Contract law and the Digital Single Market

Towards a new EU online consumer sales law?
This in-depth analysis aims to analyse the regulatory options for the revised proposal of the Common European Sales Law, as part of the Juncker Commission’s Digital Single Market strategy.

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EXECUTIVE SUMMARY

In May 2015, the Commission published its communication on the Digital Single Market Strategy, thereby fulfilling the second priority of Jean-Claude Juncker’s ‘Political Guidelines for the Next Commission’ of July 2014. One aspect addressed in the Strategy is to modify the proposal for a Common European Sales Law (‘CESL’) by the end of 2015. The modified proposal would address online consumer sales in the internal market, encompassing a set of mandatory EU contractual rights for domestic and cross-border online sales of tangible goods. The Strategy was followed with an 'Inception Impact Assessment' published in July, and a consultation with stakeholders is ongoing.

However, the field of online consumer sales is by no means a legal lacuna. Four existing Directives – on consumer rights (2011), e-commerce (2000), consumer sales (1999) and unfair terms in consumer contracts (1993) – jointly apply to domestic and cross-border online contracts, and provide for various consumer rights. In particular, consumers enjoy rights to information, to cancel an online contract without giving a reason within 14 days of its conclusion; they have access to four different remedies in case of non-conformity of goods shipped to them; and they are protected against unfair terms in the general terms and conditions imposed upon them by the trader. Two of the relevant instruments – the Directives on Consumer Sales (1999) and Unfair Terms (1993) pre-date the development of online consumer sales, and arguably need to be updated. Furthermore, the existing rules are scattered across four different EU directives and bringing them together into one, systematically arranged legal act would increase transparency and coherence.

The revamped proposal for an EU Online Sales Act will likely draw, to a greater or lesser extent, on the originally proposed CESL text, tabled by the Commission back in 2011. That regulation was intended to create an 'optional instrument' on sales law. This means that it did not seek to unify or harmonise national laws, but instead to create a parallel and optional regime governing sales contracts. However, the proposal was based on Article 114 TFEU, which is the legal basis for the approximation of laws (harmonisation) but, in line with Court of Justice of the European Union (CJEU) case law, may not be used for creating optional instruments. Controversy thus arose as to the legal basis of the CESL, voiced by national parliaments in the subsidiarity check mechanism. Ultimately, the legislative procedure stalled in the Council, before the Commission officially announced, in December 2014, its intention to revamp the text.

At least four central issues regarding the forthcoming proposal for an EU Online Sales Act require consideration. Firstly, the legal form – will the future online sales law be a regulation or a directive? Secondly, if the legal form of a directive is chosen, whether total harmonisation or minimum harmonisation would be most appropriate, taking into account the principles of subsidiarity and proportionality? Thirdly, whether it would be sufficient for the instrument to regulate cross-border trade, or must it also extend to purely domestic online transactions. The fourth issue is the 'country of origin principle' – should traders be allowed to rely on their domestic law when selling to consumers abroad? How does that fit with the current system of Rome I and Brussels Ia Regulations? Finally, the debate will have to focus on the content of the revamped proposal. Should it simply be copy-pasted from the original CESL, or rather tailor-made to cater specifically for the needs of parties to online transactions, where both consumers and traders have different interests and expectations than in the case of offline transactions?
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1. Background: Digital Single Market and contract law


*ambitious legislative steps towards a connected digital single market [...] by modernising and simplifying consumer rules for online and digital purposes.*

The contract law aspect of the Digital Single Market was already addressed in the Commission’s 2015 Work Programme, and in more detail, in its recently unveiled strategy. Indeed, one of the three ‘pillars’ of the strategy is 'better access for consumers and businesses to online goods and services across Europe'. Specifically, the Commission undertook to present, by the end of 2015, an amended proposal for a Common European Sales Law. As Commission staff are conducting consultations with stakeholders representing consumers and businesses, as well as workshops with Member States and an online public consultation, an 'Inception Impact Assessment' was unveiled in July 2015, outlining the Commission’s position on the matter.

Whilst the original proposal was for a regulation creating an optional sales law for cross-border transactions in Europe, to which the parties could opt in (see Section 4 below), the new proposal for an EU Online Sales Act will almost certainly abandon the controversial concept of an optional instrument. In the Digital Single Market Strategy, the Commission explained that the revised proposal:

*will (...) allow sellers to rely on their national laws, further harmonising the main rights and obligations of the parties to a sales contract. This will be done notably by providing remedies for non-performance and the appropriate periods for the right to a legal guarantee. The purpose is to ensure that traders in the internal market are not deterred from cross-border trading by differences in mandatory national consumer contract laws (...).*
It is not clear from the Digital Single Market Strategy whether the EU Online Sales Act will be a regulation or a directive, and both options are taken into consideration in the Inception Impact Assessment. The Commission has, however, made clear statements as to its scope and content, announcing that it will:

*make an amended proposal [for an EU Online Sales Act] by the end of 2015 (i) covering harmonised EU rules for online purchases of digital content, and (ii) allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods.*

The present analysis aims to provide the necessary background information for the debate on the future EU Online Sales Act. In particular, Section 2 analyses EU competence to regulate contract law, a particularly disputed issue under the original CESL proposal which has a direct impact upon the scope, form and content of the future EU Online Sales Act. The analysis also offers a survey of existing EU legislation applicable to online consumer sales contracts (Section 3), in the guise of four directives (on consumer rights, consumer sales, e-commerce and unfair terms). A brief presentation of the original proposal for a Common European Sales Law (Section 4) is followed by an analysis of the regulatory options for the new EU Online Sales Act (Section 5), which the Commission plans to unveil shortly. Section 6 concludes the paper.

## 2. EU competence to regulate contract law

### 2.1. Three guiding principles

The attribution and exercise of EU powers to enact any legislative measure – including contract law – is subject to three principles:

- firstly, the **principle of conferral** which answers the question *whether* the EU is competent in that field?;
- secondly, the **principle of subsidiarity**, which answers the question whether, if the EU is competent in a given field (and that competence is shared with the Member States), *should* it actually enact legislation?; and
- thirdly, the **principle of proportionality**, which – provided that the first two questions are answered in the positive – answers the question *how should the EU legislate?*

### 2.2. Principle of conferral

Unlike national legislatures, which are, in principle, free to enact legislation in any field they wish (with the exception of areas of exclusive EU competence), EU co-legislators are bound by the will of the Member States, expressed in the Treaties, laying down the precise fields of potential EU legislative activity. This is in line with the **principle of conferral** (Article 5(2) TEU), according to which the EU retains only those competences conferred upon it by the Member States.

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10 'Inception impact assessment...', p. 4.
11 Ibid.
Member States have not explicitly conferred the competence to legislate in the field of contract law upon the EU, in contrast to other areas of private law, such as transnational civil procedure (Article 81 TFEU), private international law (also Article 81), certain aspects of company law (Article 50), certain forms of intellectual property law (Article 118) and, to a limited extent – labour law (Article 153 TFEU).

2.3. Contract law and approximation of laws (Article 114 TFEU)

The fact that the Member States have not granted the Union an explicit competence to issue regulations or directives in the field of contract law does not automatically mean that any such legislation is ultra vires. This is because contract law provides the legal framework for economic transactions in the internal market, such as sale of goods or provision of services. Therefore, contract law may be implicitly encompassed by the EU’s competence to harmonise Member States' laws whenever their divergence interferes with the smooth functioning of the internal market (Article 114 TFEU). Furthermore, since the Maastricht Treaty, the EU enjoys an independent mandate to protect consumers (Article 169 TFEU), and such protection takes place, inter alia, through the harmonisation of laws affecting the internal market (Article 169(2)(a) in conjunction with Article 114(1) and (3) TFEU).

However, as the Court of Justice has ruled on several occasions, the mandate to harmonise laws in order to ensure the proper functioning of the internal market does not give the EU legislature carte blanche to harmonise any laws it wishes. The Union does not enjoy a general competence to legislate in the internal market, and mere disparities between national legal systems are not enough, per se, to justify harmonisation measures. Such legal differences must constitute a real or potential obstacle, which the EU legal measure must genuinely aim to remove.

Harmonisation of contract law always represents an interference with national legal systems, with their cultures, traditions, as well as political and ideological choices (made within the European nation-states). Therefore, in order to harmonise private law on the basis of Article 114 TFEU, the EU legislature must show not only that there is divergence between domestic laws, but also that such divergence hampers the smooth functioning of cross-border economic exchange and that harmonising those rules will effectively help such exchanges to take place.

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14 Article 81 TFEU is confined to international civil procedure and private international law, and cannot be used to regulate substantive private law – see M.W. Hesselink, J.W. Rutgers J.W & T. Q. de Booy, (The legal basis for an optional instrument on European contract law, Policy Department C short study, PE 393.280 (EP, 2008), p. 22; J. Bełdowski, M. Zachariasiewicz, 'Nowy etap...', p. 7.

15 For an overview of areas of EU competence in private law see Rafał Mańko, EU competence in private law: The Treaty framework for a European private law and challenges for coherence, EPRS in-depth analysis, PE 545.711 (EPRS, 2015).

16 Case C-376/98 Germany v Parliament and Council (Tobacco Advertising I), ECLI:EU:C:2000:544, para. 84; Case C-380/03 Germany v Parliament and Council (Tobacco Advertising II), ECLI:EU:C:2006:772, para 41, 80.
Critics argue that empirical evidence is yet to be adduced, and that the preambles of EU legal acts do not pay sufficient heed to this requirement. Furthermore, in order to trigger the competence provided for in Article 114 TFEU it must be shown that the rules of private law in question fall within the scope of free movement and obstruct entry to a market. Concluding her analysis of CJEU case law on Article 114 TFEU, J. W. Rutgers points out that:

rules of private law do not constitute, in general, an obstacle to the internal market, but only in specific areas there may be an obstacle to trade. Only in those instances, does the European Union have the power to adopt harmonizing measures.

Furthermore, EU competence to harmonise national laws affecting the internal market belongs to the category of 'shared competences', and is therefore shared between the Member States and the Union (Article 4 TFEU). Unlike exclusive competences, shared competences are exercised at both the EU and domestic levels. However, to the extent that the EU has exercised its competence, the Member States are precluded from issuing their own legislation in that specific area (Article 2(2) TFEU), unless national rules implementing an EU directive are concerned. Conversely, should the EU abrogate its legislation, the power of the Member States to legislate freely in that area will be revived (Article 2(2), sentence 2 TFEU).

2.4. Principle of subsidiarity

The exercise of competences which the EU shares with its Member States – and contract law belongs to this group – is subject to the principle of subsidiarity. The EU may legislate in a given area only if it is demonstrated that Member States are not able to deal with it efficiently on their own, and that the EU is in a better position to do so. The principle of subsidiarity (Article 5(3) TEU) creates a presumption in favour of a narrow interpretation of EU competence in case of doubt. For instance, it could be argued that whilst Member States are in a good position to enact legislation applicable to purely domestic contracts (where both trader and consumer reside in the same country), they are unable to cater satisfactorily for cross-border transactions (see Section 5.3 below). Whilst previous to the Treaty of Lisbon, the only body monitoring the correct application of the principle of subsidiarity was the Court of Justice (which was rather reluctant to do so), this has changed since, with national parliaments both involved at the stage of adoption and vested with the power to bring actions to the

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23 J. W. Rutgers, ‘European Competence...’, p. 314, with further references.
CJEU for violation of the subsidiarity principle after legislation is enacted.\textsuperscript{24} To summarise, the Treaty of Lisbon strengthened and juridified\textsuperscript{25} the principle of subsidiarity and the positions expressed by national parliaments on the CESL (see Section 4.2.2 below) are a good example of this process.

### 2.5. Principle of proportionality

When exercising its competences, whether shared or exclusive, the EU must always abide by the principle of proportionality (Article 5(4) TEU). This means that any measure the EU resorts to must not exceed the ends which are to be pursued. A less invasive legislative measure is to be preferred if it is capable of attaining the goal pursued. If it is not, a more intrusive form of EU legal act may have to be deployed.

The principle of proportionality governs the choice of legal instruments, unless a specific type of instrument is prescribed by the competence norm itself (Article 296 TFEU). This means, \textit{inter alia}, that non-binding instruments should be preferred over binding ones. Within the remit of Article 114 TFEU, both directives and regulations may be issued.\textsuperscript{26} Amongst binding instruments, preference needs to be given\textsuperscript{27} to those which are less intrusive, i.e., in principle, to minimum harmonisation directives (which set a minimum common standard) before total harmonisation directives (which do not leave Member States any choice), and, in principle, to directives before regulations.\textsuperscript{28} The difference between total (maximum, full) harmonisation and minimum harmonisation is analysed in more detail in Section 5.2 below.

The necessity of resorting, for instance, to a total harmonisation directive instead of a less invasive minimum harmonisation instrument needs to be demonstrated. Likewise, the need for a regulation, as opposed to a directive, also requires justification.

This picture is somewhat complicated if the level of intensity of EU measures is combined with its scope \textit{ratione materiae}, and in particular with its extension to purely cross-border transactions or also to domestic ones. Despite the more intrusive, as a matter of principle, nature of a regulation, it can be argued that a regulation which would apply exclusively to cross-border transactions would be a milder, i.e. more proportionate, legislative measure than a directive, which would indistinctly apply to purely domestic transactions. This aspect will be discussed in more detail in Section 5.3 below.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{24} See Protokol No 1 on the role of national parliaments in the EU, Article 3; Protokol No 2 on the application of the principles of subsidiarity and proportionality, Articles 6-8.
  \item \textsuperscript{26} M.W. Hesselink, J.W. Rutgers & T.Q. de Booy, \textit{The legal basis...}, p. 24. See also Article 296 TFEU.
  \item \textsuperscript{27} The Protocol on the application of the principles of subsidiarity and proportionality in its version attached to the Amsterdam Treaty explicitly provided that ‘Other things being equal, directives should be preferred to regulations and framework directives to detailed measures’ (para 7), and that ‘Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the treaty.’ These very explicit passages disappeared from the protocol in its Lisbon version, replaced by the broader formulation of Article 296 TFEU.
\end{itemize}
\end{footnotesize}
3. Existing EU legislation regarding online consumer sales

3.1. Not a legal lacuna, but in need of an update

Online sales contracts within the EU are by no means a legal lacuna. Whereas there is no legal instrument which specifically addresses the problems posed by such contracts, they are covered by existing legal instruments, both at EU and Member State level. In particular, consumers’ information rights and the right of termination at will (cooling-off period) are regulated in the Consumer Rights Directive; the seller’s liability for non-conformity of the object sold, as well as guarantees, are regulated in the Consumer Sales Directive; the legality of fine-print terms in a sales contract falls within the scope of the Unfair Terms Directive; and the e-Commerce Directive provides the legal framework for online consumer transactions. Furthermore, the Unfair Commercial Practices directive protects consumers from rogue traders, including those active in the digital environment. However, it does not regulate contract law per se (Article 2(2)).

Nevertheless, it must be borne in mind that many of these legal instruments were enacted long before the advent of digital online sales. The Unfair Terms Directive, for instance, dates back to 1993, when the internet was still a rare phenomenon; and the Consumer Sales Directive to 1999, when online sales were only beginning to appear. Therefore, their content may need to be revised in order to be adapted to the particular issues posed by online consumer transactions.

The Commission has announced, in its Work Programme for 2015, that it will subject the Unfair Terms Directive, Consumer Sales Directive and Unfair Commercial Practices Directive to a screening exercise as part of the REFIT (regulatory fitness) programme.

Furthermore, the regulatory picture is fragmented, with four different EU legal acts (and relevant national implementing provisions) being applicable to online contracts which does not (always) make it easy to determine the legal regime. Therefore, in the interest of legal certainty, coherence and transparency, consolidation of the existing legislation applicable to online consumer sales transactions could be considered desirable.

3.2. The Consumer Rights Directive

3.2.1. Scope and harmonisation methodology

The Consumer Rights Directive was enacted in times when online consumer sales were already growing – the proposal dates from 2009 and the Directive was adopted in 2011. Member States had until the end of 2014 to implement the Directive. It is a total

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harmonisation directive (Article 4), and it replaces two minimum harmonisation directives – the Distance Selling Directive and the Doorstep Selling Directive.

It applies to any contract concluded between a trader and consumer, regardless of the modality of its conclusion, i.e. whether it was concluded face-to-face, on or off the trader’s premises, online or offline (Article 3(1)). It even includes utilities contracts for water, gas, electricity or heating (Article 3(1)). However, some contracts are excluded from the directive on account of subject matter. This is either because they are regulated in other directives (e.g. package travel, financial services, timeshare property) or on account of their specific features (e.g. contracts for social services, such as social housing or social child care, healthcare contracts, construction contracts).

3.2.2. Information rights and contractual formalities

The Directive imposes a set of detailed information duties incumbent upon traders (Articles 5-6), as well as formal requirements regarding the contract document (Articles 7-8). Consumers enjoy an at-will right of withdrawal (Articles 9-15) for contracts concluded at a distance and off-premises, which applies (indistinctly) to all digital contracts. The standard deadline for exercising the right of withdrawal is set at 14 days from the conclusion of the contract (Article 9). The consumer does not need to give any reason and will not incur any costs, save those of sending the goods back to the trader, if the latter previously warned the consumer that he would have to bear that cost (Article 14(1)). Consumers are actually allowed to 'handle the goods' in order to 'establish [their] nature, characteristics, and functioning' (Article 14(2)) and may not be held liable for any reduction in value as a result of such handling.

For instance, consumers are allowed to unpack a book or item of clothing in order to see if the book is interesting for them or if the item of clothing fits. Traders may not charge consumers for such unpacking and inspection.

3.2.3. Rules on digital content

The Consumer Rights Directive contains rules specifically designed for the digital environment. In principle, consumers cannot withdraw from a contract for the provision of digital content if they have already used the content, i.e. either unpacked a CD-ROM or downloaded the content from the internet.

Specifically, consumers lose the right of withdrawal if they unseal digital content provided on a tangible medium, such as CD-ROM [Article 16(i)]. They also need to pay for downloaded digital content, unless they did not give their consent to the download, did not acknowledge the loss of their right of withdrawal, or if the trader infringed duties regarding the form of the contract and information duties [Article 14(4)(b) and Article 16(m)].

3.2.4. Miscellaneous rights

Furthermore, the Directive provides for a number of additional rights for consumers, besides those relating to information and termination-at-will rights. Thus, consumers have a (default) right to the timely delivery of goods, and in any event delivery must take no longer than 30 days (Article 18). In cases of later delivery, a consumer may cancel the contract. Fees for using a given means of payment (e.g. a credit card) must

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34 Some contracts are excluded on account of the modality of their conclusion: those for the supply of consumer goods intended for current consumption in the household physically supplied by a trader on frequent and regular rounds to the consumer’s home; concluded by means of automatic vending machines or automated commercial premises; concluded through public payphones or for the use of one single connection by telephone, internet or fax. See Article 3(3)(j), (l) and (m).
be limited to the actual cost borne by the trader (Article 19). The risk of damage to the goods passes to consumers, in principle, only once the goods are actually delivered to them (Article 20). Calling a trader's hotline may only be subject to a basic fee (Article 21). The consumer must have explicitly consented to any extra fees charged in addition to the price, and these may not be imposed by way of default options (prohibition of pre-ticked boxes) (Article 22).

3.3. The Consumer Sales Directive

3.3.1. Scope and harmonisation methodology
The Consumer Sales Directive dates back to 1999 and is based on a proposal submitted by the Commission in 1996, long before the development of digital consumer sales. The Directive applies (indistinctly) to all consumer sales transactions, regardless of the modality of their conclusion. Therefore, online sales are also covered by its scope. The Directive is a minimum harmonisation instrument (Article 8).

3.3.2. Consumer's remedies in case of 'non-conformity'
The Directive introduced the concept of 'conformity with the contract' (Article 2). It extends the traditional concept of liability for faulty goods to include liability for any public statements regarding the goods (e.g. in advertising or promotion materials). Sellers may escape this liability only if they can show that they were either not aware of such statements, or that the statement was corrected before the sale took place, or that the consumer’s decision to buy was not influenced by such a statement. The burden of proof lies with the seller. The deadline for pursuing remedies in case of non-conformity is set at two years from delivery of the goods.

The Directive divided the consumer’s remedies into two groups – primary remedies (repair, replacement) and secondary remedies (price reduction, rescission). The secondary remedies are available only if the primary remedies cannot be completed, or if the seller has failed to complete them in a timely manner and/or without significant inconvenience for the consumer.

As regards the primary remedies, consumers have the right to propose which remedy they prefer (repair or replacement). However, the trader may refuse the remedy proposed by the consumer, and offer the alternative remedy instead, if the remedy required by the consumer is deemed 'disproportionate', i.e. if it is 'unreasonable' in comparison with the alternative remedy, proposed by the trader, taking into account:

- the value the goods would have if they were in conformity with the contract;
- the significance of the non-conformity;
- whether the alternative remedy (proposed by the trader) can be completed 'without significant inconvenience' to the consumer.

Ultimately, consumers may demand the remedy they prefer (replacement or repair), but the trader may refuse that remedy and impose the alternative remedy, acting against the will of the consumer.

The secondary remedies are subsidiary, i.e. they are available only if:

- neither of the two primary remedies is available;
- the seller has not completed a primary remedy within a 'reasonable' time;

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35 The only exceptions are the supply of goods to be manufactured (emptio rei speratae) [Article 1(4)] and the optional exclusion of sales of second-hand goods at an offline auction (in-person attendance) [Article 1(3)].
• the seller has not completed a primary remedy 'without significant inconvenience to the consumer'.

The choice between the secondary remedies is made exclusively by the consumer, i.e. the trader cannot force an alternative remedy upon the consumer, as is the case with primary remedies. However, the consumer may not use the rescission remedy (cancellation of the transaction and full refund) if the non-conformity is 'minor'.

### 3.3.3. Optional guarantees

On top of liability for non-conformity, which is obligatory in business-to-consumer transactions, the Directive also provides for an optional guarantee (Article 6). The conditions of such a guarantee are laid down in the guarantee statement and in any associated advertising. The guarantor can be any third party; and need not be the seller, or the producer. A consumer has the right to obtain the conditions of the guarantee in writing or another durable medium (e.g. digitally). A guarantee does not in any way affect the legal rights of the consumer with regard to remedies for non-conformity.

### 3.3.4. Remedies in a Digital Single Market

Although written before the massive development of online consumer sales, the Consumer Sales Directive is applicable to all forms of commerce, including distance sales. However, in the Digital Single Market, the adequacy of the Directive's rules regarding consumer's remedies in case of non-conformity could be questioned. In particular, consumers buying online in a distant Member State might have a preference for rescission or price reduction, rather than be forced to accept e.g. repair or replacement; especially if, after discovering the non-conformity, they no longer trust the quality of the product purchased initially, and would prefer to return it in order to buy a different one (and/or from a different seller). Whilst the same logic may apply to consumers buying online in (larger) Member States, it is even more relevant to cross-border shopping, where distances and shipment costs are higher, and linguistic as well as cultural differences make it more difficult to negotiate repair or replacement, and make the consumer's need to cancel the contract more pressing.

If a Polish consumer buys from a Polish online shop, in case of non-conformity they can make a phone call and explain the problem. However, if a Polish consumer has bought from a Spanish online shop, such a course of action is more cumbersome for linguistic and cultural reasons (e.g. different usages of trade). The consumer will prefer, as a rule, to cancel the contract altogether and get a refund.

### 3.4. The e-Commerce Directive

#### 3.4.1. Scope and harmonisation methodology

The e-Commerce Directive, enacted 15 years ago, was intended to 'ensure the free movement of information society services' between the Member States (Article 1(1)). It is a minimum harmonisation directive (Article 1(3)). Among the various topics covered by its scope, the e-Commerce Directive is also applicable to online contracts.

#### 3.4.2. e-Contracts

The Directive obliges Member States to ensure that contracts can be concluded in a digital environment (Article 9(1)). The fact that they have been concluded in electronic form may not hamper their legal effect in any way. Member States may, however, provide that certain contracts may not be concluded electronically, such as contracts to create or transfer rights in immovable property (but must allow for electronic rental contracts), contracts requiring the involvement of public authorities or professionals
exercising public authority (e.g. notaries), contracts of surety, and contracts in the field of family law and the law of succession.

3.4.3. Information rights
The Directive sets out detailed information rights of the parties concluding an electronic contract, which are mandatory in the case of consumer contracts, but may be waived if both parties are professionals (Article 10).

3.5. The Unfair Terms Directive
3.5.1. Scope and harmonisation methodology
The Unfair Terms Directive applies to all business-to-consumer contracts across the EU, be they cross-border or domestic, concluded online or offline. Owing to the fact that the Directive is a minimum harmonisation instrument, Member States may retain or introduce higher standards of consumer protection (above the ‘floor’ set by the Directive).

The prohibition against ‘unfair’ terms extends only to those terms of a consumer contract which have not been individually negotiated, and in particular those which were drafted by the professional party in advance, including 'one-off' pre-formulated contracts. However, terms which concern the main subject matter of the contract, such as those regarding the price to be paid for the goods, are also excluded from review by courts, provided that they are drafted in plain and intelligible language. Conversely, if the language of the terms regarding the main subject matter is obscure and unintelligible, a court may test their fairness.

3.5.2. Duty of courts to review terms on their own initiative
The CJEU held that national courts have the power and duty to ascertain the unfairness of a standard term under their own motion, even if demanded by neither party. National law may not limit this power of the judge, which stems directly from EU law. However, the court must have all the necessary legal and factual data.

3.5.3. The concept of unfairness
The Directive defines unfairness by resorting to broadly formulated standards of ‘good faith’ and ‘significant imbalance’ (Article 3). The CJEU fleshed out these broad concepts by inviting national courts to take into account the nature of the goods or services for which the contract was concluded, all the circumstances attending the conclusion of the contract, and the consequences of the term under the national law applicable to the contract. Furthermore, national courts also need to examine the other contractual terms, the default rules of national law which supplement the contract (implied terms), whether the term was drafted in plain, intelligible language, and whether the consumer has a right to cancel the contract.

An annex to the Directive contains an indicative and non-exhaustive list of potentially unfair terms. It does not create a presumption of unfairness.

37 Joined cases C-240/98 to C-244/98 Océano Grupo Editorial, ECLI:EU:C:2000:346.
38 Case C-473/00 Cofidis, ECLI:EU:C:2002:705.
40 Case C-76/10 Korčkovská, ECLI:EU:C:2010:685.
41 Case C-472/10 Invitel, ECLI:EU:C:2012:242.
3.5.4. Effects of unfairness
The Unfair Terms Directive states that the consumer is not to be bound by an unfair term, adding that the remainder of the contract should remain in force if it can be upheld without the unfair terms. These rules have been developed by the CJEU. According to its case law, national law may provide that the whole contract be void if protection of consumers is better served.\textsuperscript{42} Furthermore, an unfair term is not binding regardless of whether the consumer contests its validity; nevertheless, if the consumer explicitly requests that the unfair term be applied, the national court may do so.\textsuperscript{43} When assessing whether a consumer contract containing one or more unfair terms can continue to exist without those terms, the national court cannot base its decision solely on a possible advantage for the consumer, but should rather adopt an objective point of view.\textsuperscript{44} In any event, the national court may not rewrite the unfair term.\textsuperscript{45}

4. The original proposal for a Common European Sales Law

4.1. Road to the proposal

4.1.1. The (Draft) Common Frame of Reference
Formally speaking, the Commission has announced that it will not withdraw the proposed Common European Sales Law (CESL), which was not backed by the Council, but amend it. The origins of the CESL proposal go back to the 1990s, when the Tampere European Council (1999) requested\textsuperscript{46} a study on the possible need to harmonise Member States' private law. In reply to the Tampere mandate, the Commission launched a debate on European contract law in 2001.\textsuperscript{47} In consequence, the Commission proposed the creation of a \textit{Common Frame of Reference} (CFR) containing principles, definitions and model rules for European contract law, and also contemplated the idea of an optional instrument.\textsuperscript{48}

A network of experts delivered a draft CFR ('DCFR') in 2009.\textsuperscript{49} They drew heavily on the drafting output of the Study Group on a European Civil Code (SGECC) and the Acquis Group, from which the experts were drawn.\textsuperscript{50} Whilst the Acquis Group intended to draw up a restatement of existing EU contract law, the SGECC worked on a draft European Civil Code, drawing heavily on the Principles of European Contract Law (PECL) prepared by the Lando Commission in the 1980s and 1990s.

Although the DCFR, known as the 'academic' CFR was to provide the basis for a definitive ('political') CFR, the Commission has not indicated whether and when a final

\textsuperscript{42} Case C-453/10 Pereničová, ECLI:EU:C:2012:144.
\textsuperscript{43} Case C-243/08 Pannon GSM, ECLI:EU:C:2009:350.
\textsuperscript{44} Case C-453/10 Pereničová, ECLI:EU:C:2012:144.
\textsuperscript{45} Case C-618/10 Calderón Camino, ECLI:EU:C:2012:349.
\textsuperscript{46} Presidency Conclusions – Tampere European Council, 15-16 October 1999.
CFR may be expected. A 'political CFR' may take the form of an inter-institutional agreement and be binding on the Commission as well as the co-legislators as a background structure ('toolbox') for drafting future legislation in the field of contract law, especially with regard to common concepts and terminology. However, the only end-product to result, for the time being, from the 'academic' DCFR has been the proposed CESL. Furthermore, the DCFR has been criticised for lacking any democratic legitimacy.  

4.1.2. Green Paper and 'feasibility study'  
With its 2010 Green Paper, the Commission re-consulted the public on possible policy options, including an optional instrument. The European Parliament backed the idea of such an instrument in a resolution of 2011. In the meantime, in 2010, the Commission set up an 'Expert Group on the Common Frame of Reference in the area of contract law', and appointed 18 members, mainly distinguished academics. In 2011 the Expert Group drew up a 'Feasibility Study' including a draft instrument on sales law, mainly inspired by the DCFR (published in 2009). On the basis of the Feasibility Study the Commission prepared its proposal for a Common European Sales Law, tabled in October 2011.  

4.2. Commission proposal (2011)  
4.2.1. An optional instrument on sales law  
The proposed CESL was intended to be an 'optional instrument', meaning it would contain, in its annex, a single set of pan-EU rules which would exist in parallel to Member States' contract law. Those rules would have the legal force of an EU regulation, and therefore would be directly and uniformly applicable across the EU (Article 288(2) TFEU). However, their applicability to a concrete contractual relationship would not be automatic, but would depend on the parties' decision (the 'blue button' idea).

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52 Professor von Bar, head of the SGECC, was strongly opposed to the idea of a toolbox, urging that an optional code be adopted. See P. Brulez, 'From the Academic DCFR...', p. 1043-1044.  
55 European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses [2011/2013(INI)].  
57 See 'The composition of the Expert Group on European contract law' on the Commission website.  
58 See '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', available on the Commission website.  
Furthermore, although uniform across Europe, the CESL would not be, strictly speaking, a '29th legal system', which could be chosen instead of a specific national law under conflict-of-law rules.\textsuperscript{61} The contract would still be governed by the law of a given Member State, but within that national law, the uniform EU-law CESL regime, based on a directly applicable regulation, would apply. Therefore, opting for CESL would not be a choice of law\textsuperscript{62} in the sense of the Rome I Regulation,\textsuperscript{63} but would be a choice within a domestic legal system.

Thanks to this, national contract laws would \textbf{neither be replaced nor harmonised}, but would remain intact and exist in parallel to the uniform CESL regime. The CESL was to apply on an 'opt-in' basis, that is, only if parties were to opt for it in a specific cross-border contract for the sale of goods or digital content, and for related service contracts. A consumer would have to explicitly consent to the use of CESL, after receiving information on its content. This would allow for \textbf{regulatory competition} between the existing national rules on the one hand (applicable under the Rome I Regulation), and the CESL. However, opting for the CESL would be possible only on an all-or-nothing basis, limiting the parties' flexibility to shape the contractual relationship.\textsuperscript{64}

The proposed substantive rules would encompass, \textit{inter alia}, the conclusion of a contract, the determination of its content, obligations and remedies, damages and interest, restitution and time limits for making claims. Buyers would have free choice of remedies (repair, replacement, or termination of the contract). All aspects not regulated in the CESL would be governed by the law of a Member State, chosen or applicable by default under the Rome I regime. As regards the level of consumer protection provided in the CESL, it was argued that some Member States have a higher level of protection, but that the CESL would provide a higher-than-average overall level.\textsuperscript{65}

\subsection*{4.2.2. Controversial legal basis}

Controversially, the Commission invoked the legal basis of internal market harmonisation (Article 114 TFEU), rather than the flexibility clause of Article 352 TFEU. Most authors argue that Article 114 TFEU cannot be the basis for an optional instrument, but that the flexibility clause should be used instead.\textsuperscript{66}

This view is founded on established CJEU case law. In its opinion 1/94\textsuperscript{67} the Court ruled that:

\begin{quote}
\textit{the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles [114-115 TFEU] and may use Article [352 TFEU] as the basis for...}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item Ibid., p. 24.
\item E. Łętowska, 'Co znaczy...', p. 8.
\item View expressed by L. Berlinguer (S&D, Italy) during debate in Parliament. See the report from the debate in \textit{Council document no. 6749/14}, p. 3.
\item J. W. Rutgers, 'European Competence...:', p. 316-317.
\item \textit{Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property}, ECLI:EU:C:1994:384, para. 53.
\end{enumerate}
\end{footnotesize}
creating new rights superimposed on national rights, as it did in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark....

In the subsequent case of Netherlands v Parliament and Council (Patentability of biotechnological inventions) the Court confirmed this view.\(^68\) Both Opinion 1/94 and Netherlands v Parliament and Council could be given a narrow reading, whereby they apply only to intellectual property law. However, the subsequent case of Parliament v Council (Societas Cooperativa Europaea)\(^69\) indicates that the *ratio deciderendi* behind the Court’s case law is more general, and boils down to the illegality of enacting any kind of optional instruments (not only in IP law) on the legal basis of approximation of laws in the internal market (Article 114 TFEU).\(^70\) In other words, the notion of "measures for harmonisation" within the meaning of Article [114 TFEU] *do not include new [EU] instruments that co-exist with national rules.*\(^71\) Indeed, in Parliament v Council the Court presented the *ratio deciderendi* by pointing out that:

> the contested regulation (...) *leaves unchanged the different national laws already in existence* [and therefore] cannot be regarded as aiming to approximate the laws of the Member States’ [as required by Article 114 TFEU]\(^72\)

Furthermore, the fact that the Societas Cooperativa Europaea Regulation,\(^73\) as was supposed to be the case with the CESL regulation, was to refer to national law for subsidiary (fall-back) rules, did not invalidate the Court’s finding (para. 45). Reading the earlier case law (Opinion 1/94, Netherlands v Parliament and Council) in the light of Parliament v Council, seems to indicate that the notion of 'approximation' within the meaning of Article 114 TFEU does not extend to establishing optional instruments, whether they provide for an optional regime of property rights, legal personality or contracts.

This reading of the Court's case law is shared by most scholars, who have also clearly indicated that an optional instrument cannot be based on Article 114 TFEU, but that Article 352 TFEU should be invoked instead, with all the ensuing institutional implications (Parliament gives consent, Council acts unanimously).\(^74\) Furthermore, within the legislative proceedings on the proposed CESL regulation, four national

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\(^68\) *Case C-377/98* Netherlands v Parliament and Council (Patentability of biotechnological inventions) ECLI:EU:C:2001:523, para. 24.

\(^69\) *Case C-436/03* Parliament v Council (Societas Cooperativa Europaea), ECLI:EU:C:2006:277. The CJEU ruled that a new, optional form of legal personality cannot be based on Article 114 TFEU, but must be based on Article 352 TFEU. It also pointed out that optional EU intellectual property rights likewise need to be based on the flexibility clause (before Lisbon there was no special legal basis for these). Whilst the judgment does not explicitly deal with optional contractual regimes, is clearly indicates that optional property rights and optional legal personality forms cannot be based on Article 114 TFEU, which allows generalisation of the Court’s findings.

\(^70\) See: e.g. A. Kunkiel-Kryńska, *Metody...*, p. 175.


\(^72\) *Case C-436/03* Parliament v Council (Societas Cooperativa Europaea), para. 44.


parliaments invoked a wrongful application of Article 114 TFEU and an infringement of the principle of subsidiarity.\(^\text{75}\)

### 4.2.3. Position of the European Parliament

In September 2013, the Legal Affairs Committee (JURI) adopted its report,\(^\text{76}\) (by 22 votes to 17 with 1 abstention) backing the proposal, and in particular the optional character of the instrument and the legal form of a regulation. Importantly, the Parliament opted for limiting the scope \textit{ratione materiae} of CESL to distance contracts only.

The JURI Committee relied on the feedback from two other committees, associated for opinion. The Committee on the Internal Market and Consumer Protection (IMCO) suggested changing the \textit{legal form of CESL to a directive}, which would harmonise certain aspects of the seller's liability towards consumers, thereby supplementing the existing Consumer Rights Directive.\(^\text{77}\) The IMCO Committee had 'fundamental doubts concerning the suitability of the Commission proposal' and warned that:

\begin{quote}
Creating an additional, optional instrument, and effectively placing the decision on the choice of instrument in the hands of the trader, would \textbf{complicate the legal situation} and would \textbf{disadvantage the consumer} in particular. The legal uncertainty which could be created by the introduction of an optional sales law represents an avoidable risk for the operation of the single market. [...] [I]n the absence of case law, it would take many years before the [CJEU] had given final rulings on the interpretative issues raised by the Common European Sales Law.
\end{quote}

A more favourable view was taken by the Committee on Economic and Monetary Affairs (ECON), which stressed the political difficulties entailed by total harmonisation, and therefore supported the optional instrument.\(^\text{78}\)

In February 2014, the Parliament adopted its legislative resolution on the CESL\(^\text{79}\) (by 416 votes to 159, with 65 abstentions). It proposed to limit the scope of the CESL to distance contracts, including online contracts, which are cross-border contracts (amended Article 4), and only if the seller of goods or the supplier of digital content is a trader (amended Article 7). In other words, the Parliament expressed the will to limit the CESL to \textit{cross-border business-to-consumer transactions only}.

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\(^{75}\) Opinion of the German Bundestag on CESL (30.11.2011); Opinion of the Austrian Federal Council on CESL (30.11.2011); Opinion of the Belgian Senate on CESL (6.12.2011); House of Commons, Opinion of the UK House of Commons on CESL (1.12.2012). The Polish Government also opted for Article 352 TFEU as the appropriate legal basis, although the Polish Parliament did not adopt a formal reasoned opinion (E. Łętowska, ‘Co znaczy…’, p. 8 no. 18).


4.2.4. **Lack of backing in the Council and announced modification**

Although discussed on many occasions in the Council, the CESL proposal never received the backing of that co-legislator. The fate of the CESL proposal was decided on 16 December 2014, when the Commission officially placed it on the list of proposals to be modified or withdrawn, indicating that the proposal will be '[m]odified (...) in order to fully unleash the potential of e-commerce in the Digital Single Market'.

5. **Towards a new Online Sales Act as part of the Digital Single Market Strategy**

5.1. **Legal form – directive instead of regulation?**

The wording of the Digital Single Market Strategy (see Section 1 above), speaks of 'harmonisation', rather than 'unification', of the rules governing online sales in the EU. However, the 'Inception Impact Assessment' states that proposed EU Online Sales Act 'will create uniform rules for digital products avoiding legal fragmentation', but simultaneously speaks of 'a fully harmonised targeted set of mandatory rules'.

Harmonisation' or 'approximation' is commonly understood as bringing national laws closer to each other (by way of a directive), whilst 'unification' is understood as their replacement by a uniform (EU) legal act (by way of a regulation). This inconsistent choice of words by the Commission, and the explicit mention of a regulation in the Inception Impact Assessment, indicates that both options (i.e. total harmonisation directive or regulation) are being considered at this stage. In any event, even if a regulation is tabled, one aspect is almost certain: it will not be an optional instrument which neither harmonises, nor unifies domestic laws, but creates a parallel regime.

The idea of an optional European sales law, available for cross-border transactions on an opt-in basis, which was the essence of the CESL, will therefore most probably be abandoned. Harmonisation of contract law by way of directives on the basis of Article 114 TFEU is less controversial than resorting to this legal basis for an optional instrument, and already has a 30-year old tradition in the EU.

In line with the principles of subsidiarity and proportionality applicable to areas within the reach of EU shared competences (see above, Section 2), if possible, preference should be given to a directive over a regulation. This is because regulations are the most far-reaching instruments of EU law which completely replace previously existing national law. Finally, an argument in favour of directives (especially minimum harmonisation directives) over regulations, is that they respect the legal cultures and

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81 'Inception impact assessment...', p. 3.
82 Ibid., p. 4.
83 J. Bełdowski, M. Zachariasiewicz, 'Nowy etap...', p. 4 n. 2.
85 G. Liebnacher in: EU-Kommentar, op.cit., § 37, p. 126.
legal traditions of Member States, which are particularly cherished in the field of contract law.

However, this picture needs to be nuanced somewhat in the sense that a cross-border-only regulation could be less invasive than a directive also applicable to domestic legal relationships. Indeed, it has been argued that 'harmonisation of national law is both intrusive and disruptive to national legal systems and therefore in conflict with the proportionality principle.' A cross-border-only regulation could help to avoid this problem (see Section 5.3.3 above).

5.2. Total harmonisation?

If a directive is chosen as the legal form for the proposed EU Online Sales Act, the principle of proportionality requires that precedence is given to minimum harmonisation over total harmonisation, if this is sufficient to attain the directive's purpose. However, it is not fully clear from the communication whether the revised proposal will provide for total (full, maximum) or rather minimum harmonisation. However, both from the wording of the Digital Single Market Strategy (which does not mention 'minimum standards' but rather speaks of a 'focused set of key mandatory EU contractual rights'), and especially from the purpose of the instrument, it seems that the Commission's preference will be for total harmonisation. In the Inception Impact Assessment, the Commission clearly indicates that the proposed directive 'could either be a minimum harmonisation directive or a full [total] harmonisation directive.'

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**Total harmonisation, minimum harmonisation and unification: of floors and ceilings**

Directives are referred to as 'two-stage legislation', because – in contrast to regulations – they are addressed to the Member States and not to private parties. Only in the second stage, when Member States transpose the directive into their national laws, are the rules (of the national implementing measures) addressed to all legal subjects (citizens, companies, etc.).

A minimum harmonisation directive contains semi-mandatory rules directed to the Member States. They need to implement the minimum standard of protection (e.g. of consumers) required by the directive, which is a 'floor'. However, they may introduce or maintain a higher level of protection, provided that they do not infringe the fundamental freedoms of the Internal Market which constitute the 'ceiling'. Therefore, the legislative discretion of Member States implementing a minimum harmonisation directive lies between the 'floor' of the directive's minimum standard and the 'ceiling' of the fundamental market freedoms, or more generally, the Treaty provisions.

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88 J. Bełdowski, M. Zachariasiewicz, 'Nowy etap...', p. 4.
91 'Inception impact assessment...', p. 4.
94 B. Kurcz, 'Harmonisation...', p. 297. Kurcz points out that 'Member States cannot hide behind minimum harmonisation in order to justify hidden protectionism.'
In contrast, total (maximum) harmonisation, **conflates the floor and ceiling** leaving the Member States with no room for manoeuvre. They must implement the standard provided for by the directive, without departing from it; neither in favour of consumers, nor in favour of businesses. Full harmonisation directives are similar to regulations95 (in the sense that they do not leave the national legislatures any discretion as to substance), but at the same time they differ from regulations in that they still require national implementing provisions to be enacted (thereby leaving some freedom to the Member States as regards the form of implementation). Nevertheless, the actual effects of total harmonisation (by directive) and unification (by regulation) are very similar.

At this point, it is useful to recall that the currently applicable Consumer Sales Directive is a minimum harmonisation instrument, which applies equally to online and offline sales in the internal market. The Consumer Rights Directive, which was implemented by the Member States by the end of 2014, is a total harmonisation instrument, whilst the Mortgage Directive96 – a recent piece of EU consumer legislation – provides for minimum harmonisation. Clearly, despite a tendency towards more total harmonisation, visible since 2005, at present it is difficult to predict with certainty whether the Online Sales Act, if it is a directive, will follow the total or minimum harmonisation model.

5.3. Scope – online contracts, domestic and cross-border?

5.3.1. **Expected scope: online consumer sales, including purely domestic, contracts**

A third aspect is the **scope** of the revised proposal. The initial CESL proposal, submitted in 2011, was to be applicable to all cross-border transactions, be they online or offline. The Parliament opted for its limitation to **online transactions** only. It seems that Parliament’s view will prevail, but on the other hand the revised proposal will probably also be applicable to **domestic** transactions. This is deemed, by the CJEU, permissible under Article 114 TFEU,97 and indeed all existing EU contract law in the form of directives is applicable to domestic and cross-border transactions alike. It seems therefore highly probable that the revised proposal will cover all **online transactions**, **be they cross-border or domestic**. It remains to be seen whether, in the course of legislative proceedings, the EU co-legislators will accept such a broad scope or rather will opt to limit the directive to cross-border sales only.

Furthermore, whilst the original CESL was also to apply, to a certain extent, to transactions between businesses (if one of them was an SME), it seems highly probable that the proposal for an EU Online Sales Act will be limited to **consumer transactions only**, as is explicit from the Digital Single Market Strategy.

However, the Inception Impact Assessment indicates that at the present stage the Commission intends98 to cover distance contracts, both online and offline, and is considering whether to also include within the scope of the EU Online Sales Act purely

98 'Inception impact assessment...', p. 5.
commercial transactions (business-to-business contracts). Furthermore, it is analysing whether all or only some digital content products should be included, as well as considering the possibility of including contracts for the provision of digital content products against a counter-performance other than payment, e.g. access to a product in exchange for personal data.

5.3.2. An option: only cross-border contracts?

Among European private law experts, Christian Twigg-Flesner has notably argued recently for limiting the revised CESL to cross-border distance sales, understood as sales contracts concluded between a consumer and trader based in two different Member States.\(^99\) He would also include, as a matter of exception, contracts concluded in a situation when a trader 'has actively attracted consumers from another jurisdiction' to come to the trader's country and conclude a contract there, as his intent to enter a cross-border transaction is explicit.

The logic that a single market should be governed by a single set of rules makes sense with regard to a genuinely single market in a socio-economic sense. However, whilst there is a single market of online consumer sales, there are also, in parallel, purely domestic online markets, where consumers buy from traders from their own Member State, rather than from abroad.\(^100\) Various reasons lie behind the existence of such markets, especially issues of trust (domestic sellers are more familiar), linguistic (possibility to write an email or make a phone call in one's own language) and logistic (domestic vs. international shipment, not least if the product needs to be repaired/replaced).\(^101\) Empirical research (surveys) seems to confirm, therefore, as J. J. Kuipers pointed out, that '[t]he extent to which the variety of national contract laws really discourages parties to engage in cross-border trading tends to be overstated.'\(^102\)

Consumers, buying from domestic online sellers have legitimate expectations that the domestic level of protection, typical of their Member State, will apply. And the trader, choosing to sell only domestically, is certainly not threatened by the 'surprise' of foreign law. This is an argument in favour of making the EU Online Sales Act applicable to online cross-border transactions, leaving domestic transactions to national contract law systems with their idiosyncratic choices fuelled by legal cultures and underlying socio-economic conditions.

The country of origin principle (See Section 5.4) would alter this situation, transferring the risk of 'legal surprise' to consumers.

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\(^99\) Ch. Twigg-Flesner, ‘CESL, Cross-Border Transactions and Domestic Law: Why a Dual Approach Could Work (Although CESL Might Not)’, ERPL 23.2 (2015): 231-250. See also his earlier paper: "Good-Bye Harmonisation...".

\(^100\) This happens if auction platforms or websites allowing price comparisons for consumer goods (and to click directly to the chosen online shop) encompass only offers from the same country, as is often the case.

\(^101\) For instance, in Poland 45% people shop online domestically, whilst only 13% shop from abroad. Within the EU, on average in the 47% consumers buy online in their own country, 17% abroad but within the EU and 8% outside the EU. In a recent survey, Polish online consumers, when asked why they prefer not to shop cross-border on the internet, indicated issues of security and trustworthiness (18%), the possibility of picking up the product in person and/or low costs of shipment (13%), linguistic barriers (12%), speedy delivery (10%), payment issues (e.g. exchange rates, need to have a credit card) (6%), and local patriotism (6%). Only 4% consumers mentioned legal differences as a factor preventing them from shopping abroad. See E-Commerce Polska – Izba Gospodarki Elektronicznej [E-Commerce Poland: Chamber of Electronic Economy], E-Commerce w Polsce 2014 [E-commerce in Poland in 2014], p. 34-37; Flash Eurobarometer 358, p. 16.

Furthermore, Twigg-Flesner argues that limiting the instrument to cross-border sales only would have the benefit of allowing national lawmakers to continue catering to the needs of local consumers, with a view to the circumstances prevalent in 28 quite different Member States.\(^\text{103}\)

Obviously, the existence of a uniform regime for cross-border sales, and 28 distinct national regimes for domestic sales would create challenges for coherence and would inevitably lead to fragmentation. However, Twigg-Flesner argues that this would not be a problem, provided that the cross-border sales instrument were clearly geared towards specific, cross-border problems.\(^\text{104}\)

5.3.3. Principle of subsidiarity and cross-border only regulation

The EU's competence, based on Articles 114 and 169 TFEU, read in the light of the principle of subsidiarity, is also an argument in favour of limiting the future instrument to cross-border transactions only.\(^\text{105}\) As Twigg-Flesner points out:

Member States are perfectly capable of legislating for consumer contracts at domestic level, but what they cannot do individually is to adopt legislation on transactions in other Member States, or for cross-border transactions. Those kinds of contracts are properly within the competence of the EU level. (...) EU legislation dealing only with cross-border transactions would be in accordance with subsidiarity, because individual Member States cannot create a legal framework to regulate cross-border transactions that would be applicable in all other Member States.\(^\text{106}\)

On the other hand, an argument against having a separate EU online sales law and domestic online sales law could be the risk of systemic incoherence. However, this risk would be minimised by the fact that each market (domestic, European) would have its own set of rules, and traders wishing to sell abroad would be aware that a different set of rules apply than with regard to domestic transactions. Practical difficulties could also arise when determining whether a given contract is cross-border or not.\(^\text{107}\)

5.4. Country of origin principle?

5.4.1. Seller's law applicable to online consumer contracts?

Even the most comprehensive online sales act cannot possibly encompass all imaginable legal rules applicable to a transaction. Therefore, a risk of 'legal surprise' of rules from outside the scope of a harmonisation or unification measure exists. This has led the Commission, in its discussion on the future EU Online Sales Act, to table the country of origin principle. The Commission explicitly mentions this, in stating that the new instrument will 'allow sellers to rely on their national laws' which are to be 'based on a focused set of key mandatory EU contractual rights'. This would mean that the law applicable to the online sales contract would be the law of the seller's seat or residence, rather than the law of the consumer's seat or residence. In the Inception Impact Assessment, the Commission seems to consider a two-track approach, whereby the country of origin principle would be applicable to tangible goods only, but not to digital content products.\(^\text{108}\)

\(^{103}\) Ibid., p. 245.

\(^{104}\) Ibid., p. 246.

\(^{105}\) J. Bełdowski, M. Zachariasiewicz, 'Nowy etap...', p. 9.

\(^{106}\) Ch. Twigg-Flesner, "Good-Bye Harmonisation...", p. 251.

\(^{107}\) J. Bełdowski, M. Zachariasiewicz, 'Nowy etap...', p. 9.

\(^{108}\) 'Inception impact assessment...', p. 4.
Country of origin principle: size matters

The country of origin principle could certainly help small firms, particularly sole traders selling online, to enter the market in other Member States. This is because they do not have the necessary resources to obtain legal advice on the laws of other Member States. Provided that consumers are sufficiently warned about the risks and give informed consent to the applicability of foreign law, they should, arguably, have the right to opt for such a transaction in order for example, to buy the same product for less (trading off legal uncertainty versus price). However, this rationale is not valid for medium and especially large enterprises, which usually trade through their foreign subsidiaries or, in any event, have sufficient resources to seek legal advice before entering a foreign market.

If the Online Sales Act were to be in the form of a regulation, i.e. a directly applicable act of EU law which takes precedence over national law, the country of origin principle would be automatic (same set of rules), however only within the subject-matter scope of the regulation. Outside that scope, the choice of law and the possibly applicable mandatory rules of another jurisdiction would still be important.

Even the original CESL proposal, which was quite a comprehensive instrument, failed to address all possible private-law aspects of a cross-border sales transaction (let alone public law issues, such as taxation, licences etc.).

The original CESL proposal, for instance, did not cover such areas as legal capacity to enter into a contract, illegality of the contract, immorality of the contract, representation to enter into the contract, plurality of contracting parties, change of parties. Indeed, it seems highly unlikely that the revised proposal for the EU Online Sales Act would include these topics which are either complex (e.g. representation, plurality of parties), or potentially sensitive (e.g. immorality).

5.4.2. Amending the consumer protection rule of the Rome I Regulation?

If the country of origin principle were really to be implemented, so that online traders would no longer risk surprise with higher standards of consumer protection abroad, the protective rule of Article 6 of Rome I would have to be amended so as to exclude online consumer sales contracts, as the Commission admitted explicitly in the Inception Impact Assessment.

Currently, Article 6(1) of Rome I provides that in the absence of a choice of law, such contracts are governed by the law of the country where the consumer has their habitual residence, provided that the trader’s business activity (encompassing the contract in question) is either pursued or at least directed at the country in which the consumer is resident. This rule is intended as a means of protecting the consumer as the weaker party to the contract in those situations in which a consumer lives in a country with a higher standard of consumer protection, but the seller is located in a country with a lower standard.

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111 ‘Inception Impact Assessment...’, p. 4.
The Rome I Regulation allows, in Article 6(2), for the parties to a consumer contract to make a choice-of-law agreement. However, such a choice may not have the result of depriving the consumer of the protection afforded to him by mandatory provisions of his jurisdiction. In other words, the consumer may lose the protection provided by default rules of his home law, but the mandatory rules of the consumer's country of residence must still be applicable, even if the law of a different country applies.

If the protective rule of Article 6, Rome I (lex specialis) was to be amended in order to exclude online consumer sales contracts from its scope, the lex generalis of Article 4(1) of Rome I would apply. This rule provides that in the absence of an explicit choice of law by the parties, a contract for the sale of goods is governed by the law of the country where the seller has their habitual residence.

If that were actually implemented, then the entire cross-border legal relationship between a consumer and a trader, created via an online transaction, would be subject to the law of the trader’s place of business. All aspects of the legal relationship, not only those within the scope of EU directives and regulations, would, in such a case, be subject to the law of the seller's country (lex venditoris).

This raises the question whether consumers would indeed, in such circumstances, become more confident in cross-border online shopping than at present, when they enjoy the double protection offered by Rome I (consumer's home law applicable to the sales contract) and Brussels la112 (consumer may be sued only in their home jurisdiction and may also sue there if they wish). Clearly, depriving consumers of the protection currently offered by Article 6 would be favourable to businesses, especially SMEs which often cannot afford complex legal advice. On the other hand, this would take place at the expense of the legal protection offered to consumers.

A contract takes (at least) two parties to agree, and an online consumer sales contract, to be concluded, presupposes a certain level of trust and confidence on both sides. It is a valid argument that sellers should be protected against legal surprises in the consumer's legal system, but this argument also works in the other direction: consumers should also be protected from legal surprises in the legal system of the seller's jurisdiction (such surprises of course lurk outside the scope of the EU Online Sales Act).

A fully fledged country of origin principle, whereby the seller's contract law would apply to the entire legal relationship would simply reverse the 'burden of the surprise'.

Whilst at present, under Article 6 of Rome I, it is the trader who needs to cope with legal surprises, under the country of origin principle, the online consumer would be exposed to such risk.

Until now, EU contract law has been based on the principle that the consumer is a weaker party who needs protection from the trader, who is the stronger party. Reversing the 'burden of legal surprise' by introducing a fully fledged country of origin principle would go against this principle.

5.4.3. Country of origin principle and overriding mandatory provisions

Removing online sales contracts from the scope of the consumer protection rule of Article 6 of Rome I would still leave the question of overriding mandatory rules open.

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According to Article 9 of Rome I, provisions which a country considers as 'crucial (...) for safeguarding its public interests, such as its (...) social or economic organisation' are applicable to a contract regardless of any other law otherwise applicable on the basis of choice of law or default rules on the applicable law. This means that the court which is hearing a contractual dispute may apply the overriding mandatory provisions of the *lex fori*,\(^\text{113}\) even if the contract is governed by foreign law.

This would become particularly relevant should the EU Online Sales Act take the form of a minimum harmonisation directive, allowing the Member States to provide for a higher level of consumer protection than in the EU Online Sales Act. Nevertheless, even if the new law were a total harmonisation directive or a directly applicable regulation, the issue of overriding mandatory rules would still be relevant for all aspects outside the scope of the EU Online Sales Act, such as, for instance, capacity to enter into a contract, immorality of the transaction, or representation.

This is because even if the future EU Online Sales Act provided for an amendment of Rome I with a view to making the law of the seller’s country govern the transaction, under Brussels Ia the dispute would still be decided by the court of the consumer’s place of residence (which has mandatory jurisdiction if the consumer is defendant and optional jurisdiction if the consumer is claimant).

The question whether consumer protection rules can count as overriding mandatory provisions is controversial in the literature, with some authors claiming that they cannot,\(^\text{114}\) whilst others argue the opposite.\(^\text{115}\) Likewise, national courts also do not agree on this matter. For instance, the German Supreme Court considers that consumer protection rules cannot be treated as overriding mandatory provisions, whilst English and French courts have ruled that rules protecting consumers and employees actually serve the public interest (and not only the individual interest of those weaker parties), and therefore can be applied as overriding mandatory provisions.\(^\text{116}\) Indeed, it has been argued that abusing weaker parties, such as consumers, is actually a threat to civil society.\(^\text{117}\) Furthermore, it should be underlined that consumer protection has been elevated to the dignity of a *fundamental right* in the now legally binding EU Charter, which presents another argument in favour of treating (at least certain) consumer protection rules as overriding mandatory provisions.\(^\text{118}\)

The CJEU has not yet pronounced itself on this matter, as no specific case on this topic has as yet been referred.\(^\text{119}\) However, some clues may be found in the Court's judgment in the *Unamar case*,\(^\text{120}\) according to which a national court may treat a mandatory rule of domestic law as overriding even if it implements a minimum harmonisation directive and

\(^{113}\) *Lex fori* ('the law of the court') – the law of the jurisdiction in which the court hearing a case is located.


\(^{116}\) Ibid., p. 149-150.


\(^{118}\) L.M. Van Bochove, ‘Overriding...’, p. 150.

\(^{119}\) Ibid.

\(^{120}\) Case C-148/12 *Unamar v Navigation Maritime Bulgare*, ECLI:EU:C:2013:663.
provides for a higher standard of protection. According to L. M. van Bochove, the Unamar judgment can be understood as 'confirming implicitly that a rule aimed primarily at the protection of a weaker party could be viewed as an overriding mandatory rule'.

The opponents of allowing the application of consumer rules of the forum, under the doctrine of overriding mandatory provisions, point out that consumers are already protected by Article 6 (which provides for the application of the law of the consumer’s country to the contract), and that Article 6 is a lex specialis with regard to Article 9 (lex specialis derogat legi generali – the more specific rule takes precedence over the more general one). However, this argument, regardless of its validity, would become irrelevant if the EU Online Sales Act implemented the country of origin principle and made an exception to the protective rule of Article 6.

Without aiming to be definitive in clarifying this issue, which remains a task for the Court of Justice at some future stage, it must be underlined that if the future EU Online Sales Act takes the form of a minimum harmonisation directive, the country of origin principle envisaged by the Commission could in practice be limited, at least in some countries, by the application of the overriding mandatory rules doctrine.

This situation could only be avoided by also amending Article 9 of the Rome I Regulation and providing that the doctrine of overriding mandatory provisions does not apply to the rights harmonised or codified in the EU Online Sales Act. However, such a far-reaching amendment of Rome I would be politically controversial and it seems doubtful whether it would gain support from the lawmakers.

5.5. What’s in a sales law? Decisions on the content

What the substance of the EU Online Sales Act will look like remains to be seen. Commentators expect that Parliament’s input to the original proposal (see Section 4.2.3 above) will be taken into consideration.

Drawing on the debate on the CESL, Christian Twigg-Flesner has made an interesting proposal with regard to the content of a legal instrument regulating cross-border contracts. Instead of looking for a compromise between the laws of the Member States or drawing inspiration from international instruments, he considers that the starting point could be the identification of the actual problems encountered by consumers in cross-border transactions. These rules could be different from the rules applicable to ordinary, domestic sales, where the seller is located close by and can assist the buyer, e.g. by repairing the faulty goods. Twigg-Flesner proposes to:

\[
\text{develop a tailor-made [legal] framework that would recognize that domestic and cross-border transactions do not give rise to the same problems as problems that require a different solution in the cross-border context.}
\]

121 Cfr. L. M. van Bochove, ‘Overriding…’, p. 149.
122 Ibid., p. 150.
124 Amendment of Article 6 is already politically controversial. In the context of the original CESL proposal, Martijn Hesselink commented that the amendment of Article 6 to limit consumer protection 'seems politically unviable' (M. W. Hesselink, An optional instrument..., p. 12).
126 Ch. Twigg-Flesner, 'CESL, Cross-Border...', p. 244.
127 Ibid., p. 244
As examples, Twigg-Flesner considers a system of 'network liability', whereby sellers of the same network in the consumer's country of residence would be liable for faulty goods purchased cross-border. He also points out that consumer confidence in cross-border sales should be built not so much through an elaborate and complex system of uniform rules (as per the original CESL proposal), but rather through a set of practice-oriented rules which would actually help consumers in cross-border situations.

Online and offline consumers: different interests, need for different remedies?

Consumer A, resident in Member State 1 buys a vacuum cleaner of brand X in a household electronics store 'S' in their town. The vacuum cleaner breaks down. It is reasonable for Consumer A to go to store 'S' and have the vacuum cleaner repaired or exchanged on the spot.

Consumer B, likewise resident in Member State 1, is an active online shopper and found the same brand X vacuum cleaner 30% cheaper in an online store in Member State 2, hundreds of kilometres away. When the vacuum cleaner finally arrives, Consumer B discovers that it is faulty. The online trader from Member State 2 offers, in line with the legal system of Member State 1 (and the Consumer Sales Directive) to repair the vacuum cleaner free of charge, with shipment to the trader and back for free.

However, Consumer B is not satisfied with this solution, as it will take a considerable amount of time. They would prefer to have the vacuum cleaner either repaired locally (in Member State 1) or simply send it back, at the trader's expense, and get a refund.

6. Outlook

Once the Commission unveils its revised proposal for an EU Online Sales Act, possibly before the end of 2015, it will open a new chapter in the process of Europeanisation of contract law which began in the mid-1980s. It can be expected that the proposed EU Online Sales Act, whether it takes the form of a directive or regulation, will draw on the substance of the Common European Sales Law, initially proposed in 2011. That text was based, in turn, on the Draft Common Frame of Reference which incorporated the drafting output of the Study Group on a European Civil Code (headed by Professor von Bar) and the earlier Commission on European Contract Law (headed by Professor Lando).

However, as with the revision of the consumer acquis initiated a decade ago, the fate of the CESL – never backed by the Council – has indicated that Member States are not prepared to give up too much of their sovereignty in the field of contract law. One reason is that the apparently 'merely technical' issues of contract law actually involve high political stakes.128 The revision of the consumer acquis was intended to replace eight EU contract law directives, based on the principle of minimum harmonisation, with a single Consumer Rights Directive, based on the principle of total harmonisation. Ultimately, only two directives were replaced.

When the CESL proposal was unveiled in 2011, it seemed that an optional instrument on EU contract law could be a way out of the deadlock between minimum and total harmonisation. If it is left to the parties to opt in or not to the CESL, then national contract law could be left untouched, and at the same time there could be an EU-wide legal alternative to the fragmentation of domestic private laws. However, serious constitutional doubts were raised as to the possibility of enacting an optional

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instrument on the basis of Article 114 TFEU, as well as controversy regarding the actual need for such an optional instrument for EU traders and consumers. Although the Parliament backed the proposal before the end of its previous term, it was never endorsed by the Council, and one of the first moves of the Juncker Commission was to announce, in December 2014, that the CESL, as it stands, will not be pursued, but replaced with a modified proposal.

The exact shape and content of the Commission’s modified proposal is yet to be seen, nevertheless many questions can and should already be debated. These include, in particular, the legal form of the EU Online Sales Act (regulation, total harmonisation directive, minimum harmonisation directive), its scope (cross-border contracts or also purely domestic transactions), the exact shape of the country of origin principle and, finally, the substantive content of the proposal. Whilst the Commission intends to cover both cross-border and purely domestic transactions, some authors have argued in favour of a dual contract law regime, with a cross-border regime provided by the EU legislature existing side by side with domestic legal regimes for purely internal transactions which do not involve parties from different Member States.

Whatever exact shape is given to the country of origin principle, announced in the Digital Single Market Strategy, it will certainly give rise to debate, especially with regard to its implications for private international law (the Rome I Regulation). Those Member States which provide for a higher level of consumer protection than currently foreseen by the Consumer Sales Directive may be unwilling to abandon this in cross-border transactions involving their consumers. On the other hand, the interests of consumers need to be balanced with the needs of small enterprises, especially sole traders looking forward to selling their goods online in other Member States. For financial and organisational reasons, they are unable to tailor their offer to each legal system separately, unlike larger players. A compromise solution could be the introduction of the country of origin principle for cross-border consumer sales, but retaining the doctrine of overriding mandatory rules in Rome I, which could serve as a 'safety valve' allowing courts to protect domestic consumers if the violation of their interests is particularly flagrant.

The idea of an optional instrument in contract law, initially put forward by the Commission 15 years ago, is now relegated, at least for the time being, to the history books. The exact legal form, scope and substantive content of the EU Online Sales Act will now be the subject for debate, as it inevitably involves political choices: the balancing of interests between traders (including SMEs) and consumers, as well as the balance of power between the Member States and the Union (regulation vs. directive, regulating cross-border transactions only vs. regulating also purely domestic transactions). Such choices certainly lend themselves to democratic debate.129

7. Main references


In its Digital Single Market Strategy, unveiled in May 2015, the Commission has promised to come up with a revised proposal for a Common European Sales Law by the end of the year. More indications have been given the Commission in an Inception Impact Assessment, published in July 2015.

The debate on the revamped proposal will have to address at least five crucial issues.

Firstly, the legal form – whether the future online sales law will be a regulation or a directive? Secondly, if the legal form of a directive is chosen, whether total harmonisation or minimum harmonisation would be most appropriate, taking into account the principles of subsidiarity and proportionality? Thirdly, whether it would be sufficient for the instrument to regulate cross-border trade, or should it also extend to purely domestic online transactions? A fourth issue regards the ‘country of origin principle’ – should traders be allowed to rely on their domestic law when selling to consumers abroad? How would that fit with the current system of Rome I and Brussels I Regulations?

Finally, the debate must focus on the content of the revamped proposal. Should it be copy-pasted from the original CESL, or perhaps tailor-made to online transactions specifically, where both consumers and traders have different interests and expectations than in offline transactions?