European Sales Law

Based on Article 114 of the Treaty on the Functioning of the European Union (“TFEU”), the European Parliament and the Council of the European Union have adopted a Proposed Regulation of the European Parliament and of the Council on a Common European Sales Law, which the EU Commission published on 11 October 2011.

The Proposal starts with an Explanatory Memorandum¹¹⁹ that explains the context of the Proposal and reflects, among others, on the results of consultations with the interested parties, impact assessments, and the legal elements of the proposal. The second part contains the “Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law” (“Proposed Regulation”)¹²⁰ consisting of 16 articles. The text of the Common European Sales Law (“CESL”)¹²¹ constituting the self-standing set of contract law rules is Annex I to the Proposal. There is also an Annex II comprising the Standard Information Notice¹²² that must be provided by the trader to the consumer before they make an agreement on the use of the CESL.

1. Context of the Proposal

1.1. Justification

The Explanatory Memorandum summarizes how differences in contract law between Member States hinder traders, especially

¹¹⁷ *Id.* ¶¶ 5-6.

¹¹⁸ COM (2011) 635 final, *supra* note 5.

¹¹⁹ *Id.* at 2-13.

¹²⁰ *Id.* at 14-29.

¹²¹ *Id.* at 30-113.

¹²² *Id.* at 114.

SMEs, and consumers who wish to engage in cross-border trade. In doing so, the Memorandum refers to the already familiar arguments, again drawing the conclusions that less trade results in limited competition and thus higher prices in the internal market.¹²³

1.2. Objective

The Memorandum sets forth that the overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating cross-border trade for business and cross-border purchases for consumers.

This objective is to be achieved by the proposed CESL, which is a self-standing uniform set of contract law rules as a second contract law regime within the national law of each member state, covering the full life cycle of a contract. Traders could agree on the application of the CESL in all of their cross-border transactions. As to B2C transactions, the fully harmonized consumer protection rules of the CESL would eliminate the need to identify the mandatory consumer protection provisions in the consumer's law. This would result in decreased contract law-related transaction costs for traders as well as a less complex legal environment for cross-border trade. This would enable traders to expand across the borders and would ultimately result in increased competition in the internal market and better access to offers from across the borders at increased prices. Mandatory rules would also offer a high level of consumer protection.¹²⁴

1.3. Context

The Explanatory Memorandum also summarized the general context of the Proposal, and referred to the existing minimum harmonisation in the field of contract law by Directives and the full harmonisation of certain areas by the recently adopted Consumer Rights Directive. At the international level, the Memorandum mentioned the CISG, pointing out that it leaves important matters outside its scope, e.g., defect in consent, unfair contract terms and prescription. The Memorandum also mentioned that not all Member States have signed the CISG and that there is no mechanism which could ensure its uniform interpretation.¹²⁵ The Memorandum also specifically mentioned the E-commerce Directive¹²⁶ as Union legislation relevant for both B2C and B2B

¹²³ *Id.* at 2-4.

¹²⁴ COM (2011) 635 final, *supra* note 118, at 4.

¹²⁵ *Id.* at 4-5.

¹²⁶ Directive 2000/31, of the European Parliament and of the Council of 8 June

relations.¹²⁷ The Rome I Regulation was referenced as well, which would continue to apply unaffected by the proposal.¹²⁸

2. Legal Elements of the Proposal

The Memorandum also summarized the legal elements of the Proposal. It pointed out that the proposed Common European Sales Law creates within each Member State's national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The CESL would apply on a voluntary basis upon express agreement of the parties, to a cross-border contract.¹²⁹

The choice of the CESL is not a choice of the applicable law within the meaning of private international law rules. Rather, it is a choice made *within* the national law applicable according to the private international law rules.¹³⁰ In case the parties make such a choice in favor of the CESL, the CESL rules will be the only national rules applicable for matters falling within its scope. However, since the CESL will not cover every aspect of a contract, the existing rules of the national law applicable to the contract will regulate the residual questions.¹³¹

Although the application of the national law rules cannot be eliminated entirely, mandatory consumer protection rules can. In accordance with Art. 114(3) TFEU, the CESL would guarantee a high level of consumer protection by setting up mandatory rules maintaining or improving the level of protection under the existing *acquis*.¹³² If the parties opt for the CESL within the applicable national law, then the consumer protection rules of the CESL apply, and these are necessarily identical both in the applicable national law and in the law of the consumer's country. Thus, the consumer will not be deprived of the protection of the law of his habitual residence. Thus if the parties choose the CESL, they do not need to investigate mandatory consumer law rules of the consumer's country to comply with Art. 6(2) of the Rome I Regulation.¹³³

2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1-16 [hereinafter 2000 O.J. (L 178)].

¹²⁷ COM (2011) 635 final, *supra* note 5, at 5.

¹²⁸ *Id.*

¹²⁹ *Id.* at 8.

¹³⁰ *Id.* at 6, 9.

¹³¹ *Id.* at 6.

¹³² *Id.* at 9.

¹³³ COM (2011) 635 final, *supra* note 121, at 6.

2.1. Legal Basis

The Proposal is based on Art. 114 of the Treaty on the Functioning of the European Union (“TFEU”).¹³⁴

2.2. Compliance with European Union Principles

The proposed regulation had to comply with the subsidiarity and proportionality principles of the European Union.¹³⁵

As the Memorandum explained, the Proposal complies with the subsidiarity principle due to the clear cross-border dimension of its objective, which cannot be achieved by the Member States in the framework of their national systems.¹³⁶

Further, the Proposal also complies with the principle of proportionality. Namely, the Proposal is confined to the aspects posing real problems in international transactions; it covers only cross-border situations, and transactions where the problems related to the internal market are mainly found, i.e., B2B relations where at least one of the parties is an SME¹³⁷ and B2C relations. The Regulation leaves Member States the options of making the CESL also available in domestic settings and to contracts concluded by traders, neither of which is an SME.¹³⁸

Further, the CESL is optional and voluntary. This guarantees that it does not interfere with deeply embedded national legal systems and traditions. Consequently, the measure will only go as

¹³⁴ According to Paragraph 1, the provisions of art. 114 shall apply for the achievement of the objectives set out in Article 26 TFEU. Accordingly, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In terms of Art. 26 TFEU the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, which shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

¹³⁵ Principles codified in Paragraphs 3 and 4 of art. 5 of the Treaty on European Union (consolidated version OJ C 326, 26.10.2012, p. 13-390), respectively. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

¹³⁶ COM (2011) 635 final, *supra* note 5, at 9.

¹³⁷ Concerning the definition of micro, small and medium-sized enterprises, the CESL draws upon the Commission Recommendation 2003/361. *See* 2003 O.J. (L 124) 36.

¹³⁸ COM (2011) 635 final, *supra* note 5, at 10.

far as necessary to create further opportunities for traders and consumers in the single market.¹³⁹

2.3. Form

According to the reasoning of the Memorandum, a non-binding instrument such as a toolbox would not achieve the objective, whereas a Directive or a Regulation replacing national laws with a non-optional European contract law would go too far. A Directive setting up minimum standards of a non-optional instrument would not achieve the level of legal certainty and the necessary degree of uniformity to decrease the transaction costs.¹⁴⁰

3. Database and Training

The Memorandum indicated that after the adoption of the Proposal, the Commission will set up a database for the exchange of information concerning final judgments referring to the CESL or any other provision of the Regulation, as well as judgments of the Court of Justice of the European Union.¹⁴¹ This is laid down in Art. 14 of the Proposed Regulation as well, which requires Member States to ensure that final judgments of their courts applying the rules of the Regulation are communicated to the Commission. The Commission shall set up a system accessible to the public, which allows the information concerning these judgments as well as relevant judgments of the ECJ to be consulted. The Commission also planned to organize training sessions for legal practitioners.¹⁴²

In the case of the CISG, a similar database has proven to be highly successful.¹⁴³ Considering it as an example, it might be useful to consider including arbitral awards, case abstracts and publications as well. Thanks to the Annual Willem C. Vis International Commercial Arbitration Moot, generations get to know the website and the CISG year by year. To date, over 3,000 law students, academics and professionals gather in Vienna before every Easter. Participants use the site and the materials intensively for over half a year, which brings the CISG and international sales law close to the legal community. A similar competition might pave the way for the future success of the CESL as well, which could even be able to attract a significant part of the Vis Moot crowd.

¹³⁹ *Id.*

¹⁴⁰ *Id.* For the difference between regulations and directives, see the above discussion on art. 288 TFEU with regard to the 2010 Green Paper under the subtitle "2.1. Planning an instrument - legal form".

¹⁴¹ *Id.*

¹⁴² *Id.* at 11.

¹⁴³ *Institute of International Commercial Law*, ELISABETH HAUB SCHOOL OF LAW AT PACE UNIVERSITY, <http://iicl.law.pace.edu/cisg/cisg> (last visited Sept. 19, 2016, 7:46 PM).

The Memorandum also referred to the review clause of the Proposed Regulation. Accordingly, Art. 15(2) provides for a review of the operation of the Regulation five years after its date of application, considering e.g., the need to further extend the scope in relation to B2B contracts, market and technological developments in respect of digital content and future developments of the Union *acquis*. To this end, the Commission will submit a report, if necessary, accompanied by proposals to amend the Regulation, to the European Parliament, the Council and the European Economic and Social Committee.

The Memorandum also mentioned that, since the Regulation concerns a matter related to the European Economic Area, it should be extended to the EEA.¹⁴⁴

The Memorandum then explained the structure of the Proposed Regulation, listing and describing the three main parts; i.e., the Regulation itself, Annex I to the Regulation constituting the CESL, and Annex II containing a Standard Information Notice.

4. The Proposed Regulation

This section aims to provide a brief summary of the text of the Proposed Regulation published by the Commission, including a short description of the content of the CESL.

The Preamble of the Proposed Regulation summarizes the argumentation underlying the proposed instrument,¹⁴⁵ and also points out that the single uniform set of contract law rules shall have the same meaning and interpretation in all Member States.¹⁴⁶

Article 1 sets out the goals, as well as the subject matter of the Regulation. Accordingly, the purpose of the Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules. These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so. The Regulation thus enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions, thereby reducing unnecessary costs while providing a high degree of certainty. The Regulation also encompasses a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and to encourage consumers to shop across borders.

¹⁴⁴ COM (2011) 635 final, *supra* note 5, at 11.

¹⁴⁵ *Id.* at 16.

¹⁴⁶ *Id.*

Article 2 contains definitions for terms used in the Regulation. Article 3 explains the optional nature of the CESL, and Article 4 limits the use of the CESL to cross-border contracts, whereas Articles 5 and 6 state the material scope, i.e., contracts for the sale of goods and supply of digital content and related services, excluding mixed-purpose contracts, including any other elements as well as contracts linked to consumer credit. Article 7 defines the personal scope of application, covering B2C and B2B contracts where at least one party is an SME.

According to Article 8, the choice of the CESL requires an agreement of the parties to that effect. In B2C contracts, the choice of the CESL is valid only if the consumer's consent is given by a separate, explicit statement. Article 9 contains information requirements in this regard, including the provision of the consumer with the information notice in Annex II. In accordance with the guarantees set forth in Article 10, Member States are to provide for effective, proportionate and dissuasive penalties for breaches by traders of the requirements set out in Articles 8 and 9.

In accordance with Article 11, a valid choice of the CESL means that only the CESL shall govern the matters addressed in its rules. If the contract was actually concluded, the CESL shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

Article 12 sets forth that the Regulation is without prejudice to the information requirements of Directive 2006/123/EC on services in the internal market.¹⁴⁷

Article 13 provides two options for Member States concerning the CESL. Accordingly, Member States can make it available in an entirely domestic setting and/or for contracts for traders, neither of which was an SME.

Article 14 is about the database and related duties, while Article 15 contains the review clause already referred to. Finally, Article 16 concerns the Regulation's entry into force.

4.1. The CESL

Annex I contains the text of the Common European Sales Law. The text consists of 186 articles and is divided into eight parts.

Part I contains introductory provisions, including a chapter on general principles and application.

Part II contains chapters on pre-contractual information, contracts to be concluded by electronic means, conclusion of contract, the right to withdraw in distance and off-premises contracts between traders and consumers and defects in consent.

¹⁴⁷ 2006 O.J. (L 376) 36.

Part III deals with the assessment of what is in the contract. The chapters in this part include rules on interpretation, contents and effects as well as unfair contract terms.

Part IV regulates the obligations and remedies of the parties to a sales contract or a contract for the supply of digital content. This part is divided into chapters on general provisions, the seller's obligations, the buyer's remedies, the buyer's obligations, the seller's remedies and the passing of risk. Part V separately deals with the obligations and remedies of the parties to a related service contract.

The remaining Parts VI, VII and VIII have provisions on damages and interest, restitution and prescription, respectively.

B. Progress through Technology– The Digital Key to the Success of CESL

The example of the CISG shows that an international instrument for cross-border sales of goods transactions can be created and that such an instrument can indeed exist and be successful.

However, the author is of the view that the success of the CESL could be achieved in a different way for several reasons. First, the CESL is intended to be there for unsophisticated parties. These parties may be unaware of the importance of the law governing the contract and concentrate mostly on substantive clauses.¹⁴⁸ With certain exaggeration, it could be argued that this even favors the application of an instrument like the CISG in practice. Namely, the CISG applies automatically if the parties do not exclude it. Following this logic, it could be established that this would most probably work the other way around in case of an opt-in instrument like the CESL, which can apply only if the parties make a choice in favor of it.

Nevertheless, no departure can be expected from the proposed opt-in nature, at least not if the form of the instrument will remain to be a regulation, since that would most probably raise concerns from a European Union law perspective. It must be kept in mind that the CESL is to be a regulation, part of EU law. Thus, the legal basis, i.e., Art. 114 TFEU must be respected, so as to avoid a 'spill-over'. Also, concerns might arise with regard to the principles of subsidiarity and proportionality set forth in Art. 5 TFEU.

Among the factors limiting the prospects of the CESL for success, there are also the mainstream arguments raised against the CISG and the unification of sales law as such.

In sum, chances seem high that the introduction of the CESL as an opt-in instrument as it stands will not change the existing legal practice in the European Union once and for all. This is, however,

¹⁴⁸ Gilles Cuniberti, *Is the CISG Benefiting Anybody?*, 39 VAND. J. TRANSNAT'L L. 1512, 1520 (2006).

not to say that no breakthrough is possible. On the contrary, the instrument has considerable potential, yet the immediate introduction of a CISG epigone instrument might not be the key to immediate success. The strategy should be based on the strength of the CESL, which is its innovative approach towards the online environment. In other words, progress is to be made through technology,¹⁴⁹ in line with the priorities of smart growth and an economy based on knowledge and innovation.¹⁵⁰

The following sections aim to show the relationship between the CESL and the online environment. It also serves to outline an alternative strategy for the introduction of the CESL.

1. E-european Union – building a digital society

As a result of new information technologies transforming the way business is done, the present age is one of e-business.¹⁵¹ Technological innovations are also referred to as a “tsunami” due to their magnitude and velocity.¹⁵² The EU has also perceived the changes and reacted with new initiatives.

One of the three priorities of the strategy “Europe 2020” was smart growth, meaning an economy based on knowledge and innovation.¹⁵³ In this regard, the Commission emphasized that action must be taken to build a digital society. As the Communication highlighted, the global demand for information and communication technologies is a market worth € 2 000 billion, with only one quarter coming from European firms. In addition, Europe is also falling behind on the online dissemination of knowledge, goods and services.¹⁵⁴

The Digital Agenda for Europe,¹⁵⁵ the first flagship initiative adopted under the Europe 2020 strategy, aims to deliver sustainable economic and social benefits from a digital internal market by eliminating legal fragmentation.¹⁵⁶ The Europe 2020 Strategy set forth that the Commission would work to create a true single market for online content and services, bringing about,

¹⁴⁹ The company ethos of Audi (German original: “Vorsprung durch Technik”); *See About Audi*, AUDIUSA.COM, <http://www.audiusa.com/about>, (last visited Sept. 20, 2016, 9:19 AM).

¹⁵⁰ COM (2010) 2020 final, *supra* note 70, § 2.

¹⁵¹ JANE KAUFMAN WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE*, 1-2.1 (4th ed. 2016) [hereinafter *LAW OF ELECTRONIC COMMERCE*].

¹⁵² *Id.*

¹⁵³ COM (2010) 2020 final, *supra* note 70, § 2.

¹⁵⁴ *Id.*

¹⁵⁵ *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe*, COM (2010) 245 final (May 19, 2012) [hereinafter *COM (2010) 245 final*].

¹⁵⁶ *Green Paper*, *supra* note 1.

among others, a balanced regulatory framework with clear rights regimes.¹⁵⁷

In the Digital Agenda, the Commission indicated that by 2012 it would propose an optional contract law instrument complementing the Consumer

Rights Directive to overcome the fragmentation of contract law, in particular, the online environment.¹⁵⁸

The Europe 2020 Strategy also referred to the huge potential inherent in the emergence of new services, e.g. content and media, but also highlighted that Europe will only exploit this potential if it overcomes the fragmentation that currently blocks the flow of online content and access for consumers and companies.¹⁵⁹

2. CESL and the Online Environment: Transactions for the Supply of Digital Content and E-Commerce Transactions

In compliance with the Commission materials discussed above and the twenty-first century challenges also summarized in the Digital Agenda, the CESL addresses two different aspects of the digital age and the online environment, i.e., transactions for the supply of digital content and e-commerce transactions.

The term 'transaction for the supply of digital content' refers to the subject of the transaction. Such transactions are not necessarily transactions concluded online. For instance, it is possible to walk into a shop and buy a disk containing software. In this scenario, the disk is merely a medium, with the subject of the transaction being digital content, i.e., software.

The term e-commerce was coined in the mid-1990s, when the internet began to capture public attention and electronic contracting transactions were implemented among the first electronic commerce systems.¹⁶⁰ The term is a technical one and as such, has to do with the form of the contract and covers transactions that are concluded electronically. The subject of such a transaction is, however, not necessarily digital content, but it can be anything, since movable goods can also be bought online.

Thus, transactions concluded online are not necessarily transactions for the supply of digital content, and transactions for the supply of digital content are not necessarily transactions concluded online. Nevertheless, the imaginary Venn diagram of these two sets of transactions would show considerable intersection.

¹⁵⁷ COM (2010) 2020 final, *supra* note 70, § 2.

¹⁵⁸ COM (2010) 245 final, *supra* note 155, § 2.1.3.

¹⁵⁹ COM (2010) 2020 final, *supra* note 70, § 3.1.

¹⁶⁰ LAW OF ELECTRONIC COMMERCE, *supra* note 151, at 1-2.1.

3. Introduction of the New Instrument – The Strategy

3.1. Gradual Introduction

The CESL shall for the first time make it possible to market and purchase goods, digital content and related services in the internal market under a uniform set of contract law rules, for both traders and consumers.¹⁶¹ The significance of tailoring provisions of the instrument to transactions in digital content cannot be overestimated. In light of the experience with existing instruments of sales law, which can only be applied to transactions in digital content through interpretation, this is also a necessity. In other words, a new instrument regulating cross-border trade would be nothing more than a ‘Timex watch in the digital age.’¹⁶²

However, if introduced immediately with such a broad scope, the application of the new instrument in practice might not be a success story right from the start. It could be seen in the case of the CISG as well, that its use in practice extended slowly, with only a few cases in the first years. Instead of introducing the instrument as it now stands, it could be a favorable alternative to introduce the instrument gradually in stages.

Thus, the stages of introducing the instrument are different from the Matryoshka dolls of planning and drafting going from general to specific. It is exactly the other way around so that the complex instrument of sales law can become reality within a reasonable period of time. First, only the smallest doll, i.e., only a limited part of the instrument should enter into effect. This first set of rules should cover an area of law where the competition is the least significant, i.e., where there are no real alternatives to resort to. In such a legal no man's land, the market and different actors need and would thus, also welcome, a set of clearly formulated, systematized and tailor-made rules that can be applied in a cross-border context.

3.2. Stages of Introduction- The Digital Key to Success

In accordance with the strategy outlined by the author, the CESL should be made applicable exclusively to the online environment first in the spirit of creating a smart instrument designed for today's digital world.

The online environment is also an area of law where there is a need for regulation. Namely, the law applying to electronic commerce is a complex patchwork of case law, state and federal

¹⁶¹ COMMON EUROPEAN SALES LAW – COMMENTARY (Reiner Schulze ed., 2012) [hereinafter CESL COMMENTARY].

¹⁶² DIE HARD 4.0 LIVE FREE OR DIE HARD (Cheyenne Enterprises 2007).

statutes, as well as international law, and it is undergoing substantial revisions.¹⁶³

Differentiation would be favorable even within the online environment. Accordingly, the first stage of the way towards *the* One Common European Sales Law could be the introduction of a European instrument regulating only transactions for the supply of digital content, since this is the area where straightforward and clear regulation would be the most necessary. Exactly this need for clear rules is what could attract jurists to opt for a uniform instrument and apply it in practice. This is the area, where alternatives are scarce and where parties cannot resort to other instruments, not in the least to a uniform instrument designed specifically to accommodate transactions for digital content. Consequently, even if parties manage to establish the fractions from different national laws applicable to their cross-border transaction, they still have no common denominator.

In a second stage, the scope of the instrument could be extended to cover all sorts of e-commerce transactions. Once application in the online environment has paved the way for the success of the CESL, the scope of application of the already known and established instrument could also be extended to cover 'ordinary' sales transactions.

3.3. Formal Aspects

Already, the instrument on transactions for digital content should take the form of a regulation, because this would create a new, visible set of uniform rules on digital content. This is also the greatest advantage in comparison with a directive. Namely, even if a directive requiring full harmonisation is implemented, thereby unifying national laws in the EU, the directive itself remains invisible in the sense that parties cannot choose to apply 'the directive'; it is still national law that is applied.

In the further stages, the scope of this first regulation should be extended gradually. Regarding the extension, two approaches may be considered. One would be the introduction of an instrument regulating transactions for the supply of digital content only. In the consecutive stages, this initial regulation could either be amended by adding the provisions necessary so that the instrument could be applied to e-commerce transactions and then sales transactions in general, or rather, new regulations could be adopted incorporating the previous ones.

The other option would be the introduction of the regulation on the CESL as it stands, with the restriction that the CESL is only applicable to transactions for the supply of digital content. The

¹⁶³ LAW OF ELECTRONIC COMMERCE, *supra* note 151, at 1-2.

restrictions could then be lifted gradually so as to provide for an extended scope of application. In this way jurists would have in mind that a Common European Sales Law is about to be born, and perhaps, they would even start to apply it based on consent in arbitration.

C. 'Innovation that Excites'¹⁶⁴ – The Regulation of Transactions for the Supply of Digital Content in the CESL

1. The Necessity of Regulating Transactions for the Supply of Digital Content

The twenty-first century of smart phones and tablets is largely characterized by the online dissemination of digital content, i.e., transactions for the supply of digital content. Such transactions are mostly cross-border transactions, since the developers and distributors of an application or a software are usually seated in different countries. Both consumers and SMEs are heavily affected in this field, since consumers buy the applications, which are often developed and sold by SMEs, not only to consumers, but also to other enterprises.

It can be demonstrated with the example of the CISG as well, that trade in digital content often raises concerns, since sales laws have not been designed to govern transactions for the supply of digital content. Due to the specific features of such a transaction, these contracts are sometimes hard to accommodate within the architecture of a body of sales law. The terms of the CISG, a convention designed for sales of goods transactions in an age in which no smart device had ever been heard of, are sometimes interpreted so that the CISG can be applied to transactions in digital content and software. Still, even if the proposition that the CISG is a living document is accepted, meaning that its terms including the concept of goods shall be interpreted broadly, there are still problems with the non-sales elements in the given contracts as well as the question of the transfer of ownership.

Problems are just multiplied by the differences in legal regimes. In light of this, an instrument adequately regulating transactions for the supply of digital content could probably attract attention and would be welcomed. Seeing the application of such an instrument in practice, even the large players, i.e., the sophisticated enterprises, could be interested in resorting to applying it to their contracts concerning software and technology. Thus, the CESL could even constitute an alternative to the application and interpretation of the vaguely formulated CISG to online transactions. In this way, it

¹⁶⁴ Slogan of Nissan. See NISSAN-ME.COM, <http://www.nissanbrand-me.com/> (last visited Nov. 16, 2016).

would be worth it for Member States to make the 'high-tech' instrument available for the large enterprises as well. In the end, an instrument successfully regulating transactions for digital content may even be exported outside the EU.

2. The Regulation of Transactions for the Supply of Digital Content in the CESL

2.1. The Feasibility of Transactions for the Supply of Digital Content

In its Feasibility Study, the Expert Group has delivered a text constituting a complete set of contract law rules. All interested parties were invited to submit feedback on specific issues listed in the publication.

The last issue to be addressed was if a European contract law instrument should also cover the digital content itself, whether it is delivered on a durable medium or directly downloaded from the Internet. Namely, the text of the Feasibility Study only covers the durable medium on which digital content can be delivered.¹⁶⁵

Provided the answer is yes, there were further questions on whether the rules on pre-contractual information should be modified or whether it would be appropriate to include specific rules on the functionality of digital content, i.e., the ways in which digital content can be used, including any technical restrictions, whether the general rules on sales and remedies should be modified, or whether the instrument should provide for specific rules. In the case of specific rules, a further question was whether it would be appropriate to include a rule clarifying that for digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period, e.g., by way of updates which are free of bugs. If yes, the last questions concerned whether the general rule on passing of risk could be appropriate or whether it may be necessary to include specific rules.¹⁶⁶

2.2. Digital Content in the CESL

As we can see from the text of the proposed instrument, the answer to the basic question concerning digital content, i.e., whether it should be covered by the instrument, turned out to be yes. The present section aims to show how the CESL deals with digital content.

¹⁶⁵ Publication, *supra* note 105, at 9.

¹⁶⁶ Publication, *supra* note 105, at 9.

Defining its scope, Article 1 of the Proposal sets forth that the set of contract law rules set out in its Annex I, i.e., the CESL, can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.

The Preamble to the proposed Regulation explains the reasons for the extension of the scope of application of the instrument to include contracts for the supply of digital content as well. Accordingly, the CESL shall cover such contracts in order to reflect the increasing importance of the digital economy.¹⁶⁷ This is in conformity with the "Europe 2020" strategy as well as the Digital Agenda for Europe referred to above.

The Preamble points out that the transfer of digital content for storage, processing or access, and repeated use, such as music download, has been growing rapidly and holds a great potential for further growth. At the same time, the Preamble also, very correctly, drew attention to the fact that the transfer of digital content is still surrounded by a considerable degree of legal diversity and uncertainty. It set forth in a straightforward way that the CESL should therefore cover the supply of digital content irrespective of whether or not that content is supplied on a tangible medium.¹⁶⁸

The Preamble also drew attention to some peculiarities of transactions for the supply of digital content.

2.3. Offering More than the CISG - The Accommodation of Transactions for the Supply of Digital Content in the CESL

The application of the CISG to transactions in software may be problematic. There are differing views both in academia and in case law. The core problem is that a body of sales law like the CISG is generally designed to be used for sales of goods transactions, where usually tangible and movable objects qualify as goods, with the obligations of the seller being the delivery of goods and the transfer of property over the goods (Art. 30 CISG), and those of the buyer being the taking of the delivery and the payment of the price. So that the CISG can be applied to a transaction for the supply of digital content such as software, the broad interpretation of the term 'goods' is necessary. In addition, the transaction must also qualify as a 'sale' in accordance with Art. 3 CISG.

The most significant questions concerning contracts for the supply of digital content like software are, for example, whether it is supplied on a tangible medium, whether it is standard or custom-made or whether associated services to be performed by the seller change the character of the transaction. In addition, problems may

¹⁶⁷ COM (2011) 635 final, *supra* note 5, at 17-18.

¹⁶⁸ *Id.* at 18.

also arise concerning the transfer of property in the goods, due to the intellectual property rights retained by the seller, who is often also the copyright-holder. This can make it difficult to decide whether the transaction concerned is a sale or a license.

The general view is that the CISG is applicable both to contracts for the supply of standard software on a tangible medium, as well as to the online supply of standard software,¹⁶⁹ while there are views which only accept the applicability of the CISG to software transferred on a tangible medium.¹⁷⁰ Most legal writing does not make a difference between individualized or standardized software either.¹⁷¹ In order for the CISG to apply, (1) the buyer must purchase the software for an unlimited time period, (2) must be able to use the software as his or her property, (3) after paying the purchase price, and (4) is only prohibited from selling the software.¹⁷² According to the similar synthesis of another commentary,

“(…) If software is permanently transferred to the other party in all respects except for the copyright and restrictions to its use by third parties and becoming the other party's property – as opposed to mere agreements on temporary use against the payment of royalties – it can be the object of a sales contract governed by the CISG.”¹⁷³

The real problem with the CISG is that it is the United Nations Convention on Contracts for the International *Sale* of Goods, and that it applies to *contracts for the sale of goods* between parties whose places of business are in different states.¹⁷⁴ It is questionable to what extent a contract with a complex legal structure can be seen as a sale to make the application of an instrument possible.

¹⁶⁹ E.g., Frank Diedrich, *The CISG and Computer Software Revisited*, 6 VINDOBONA J. OF INT'L. COM. L. AND ARB., 55, 63-64 (2002); Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. OF COMP. & INT'L. L. 263, 278 n.77 (2003).

¹⁷⁰ Jacqueline Mowbray, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to E-Commerce Transactions: The Implications for Asia*, 7 VINDOBONA J. OF INT'L. COM. L. & ARB. 121, 128-29 (2003).

¹⁷¹ INGBORG SCHWENZER, CHRISTIANA FOUNTOLAKIS & MARIEL DIMSEY, INTERNATIONAL SALES LAW: A GUIDE TO THE CISG 23 (2d ed. 2012).

¹⁷² PETER SCHLECTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 31 (Springer 2009).

¹⁷³ SCHLECTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Art. 1 ¶ 18, 35 (Ingeborg Schwenzler ed., 3d ed. 2010).

¹⁷⁴ United Nations Convention on Contracts For The International Sale of Goods (CISG) art. 1(1), 19 I.L.M. 671 [hereinafter CISG].

Concerning the copyright related issues in case of a software transaction for example, one could argue that the licensing element is necessary exactly to make the sale possible. Namely, e.g., computer programs enjoy copyright protection pursuant to Art. 2 of the WIPO Copyright Treaty,¹⁷⁵ since they are protected as literary works.¹⁷⁶ The author of the program necessarily enjoys copyright protection; therefore, these rights must be settled somehow to enable the buyer of the software to use the software and reach the economic effect it wants to reach with the purchase contract. License elements in the contract may be one way of settling the IP related issues, since they guarantee the buyer's right to use the product without any interference from the seller as well.

However, at the time of drafting the CISG, its application to the supply of digital content did not constitute a point on the agenda; therefore, the CISG is basically not designed to fit such transactions. The accommodation of such transactions within the CISG is thus only possible through the interpretation of the terms of the CISG. That means that it is necessary to consider something a sale, which is, at the end of the day, something much more complicated. As one author put it, the application of the CISG to license contracts would be the opening of Pandora's Box, since otherwise there would be nothing to stop the temptation to apply the CISG to other types of contracts.¹⁷⁷

The Proposed Regulation solves the dilemma just like Alexander the Great cut the Gordian knot. Namely, under the CESL, a sales contract is always considered to be a contract for the delivery of goods.¹⁷⁸ The Proposal, however, does not consider digital content as goods.¹⁷⁹ The solution is in Art. 5 of the Proposed Regulation, which lists the contract types falling within the scope of application of the CESL. This also expressly includes contracts for the supply of

¹⁷⁵ World Intellectual Property Organization Copyright Treaty art. 2, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WIPO].

¹⁷⁶ *Id.* at art. 5.

¹⁷⁷ Hiroo Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* 512, 526 (Camilla B. Anderson & Ulrich G. Schroeter eds., 2008).

¹⁷⁸ CESL COMMENTARY, *supra* note 161, at 41.

¹⁷⁹ According to the definition of goods in Art. 2(i) of the Proposal, 'goods' means tangible movable items and excludes electricity and natural gas, as well as water and other types of gas unless they are put up for sale in a limited volume or set quantity. This definition is similar to what the term 'goods' encompass under the CISG and by and large corresponds to the definition given in Art. 2(3) of Directive No 2011/83/EU. Concerning digital content the CISG is silent, whereas the Directive provides that digital content supplied on a tangible medium qualifies as goods. In contrast to this, in accordance with Art. 5(b) of the Proposal contracts for the supply of digital content are to be treated separately from the sale of goods, and 'supply' also covers any supply regardless of the medium. *See* Council Directive 2011/83, art. 2(3), 2011 O.J. (L 304) (EU) [hereinafter 2011 O.J. (L 304)].

digital content. Basically, this means that the CESL does not apply to transactions for the sale of digital content, but it applies to transactions for the supply of digital content that are equivalent to a sales contract.

The definition of digital content in Art. 2(j) of the Proposed Regulation, read in conjunction with Art. 5 of the Proposal expressly solves several of the questions that have arisen with regard to the CISG.

Article 2(j) of the Proposed Regulation offers a very detailed definition of 'digital content':

“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 or 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 communications services and networks, and associated facilities and services;
- (v) gambling; and
- (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users.”¹⁸⁰

It is clear from the definition that the Proposed Regulation applies to transactions for the supply of digital content including software without regard to whether it is standard or customized.

As mentioned above, Art. 5 of the Proposed Regulation lists the contracts for which the CESL can be used. These are sales contracts (Art. 5(a)), contracts for the supply of digital content (Art. 5(b)) and related service contracts (Art. 5(c)).

Further, Art. 5(b) of the Proposed Regulation also expressly provides that the CESL may be used for contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price. This provision also settles in an explicit way several of the issues mentioned with regard to the CISG.

According to the provision, the digital content must be supplied in a way so as to make the contract equivalent to a contract of sale. Up to this point, it would not have much added value in comparison with the CISG, since the CISG is only applied to contracts with non-

¹⁸⁰ COM (2011) 635 final, *supra* note 5, at 22-23.

sales elements if the transaction is the economic equivalent of a sale. Still, the Proposed Regulation makes it clear that the CESL is not only there for sales transactions, but that other contracts may also come into play. The advantage of the CESL over the CISG is that Art. 5(b) of the Proposed Regulation lists the three cumulative conditions that must be met so that the contract will be the economic equivalent of a sale,¹⁸¹ instead of leaving this task to various courts and commentators. Accordingly, the digital content must be able to be (1) stored, (2) processed or accessed, and (3) re-used by the buyer.

Art. 5(b) of the Proposal also expressly mentions that the CESL applies irrespective of whether or not the digital content is supplied in exchange for the payment of a price. The aim of this rule is to handle situations where providers offer digital content seemingly for free, usually in exchange for user data.¹⁸²

In cases involving software and the CISG, Art. 3(2) CISG can also pose problems and can have the result that the CISG applies to some software transactions, while it does not apply to others. Namely, the CISG does not apply to contracts in which the preponderant part of the obligations of the party furnishing the goods consists in the supply of labor or other services.

Art. 5(c) of the Proposal provides that the CESL applies to related service contracts, irrespective of whether a separate price was agreed for the related service. Consequently, no preponderance test must be concluded, but the CESL automatically applies to the rendering of related services. These services may not only be services rendered under the contract for the supply of digital content, but also related services provided under a separate, but related, service contract.¹⁸³

D. E-Commerce Transactions

In 1997, the European Commission had already announced its intention to create a coherent legal framework within Europe by the year 2000,¹⁸⁴ also reflecting on the electronic commerce and internet revolution. An electronic Commerce Directive was indeed adopted in 2000,¹⁸⁵ setting up an Internal Market framework for electronic commerce.

¹⁸¹ CESL COMMENTARY, *supra* note 161, at 44-45.

¹⁸² *Id.* at 45-46.

¹⁸³ *Id.* at 46.

¹⁸⁴ *Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee, and the Committee of the Regions, a European Initiative in Electronic Commerce*, at 4, COM (97) 157 final (Apr.16, 1997) [hereinafter COM (97) 157 final].

¹⁸⁵ 2000 O.J. (L 178), *supra* note 126, at 1-16.

The 2010 Green Paper also specifically addressed the issue of e-commerce. Considering the problems arising due to the application of the mandatory consumer protection rules of the consumer's law in accordance with Art. 6 of the Rome I Regulation, the Paper found that the potential of cross-border e-commerce remains partly unfulfilled, to the detriment of both businesses, in particular SMEs, and consumers.¹⁸⁶ The Green Paper also referred to the fact that for 61% of cross-border e-commerce offers, consumers could not place an order because of the businesses refusing to serve the consumer's country.¹⁸⁷

With regard to the scope of application of the future instrument, the Paper also dealt with contracts concluded in the online environment, or more generally at a distance, constituting a significant proportion of cross-border transactions in the internal market and having the highest potential for growth. The Paper also considered the possibility of developing an instrument tailor-made for the online world. According to the Paper, such an instrument could be applicable in both cross-border and domestic situations, or only in cross-border situations.¹⁸⁸

According to the Communication "Europe 2020," citizens must be empowered to play a full part in the single market, which requires strengthening their ability and confidence to buy goods and services cross-border, in particular, online.¹⁸⁹

Due to the peculiarities of e-commerce transactions, consumers especially require protection. Currently, directives provide the guarantees in this regard. As of 13 June 2014, the new Directive 2011/83/EU¹⁹⁰ on consumer rights replaces Directive 97/7/EC on the protection of consumers in respect of distance contracts,¹⁹¹ and Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises.¹⁹² The new Directive contains significant, improved rules, providing for full harmonisation regarding, e.g., information requirements, withdrawal, delivery and passing of risk. The directive also provides for better consumer protection in relation to digital products and aims to provide common rules for businesses to make it easier for them to trade all over Europe.

¹⁸⁶ *Green Paper*, *supra* note 1, § 3.1

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 12.

¹⁸⁹ COM (2010) 2020 final, *supra* note 70, at 20.

¹⁹⁰ See generally Directive 2011/83 2011 O.J. (L 304) (EU). This directive amended Directive 97/7/ EC and Directive 85/577/EEC.

¹⁹¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144).

¹⁹² Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises, 1985 O.J. (L 372).

Consumer protection in distance contracts plays an important role in the proposed instrument as well. The Explanatory Memorandum also highlighted that e-commerce facilitates the search for offers and the comparison of prices and other conditions irrespective of where a trader is established. Still, consumers trying to purchase from other Member States often face refusal, often due to differences in contract law.¹⁹³

The Preamble of the Proposed Regulation highlighted that traders miss out on cost savings they could achieve if it were possible to market goods and services on the basis of one uniform contract law for all their cross-border transactions and, in the online environment, one single website.¹⁹⁴ The Preamble specifically referred to the fact that in e-commerce, website adaptations that need to reflect mandatory requirements of foreign consumer contract laws due to Art. 6 of the Rome I Regulation entail further costs.¹⁹⁵

The Preamble also sets forth that the CESL should be available in particular for the sale of movable goods, including the manufacture or production of such goods. According to the reasoning, this is the economically single most important contract type, which could present a particular potential for growth in cross-border trade, especially in e-commerce.¹⁹⁶

As outlined above, the scope of a successful instrument regulating transactions for the supply of digital content could be extended so as to apply to e-commerce transactions in a second step, paving the way for the birth of a complex instrument of contract law regulating all kinds of sales of goods transactions.

Conclusion

The story of the CESL could be summarized as that of a vintage draft with promising elements. Even if the creation of One Common European Sales Law in the European Union in the form of a regulation providing for an optional 29th regime of sales law may not be realized for the time being, the innovations in the text do provide bases for new legislative projects designed to keep pace with the fast-moving world of information technology. How the process can further develop, time will tell.

¹⁹³ COM (2011) 635 final, *supra* note 5, at 4.

¹⁹⁴ *Id.* at 15, Preamble (2).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 17.