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The Proposal for an Optional Common European Sales Law: A Step in the Right Direction for Consumer Protection?

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1. Introduction

On October 11, 2011, the European Commission (hereinafter *Commission*) presented its Proposal for a Regulation on a Common European Sales Law[1] (hereinafter *Proposal*). The Regulation on a Common European Sales Law (hereinafter *Sales Law Regulation*), if and once adopted, would introduce an innovative and so far unique European mechanism that is *inter alia*[2] applicable to cross-border business-to-consumer (hereinafter *B2C*) sales relationships. The Commission intends to install a fully harmonized pan-European sales law at the national level, the Common European Sales Law, which would establish a voluntary and parallel national sales law regime as an alternative to already existing national sales law rules.

According to an accompanying press release of the same date, the Sales Law Regulation is considered to "open markets for businesses and give consumers more choice and a high level of protection"[3] in cross-border transactions, "breaking down … barriers"[4] which are believed to be caused by the existence

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1 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, October 11, 2011, COM(2011) 635 final.

2 Pursuant to Art. 7 Sales Law Regulation the regulation would also be applicable to B2B relationships, if at least one of the parties is an SME.

of diverse national sales laws. The Commission hopes that the Sales Law Regulation would benefit both target groups: businesses which want to trade across borders and consumers who should profit from a wider range of products offered at lower prices.[5]

This paper aims to analyze the Sales Law Regulation in the context of consumer law and its likely practical consequences. It will start by highlighting the major steps which led to the adoption of the Sales Law Regulation: shifts from minimum to maximum harmonization; simplification of consumer directives and the related works of various study and research groups; and above all the elaborations of the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (hereinafter *Acquis Group*) which led to the adoption of the Draft Common Frame of Reference (hereinafter *DCFR*), a major intermediate step towards the Sales Law Regulation. The paper will then continue with an introduction of the Sales Law Regulation and its regulatory framework highlighting some of its unique features. It concludes with a brief analysis of some highlights of the Sales Law Regulation in relation to B2C contracts.

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[3] See Communication Department of the European Commission, *An Optional Common European Sales Law: Frequently Asked Questions* (October 11, 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/680&format=HTML&aged=0&language=EN&guiLanguage=en> (visited December 8, 2011).

[4] Ibid.

[5] See European Commission, *Explanatory Memorandum to the Proposal for a Regulation on the European Parliament and of the Council on a Common European Sales Law* (hereinafter *Explanatory Memorandum*) (October 11, 2011) <http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf> (visited December 8, 2011).

2. Background

2.1 EU Law and Consumer Protection

The European Union (hereinafter *EU*) and its predecessors have traditionally put the focus on the supply side rather than the demand side. This does not come as much of a surprise, as initially the main purpose of one of the sectoral predecessors of the EU, the European Economic Community (hereinafter EEC), was to establish a free trade area where businesses could easily trade beyond borders without being negatively affected by national custom rules or comparable obstacles. As Art. 3 (a) EEC Treaty put it: "… the activities of the Community shall include … the elimination as between Member States, of customs duties and of quantitive restrictions on the import and export of goods, and of all other measures having equivalent effect." It was only in the late 1970s and early 1980s that consumers' interests were given express reference.[6] Strengthening consumers' rights, or rather the consumers' confidence in the steadily expanding regional market, was considered to be important for European economic integration to function well.[7]

Still, it was not until Maastricht that consumer protection found its independent and explicit role within the European legislative framework via Art. 129a of the Maastricht Treaty.[8] Since then the Commission has been introducing harmonized rules in the field of consumer law step by step.[9] This movement has led to a fragmentation of consumer law rules, not only between sectoral groups (e.g.,

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6 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975 No. C92, followed by Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981 No. C133.

7 See e.g., Norbert Reich, *Economic Law, Consumer Interests an EU Integration, in* Understanding EU Consumer Law 1, 12-13 (Hans-W. Micklitz, Norbert Reich and Peter Rott eds., 2009).

8 See Reich, *supra* note 7, at 13 for details.

advertising rules vs. procedural rules vs. sales law rules), but also within one and the same sector. One of the best examples is the field of consumer contract law, where various parallel directives exist.[10] To overcome this problem, the Commission published the Green Paper on the Review of the Consumer Acquis (hereinafter *Acquis Green Paper*) in 2007.[11] As will be shown in more detail later, the Acquis Green Paper aimed at replacing and harmonizing already existing consumer law rules by the introduction of a more general legal framework and resulted in the recently adopted Directive on Consumer Rights.[12]

More or less at the same time as the European movements in the sector of consumer law started to expand, the Commission also increased its interest in common rules of *general* private law. These parallel developments were triggered by some European resolutions in the late 1980s and mid-1990s[13] which originally sought a harmonization of European Civil Law in general.

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9 *Christian Twigg-Flesner* describes the position consumer law takes within European private law as a "central role"; for this and his thoughts on the scattered framework see Christian Twigg-Flesner, *Introduction: Key Features of European Union Private Law, in* European Union Private Law 1, 7-8 (Christian Twigg-Flesner ed., 2010).

10 See chapter 2.2 of this paper for more details.

11 Green Paper on the review of the consumer acquis, February 8, 2007, COM (2006) 744 final.

12 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 2011 No. L304 (hereinafter *Directive on Consumer Rights*); for details see DG Justice, *The Directive on Consumer Rights* (October 12, 2011) <http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm> (visited December 8, 2011). The Directive on Consumer Rights was built on the basis of the Proposal for a Directive of the European Parliament and of the Council on consumer, October 8, 2008, COM (2008) 614 final; for a general overview of that Proposal see e.g., Geraint Howells and Reiner Schulze, *Overview of the Proposed Consumer Rights Directive, in* Modernising and Harmonising Consumer Contract Law 4 (Geraint Howells and Reiner Schulze eds., 2009) or Christian Twigg-Flesner, *Fit for Purpose? The Proposal on Sales?, in* Modernising and Harmonising Consumer Contract Law 147.

13 Resolution on action to bring into line the private law of the Member States, OJ 1989 No. C158 and Resolution on the harmonization of certain sectors of the private law of the Member States, OJ 1994 No. C205.

Roughly a decade later the course was narrowed down and set for a partial private law harmonization dealing exclusively with contract law.[14] The 2003 Communication on "A More Coherent European Contract Law. An Action Plan" (hereinafter *2003 Action Plan*) came up with the idea of drafting a "Common Frame of Reference," in the form of a general contract law code also covering consumer contract issues, but at the same time also going beyond rules purely related to consumer law.

The parallel movements, consumer law specific rules on the one hand and general contract law rules dealing also with consumer issues on the other, mirror an interesting academic discussion: is consumer law a field of special private law or an integral part of the general private law regime? In other words, and linking the question more to the practical debate underlying the main topic of the present paper, regarding the Sales Law Regulation and its Common European Sales Law: will and shall consumer law remain a separate private law regime or will and shall its protective ideas also permeate general private law transactions, including business-to-business (hereinafter *B2B*) and consumer-to-consumer (hereinafter *C2C*) relationships?[15] The question has not yet been clearly resolved, but (as will be shown later) the trend at the pan-European level points rather in the second direction, at least when it comes to contract law.

2.2 Mechanisms Used So Far

As indicated in the previous chapter, the European consumer law body has traditionally been characterized by its scattered regulatory framework. Due to

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[14] Communication from the Commission to the Council and the European Parliament on European contract law, July 11, 2001, COM (2001) 398 final.

[15] For this discussion see e.g., Sergio Cámara Lapuente and Evelyne Terryn, *Consumer Contract Law, in* CASES, MATERIALS AND TEXT ON CONSUMER LAW 157, 169 (Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn eds., 2010) with further references, or Giuditta Cordero Moss, *Commercial Contracts and European Private Law, in* EUROPEAN UNION PRIVATE LAW 147.

the then-existing needs and political possibilities, European consumer law has been steadily growing in a piecemeal way since the 1980s. European rules with specifically defined fields of application have been introduced. Directives such as the Timeshare Directive[16] (covering "the purchase of the right to use one or more immovable properties on a timeshare basis"),[17] the Doorstep Selling Directive[18] (applicable to certain B2C contracts concluded at a "consumer's home or … the consumer's place of work"),[19] or the Package Travel Directive[20] (exclusively focusing on the "pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: transport, accommodation or other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package"),[21] are only some examples of how narrowly the scopes of application of the directives were drawn. To some extent, the Acquis Green Paper tried to fix the problem of having a scattered mix of consumer contract law rules by reviewing eight consumer directives including the three just mentioned.[22] The outcome of this elaboration was the recently adopted Directive on Consumer Rights, which merged four of the eight reviewed directives: the Consumer Sales Directive;[23] the Unfair Contract Terms

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16 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 No. L280 (hereinafter *Timeshare Directive*).

17 Art. 1 Timeshare Directive.

18 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 No. L372 (hereinafter *Doorstep Selling Directive*).

19 Art. 1 Doorstep Selling Directive.

20 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 No. L158 (hereinafter *Package Travel Directive*).

21 Art. 2 (1) Package Travel Directive.

22 A complete list of the directives under review can be found in Annex 2 of the Acquis Green Paper.

23 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 No. L171.

Directive;[24] the Distance Selling Directive;[25] and the Doorstep Selling Directive. All four directives deal exclusively with contract law issues and provide a general regulatory framework for "certain aspects of business-to-consumer contracts across the [European] Union."[26] We can thus say that the regulatory mechanism of European consumer law has begun to shift from a scattered regime towards a more unified one.

One more important change which has taken place in the field of consumer law is another shift: while older directives have taken a minimum harmonization approach, leaving Member States the discretion to enact stricter national rules, the Commission has recently come to favour a full or maximum harmonization approach setting fixed standards applicable at the pan-European level all across the EU.[27] Also the Acquis Green Paper has refrained from including a pure minimum harmonization solution in its catalogue of optionally proposed tools. In addition to the eventually taken maximum harmonization mechanism the Acquis Green Paper listed two mitigated minimum harmonization tools: minimum harmonization in combination with the country-of-origin approach and minimum harmonization with a mutual recognition clause.[28] The latter two

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[24] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 No. L95.

[25] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 No. L144.

[26] Recital 7 of the Directive on Consumer Rights; for the interrelationship of the Directive on Consumer Rights and the DCFR see e.g., Hans Schulte-Nölke, *The Way forward in European Consumer Contract Law: Optional Instrument Instead of Further Deconstruction of National Private Laws, in* European Union Private Law 131, 143-6.

[27] See e.g., Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 No. L149 (hereinafter *Unfair Commercial Practices Directive*). For a critical analysis of this trend see e.g., Hans-W. Micklitz, *The Targeted Full Harmonisation Approach: Looking behind the Curtain, in* Modernising and Harmonising Consumer Contract Law 47. As for the development of mechanisms used for EU private international law in general, see e.g., Angus Johnston and Hannes Unberath, *European Private Law by Directives: Approach and Challenges, in* European Union Private Law 85-100.

[28] Section 4.5 of the Acquis Green Paper.

have rightly been criticized in the literature for contradicting the protective regime of the Rome I Regulation,[29] which under certain conditions guarantees the protection of consumers by stricter national rules in cross-border cases.[30] The recently adopted Directive on Consumer Rights eventually followed the proposed maximum harmonization approach.[31]

2.3 Studies in the Field of European Contract Law or: the Way towards a New Regime

As explained above, the developments within the area of consumer contract law were twofold within the Commission: on the one hand, *DG Sanco* was pushing for a harmonized mechanism exclusively regulating consumer rights. This resulted in the creation of the Proposal for a Directive on Consumer Rights in 2008 and the recent adoption of the proposed directive: the Directive on Consumer Rights.[32]

On the other hand, *DG Justice* had started to put more effort into studying general national and European private law principles, mainly with the help of two study groups: the Study Group on a European Civil Code of 1998[33] (hereinafter *Study Group*) and the European Research Group on Existing EC Private Law of 2002, better known as the *Acquis Group*.[34] While the first group focused on the analysis, comparison, and development of national private laws, the Acquis Group concentrated on European case law and EU legislation.[35] The

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[29] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ 2008 L177 (hereinafter *Rome I Regulation* or *Rome I*).

[30] Art. 6 Rome I Regulation. For the critique see e.g., Hans-W. Micklitz and Norbert Reich, *Europäisches Verbraucherrecht – quo vadis? Überlegungen zum Grünbuch der Kommission zur Überprüfung des gemeinschaftlichen Besitzstandes im Verbraucherschutz vom 8.2.2007*, 22 VUR 210 (2007) or Thomas Wilhelmsson, *Full Harmonisation of Consumer Law?*, 3 Zeitschrift für Europäisches Privatrecht 225 (2008).

[31] Art. 4 Proposal for a Directive on Consumer Rights.

main purpose of the Commission in relying on the work of research groups was the planned creation of a "Common Frame of Reference" (hereinafter *CFR*). Ever since the Commission started to cooperate with the study groups, the views on the practical role of the CFR have been divided. Or as *Sergio Cámara Lapuente* and *Evelyne Terryn* vividly summarize, "the *legal nature* of this instrument [note: the CFR] has been extremely ambiguous."[36] Even within the Commission the way to go was not clearly agreed on: should the CFR become merely an unbinding tool containing basic contract law principles, or could it have a more harmonizing impact on national laws, setting binding standards?[37]

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[32] When it comes to B2C contracts, the relationship between the Directive on Consumer Rights and the proposed Sales Law Regulation is quite interesting. The Directive on Consumer Rights differs from the Sales Law Regulation in several aspects, making it both wider and narrower in its application. Wider, as the Directive on Consumer Rights also applies automatically to domestic contracts and service contracts. Narrower, as it takes a sectoral approach covering primarily doorstep and distance selling cases. While the Sales Law Regulation also covers such contracts, it goes further beyond as it would also be applicable to any cross-border contract for the sale of goods, for the supply of digital content or for related services as defined by Article 2 Sales Law Regulation (Article 4 (1) Sales Law Regulation). Thus it offers a much more general framework, dealing with more basic issues such as interpretation of contracts or prescription. However, the most important difference to the Directive on Consumer Rights, which directly affects existing national rules, might be the controversial voluntariness of the Sales Law Regulation regime. It would not replace national rules, but "only" establish a parallel national sales law tool as an alternative to already existing national sales law rules (which themselves might be influenced by the Directive on Consumer Rights); see chapter 4.5 of this paper for further details on this.

[33] For more details see e.g., Christian von Bar, *The Study Group on a European Civil Code* (November 19, 2002) <www.cisg.law.pace.edu/cisg/biblio/vonbar2.html> (visited December 8, 2011) or the website of the Study Group <http://www.sgecc.net> (visited December 2, 2011).

[34] For more details see the website of the Acquis Group <www.acquis-group.org> (visited December 8, 2011).

[35] For some more details see e.g., Lapuente and Terryn, *supra* note 15, at 160.

[36] Ibid, at 161. For more on this "ambiguity" see also e.g., Florian Möslein, *Legal Innovation in European Contract law: Within and beyond the (Draft) Common Frame of Reference, in* European Private Law after the Common Frame of Reference 173 (Hans-W. Micklitz and Fabrizio Cafaggi eds., 2010) or Horatia Muir Watt and Ruth Sefton-Green, *Fitting the Frame: an Optional Instrument, Party Choice and Mandatory/Default Rules, in* European Private Law after the Common Frame of Reference 201.

The preliminary outcome of the elaborations was the Draft Common Frame of Reference (DCFR) on the Principles, Definitions and Model Rules of European Private Law prepared by the Study Group in cooperation with the Acquis Group.[38] As its title indicates, the DCFR basically contains three categories: Principles, Definitions and Model Rules on European private law.[39] The group of Definitions, to be found in the Annex to the DCFR, refers to legal terms used throughout the EU and aims at offering generally applicable definitions of those terms. The two other groups, Principles and Model Rules, are more difficult to distinguish from each other. To put it in a nutshell, one can say that the first of these two categories is comprised of key ideas which lay the foundation for the latter one. The DCFR itself refers to the four principles of freedom, security, justice, and efficiency as *underlying principles*.[40] Despite the relatively small number of DCFR-principles, one can say that they embody a strong and broad basis, as they are broadly defined by the DCFR. The Model Rules on the other hand go one step further and, as extensively described in ten "books," cover a wide-range of private law, going far beyond the area of contractual relations and also including some non-contractual relationships.

Although the DCFR itself is not to be equated with the CFR (the first being the

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[37] See e.g., Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, March 15, 2003, COM(2003) 68 final, at recital 77.

[38] See Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Dcfr) Outline Edition (2009). For a critical review of the DCFR see e.g., Hans-W. Micklitz and Fabrizio Cafaggi, *Introduction, in* European Private Law after the Common Frame of Reference viii; Jan M. Smits, *The Draft Common Frame of Reference: How to Improve It?, in* European Private Law after the Common Frame of Reference 90; Fernando Gomez, *The Empirical Missing Links in the Draft Common Frame of Reference, in* European Private Law after the Common Frame of Reference 101.

[39] *Hugh Beale*, a member of the Study Group, gives a brief overview of the key differences in Hugh Beale, *European Contract Law: the Common Frame of Reference and beyond, in* European Union Private Law 116, 124-6.

[40] See the title of the first chapter on the Principles of the DCFR.

outcome of two (academic) research groups, the second being a planned "political"[41] document of the Commission), it could be considered an important step towards the creation of the latter and viewed as facilitating further elaborations of a possible optional instrument as suggested by the 2003 Action Plan. The strong interest of the Commission in the research work in combination with the funding provided by the Commission[42] is a strong indication in favour of this assumption.

Still, until quite recently, not everybody expected that the research work of the Study Group and the Acquis Group would result in the proposal of an optional instrument. In 2010, *Cámara Lapuente* and *Terryn* noted that the "[i]nterest in this instrument [note: the optional instrument], resulting from an idea to encode private law that was on the agenda in 2001 and 2003, has gradually diminished in recent years and is no longer a priority."[43] On the other hand, in the *Introduction* of the *Outline Edition* of the DCFR, *Christian von Bar, Hugh Beale, Eric Clive,* and *Hans Schulte-Nölke* (the first three being members of the Study Group and the fourth one being a member of the Acquis Group) stated that although the future role of the DCFR was unclear at the time of its adoption, both research groups consider the DCFR as being "consciously drafted in a way that, given the political will, would allow progress to be made towards the creation of such an optional instrument."[44]

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41 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 38, at 4.

42 Ibid, at 55.

43 Lapuente and Terryn, *supra* note 15, at 163.

44 Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *supra* note 38, at 46.

3. The Proposal for a Regulation on a Common European Sales Law

3.1 Drafting the Proposal

After years of uncertainty over which way the Commission would go, the Proposal for a Regulation on a Common European Sales Law brought an answer: on October 11, 2011, the Commission presented the Sales Law Regulation, a fully harmonized mechanism for the sector of sales law. Unlike the DCFR, which can be seen as an academic advisory collection,[45] the Sales Law Regulation is meant to be a binding instrument directly applicable in the Member States. In its Annex I it would (and this is maybe its most striking feature) introduce the Common European Sales Law, an optional (national) instrument, i.e., it would not override existing national rules, but would only be applicable in cases where both contract sides wish to be bound by it.[46]

The Sales Law Regulation is so far the latest step in the drive to create a harmonized European contract law regime, an area where the most recent development was a quite fast one: not long after the Study Group and the Acquis Group had presented their DCFR, the Commission installed a new research group: the Expert Group on a Common Frame of Reference (hereinafter *Expert Group*) in early 2010. Members of that group were drawn together from among legal scholars, practitioners, and representatives of consumer and business groups.[47] The Expert Group was asked to meet regularly on a monthly basis and to further develop the work carried out by the two former study groups. As some members of the Expert Group belonged to either the Study Group or the

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45 On the question of whether it is really a 100% academic draft, see e.g., Alessandro Somma, *Towards a European Private Law? The Common Frame of Reference in the Conflict between EC Law and National Laws, in* European Private law after the Common Frame of Reference 1, 2-3, or Nils Jansen, *The Authority of an Academic 'Draft Common Frame of Reference', in* European Private Law after the Common Frame of Reference 147, 147-9.

46 Art. 3 Sales Law Regulation; see also chapter 4.5 of this paper.

47 See IP/10/595, Brussels, 21 May 2010.

Acquis Group, the elaborations proceeded quite smoothly.

A few months after the installation of the Expert Group, the Commission published its Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses (hereinafter *Policy Options Green Paper*).[48] The purpose of the Policy Options Green Paper was set forth in quite vague language that defined it as "to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law, and launch a public consultation on them."[49] The Policy Options Green Paper listed in total seven options for a European Contract Law instrument.[50] The options ranged from weaker mechanisms, such as the "publication of the results of the Expert Group"[51] and "[a]n official "toolbox" for the legislator,"[52] to stronger ones such as a "Regulation establishing a European Contract Law"[53] or a "Regulation establishing a European Civil Code."[54]

3.2 Basic Outline of the Proposed Regulation on a Common European Sales Law

Slightly more than a year after the presentation of the Policy Options Green Paper, and following a public consultation[55] with more than 300 submitted contributions and several surveys,[56] the Commission proposed the Sales Law Regulation to the European Parliament and the Council. As indicated above, the

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[48] Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, July 1, 2010, COM (2010) 348 final.

[49] Ibid, at recital 1.

[50] Ibid, at recital 4.1.

[51] Ibid, option 1.

[52] Ibid, option 2.

[53] Ibid, option 6.

[54] Ibid, option 7.

[55] For details and a list of contributions see DG Sanco, *Green Paper on Policy Options for Progress towards a European Contract Law* (*ECL*) (July 1, 2010) <http://ec.europa.eu/justice/newsroom/contract/opinion/100701_en.htm> (visited December 8, 2011).

[56] For details see chapter 4.2 of this paper.

Sales Law Regulation basically consists of three parts. The main text of the regulation contains general, "administrative" provisions including a catalogue of definitions. This is followed by the core part, the substantive sales law rules of the Common European Sales Law in Annex I. The Common European Sales Law itself is comprised of a relatively extensive list of rights and obligations, but unlike one of its main influential sources, the DCFR, it exclusively regulates the area of sales contract law and does not cover non-contractual relationships. Annex II contemplates the framework by introducing the Standard Information Notice, a mandatory summary of consumers' rights in relation to the contract.

An important feature of the Sales Law Regulation, and one justification for this paper, is to be seen in its scope of personal application. Unlike another practically important alternative national sales law regime, the CISG, the Sales Law Regulation would also be applicable in B2C transactions. Art. 7 (1) Sales Law Regulation defines the personal applicability of the Common European Sales Law as requiring that the "seller of goods or the supplier of digital content is a trader." While it would also be applicable to some B2B transactions,[57] the Sales Law Regulation excludes C2C transactions from its scope of application. This together with the fact that it would (theoretically)[58] create an optional, not mandatory, instrument would make it a unique national tool initiated by the EU.

Art. 7 (1) Sales Law Regulation also has to be read together with Art. 4 (1) Sales Law Regulation. Basically, or rather *directly*, the Common European Sales Law is only applicable in cases of cross-border contracts, which are defined in the subsequent paragraphs of Art. 4 Sales Law Regulation. The Sales Law Regulation can, however, also be seen as a double-optional device. Upon its coming into effect the Common European Sales Law can be chosen by parties to cross-border sales contracts ("option exercised by the parties"); purely national

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[57] See Art. 7 (1) and (2) Sales Law Regulation.
[58] See chapter 4.5 of this paper.

cases are not automatically covered. Member States can, however, also transform the Common European Sales Law rules into national law applicable to purely domestic B2C contracts ("option exercised by the Member States").[59] Only in the latter case would the Common European Sales Law become a "full" parallel sales law regime for B2C cases.

Another issue worth mentioning in this respect is that the Common European Sales Law would in principle not apply to service contracts: the material scope of application only covers sales contracts (Art. 2 (k) Sales Law Regulation)[60] and "digital content" contracts as a form of sales contracts dealing with one category of intangible goods (Art. 2 (j) Sales Law Regulation).[61] In addition, and to be understood as the only "service element" covered by the Sales Law Regulation, the regime also applies to "related service contracts" (Art. 2 (m) Sales Law Regulation).[62]

One should, however, be careful and not understand the Sales Law Regulation as a regime dealing with each and every sales contract in its literal meaning.

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[59] Art. 13 (a) Sales Law Regulation.

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

[61] Art. 2 (j) Sales Law Regulation: "'digital content' means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software; it excludes:
(i) financial services, including online banking services;
(ii) legal or financial advice provided in electronic form;
(iii) electronic healthcare services;
(iv) electronic communications services and networks, and associated facilities and services;
(v) gambling;
(vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users."

Like most EU mechanisms dealing with consumer related issues,[63] the Sales Law Regulation further distinguishes between several contractual subcategories and narrows down the material scope of application. For example, the term "sales contracts" excludes "mixed-purpose contracts," i.e., "contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services" (Art. 6 (1) Sales Law Regulation), or consumer credit linked contracts (Art. 6 (2) Sales Law Regulation). Immovables are also explicitly excluded, since the definition of "goods" refers only to "movable items" (Art. 2 (h) Sales Law Regulation). Also when it comes to movable tangibles, one must differentiate in more detail. As it was the case already with the Distance Selling Directive, goods or digital content purchased at a public auction fall outside the scope of the Sales Law Regulation. Compared to Art. 3 (1) of the Distance Selling Directive,[64] the definition of "public auction" of Art. 2 (u) Sales Law Regulation is, however, clearer: it explicitly refers only to those public auctions where the consumer has at least "the possibility to attend the auction in person." Online auctions, such as for example eBay auctions, are explicitly not covered by this definition and thus should fall under the regulatory regime of the Sales Law Regulation, bringing a clear answer to interpretation problems of some Members States' jurisdictions in the past.[65]

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62 Art. 2 (m) Sales Law Regulation: "'related service' means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:
(i) transport services,
(ii) training services,
(iii) telecommunications support services; and
(iv) financial services."

63 See chapter 2.2 of this paper for some examples.

64 Art. 3 (1) of the Distance Selling Directive reads: "This Directive shall not apply to contracts … concluded at an auction."

4. Brief Analysis of the Proposed Sales Law Regulation

4.1 General Remarks

At first sight the proposed Sales Law Regulation looks quite impressive, at least when it comes to the ambitiousness of the Commission. If done properly, harmonizing sales law rules for B2C relationships might indeed facilitate the growth of the internal market, which pursuant to Art. 114 (1) in the Treaty on the Functioning of the European Union (hereinafter TFEU), is the justification for the Proposal.[66]

The Sales Law Regulation poses several questions in relation to B2C transactions which must not be ignored. Some of these will be explained in more detail in this chapter as they relate to the following issues: Is there actually any need for introducing the Common European Sales Law? Would it really lead to an improved certainty of consumers' rights? Would the Sales Law Regulation really reduce costs for businesses, increase the certainty for businesses by simplifying sales law rules and facilitate cross-border transactions? Would it really be a voluntary regime? Would the Sales Law Regulation really strengthen consumer protection? And is the relationship between the Common European Sales Law and Rome I really that unproblematic?

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[65] In several Member States it is not totally clear if the exception of auctions also refers to online auctions or only to traditional auctions, i.e., auctions, which are moderated by an auctioneer; for the discussion e.g., in Austria see e.g., Georg Kathrein, *§ 5b KSchG, in* KURZKOMMENTAR ZUM ABGB recital 2 (Helmut Koziol, Peter Bydlinski and Raimund Bollenberger eds., 2nd ed. 2007).

[66] See e.g., European Commission; *supra* note 5, at 8-9. For a general discussion of EU competences in the context of European private law see e.g., Stephen Weatherill, *Competence and European Private Law, in* EUROPEAN UNION PRIVATE LAW 58. But see also case C-436/03, *European Parliament v. Council of the European Union* [2006] ECR I-3733, at recital 44, where the ECJ denied the fulfilment of approximation conditions where a regulation "leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States." Thus, one may also doubt that the Sales Law Regulation meets the requirements of Art. 114 (1) TFEU.

The answers provided by the Commission would presumably all be "yes," but things are not always as easy as one might think. Let us take a closer look.

4.2 Is the Common European Sales Law Really Needed?

When drafting the Sales Law Regulation, the Commission was convinced that different national sales laws are one of the biggest, if not the biggest, obstacle(s) for businesses to trade across borders. The Commission based its arguments on several surveys, of which the Eurobarometer survey "European Contract Law in Consumer Transactions" (hereinafter *B2C survey*) can be seen as the most influential one when it comes to consumer law related questions.[67] In that survey, businesses were asked about the detrimental impact of various law and non-law related factors on cross-border trade.

Some contract law related barriers reached the top of the "obstacle list," with the "[d]ifficulty in finding out about the provisions of a foreign contract law" and "[t]he need to adapt and comply with different consumer protection rules in … foreign contract laws" ranking first and third respectively.[68] Non-law related obstacles, such as language issues or cultural related obstacles, were also included in that list, but overall did not score as high as the contract law related impediments.[69]

When reading the survey's results one has to bear in mind that the survey was

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[67] The Gallup Organization, Hungary, *European Contract Law in Consumer Transactions. Analytical Report. Flash Eurobarometer 321* (2011) (hereinafter *B2C survey*) <http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf> (visited December 8, 2011). See also the parallel survey dealing with B2B transactions: The Gallup Organization, Hungary, *European Contract Law in Business-to-business Transactions. Analytical Report. Flash Eurobarometer 320* (2010) <http://ec.europa.eu/public_opinion/flash/fl_320_sum_en.pdf> (visited December 8, 2011).

[68] B2C survey, *supra* note 67, at 19.

[69] Ibid.

exclusively developed for businesses. The target group of the B2C survey was comprised of two groups of businesses: those which are already engaged in cross-border trading and those which, despite having an interest in cross-border trade, are not yet engaged in trading beyond national borders. Businesses with no intention of expanding their contractual focus were left out of the survey. Consumers were also not questioned in the B2C survey.[70] It is very doubtful whether a survey conducted only with consumers would have led to the same results. Comparable studies show that the major reasons why *consumers* do not shop cross-border are different: the biggest obstacle for consumers is to be found in difficulties regarding the post-contractual stage, i.e., filing complaints or seeking effective dispute settlement.[71] Also psychological issues such as distrust in foreign sellers or the risk of falling victim to a fraud in combination with difficulties in getting rights enforced abroad, as well as language issues, rank comparatively high.[72] Different legal standards play only a minor role and only as far as *foreign* laws are less protective than national laws.[73]

While some businesses might appreciate the approach taken by the Commission, it cannot be denied that a well-functioning internal market based on enhanced cross-border transactions does need both: the support of businesses *and* acceptance by consumers. Even if one of the two interest groups eventually benefitted from the new sales regime, it would not necessarily mean that the internal market itself is strengthened. The drafters of the Sales Law Regulation seemed to pay only minor attention to this fact. From a consumer's perspective

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[70] Ibid, at 4 and 5.

[71] See e.g., TNS Opinion & Social, *Consumer Protection in the Internal Market. Special Eurobarometer 252 / Wave 65.1* (2006), chapter 3.2 <http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf> (visited December 8, 2011) or The European Opinion Research Group EEIG and EOS Gallup Europe, *Public Opinion in Europe: Views on Business-to-Consumer Cross-border Trade. Report B. Standard Eurobarometer 57.2 / Flash Eurobarometer 128* (2002), chapter II.1.1 <http://ec.europa.eu/public_opinion/archives/ebs/ebs_175_fl128_en.pdf> (visited December 8, 2011).

[72] Ibid.

[73] Ibid.

it does not seem that a harmonized European sales law is really needed, at least not in the form of the proposed Common European Sales Law. Actually, the Common European Sales Law in its current version could cause more problems than it solves, as will be shown in the next couple of subchapters.

4.3 More Certainty for Consumers?

As indicated in the previous subchapter, the likeliness that a harmonized set of rules is of primary importance to consumers is very low. There is no indication whatsoever which could prove the assumption that consumers are asking for a harmonized sales law regime that overrides the protection offered by traditional national (consumer) sales laws.

Introducing a parallel regime of national rules for cross-border B2C cases which is different from "internal" national rules might actually cause uncertainty. Making an informed decision about whether to buy within or across national borders would clearly take more than just comparing prices. Whereas consumers can nowadays usually[74] rely on the protection of a single set of national rules, the introduction of the Common European Sales Law would place a parallel sales law regime next to the traditional regime, complicating the consumer's choice between two different national sales law regimes.

If consumers really cared about the legal framework applicable to their transactions, they would have to invest more time and money into finding out about the advantages and disadvantages of both regimes: the already existing traditional national sales law regime and the harmonized Common European Sales Law. Instead of basing their decision of where to buy on factors such as the overall price or the availability of a product, they would also have to compare legal aspects. Needless to say only a very small percentage of potential

[74] See Art. 6 Rome I Regulation for details.

consumers show such a high degree of legal knowledge that they can simply compare the advantages and disadvantages of the two systems.

The mandatory provision of the (relatively short) Standard Information Notice by the respective business would clearly not suffice. The "one-size-fits-all" information notice as introduced by Annex II of the Sales Law Regulation (hereinafter *Standard Information Notice*), only explains key provisions of the Common European Sales Law without making reference to the pertinent already existing parallel national law. Businesses are only required to inform consumers about Common European Sales Law rules, but are not asked to contrast its provisions with the traditional national sales law rules. How then can the consumer make an informed decision without the need to "research" by him- or herself?

4.4 Reduced Transaction Costs and Increased Certainty for Businesses?

On several occasions, the Commission has listed the possible reduction of transactions costs as one of the biggest merits of the proposed Sales Law Regulation for businesses as well as for consumers.[75] The Commission argues that businesses would not need to consult with legal advisors regarding the contents of foreign law anymore, as due to the harmonization the same sales law rules would apply regardless of where the consumer resides. This, according to the Commission, would eventually lead to lower product prices.

This assumption would, however, only be true if the businesses were willing to pass on the cost reduction to the consumers and only subject to the condition that every consumer accepts the applicability of the Common European Sales Law, i.e., that there would not be any need for businesses to get legal advice on traditional national sales laws. Regarding the first of these two issues, a likely

[75] See e.g., European Commission; *supra* note 5, at 2-4 and 8-10.

price reduction for consumers, it is not the first time that a EU institution has based its arguments on alleged cost savings for consumers: in the course of the national implementations of the Product Liability Directive,[76] the European Court of Justice (hereinafter ECJ) in *Skov* v. *Bilka*[77] argued that the application of already existing Danish rules which simplified the redress mechanism for consumers in product liability cases, but at the same time went beyond the provisions of the Product Liability Directive, would eventually have a negative impact on consumers. As businesses would have to "insure against such liability,"[78] retail prices would increase. However, as *Geraint Howells* and *Jean-Sébastien Borghetti* argue, "nothing indicates that products were more expensive in countries which used to impose liability for defective products on suppliers [note: as was the case in Denmark] … than in countries which have always channelled product liability on producers [note: as also foreseen by the Product Liability Directive]."[79] There is actually no scientific proof that product prices in Member States with consumer-friendlier product liability rules are generally higher, or at least there is no evidence for a direct connection between stricter product liability rules and higher prices (if any exist).

Also in the case of the proposed Common European Sales law there is no indication that consumers would financially benefit. The Commission has no evidence which could verify the two basic assumptions, namely that there would be a cost decrease on the side of the businesses and a passing on of the cost decrease for the benefit of the consumers.

It rather seems likely that transaction costs could eventually increase:

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[76] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 No. L210.

[77] Case C-402/03, *Skov Æg* v. *Bilka Lavprisvarehus A/S* [2006] ECR I-00199, at recital 28.

[78] Ibid.

[79] Geraint Howells and Jean-Sébastien Borghetti, *Product Liability, in* Cases, Materials and Text on Consumer Law 439, 452.

businesses would need to obtain substantive advice on both national laws and the Common European Sales Law rules, as the latter one would only be an alternative regime and not regulate each and every cross-border B2C contract. The certainty for businesses would obviously not be improved by this. In order to avoid extra costs and uncertainty, businesses would have only two options: either refrain from trading cross-border or choose to offer their products only under one of the two regimes, genuine national sales law or Common European Sales Law, making it a condition for the conclusion of a contract that consumers accept that "offer." The latter, however, would verify the assumption made in the following subchapter, namely that the Common European Sales Law, if chosen by the respective business, would practically be a non-voluntary tool for consumers, in keeping with the motto "*take it or leave it*." It is very doubtful that this would really enhance B2C cross-border sales.

4.5 The Common European Sales Law as an Alternative and Voluntary Regime?

As indicated further above,[80] the Commission explained the need for harmonized sales law rules with the argument of possible contract-law related impediments to cross-border trade. To solve this "problem" it took a quite elegant approach, stating that the Common European Sales Law is just an alternative regime which is applicable only if the contractual parties agree on its applicability.[81] This voluntariness should also mean that the new regime would be a less "radical" instrument compared to a directive or regulation replacing traditional

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[80] See chapter 4.2 of this paper.

[81] Art. 3 Sales Law Regulation: "The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7." In addition, Art. 8 (2) Sales Law Regulation requires that "the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract." For the "normal" case of contractual choices of law, i.e., choosing between the laws of two different countries see e.g., Martin Fricke, *Art 6 Rom I-VO, in* Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR Art 6 Rom I-VO, recital 50 (Thomas Rauscher ed., 2011).

national sales law rules.[82]

But would the Common European Sales Law really be a voluntary regime also for *consumers*? The B2C survey shows that on average roughly 71% of businesses which are interested in cross-border sales would appreciate a harmonized single set of contract law rules.[83] The majority of businesses, roughly 53%, would however favour a regime which replaces national contract laws over the finally proposed Optional Instrument.[84] Only 14.6% of the contacted businesses favoured the approach which was eventually taken by the Commission.[85] The proposed Sales Law Regulation can be seen as a kind of a compromise. Perhaps also due to concerns in relation to the subsidiarity and proportionality barriers enshrined in the TFEU, the Commission drafted the existing Proposal that fully pleases only a relatively small number of businesses. It is very doubtful that businesses would in practice use the Common European Sales Law as an *alternative* tool; they might rather exercise "soft" pressure on consumers to agree on the applicability of the Common European Sales Law regime.

Of course, in order to be applicable, both the respective business and the consumer would have to agree on the applicability. But do consumers really have a choice? It is very likely that at least those businesses which due to a

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[82] For details see Commission Staff Working Paper, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law, October 11, 2011, (SEC)2011 1165 final, 44-8.

[83] The Gallup Organization, Hungary, *European Contract Law in Consumer Transactions. Analytical Report, supra* note 69, Table 22a.

[84] Ibid, Table 25a.

[85] Ibid; in addition to the 14.6% which favoured an optional instrument for cross-border transactions only, another 22% favoured an optional instrument which would equally be applicable to national and cross-border transactions. The currently proposed regime would, however, primarily only apply to cross-border transactions and, only in the event that the respective national legislators also opt for a domestic application, cover purely national transactions – see Art. 13 (a) Sales Law Regulation.

"fear" of diverse national sales laws are currently not engaged in cross-border transactions, i.e., those businesses which currently strongly support a possible introduction of a harmonized mechanism, would be willing to conclude a cross-border contract only if the other party, i.e., the consumer, agrees on the applicability of the Common European Sales Law. If diverse national law rules were really such a big obstacle for businesses, why then would the introduction of a parallel regime take away this fear from businesses and make them willing to accept the applicability of diverse national law rules of which they are so "afraid"? In other words: one can assume that those businesses would only engage in cross-border transactions if the consumer accepts the Common European Sales Law; in theory, i.e., on paper, one may still call the instrument "voluntary" or "alternative", as it needs an agreement between the two contract parties. In reality, however, there would be at least indirect pressure on the consumers to agree and accept the Common European Sales Law rules.

The Common European Sales Law would therefore not in fact be a 100% voluntary instrument in the end, at least not in practice. Although the Sales Law Regulation would look like a voluntary regime, the Commission might actually reach the same results as it would have done e.g., if it had chosen option 6 of the 2010 Policy Options Green Paper,[86] or as *Howells* puts it, it might result in "*de facto* achieving in practical terms … maximal harmonisation."[87]

In practice consumers might encounter similar problems as in the area of general terms and conditions: consumers wanting to change provisions contained in general terms and conditions will succeed only on very rare occasions. Under normal circumstances they only have a choice between concluding a contract which is based on a business's general terms and

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[86] See chapter 3.1 of this paper.

[87] Geraint Howells, European *Contract Law Reform and European Consumer Law – Two Related but Distinct Regimes*, 1 (visited December 8, 2011), <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/188_en.pdf>.

conditions and not concluding the contract at all. Why should it be different in the case of the Common European Sales Law? What is missing is a safeguard mechanism which really protects the consumer's freedom of choice, not only the business's party autonomy: if the Sales Law Regulation became reality, then, in addition to full disclosure of rights and alternatives to the consumer, the consumer should have the option to conclude the contract based on his or her "genuine," i.e., traditional, national sales law, not only on paper but also in reality. It must be guaranteed that businesses cannot escape through the backdoor by making the consumer's acceptance of the Common European Sales Law a condition for the business's willingness to conclude a contract. The wording of Art. 3 of the Sales Law Regulation, however, does not prevent businesses from doing so. This is of particular relevance in those cases where "genuine" national sales law provides for stricter, or consumer-friendlier, rules, as will be seen further below.[88] It remains to be seen how the ECJ would handle this problem if the Sales Law Regulation in its current version became reality.

4.6 Setting a High(er) Consumer Protection Standard?

Another argument that the Commission likes to use when promoting the Common European Sales Law is that it would guarantee a high level of consumer protection.[89] This might be true in cases where traditional national consumer law rules are not well-developed and would not cause any problem if the Common European Sales Law set the bar very high. But in fact the Common European Sales Law could pose a threat to those national consumer protection regimes which go beyond existing consumer law rules at the EU level and provide for stronger consumer protection than what is prescribed for by EU law. This is mainly due to the interrelationship between national consumer law

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[88] See chapters 4.6 and 4.7 of this paper.

[89] See e.g., European Commission; *supra* note 5, at 4: "… [t]he Common European Sales Law would contain fully harmonized consumer protection rules providing for a high standard of protection throughout the whole of the European Union".

standards, minimum and maximum harmonization issues, recent trends at the EU level, and the nature of the Sales Law Regulation itself.

In the past, most consumer law rules at the EU level were formulated as minimum standards ("minimum harmonization"). National legislators had the discretion to retain stricter national rules or introduce consumer protection rules which went beyond the required minimum level. Several national legislators indeed have done so, which on the one hand protected consumers in those countries better than in other Member States, but on the other has led to a scattered landscape of national consumer laws, the latter being now considered by the Commission as one of the main reasons why businesses are reluctant to trade across borders.[90]

However, in order to ensure equal chances for all businesses the Commission has recently begun to shift its focus more strongly from minimum to maximum harmonization, as the recently adopted Directive on Consumer Rights or the Unfair Commercial Practices Directive of 2005 both show. The Common European Sales Law regime would also be such a fully harmonized tool.[91] On top of that, being an EU regulation it would be directly applicable in all Member States without running the risk of being wrongly implemented. Para. 11 of the Preamble further explains that the new regime would "guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union [sic! note: not *national*] consumer law."

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[90] See chapter 4.2 of this paper.

[91] See e.g., the Preamble, paras. 6, 11 and 12 Sales Law Regulation, talking about "fully harmonized provisions" and "a complete set of fully harmonized mandatory consumer protection rules."

If the Commission was really interested in setting a "high level of consumer protection," it would, however, have to ensure a high standard throughout the EU, not only compared to "Union consumer law." Without any doubt, consumers all across the Member States would greatly appreciate a truly high standard of consumer protection. Thus, the Commission would have had to translate the strictest national rules in a piecemeal fashion into EU law, as the highest overall standard of consumer protection consists of the highest standards from different Member States. In other words: there is not a single Member State which has the consumer-friendliest rules for each and any legal issue possibly affecting consumers. Only by complying with the highest standards from all Member States would the Common European Sales Law really set a (very) high harmonized standard. However, as the Commission has primarily aimed at pleasing businesses and not consumers, it seems that it has unfortunately neglected this task.

One does not have to be clairvoyant to see that full harmonization does not allow all Member States to keep their high standards. A good example is the above-mentioned *Skov* v. *Bilka* case and the implications the Product Liability Directive had on existing Danish product liability rules. Also in the case of the Common European Sales Law, problems for traditional high national standards are bound to occur.[92] This leads us to one more question: the interrelationship between the Common European Sales Law regime and Private International Law.

4.7 The Common European Sales Law and Rome I – No Problems at All?

Art. 6 Rome I Regulation is undeniably a very important provision for the protection of consumers, as in most cross-border B2C transactions consumers can rely on the protection by either the national law[93] of their home country (Art. 6 (1) Rome I Regulation) or, according to its second paragraph (note: i.e., if a foreign law is chosen), by mandatory protective rules of their home country,[94] i.e., by those "provisions that cannot be derogated from by agreement by virtue

of the law which … would have been applicable on the basis of paragraph 1."

In the Explanatory Memorandum to the Proposal, the Commission refers to Art. 6 Rome I Regulation as a centrepiece of European private international law.[95] The Commission, however, does not primarily stress the practical importance of this provision for protecting consumers, but rather notes that "[i]n cross-border transactions between a business and a consumer, contract law related transaction costs and legal obstacles stemming from differences between different national mandatory consumer protection rules have a significant impact,"[96] as "[i]n cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected."[97] The formulation chosen by the Commission does not come as a surprise and is once again an indication of

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[92] Compare e.g., the non-exclusive list of forbidden contractual B2C provisions of Art. 6 KSchG (note: i.e., the Austrian Consumer Protection Act) and the provisions introduced under chapter 8 of the Common European Sales Law; while Para. 6 (1) lit. 11 KSchG *absolutely* forbids a contractual clause whereby the "burden of proof is imposed on the consumer which does not by law fall upon him," this issue falls only under the *grey list* of Ar. 85 of the Common European Sales Law, not the blacklist of Art. 84 of the Common European Sales Law. Art. 85 (a) states that a "contract term is presumed to be unfair for the purposes of this Section if its object or effect is to …restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader." Another example from the same jurisdiction is the regulation on mistakes. While Para. 871 ABGB (i.e., the Austrian Civil Code) says that "[i]f a party was mistaken with respect to the contents of a declaration given or received by him, and this mistake affects the essence or the fundamental nature of that to which the intention of the declaration was principally directed and expressed, no duties arise therefrom for the mistaken party, provided that this mistake was … promptly explained to him [note: the other party, i.e., the party which was not mistaken]," the Common European Sales Law does not know an equivalent to this.

[93] In this chapter the term *foreign law* should be understood as the law of a country which is not the consumer's home country.

[94] For an analysis of this "preferential-law approach" see e.g., Gralf-Peter Calliess, *Art. 6 Rome I, in* Rome Regulations Art. 6 Rome I recitals 68 et seq. (Gralf-Peter Calliess ed., 2011).

[95] See e.g., European Commission; *supra* note 5, at 2 and 6.

[96] European Commission, *supra* note 5, at 2.

[97] Ibid.

the underlying rationale of the proposed regime: first and foremost, the Commission intends to simplify the legal transaction process for businesses which want to increase their cross-border activities. Consumer concerns play only a minor role, if any.

This becomes even more obvious when one takes a closer look at the interplay of the Common European Sales Law and the Rome I Regulation. One has to pay tribute to the Commission for its ingenuity in drafting the Common European Sales Law. Surely having been aware of the practical obstacles a minimum harmonization tool would have caused for the approximation of national laws, the Commission drafted the Common European Sales Law in the form of a fully harmonized EU regulation which ultimately would result in an alternative national sales law device. If agreed by both parties the Common European Sales Law would, in the opinion of the Commission, override even stricter traditional national sales law rules and would be directly applicable without the need to take conflict of law rules into consideration at an intermediate stage. As the party-agreed Common European Sales Law would be exactly the same in every Member State, the Commission seems to be elegantly circumventing the "problems" for businesses caused by Art. 6 (2) Rome I Regulation, or at least it is trying to do so. According to the Commission, it would not matter anymore whether one chooses the Common European Sales Law of country A (i.e., the consumer's home country) or B (i.e., a "foreign" country), they would both be exactly the same in both Member States. The Explanatory Memorandum refers to this as follows:

> The latter provision [note: i.e., Art. 6 (2) Rome I Regulation] however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country. Therefore the level of the mandatory consumer

> protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.[98]

If the Commission succeeded with its plans, it would render the protective regime of Art. 6 Rome I Regulation practically ineffective. Consumers would be deprived of the national protection provided by the *traditional* national consumer law of their home country. Or as the European Consumers' Organisation (BEUC) rightly commented in its response to the 2010 Policy Options Green Paper: "the Commission openly aims at preventing consumers from having access to the safety-net provided by Art 6 Rome I regulation."[99] In addition to criticizing the Common European Sales Law for its circumvention of Art. 6 Rome I Regulation, the BEUC based its arguments also on the delicate relationship between the Common European Sales Law and Arts. 9 ("ordinary mandatory provisions") and 21 ("public policy") Rome I Regulation.

One of the most interesting questions might be whether the Commission could indeed neutralize the protective regime of Rome I by introducing the Common European Sales Law as a stand-alone *parallel national* sales law regime. Practically, it does not seem to make any difference whether businesses try to disable higher national consumer law standards by trying to make the less protective Common European Sales Law of the country, where the *business* operates from (i.e., the "foreign" country), the legal foundation of the contract, or by choosing the national Common European Sales Law regime of the *consumer's* home country, which would have the same low standard as the first mentioned one and might likely be of a lower standard than the traditional national regime of the consumer's home country.

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[98] European Commission, *supra* note 5, at 6.

[99] European Consumers' Organisation (BEUC), *Towards a European Contract law for Consumers and Business? Public Consultation on the Commission's Green paper on European Contract Law. BEUC's response*, 13 (visited December 8, 2011) <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/120_en.pdf>.

The first case, i.e., agreeing on the foreign Consumer European Sales Law, at the very least seems to be problematic. If the two parties do not agree on the applicability of any law, then Art. 6 (1) Rome I Regulation would lead to the application of *traditional* national sales law rules, as according to Art. 3 Sales Law Regulation parties must agree on the applicability of the Common European Sales Law. In other words, the applicable law under Art. 6 (1) Rome I Regulation is the traditional sales law of the consumer's home country and not that country's Common European Sales Law. If the parties agree on the applicability of the Common European Sales Law of a *foreign* country, then, pursuant to Art. 6 (2) Rome I Regulation, this foreign Common European Sales Law must be measured against the *traditional* sales law of the consumer's home country [note: arg. "in the absences of choice"].[100] The latter one might, however, contain stricter rules, which normally cannot be derogated from, at least not piece by piece, i.e., by picking changing provisions, but only by virtue of applying a separate set of sales rules as a whole: the Common European Sales Law of the consumer's home country. In that sense single provisions of the traditional national sales law regime can be considered as mandatory provisions, since the applicable law in the sense of Art. 6 (1) Rome I Regulation, the law of the consumer's home country would lead to the applicability of its traditional sales law.

Thus, in order to achieve the same result, i.e., lowering the standard set by the traditional national sales law, businesses could instead try to agree on the applicability of the Common European Sales Law of the *consumer's* home country as a whole. In that case Art. 6 (2) Rome I Regulation could not have any direct effect on the contractual relationship, as the agreed applicable Common European Sales Law is the one from the consumer's home country, and not a foreign country, and as the "law of the country where the consumer has his habitual residence"[101] would thus "fulfill the requirements of paragraph 1."[102]

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100 Art. 6 (1) Rome I Regulation.
101 Ibid.

At first sight the second approach seems to be in line with the Rome I Regulation, but taking a closer look, the Common European Sales Law could indeed be a circumvention of the protective Rome I regime. Businesses could very easily use the same (low) standards of the Common European Sales Law in any Member State just by making the application of the Common European Sales Law of the consumer's home country a condition for concluding a contract. Art. 6 Rome I Regulation would be rendered more or less ineffective, especially if one considers the low chances in practice for consumers to escape the applicability of the Common European Sales Law regime.[103] In this sense the Sales Law Regulation might indeed have the same effect as a maximum harmonized regulation: it would replace traditional sales law rules for B2C cases, but that is exactly what the Commission wanted to avoid.[104] It must be hoped that this is realized by the European legislator or at least by the courts.[105]

5. Conclusion

If adopted, the proposed Sales Law Regulation might bring an answer to a question which has kept many in the academic field busy for a long time: what will the future bring for B2C cross-border transactions? The Commission has finally set the path for a Common European Sales Law. This tool, however, does not stand on very solid ground, as was shown in this paper.

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102 Art. 6 (2) Rome I Regulation.

103 See chapter 4.5 of this paper.

104 See e.g., European Commission; *supra* note 5, at 8-9.

105 Especially the ECJ might play a decisive role in this context. It has to be seen how the ECJ would solve the tense relationship between the Common European Sales Law and the Rome I regime by the help of preliminary rulings. But even if the ECJ fully approved the Common European Sales Law, it would remain doubtful whether the internal market would be really strengthened by the introduction of the parallel regime. Getting the green light to use the Common European Sales Law as one pleases would definitely be very welcomed by those businesses which have strongly supported its introduction. However, consumers, on the other hand, would be unlikely to benefit from this, as was explained in chapters 4.3, 4.5 and 4.6 of this paper.

On the technical side, one must not forget that already Art. 114 (1) TFEU as the basis of the Sales Law Regulation may cast doubts, as the ECJ has already declared that a parallel regime might not fulfil the approximation requirement of that provision.[106] But even if the Sales Law Regulation passed an approximation of laws test, the relationship to the protective regime of Rome I would remain problematic, as the Common European Sales Law could likely render it practically ineffective, thus depriving consumers of an important safety-net.

On the practical side, even more questions have to be raised. So far the Commission has been unable to provide proof for its speculations that the internal market would eventually be strengthened. There is no evidence to support the assumption that consumers would benefit. And even for businesses the general benefits are not totally clear. It is obvious that the Common European Sales Law had to lower the overall protective standard for consumers to please loud voices from among those businesses which had expressed their wish to expand their cross-border activities. Otherwise the Commission would not have found it necessary to propose the new mechanism. If the Commission had really been that interested in setting a very high protective standard, then it would have had to pick the consumer-friendliest rules from each and every Member State and merge them in a harmonized instrument. But would that have been acceptable for the business side? Surely not.

Last but not least, did the Commission take consumers' interests into account at all? The Commission still owes us an explanation for why the Common European Sales Law is thought to be important for *consumers* and why it would really be needed. The recently adopted Directive on Consumer Rights already harmonizes certain scattered national consumer provisions. And as shown in this paper, the Common European Sales Law might in practice not really be a

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106 See *supra* note 66 for the relationship of Art. 114 (1) TFEU and the "approximation of laws" requirement thereunder.

voluntary tool. On top of that, it could cause more uncertainties than it would solve and also lead to a qualitative decrease of consumer standards. What the Commission should have tried, instead of proposing the Sale Law Regulation, is to deal with issues that are of higher priority for consumers: language and product safety issues; confidence in cross-border activities combined with a strict quality monitoring of foreign businesses; and effective assistance in dispute cases. This would really strengthen the consumers' trust in cross-border B2C sales and much more likely lead to the desired result of an improved internal market.

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