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EDITORIAL COMMENTS

A Common European Sales Law (CESL) ahead?

In October 2011, the European Commission submitted its proposal for a Common European Sales Law (CESL).[1] As to be expected, the proposal had great resonance in business and academic circles, leading to an in-depth discussion on its pros and cons.[2] At the same time, it was received with widespread scepticism as to its adequate legal basis.[3] More recently, after a series of meetings of the Working Party on Civil Law Matters and after an orientation debate on how to handle further negotiations on the proposal, the Council decided that work should start on the examination of the substance of the CESL.[4]

A brief look back

With the presentation of the proposal on a CESL, the long-lasting endeavour to create some kind of a European contract law has reached a critical stage. It is now thirty years ago that the Lando Commission started its comparative work on general principles of contract law, eventually published as "Principles of European Contract Law" (PECL).[5] Also way back in 1989, the European Parliament, for the first time, called for a far-reaching harmonization of contract law in Europe,[6] but, at that time, seemed to encounter a somewhat unreceptive Commission, as did a second resolution by the European

1. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011)635 final.

2. See e.g. The Law Commission and the Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government*, 10 Nov. 2011; Schulte-Nölke, Zoll, Jansen and Schulze (Eds.), *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich Sellier, 2012); Schmidt-Kessel (Ed.), *Ein einheitliches europäisches Kaufrecht?* (Munich Sellier, 2012); Eidenmüller, Jansen, Kieninger, Wagner and Zimmermann, "Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht", (2012) JZ, 269–289.

3. Indeed, some Member States have put forward a subsidiarity complaint under Art. 6 of Protocol No. 2 of the Treaty of Lisbon.

4. See Council, 10611/12, JUSTCIV 210/CONSOM 85/CODEC 1496; Doc. 10760/12, p. 20.

5. Beale and Lando (Eds.), *Principles of European Contract Law, Part I* (The Hague Kluwer, 1995); *Part II* (The Hague Kluwer, 2000); *Part III* (The Hague Kluwer, 2003).

6. O.J. 1989 , C 158/400.

Parliament in 1994.[7] Things radically changed, for whatever reason, in 2001, when the Commission published its Communication on European Contract Law,[8] followed by its "Action Plan" in 2003,[9] in which the Commission developed, for the first time, the idea of a *common frame of reference (cfr)*, with the aim, among others, of achieving greater coherence and consistency in European contract law. In a Communication of 2004[10] this aim was explained in greater detail, with the suggestion that the *cfr* could serve as the basis for the development of a possible optional instrument of a European contract law.[11] The task of creating such a *cfr* was entrusted to a Joint Network on European Private Law – a European academic network of researchers – which presented its work in 2009 in an outline edition of a Draft Common Frame of Reference (DCFR),[12] later on followed by a six-volume edition with comments, examples etc.[13] This document, which is to some part based on the PECL and on the Union *acquis* of consumer contract law, is aimed at no less than a veritable European civil code, comprising contract law (not only sales contracts, but also contracts on services, mandate contracts, commercial agency and franchise, loan contracts, personal security, donation), provisions on non-contractual liability (torts, unjust enrichment) and some aspects of property law (acquisition of ownership, proprietary security, trusts).

In a somewhat parallel move, the Commission pursued its project to review the consumer *acquis*, aiming to simplify and update the applicable rules, to remove inconsistencies and close unwanted gaps in the rules, and to replace the traditional minimum harmonization approach by maximum harmonization as the general rule. The (in the end) rather modest result of this initiative was finally enacted as Directive 2011/83/EU on consumer rights,[14] just replacing Directive 85/577/EEC[15] and Directive 97/7/EC.[16]

7. O.J. 1994, C 205/518.

8. O.J. 2001, C 255/1; see Editorial Comments, *On the way to a European Contract Code?* 39 CML Rev (2002), 219–225.

9. O.J. 2003, C 63/1.

10. COM(2004)651.

11. For description see Editorial Comments, *European Contract Law: Quo Vadis?* 42 CML Rev. (2005), 1–7.

12. Von Bar, Clive and Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), Outline Edition* (Munich Sellier, 2009).

13. Von Bar, Clive, *Draft Common Frame of Reference (DCFR). Full Edition. Principles, Definitions and Model Rules of European Private Law*, 6 vol., (Munich Sellier, 2009).

14. Directive 2011/83/EU, O.J. 2011, L 304/64; cf. Weatherill, "The Consumer Rights Directive: How and why a quest for 'coherence' has (largely) failed", in this *Review*, 1279-1318.

15. Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, O.J. 1985, L 72/31.

16. Directive 97/7/EC on the protection of consumers in respect of distance contracts, O.J. 1997, L 144/19.

In contrast, the project of the DCFR gained momentum with a Commission decision of April 2010 setting up an Expert Group[17] whose task was described as assisting the Commission in preparing a proposal for a Common Frame of Reference in the area of European contract law.[18] In a strangely uncoordinated fashion,[19] the Commission, in July 2010, issued a Green Paper on policy options on the development of a European Contract Law, in which it invited comments on what the scope of application and the legal nature of a European instrument on contract law should be – "toolbox", recommendation, directive, optional instrument, or a regulation establishing a European Contract or even a Civil Code.[20]

In May 2011, the Expert Group presented its so-called "Feasibility Study for a Future Instrument on European Contract Law".[21] Compared with the DCFR the scope of application for the instrument has been drastically reduced just to sales contracts, including related services contracts, complemented by rules on the conclusion of such contracts and their interpretation, on unfair contract terms, and rules on prescription.[22] All other subjects which are treated in the DCFR by extensive and detailed provisions have been dropped from the agenda of the Feasibility Study. This outcome probably reflects the task of the Expert Group, as described in Recital No. 8 of the Commission Decision of 26 April 2010, to "help the Commission select those parts of the Draft Common Frame of Reference which are of direct or indirect relevance for contract law, and restructure, revise and supplement the selected contents." Obviously, the Expert Group was of the opinion, or had been so advised, that the time for a European Contracts Code, not to think of a European Civil Code, has not yet come. On 11 October 2011 the Commission presented the CESL as Annex to the proposed regulation.[23]

17. Commission Decision of 26 April 2010, O.J. 2010, L 105/109. Most members of the Expert Group had already been involved in the work on the DCFR.

18. Recital No. 8.

19. In its fourth meeting, 1–2 Sept. 2010, the Chair of the Expert Group "reaffirmed the mandate of the group to work exclusively on the assumption of an optional instrument, while emphasizing that no political decision concerning the options of the Green Paper, including as to whether to propose such an instrument has been taken." See European Commission, Expert Group on a Common Frame of Reference in European Contract Law, Synthesis of the Fourth Meeting, 1–2 Sept. 2010; 14 Sept. 2010.

20. Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010)348 final.

21. <ec.europa.eu/justice/contract/files/feasibility_study:final.pdf>, reprinted in the annex of Schulze and Stuyck (Eds.), *Towards a European Contract Law* (Munich Sellier, 2011), pp. 217–279.

22. For a discussion of the Feasibility Study see the contributions in Schulze and Stuyck, op. cit. previous note.

23. In the pre-proposal stage the instrument of a directive had for some time been considered.

On closer inspection it becomes obvious that the proposal of the CESL, as presented by the Commission, mainly builds on the results of the Feasibility Study of the Expert Group which in turn – limited to its restricted scope – has drawn on the academic DCFR. The proposal contains rules on a broad range of subjects, relating to sales contracts: pre-contractual information, the conclusion of a contract, its interpretation, provisions on unfair terms, obligations and remedies of the seller and the buyer, provisions on damages, restitution and prescription. This Editorial is not the place to discuss the proposed provisions of the CESL in any detail,[24] nor to make ad hoc suggestions for their improvement. Rather, it seems appropriate to touch on some of the more general issues that the proposed regulation presents. In this respect it is to be noted that some of these issues were not dealt with by the Expert Group, but were decided by the Commission on its own.[25] They turn on the scope of application of the instrument, its optional character, the way in which it may become applicable, and its relationship to the Rome I Regulation.[26]

An opt-in instrument

The CESL is devised as an *optional instrument*: it does not apply *ex lege* to cross-border contracts, but is subject to an agreement of the parties (*opt-in*; Art. 3 and Art. 8(1)). The CESL is, insofar, devised as an option for the contracting parties who, by abstaining from such an agreement, may always rely on the application of some national law as foreseen by the Rome I Regulation (or, if applicable, the UN Sales Convention). As far as business-consumer contracts are concerned (B2C contracts) the consumer will have to give his or her consent for opting-in in an explicit statement, and this only after having received a standard information notice that contains some basic information on the rights and remedies of the consumer (Art. 8(1) and Art. 9). It will have to be seen whether the information notice will work as an incentive for the consumer to opt into the CESL, or, to the contrary, will rather lessen his or her confidence in that instrument.

Whereas these and other basic issues are dealt with in the text of the proposed *chapeau* regulation, the CESL itself, for whatever reasons, has been removed from the text of the Regulation to Annex I, side-by-side with the prescribed standard information notice. It is not quite clear what the logic

24. See e.g. the literature cited in note 2. This *Review* will publish a special issue devoted to the CESL in 2013.

25. See Schulte-Nölke, "Vor- und Entstehungsgeschichte des Vorschlags für ein Gemeinsames Europäisches Kaufrecht", in Schulte-Nölke et al., op. cit. *supra* note 2, pp. 1–20, at 16.

26. Regulation No. 593/2008, O.J. 2008, L 177/6.

behind this formal split-up is meant to be. The Annex undoubtedly forms part of the Regulation; and as such the obligation to state reasons (Art. 296 TFEU) extends to the Annex. The proposal, however, does not contain any detailed explanations concerning the CESL. This omission will certainly have to be cured in the future. Moreover, Article 2 of the proposed *chapeau* regulation presents a long list of definitions that relate not to the text of the regulation itself but to the CESL. This list will have to be inserted into the text of the CESL.

The scope of the instrument

The scope of application of the CESL extends *ratione materiae* not only to the sale of goods and related services, but also to contracts for the supply of digital content (as data produced and supplied in digital form; Art. 5). Such provisions were not yet included in the Feasibility Study. But given the increasing importance of the digital economy and the general purpose of the proposed instrument to promote the conclusion of sales contracts via internet, the extension of the scope of the instrument to cover contracts for the supply of digital content appears to be a major improvement (of course, subject to a discussion of the very details).

The CESL shall not be used as an opt-in instrument for mixed-purpose contracts (Art. 6(1))[27] nor in a B2C contract with a credit element (Art. 6(2)). As many contracts concluded with consumers do contain some sort of credit aspect, the latter restriction will strongly diminish the importance of the CESL with regard to B2C contracts. To this extent, the complexity of cross-border business will not be reduced. It is therefore to be expected that traders will be less ready to agree on the CESL as applicable law when they are advised that different legal regimes will apply to contracts with and without a credit element. The Commission must certainly have been aware of this drawback. The decision to propose a CESL for contracts without a credit element is probably based on the insight that an extension of the scope of the CESL to these contracts would have required further reflection, and would have blown up the instrument to more than 200 articles. From this it becomes clear that the proposal of the CESL may not be regarded as any more than a first step towards a Common European Sales Law that will have to be followed by a second (and perhaps by a third) one.

The attractiveness of the CESL for traders to be chosen as applicable law will certainly be influenced – and diminished – by the fact that an agreement

27. Whether the CESL may, instead of being chosen as the applicable law, be incorporated into a contract that is governed by some national law, is quite another question and to be determined by the applicable law.

to opt into the CESL does not wholly exclude a recourse to national substantive law and rules on private international law. The agreement by the parties on the CESL will replace (or exclude the application of) national law only insofar as issues of contract law are covered explicitly or implicitly by this instrument. In contrast, important issues, closely related to the conclusion of a contract, but not covered by the instrument, such as representation, plurality of debtors and creditors, assignment and set-off, capacity, illegality of a contract,[28] are still to be determined by the applicable national law.[29] Insofar, a certain degree of complexity will subsist – and the traders will have to seek advice on the applicable national law provisions. Moreover, the CESL does not deal with the transfer of ownership – certainly an issue of great importance with regard to cross-border trade.[30] Again, this may work as a disincentive to agree on the CESL as the applicable contract law.

The scope of application of the CESL is restricted to contracts relating to a *cross-border* situation (Art. 4(1)) where at least one of the contract partners has his or her habitual residence in one of the Member States; the CESL may be agreed upon also in situations linked with third countries. The CESL shall, however, not apply to wholly intrastate situations. This restriction of the scope of application seems to be a consequence of the legal basis (Art. 114 TFEU) proposed by the Commission. The restricted scope may also be conceived to avoid a conflict with the principle of subsidiarity. And, last but not least, the Commission may thereby attempt to evade opposition from those Member States that may fear that their national contract law, especially the provisions concerning consumer protection, may too easily become displaced in wholly intrastate situations by opting into the CESL.

It is, however, to be submitted that the exclusion of intrastate sales from the scope of the instrument appears to contradict the very purpose that the proposed regulation is meant to pursue. In its Communication on the CESL[31] the Commission argues that the existence of varying contracts laws in the Member States (with varying mandatory provisions on the protection of the consumer) may have a negative impact on businesses who are considering trading cross-border, and for consumers as well who may find it difficult to shop in other countries than their own, particularly in the context of online purchases. However, these difficulties do not arise only with regard to

28. See Art. 9 Rome I Regulation dealing with internationally mandatory provisions.

29. Recital 27 of the proposed regulation.

30. For a criticism see e.g. The Law Commission and The Scottish Law Commission (*supra* note 2), No. 4.157–4.162.

31. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market, COM(2011)636 final, p. 2.

potentially varying national laws in cross-border situations, but they exist as well for a trader who conducts business (especially online) in his home State and cross-border. Such a trader will still be confronted with two different legal regimes; he or she will need advice as to the varying requirements of each regime, and, with regard to online purchases, the need to differentiate between intrastate and cross-border sales will still subsist. If it is the purpose of the proposed regulation to reduce the complexity created by varying contract laws, and the costs that ensue from such complexity, the proposal falls short of reaching this very purpose. As businesses will often pursue the bulk of internet trading on the intrastate level, it is to be feared that traders will not be inclined to opt for the CESL for their cross-border business. However, Article 13 lit. a) of the proposed Regulation may offer a way out. The Member States are empowered to allow, under certain conditions, an opt-in by the contract partners also in purely intrastate situations. Thereby it is up to the Member States to alleviate the possibility for online traders (e.g. with a habitual residence within this State) to submit their total business – intrastate and across-border – to only one legal regime.

The CESL shall, *ratione personae*, be applicable to business-consumer contracts (B2C). In its Communication on the CESL the Commission underlines the importance of a single legal regime for traders and consumers alike in cross-border situations, particularly in the context of online purchases.[32] As national consumer law will be replaced when the parties opt into the CESL,[33] Member States will conceive it as a "necessity" that the CESL secures the level of consumer protection that is set by the existing EU directives (*acquis*), and, to some extent, by the national provisions on consumer protection alike. It is submitted that the proposed instrument stands up to this "necessity". Nevertheless, the proposed CESL may be criticized in this regard for two reasons. The high level of consumer protection set forth in the CESL may again work as a disincentive for a trader to opt into the instrument if the alternative open to the trader is the application of a less consumer-friendly national law. Moreover, it seems to be deplorable that in transferring the consumer protection *acquis* to the CESL, the chance to start an in-depth review of the *acquis*, and to put some of the *acquis* provisions into question, has been foregone (again).[34]

32. Communication (note 31), p. 2, 3.

33. The agreement to opt into the CESL has to be an explicit and informed choice on the basis of pre-contractual information by a Standard Information Notice describing the essential rights and remedies under the CESL (Art. 8(1), (2); Art. 9).

34. See with regard to Directive 2011/83/EU, O.J. 2011, L 304/64 the critical analysis by Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann, "Towards a revision of the consumer acquis", 48 CML Rev. (2011), 1077–1123.

Beyond B2C contracts, the CESL (except for its consumer protection provisions) extends to contracts where all parties are traders (B2B contracts). However, there is an important limitation to this (Art. 7(1) and (2)). The CESL may be used only if at least one of the parties is a small or medium-sized enterprise (SME)[35] – an SME being defined as a trader which employs fewer than 250 persons and has an annual turnover not exceeding € 50 million or an annual balance sheet total not exceeding € 43 million (or the equivalent in other currencies). Again, this – at first impression somewhat strange – limitation to the scope of application of the CESL needs an explanation. It may be found in recital No. 7 of the proposed regulation. Large traders are in a much better position to efficiently cope with the complexities and costs of cross-border transactions, caused by the application of diverging laws, than smaller traders which transact such business only in comparatively low numbers. The notion of subsidiarity may be another explanation. It is nevertheless submitted that the criteria for the existence of an SME for the purpose of the CESL set out in Article 7(2) not only sound somewhat arbitrary (especially in a private international law context), but tend to obstruct one of the basic aims that the regulation is meant to achieve: a high degree of legal certainty (Art. 1(2)). Again, the proposal opens the way for the Member States to correct this somewhat awkward restriction to the application of the CESL: they may extend the scope of the opt-in instrument to contracts between any traders where none of them is an SME (Art. 13 lit. b).

The relationship with the Rome I Regulation

One of the vexing problems that the proposed regulation has to clarify is its relationship to the Rome I Regulation with regard to consumer contracts, for the following reason. According to Article 6(2) Rome I Regulation, the parties to a consumer contract may choose the law applicable to a contract; however, such a choice may not deprive the consumer of the protection afforded to him by the law of his habitual residence, provided that the trader has directed his business activities towards the market of this country (see Art. 6(1) Rome I Regulation). An application of Article 6(2) Rome I Regulation might create the danger that at this point the whole diversity of national consumer protection laws enters the stage again, thereby obstructing the purpose of the proposed Regulation. One might therefore expect that the *chapeau* rules of the Regulation deal with this problem; but one will be disappointed. Instead, Recitals 9–14 touch on the issue, though in a somewhat indirect fashion.

The recitals proceed on the assumption that the agreement to use the CESL as applicable law does not amount to, and should not be confused with, the

35. With habitual residence either in the EU area or in a third country.

choice of an applicable law as set forth by Article 3 Rome I Regulation (Recital 10). The CESL is not the law of a country and, therefore, cannot be chosen as an applicable law. The parties to the contract have therefore to determine an applicable law of a certain *country* (or leave this issue to the objective connecting factors set forth in Arts. 4 and 6 Rome I Regulation). The CESL only comes into play *after* the applicable law of a Member State has been determined on the basis of the Rome I Regulation: Recital 10 circumscribes this choice-of-law process with the following words: "The agreement to use the Common European Sales Law should be a choice exercised *within* the scope of the national law" which is applicable pursuant to the Rome I Regulation. The proposed Regulation is thereby based on a two-step process by which – in a first step – the parties determine the applicable law (or leave this issue to Arts. 4 and 6 Rome I Regulation), followed by a second step whereby the parties agree on the CESL "within" the applicable law of a Member State. The competence of the parties to agree on the CESL is, however, not based on national law as such, but transferred to them by Union law. This choice of the CESL cannot be impeded by the Member States. As a consequence, Article 6(2) Rome I Regulation cannot work as an impediment either:[36] whatever the law chosen by the parties may be, the national provisions on consumer protection of the Member State of his habitual residence will be replaced by the agreed-upon CESL as uniformly applicable Union law.[37]

One may, of course, ask why the Commission is proposing such a complicated approach via the Rome I Regulation, instead of simply circumscribing the international scope of application of the CESL, accompanied by the clarification that the CESL should be regarded as *lex specialis* to the Rome I Regulation. It is suggested that the Commission probably intends to avoid such an approach with regard to the legal basis on which the proposed Regulation is based. The Commission attempts to convey the impression that the CESL is nothing other than an alternative to the applicable *national* contract law – a second contract regime (within the

36. The situation is different with regard to contracts concluded with consumers with habitual residence in a third country. As the choice of the CESL leaves Art. 6(2) Rome I Regulation untouched, the (consumer protection) law of the country of the habitual residence of the consumer might come into play even if the parties have agreed on the application of the CESL.

37. Recital No. 12 attempts to explain this approach in its sentence 1. The contention that Art. 6(2) Rome I Regulation will not have "practical" importance sounds somewhat irritating: as the national consumer protection provisions are inapplicable when the CESL is validly agreed upon, Art. 6(2) Rome I Regulation cannot exert *legal* importance.

national law) for cross-border contracts, existing alongside the pre-existing rules of national contract law.[38] This leads to the issue of legal basis.

Legal basis

The proposal of the Regulation is based on Article 114 TFEU. There are two major concerns with regard to this legal basis that have been widely discussed already before the proposal was presented. Firstly, it has been doubted whether the prerequisites of Article 114(1) TFEU, as set forth by the Court of Justice in its first *tobacco* judgment,[39] are met. It is to be recalled that Article 114(1) TFEU does not foresee an unlimited competence for the Union to harmonize the private law of the Member States. Such a competence could have been introduced by the Treaty of Lisbon, but this route has not been taken. As B2B contracts are excluded from the application of the CESL as far as SME traders are not involved, the Commission may probably be able to show that – with regard to B2C contracts and contracts in which an SME is a partner – the diversity of national contract law may create transaction costs and thereby factual barriers to market access for SME and consumers alike.[40] How serious these barriers are[41] seems to be a matter of disagreement.[42] Secondly, Article 114(1) TFEU empowers the Union to harmonize national legal provisions by way of a directive, or even to replace national law by way of a regulation. In contrast, Article 114(1) TFEU does not empower the Union to introduce a legal regime of Union law that supplements national law *without* harmonizing or replacing it.[43] The proposed CESL is an optional instrument of Union law

38. Recital No. 9.

39. Case C-376/98, *Germany* v. *Parliament and Council*, [2000] ECR I-8419.

40. Explanation Memorandum, p. 2 (with reference in fn. 1 and 2 to studies undertaken on behalf of the Commission).

41. For an assessment, see Commission Staff Working Paper, Impact Assessment, SEC(2011)1165 final, pp. 10. According to this report, contract law-related barriers rank amongst the top regulatory barriers that influence the companies' decision to trade cross-border (p. 11). Differences in contract law are said to dissuade companies from trading cross-border, e.g. by refusing orders from consumers from other countries. They generate transaction costs (costs of finding out about the content and consequences of foreign law; p. 15) which usually grow proportionally to the number of EU countries a company trades with (p. 12). Moreover, contract law differences are said to deter consumers from shopping cross-border (p. 18). For criticism see e.g. Ackermann, "Das Gemeinsame Europäische Kaufrecht – eine sinnvolle Option für B2B-Geschäfte?" in Remien, Herrler and Limmer (Eds.), *Gemeinsames Europäisches Kaufrecht für die EU?* (Munich Beck, 2012), 49–66, at para 5–15.

42. Sceptically e.g. Balthasar, "Das Gemeinsame Europäische Kaufrecht – eine Analyse aus unternehmerischer Sicht", (2012) RIW, 361–369, at p. 365.

43. See Case C-436/03, *Parliament* v. *Council*, [2006] ECR I-3755 paras. 40, 44. In its reasoning, the ECJ more than once refers to the creation of a new legal entity by way of Union law (para 40). However, this language only refers to the object of the Union regulation under

which leaves national contract law unaffected: that is neither be harmonized nor replaced. Rather, the parties may choose the CESL as an autonomous legal regime – as they may choose to set up a *Societas Europaea* according to the applicable Union regulation. Again, the Treaty of Lisbon could have introduced such a Union competence with respect to private law as an appendix to Article 114 TFEU, but it has not done so.[44] It is, therefore, submitted that Article 114(1) TFEU may turn out to be not the correct legal basis;[45] the project of the CESL might rather have to be enacted on the basis of Article 352 TFEU.[46] This issue will, in the future, definitely be a point of discussion, if not disagreement.[47]

Will the CESL come?

The proposed Regulation on the introduction of the CESL as an optional instrument is an ambitious project. It has gone a long way, but, in its present state, it still represents only a modest step forward – when compared with the DCFR. Reactions to the proposed Regulation have been controversial. There are differing opinions on its necessity and whether traders will accept the instrument. Perhaps the most convincing argument *in favour* of its introduction may be its application to online consumer contracts: online traders, especially from smaller Member States, who intend to offer their products Union-wide, and consumers alike may have a considerable interest to handle their contractual relations on the basis of just one legal regime (as far as contract matters are concerned). The proposed Regulation might gain broader acceptance among Member States and the relevant stakeholders if it were restricted just to B2C contracts that are concluded online. Such a restriction would allow to cut down on all provisions which introduce a great deal of flexibility ("good faith", "fair dealing") into the CESL[48] which

scrutiny – the creation of a European cooperative. There is no indication whatsoever that the reasoning of the Court as far as Art. 114(1) TFEU is concerned should be limited to the creation of legal entities by Union law.

44. But see the new Art. 118 TFEU relating to the creation of a legal title by Union law.

45. Stabentheiner, "Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Charakteristika und rechtspolitische Aspekte", 26 *Wirtschaftsrechtliche Blätter* (2012) 61–70, at p. 68.

46. To this end see e.g. Max Planck Institute for Comparative and International Private Law, "Policy Options for Progress Towards a European Contract Law", 75 *RabelsZeitschrift* (2011) 371–438, at para 41; Roth, "Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, KOM (2011) 635 endg"., 23 *Europäisches Wirtschafts- und Steuerrecht* (2012) 12–22, at 16–19.

47. See the Council document cited *supra* note 4.

48. For a critical view in this respect see The Law Commission and The Scottish Law Commission (*supra* note 2), para 7.57–7.86.

endanger legal certainty, and which seem to be mostly inadequate for online consumer contracts that are concluded in great numbers and in a standardized way.

One of the criticisms that has been posted against the whole project of a European Contract Code has been based on the insight that the Court of Justice will not be in a position to deal with the interpretation of Union contract law in an adequate manner: Should the CESL be enacted as set forth in the proposed Regulation, hundreds of preliminary references from national courts will have to be expected. This somewhat sober outlook (and the need for an efficient resolution of disputes concerning B2C online contracts) makes it advisable that the enactment of the CESL – as far as B2C online contracts are concerned – should be closely linked with the project of the Commission to create an effective online dispute resolution mechanism for consumer disputes.[49] Only if such a mechanism is set up and works to the satisfaction of the consumers is it to be expected that the project of CESL – at least as far as B2C online contracts are concerned – will become a success.[50]

49. Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011)794 final.

50. See Micklitz and Reich, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too broad or not broad enough?* EUI Working Papers – Law 2012/04, part I, No. 42.