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**Proposal for a Regulation
on a Common European
Sales Law: a lawyer's
viewpoint**

NOTE

DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

**Proposal for a Regulation on a Common
European Sales Law: a lawyer's
viewpoint**

BRIEFING NOTE

Abstract

With reference to B2C transactions, the proposed CESL regulation seems to create unneeded complexity of the legal framework in which consumers and business have to operate, while establishing a burdensome procedure for the choice of CESL as applicable law in the contract. Apart from giving out a certain unease regarding the level of consumer protection afforded by the proposed regulation, such a procedure is likely to discourage both consumers and traders from opting in the system. As to B2B transactions, the CESL seems to overlap with the CISG. This international convention bears several similarities with the proposed CESL and has not proven to be a complete success. The reasons of this partial success may offer EU institutions important lessons for the purpose of avoiding the same problems in the CESL.

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LIST OF ABBREVIATIONS

B2B Business to Business

B2C Business to Consumer

CELS Common European Sales Law

CISG 1980 Vienna Convention for the International Sales of Goods

SME Small Medium Enterprise

EXECUTIVE SUMMARY

Background

The idea of a common European Contract law is being discussed since 20 years. After much discussion at academic level, with the Lando Commission and the Academy of Private Lawyers, the EU Institutions took action for the purpose of verifying the feasibility of a codification of EU contract law. The Commission launched public consultations on the subject and commissioned a study to a Group of Experts. The outcome of this process is the proposed regulation of the European Parliament and the Council for a Common European Sales Law of 11 October 2011.

CESL in practice

The proposed CESL will be an optional body of law which will add to the existing national contract laws and regulates both B2B and B2C transactions.

With reference to B2C transactions, the proposed regulation seems to overlap with Directive 2011/83/EU on consumer rights thus, creating unneeded complexity of the legal framework in which consumers and business have to operate. Moreover, the proposed regulation sets forth a particularly burdensome procedure for the choice of CESL as applicable law in the contract. Apart from giving out a certain unease regarding the level of consumer protection afforded by the proposed regulation, such a procedure is likely to discourage both consumers and traders from opting in the system.

As to B2B transactions, the CESL seems to overlap with the CISG. This international convention, which has become national law of its contracting States, bears several similarities with the proposed CESL and has not proven to be a complete success. The reasons of this partial success are many, and the EU institutions may gain important lessons from it for the purpose of avoiding the same problems in the CESL.

KEY FINDINGS

- **CESL overlaps with pieces of EU positive law.**
- With regard to **B2C transactions**, CESL has a very **similar scope of application to that of the Directive 2011/83/EU on consumer rights**.
- Directive 2011/83/EU is not yet fully implemented: it might be an option to wait until this is complete, in order to be able to draw some conclusions on its application in practice.
- The proposed regulation provides for a **very burdensome procedure** for choosing CESL to be applicable in a B2C contract.
- Having regard to B2B contracts, the proposed CESL seems to have a **very similar scope of application to the CISG**.
- The **Vienna Convention for the International Sales of Goods (CISG)**, as the proposed CESL, is an optional system which did not encounter the favour of the business community, and thus it **is not widely used**.
- An **analysis of the shortcomings** of the CISG may be **used as guidance** in refining the CESL with regard to B2B transactions.

The Commission proposal for a Common European Sales Law (hereinafter referred to as "**CESL**") has created much debate over both its real need, in the proposed form, and its possible interaction and overlaps with both national and Union law.

1 BACKGROUND

The idea of a common European Contract law has been discussed since 20 years. Originally, the project was carried out by two different groups of experts: on the one side the so called Lando Commission and on the other the Academy of Private Lawyers. The outcome of the work of the two groups were, in the case of the Lando Commission, the Principle of European Contract Law (PECL) and, in the case of the Academy of Private Lawyers, the *Code européen des contrats*.

As a reaction to these projects, the EU institutions started considering the opportunity to proceed with a codification of the law of contracts. The first step of this process has been the 2001 Communication on European contract law¹. With the aforementioned Communication the Commission launched a public consultation pertaining to the legal issues arising from the existing differences between Member States' contract laws. On the basis of the consultation, the Commission issued an Action Plan in 2003². At the core of the Commission's 2003 action plan was the aim of improving the quality and coherence of European contract law by establishing a Common Frame of Reference containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation.

On 1 July 2010, the Commission launched, for a period of six months, a public consultation (Green Paper) on different ways to make contract law more coherent in the EU. This Green Paper proposed a range of different policy options: (i) a '*toolbox*' setting out coherent definitions, principles and model rules on some contract law related issues, (ii) a Regulation proposing a uniform contract law which would replace all national contract laws or (iii) the idea of an optional piece of legislation which would constitute an alternative to existing national laws for parties to choose.

The Commission had set up, through a Decision of 26 April 2010³, an expert group on European contract law, with the task of developing a Feasibility Study on a possible future European contract law instrument covering the main aspects which arise in practice in cross-border transactions. To ensure close interaction between the Expert Group and the needs identified by consumers, businesses (mainly SMEs) and the legal profession, a key stakeholder group (so-called 'Sounding Board') was set up for the purposes of providing the Expert Group with practical input. The Feasibility Study commissioned was published on 3 May 2011 in the form of a '*toolbox*' for the EU institutions.

Following the extensive consultation with stakeholders, and on the basis of an impact assessment, the Commission has decided to bring forward a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.

¹ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398, 11 July 2001

² Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law: an Action Plan, COM(2003) 68, 12 February 2003

³ O J L 105/109, 27 April 2010.

2 CESL AND DIRECTIVE 2011/83/EU ON CONSUMER RIGHTS.

The proposal for a CESL brings about several discussion points, one of the main being its scope of application.

Originally meant to be a wider project on the general law of contractual obligations, its scope was then reduced to sales contracts with a particular focus on consumer protection in B2C transactions. Albeit focusing on consumer protection, the proposed regulation is more than this. In fact, it also covers B2B, where at least one of the parties to the contract is a SME.

In great synthesis, the above shows how the scope of application of the proposed regulation conflicts with already existing pieces of EU positive law. As regards the B2C provision, and thus the focus on consumer protection, the proposed regulation seems to overlap with the newly adopted Directive 2011/83/EU on consumer rights⁴.

In fact, the proposed regulation has an almost identical scope of application compared with the aforementioned Directive 2011/83/EU. The Directive – pursuant to its Article 3 – applies to “any contract concluded between a trader and a consumer”, whilst the proposed regulation applies to cross border contracts between traders and consumers. All in all, most – if not all – the contracts falling under the proposed regulation are already covered by Directive 2011/83/EU.

Not only the two instruments share the same, or a very similar, field of application but also most of the consumer oriented provisions included in the proposed regulation have a very similar, again if not identical, content. This in principle creates obstacles to consumers, undertakings and ultimately the legal practitioners. The overlapping of different bodies of law cannot be regarded as a tool to favour the weak contractual party nor to foster cross-border trade. In fact, the overlapping of different but similar pieces of legislation will have as an effect an increased legal uncertainty. From the prospective of the consumer, alleged beneficiary of the measures, this increased complexity of regulation would render cross-border purchasing even less attractive, as it would create deep uncertainty as to which legislation applies to the transaction.

Moreover, the optional nature of the proposed system, i.e. allowing parties to the contract to choose to apply this body of regulation to their contractual relation⁵, will probably mean that the CESL will only be rarely used. In a real life situation, in fact, the consumer wishing to purchase a good in a cross border transaction, which more likely than not will be an online purchase, will simply accept the trader's general terms of sales. In fact, it is common practice to make the execution of the contract conditional upon the purchaser's acceptance of seller's general sales terms and conditions.

Given the optional nature of the system, it is likely that the traders will opt for it only in the event they consider this body of legislation to be more favourable than the national legislation applicable to the contract. As already pointed out by many stakeholders, in fact, it is likely that the optional nature of the proposed system will favour phenomena of “cherry picking”, as the choice of applicable law in online transactions will be exclusively of the trader.

A further point must be made with regard to the duty of information provided for in the proposed regulation. As mentioned before, one of the explicit aims of the proposal is to create

⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22 November 2011, p. 64–88

⁵COM(2011) 635 final, articles 8 and 9.

a higher level of consumer protection in cross-border transactions. In the framework of this objective, the proposed regulation provides for a certain amount of information that the trader is compelled to give to the consumer, and for a particularly strict procedure to be followed in order to opt for the application on the CESL to the contract (articles 8 and 9 of the proposed regulation). Particularly, article 8, second paragraph of the proposed regulation provides that the *"agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium"*. Thus, the full set of contractual documents will be made of: (i) the sales contract itself, (ii) the agreement on the application of the CESL, and (iii) the confirmation, on a durable medium, from the trader. As Prof. Castronovo pointed out, this very prudent approach of the Commission towards the opt-in mechanism, which results in the exclusion of the application of national consumer law, seems to highlight a degree of uncertainty with respect to the degree of consumer protection that CESL will be able to afford⁶. Lastly, I can point out that the application of a system which increases consumer protection should be theoretically encouraged: the procedure set forth by articles 8 and 9 of the proposed regulation is very rigid and burdensome and may be perceived as not "user friendly". In the light of the above, the safeguards set by the Commission will discourage consumers from adopting the CESL, as they will create an unneeded procedural burden.

As a final systematic consideration, the proposed system heavily interferes with a legislative instrument – Directive 2011/83/EU – which is not yet fully implemented in the EU Member States, as its full transposition in the legal systems of the Member States is due by December 13th, 2013. As it has been pointed out by many contributors, including Prof. Castronovo, it would be wiser to wait for the full implementation of the Directive, in order to be able to verify how the system works in practice. The Directive, in fact, by providing for minimum harmonization, introduces some innovations in the legal system of the Member States. Taking Italy as an example, the Consumer Code will need to be amended as follows:

- The deadline for the consumer to decide to terminate the contract will be extended to 14 days from the current 10-day deadline;
- A new 30-day deadline needs to be introduced, within which the seller shall deliver the purchased goods. In the event the seller does not comply with the aforementioned obligation, the consumer will be free to set a new deadline for the seller, failing which he will be entitled to terminate the contract. Currently, the Italian legal system provides a similar mechanism only for some consumer contracts - thus the need to extend it to all of them.
- The Italian legislator will have to provide for more stringent information obligations in favour of the consumer.

The introduction of new requirements in the national legal system entails the need for an adjustment period and begs for relevant interpretation by the case-law of both national and EU courts. Only after this adjustment period an evaluation of the impact of the new body of law will be possible. In this context, the introduction of a new and similar body of law would have the effect of creating confusion at all levels of the economic system and, possibly, also at legislative level.

From a practitioner's perspective, it is not desirable either to deal with an optional legal instrument which is applicable only to some contracts. The multiplication of legal instruments regulating - or possibly regulating - the same factual situation will most likely multiply unneeded legal uncertainty and fragmentation and will also bear the risk of creating relevant interpretative problems ultimately hindering the smooth running of commercial transactions.

⁶ C. Castronovo, *Sulla Proposta di Regolamento Reattivo a un Diritto Comune Europeo della Vendita*, in *Europa e Diritto Privato* 2/12, pag. 298.

3 THE CESL REGULATION OF B2B TRANSACTIONS: INTERFERENCE WITH THE CISG AND LESSONS TO BE LEARNT

Moving now to B2B transactions, in fact, it is also in the Commission's intention to regulate sales between undertakings, as long as one of the contracting parties falls within the classification of SME⁷. However, as it is widely known, sales of goods between undertakings already constitute the object of an international convention: the 1980 Vienna Convention on the International Sales of Goods (hereinafter referred to "**CISG**" or the "**Convention**").

3.1 Comparison with the CISG

I believe that is important to analyze the practical experiences drawn from the application of the CISG, so as to understand how an EU regulation covering the same subject matter (albeit possibly limited only to SMEs) may work in practice.

The first fact which could be identified as relevant is that not all EU Member States adopted the CISG: the UK, Ireland, Malta and Portugal did not ratify the Convention, while Germany applied some reservations in adopting it. Particularly, Germany declared, upon ratifying the Convention, that it would not apply Article 1(1)(b) in respect of any State which had made a declaration that it would not be bound by Article 1(1)(b)⁸. This event may be clearly viewed as a signal from EU Member States that an invasive regulatory proposal may prove more difficult than expected.

Coming to the outcomes of the application of the CISG, some preliminary points should be set out. As the CISG regulates only commercial transactions, most of the cases are actually not accessible, since "more than 90% of international commercial disputes are (. . .) decided by international arbitral tribunals."⁹ As Berger again affirms, "the confidentiality of arbitration has always distinguished the arbitral process from adjudication by domestic courts. Also, awards by international arbitral tribunals [have been] frequently handed over from one practitioner to another in an informal way instead of being published in official collections."¹⁰

Second preliminary point which deserves to be highlighted is that – as the proposed CESL – the CISG is an optional system. The parties to the contract pursuant to article 6 of the CISG, are free to exclude the application of the CISG in their contract. Such choice, however, must emerge clearly and expressly from the contractual document, and therefore the simple choice of a national law as applicable law is not sufficient for this purpose¹¹. Apart from the technicalities of the exclusion, which have been created by case law, it is clear that the CISG system and the proposed CESL system have several points in common, thus a brief comparison may be of some use.

The experience with the CISG shows that the Convention is often opted out, as undertakings do not automatically favour uniform rules. The rate of opt-outs varies from one jurisdiction to

⁷ Please note that, pursuant to the proposed regulation, Member States may choose to extend the scope of application also to contracts where none of the undertakings falls within the SME classification.

⁸ Source: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>. Article 1(1)(b) provides for the application of the CISG when the rules of private international law lead to the application of the law of a contracting state to it.

⁹ Berger, "*The Creeping Codification of the Lex Mercatoria*", Kluwer (1999), pag. 65

¹⁰ *Ibid*, pag. 62.

¹¹ Albeit some scarce case law accepted an implied exclusion of the CISG (cfr, Trib. Di Padova, sez. Este 11/1/2005, *Ostoznik Savo v. La Faraona soc. coop. a r.l.* in *Rivista di diritto internazionale privato e processuale*, n.3/2005, p. 791) the vast majority of cases requires an express provision to derogate the application of the CISG.

another, but it remains rather common practice for businesses practice to opt out from the CISG¹².

The reason for this preference can be explained in many different ways. On the one side, it can be argued that unfamiliarity of undertakings with the CISG plays an important role in the choice of opting out. Unfamiliarity is on the side of both undertakings/entrepreneurs and practitioners, who often prefer to deal with laws of domestic origin rather than with domestic laws of international origin (as it is the case with the CISG in the contracting States). This preference for opting out then reinforces the overall unfamiliarity with the optional system and thus the opting out rate.

The experience of the CISG thus may lead us to think that an optional system will not – at least in B2B transactions – reach the objective set out by the Commission. It is likely, in fact, that undertakings will prefer to be bound by the legal systems they are familiar with and that practitioners, at least for some time after the entry into force of the future CESL regulation, will prefer to apply their law, or instruments with which they are familiar. The above is strengthened by the fact that the proposed regulation would primarily, if not exclusively, apply to SMEs, which are often characterized by a family-based management structure, as the Italian economic reality shows. In these situations, likely the entrepreneur will prefer to adhere to familiar legal and contractual models, on which probably time and money has been spent.

In this respect, the market practice shows that, once the undertaking has decided to opt out from the optional system, it is likely it will try to maintain this stance in all the contractual relations it enters into.

3.2 The reasons for the scarce use of the CISG: is there any lesson to be learnt?

As already mentioned, the CISG has not encountered the favor of its ultimate users, one of the many reasons being the fact that it is perceived as incomplete and not uniformly applied.

As to its incompleteness, the CISG regulates only some aspects of the contractual cycle, while recourse must be had to ordinary conflict of laws rules, in order to address these same issues. This actually leaves some room for legal uncertainty, which discourages undertakings from choosing the CISG system.

Apart from the actual shortcomings of the CISG, which do not constitute the object of this paper, the lesson to be learnt from the experience of its application is that, to be successful in the B2B sector, the proposed regulation has to be as complete as possible with respect to the needs of its designed beneficiaries: the businesses engaged in cross-border transactions.

The proposed text of the CESL does not provide for many important aspects of the life cycle of a contract. As it is apparent from the explanatory memorandum of the proposed regulation, the text proposed therein does not deal with a wide array of topics. To use the very words of the Commission:

“All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law

¹² L. Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyer's Choices of Law in International Sales Contracts*, 6 *Journal of Private International Law* 2 (2010), pp. 417- 464, N. Kornet, *The Common European Sales Law and the CISG. Complicating or Simplifying the Legal Environment?*, Maastricht European Private Law Institute Working Paper No. 2012/4

outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule.

These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law¹³.

Thus, ultimately, the CESL potentially might raise the same the same encountered with the CISG. In B2B transactions, in fact, the above issues are not of secondary importance and the fact that they are not addressed in the proposed body of law will probably have as ultimate effect an increased level of fragmentation, as national law will still be applied in respect to those areas. This will result in economic operators being most probably reluctant to adopt the optional system.

Ultimately, the text -as proposed- will not eliminate the very problem that it is designed to tackle, that is, the hurdles arising from the legal fragmentation of the market, since the same problem will most likely arise in consequence of the application of the CESL system.

3.3 The relation with CISG in respect of the choice of law

Another issue which may arise in the event of the adoption of CESL as it is currently drafted is the one pertaining to its interaction with the CISG in regulating the contract.

The CESL, in fact, would become applicable in legal systems where contracts are already regulated by two different bodies of law: the national contract law and the CISG¹⁴. The parties to the contract will be free to choose to apply the CESL, which will then exclude the application of the CISG, which excludes in its turn the application of the national legislation save, as already mentioned, an express provision in the executed contract.

The choice of the CESL, however, does not exclude the application of national law as the proposed text of the CESL does not provide for a full coverage of all the legal issues relating to the contract. Therefore, and for those aspects not expressly regulated by the CESL, the applicable law will have to be identified pursuant to Regulation 593/2008 (Rome I)¹⁵. Thus, in the event the parties do not expressly choose an applicable national law, the provision contained in article 4 of Rome I (applicable law in the absence of choice) will apply.

This, as mentioned before, is a major shortcoming in the proposed Regulation which will need to be tackled as legal and economic operators will have to resort to national laws, identified by the rules of Rome I, for the purpose of having full coverage of all the legal issues which may arise from the contract. This, as already mentioned, replicates one of the problems arisen in the application of the CISG.

¹³ COM(2011) 635 final, recital (27)

¹⁴ As mentioned, the majority of EU Member States are party to the 1980 Vienna Convention on the International Sales of Goods and thus the CISG is part of their legal system.

¹⁵ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligation (Rome I), OJ L 177, 4.7.2008, p. 6 – 16.

4 CONCLUSION

Albeit aiming at approximating contract laws with regard to sales contract, the system as set forth by the CESL proposal seems to be not perfectly suitable to achieve this policy objective.

In my view, a few elements of the proposed regulation hinder the achievement of real approximation: on the one side, the fact that the proposed system is an optional system leads rather to fragmenting than approximating. The proposal, in fact, creates a body of contract law which will add up to the 27 existing bodies of national contract law and will not substitute them. Thus there will be 28 (29 considering the CISG) bodies of law regulating sales contract in the EU.

Moreover, the proposed regulation risks generating legal uncertainty, as it has several points of overlap with existing legislation: the issue should be addressed by rationalising EU legislation, thus rendering more attractive the optional system for both consumers and undertakings. The experience of the CISG should sound a warning alarm to the institutions regarding the success of incomplete and fragmentary pieces of optional legislation, at least with reference to the B2B transactions.

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