

University of Lapland, Faculty of Law

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Summary:

Aim of this thesis is to find frameworks how to opt-into the Common European Sales Law in B2C contracts. European Commission gave its proposal on the Common European Sales Law (CESL) in 2011, and since it has been widely discussed all over the Europe. Objective of the CESL is harmonise European contract law and provide rules applicable to cross-border contracts for consumers and small and medium size enterprises (SME). Projects toward common European contract law has been taken, but the CESL is the first attempt to adopt binding contract law rules in the European Union (EU). However, the CESL proposes set of complicated rules for limited contracts, and therefore it is unlikely that the CESL will even become into force as it was proposed.

The CESL presents unique opt-into mechanism. Parties cannot apply rules of the CESL before taking required steps to opt-into the CESL. Major problem with the mechanism is that its validity will be governed by national law. Therefore before parties can choose the CESL for governing law of sales contract, they are obliged to conclude separate agreement governed by national law to opt-into the CESL. Therefore the opt-into mechanism fails to create one set of rules applicable through the internal market.

Keywords: European contract law, European consumer protection, Common European Sales Law, CESL

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OPTING INTO THE COMMON EUROPEAN SALES LAW

How to opt-into, or opt-into at all, in B2C contracts?

Master's Thesis
October 2013
Laura Lassila
Faculty of Law
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ABBREVIATIONS

B2B	Business-to-business
B2C	Business-to-consumer
CESL	Common European Sales Law
DCFR	Draft Common Frame of Reference
ECJ	The European Court of Justice, and also the Court of European Community in pre-Lisbon period
EESC	European Economic and Social Committee
PECL	Principles of European Contract Law
SIN	Standard Information Notice
SME	Small and medium size enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. INTRODUCTION

The Commission Proposal presenting the Common European Sales Law (CESL) became subject of wide academic discussion soon after it was given in 2011. Aim of the Commission was create common rules for cross-border sales in the internal markets of the European Union (EU). The internal markets are one of the main subjects, and the free movement of goods, one of the four fundamental principles in the EU. Online purchases between trader and consumer are seen as a big potential to increase the internal market and the poor economic situation in the whole EU. Therefore it is in the Commission's objectives to find ways to make cross-border sales more attractive to consumers – as well as to traders.¹

Applicability of the CESL requires parties to follow complex set of rules, and if parties fail to take all required steps it may lead in situation where governing law of contract is not the CESL even if parties agreed so. The CESL is applicable when following requirements exists: cross-border contract which concerns sales or supply of digital content; seller or supplier is a trader; and parties agree to use the CESL. Rules can be applied even when other party's resident is outside of the European Union (EU). Member States have possibility to determine the CESL becoming applicable also on national sales and supply of digital content contracts – using the CESL as a national contract law.

1.1 Purpose

Purpose of this thesis is to find answer to the question: *what is required to opt-into the CESL on B2C contracts?* To be able to find answer to the question, it is necessary to set sub-questions for framing the legal problem. The sub-questions are as follows: *what are required steps of the opt-into mechanism;* and *how the steps shall be taken.* Results for these questions sets up frames for the minimum requirements parties shall fulfill to opt-into the CESL in B2C contracts. Thus my research is dealing parties' right to use the CESL and their obligation to agree on the use. Answer for the questions will give the way to use

¹ See more in the Green Paper COM (2010) 348 final

parties' right to use the CESL.

As the CESL is legislative act of the EU, it is relevant to argue if the EU has necessary legislative competence or not. The CESL is adopted in the form of regulation which is directly applicable – and has direct effect. Contract law is not in area of the EU exclusive legislative competence – as areas of the internal market and consumer protection falls into the shared competence. Therefore the EU can use its power only in certain limits. To find answer that legislative competence of the EU is been used as stated in the Treaties, it is relevant to ask if: *legal basis of the CESL has been chosen correctly*. Last question arising is: *how to improve the opt-into mechanism of the CESL*. Purpose is to present option to the proposed CESL and its opt-into mechanism.

1.2 Scope

The view of this paper is on cross-border online sales contract consumer concludes via trader's websites. I am going to draw frames for the requirements to apply the CESL as governing law of the contract. Only valid agreement opens the doors of the CESL and thus non-valid agreement could lead in several problems in parties' contractual relationship. Valid agreement to opt into the CESL will make the CESL as governing law of the contract and thus parties are aware of the rules of their contractual relationship.

The scope of this thesis is to examine closer the opt-into mechanism² of the CESL. Therefore focus is on how to make the CESL applicable – not how to apply rules of the CESL. Following an expression *agreement to opt-into* the CESL is used to refer parties' agreement to opt-into, which do not include any elements of sales contract. Therefore any provisions of the CESL stating how rules of the CESL apply to sales contract are not discussed or included in this thesis. *Sales contract* is used to refer B2C contract which is supposed to govern by rules of the CESL.

Hypothetic case behind questions arising in this thesis is as follows: trader A advertises and sells goods to consumers in other Member State than A's residence. All communication

² See more in Articles 8 and 9 of the Regulation COM(2011) 635 final

between A and consumers is done through A's website. Website provides information in language of consumers' residence and after choosing goods consumers conclude sales contract with A through the website. After concluded contract A transfers purchased goods to consumer. Consumer B purchased goods through A's website by choosing products to 'shopping cart'. B accepts goods in 'shopping cart' and moves on to next step where B accepts A's contract terms and gives address to transport and personal details for payment. After accepting all given terms and giving all necessary information B pays goods immediately through the websites. The case includes also other aspects of EU law e.g. data protection which is not taken into consideration in this thesis. Only scope of applying the CESL is discussed.

1.3 Methodology

Method used in this thesis is *positivistic theory of European law*³ which examines rules in the European law context. Definition of European law is used in this thesis in its wider approach covering whole European jurisdiction including legislation of the European Union and other institutions outside of the EU as well as national laws. Wider definition is used because area of private law, especially contract law, is mainly structured by national laws and so far in the Union level there have only been soft law instruments available. The CESL works in field of consumer protection and therefore it is not "pure" contract law in meaning of generally applicable rules for contracting parties. Therefore above mentioned soft law instruments are not acting alone in field of contract law, where the Consumer Rights Directive is strongly harmonising national rules. Comparative legal research is used to compare European contract law rules to international rules and English law rules. Legal rules constitute rights and obligations. Aim of this thesis is to examine frames for parties' obligations to opt-into the CESL. Opposite from the parties' opt-into obligations, is parties' right to use the CESL.

The positivistic theory of European law presents the definition of European legal system as a mechanism to set rights and obligations of the legal order on the factual situations. Kiikeri argues that if in positivistic theory interpretation basis rights and obligations arising from

³ See more in Kiikeri 2012, pp. 544–561.

only one rule, and not taking into consideration other rights and obligations stated in other rules, is interpretation done under European legal order, not under wider perspective of legal system. Thus result of interpretation is narrower than would be interpreting several rules under proportionality.⁴ Comparative approach is used to find options for drafted rules. Options are necessary to examine as the CESL is not meeting its objectives in normative level. The opt-into mechanism of the CESL is a draft norm and its meaning and correct interpretation is in focus in this thesis. Soft law instruments and other sources from European legal system are used to interpret the norm. Interpretation will be done following methods of teleological and systematic interpretation. Systematic interpretation approaches legally valid norms, legal principles and case law, which will give answer of interpretation. Teleological interpretation takes into account policies behind the legislation, and therefore it is also interpretation of the Treaties, which sets objectives for policies to achieve by measures of secondary legislation. The conclusion will present arguments for interpretation as well as optional rule to make objectives behind the draft CESL meeting the result of interpretation.

1.4 Materials

Materials used consists academic texts and official documents of the EU. As the CESL has not come into force yet and therefore materials includes academic argumentation concerning possible effects and problems arising if the CESL will be applicable legislation in future. There is none judgments from the ECJ or national courts. Thus cases of the ECJ are not playing big role as a direct reference, but case law has strong effect in the European legal system and therefore effecting also behind academic arguments. One of the major weaknesses of the CESL has been said to be lack of case law and so it is understandable why argumentation here is not referred directly to explicit cases. The CESL started active academic discussion after the Commission established its proposal in 2011. Therefore there is lot of publications and shorter texts written of the CESL. Problem is not to find publications dealing questions arising from the CESL, but to find quality ones. Consumer policy has a major role behind the CESL and it is shown in official documents of the EU used as a references. However, as this thesis objectives are purely in legal questions, and

⁴ Kiikeri 2012 pp. 545–547

not in politics, the stronger weight has been given to academic arguments.

Major part of the material is available in internet. Official documents are found from official sources and authenticity of these documents is high. Academic sources include old-fashion paper books and online papers. Writers are mostly university professors whom expertise is in private law. Academic texts are used as a bank of ideas which are compared and argued critically in this thesis. Therefore reliability of sources is in suitable level: writers are experts but as materials are online there is always possibility that texts are modified by third party. However, as this thesis is mostly theoretical and results are in hypothetical level, the possibility that academic texts used as a source could be modified is not jeopardizing reliability of results of this thesis.

Materials have been chosen in two different approaches: official material of the EU to express development towards the CESL and objectives of the EU policies. Academic text has been chosen by researching available papers and trying to find guiding lines from those of found. Main parts of the references are writers from, or institutions, inside of the EU. Therefore view is mainly European. However, this does not mean that it would be only negative approach. As we are speaking rules made for the internal market of the EU, those rules shall be interpreted in European context. That is also a reason why writers outside of the EU have not focused on issues concerning B2C contracts and opting into those, but more to issues on B2B contracts and issues concerning bigger picture of contract law field. Thus, as this thesis focuses on B2C contracts and consumer protection in the internal market, issues are approached through European point of view in context of European contract law.

1.5 Outcomes

The first part of this thesis examines the scope of the European contract law field, where the Commission proposal is supposed to be adopted. Second part examines how parties shall opt-into the CESL in B2C contracts. Opting into the CESL has made quite difficult and rules are not clear. Interpretation is difficult to found, as there is no previous case law, and the CESL states that its rules shall be interpreted autonomously separate from national

contract laws. This is interesting statement, as all national contract laws concerning B2C contracts, are harmonized in the EU level by the Directives of consumer protection. Last part of this thesis brings all areas together. Focus is on the problem of opting-in to the CESL. how to opt-in, and how it should be done in different way. Steps to opt-into the CESL are presented, and those steps are: 1. trader's offer; 2. consumer's acceptance; and 3. trader's confirmation. Following these steps in given order and filling requirements set to every step, parties are able to opt-into the CESL. However, the opt-into mechanism is complex and it contains many problems and possibilities to fail, it is proposed to make opting into the CESL easier. Last comment remain, is that do we even need the CESL as there is already the Consumer Rights Directive.

2. COMMISSION PROPOSAL ON COMMON EUROPEAN SALES LAW

Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (Proposal) was given on 11 October 2011⁵. The Proposal presents text of the Regulation (part 1) and Annex I including text of proposed Common European Sales Law (CESL) (part 2) and Annex II (part 3) including Standard Information Notice (SIN) which is for informing consumers when choosing the CESL as governing law of sales contract. Later on in this thesis wording *the Proposal* refers to the Proposal as a whole, *the Regulation* to the text of the part 1 including Articles of the Regulation, *the CESL* to proposed Articles of sales law in Annex I and also generally the whole Proposal , and *the SIN* to Annex II. The Proposal presents 16 Articles – including the circumstances to use the CESL – in the part 1, 186 Articles of the CESL in the part 2, and the SIN – which is mandatory to provide to consumer in B2C contracts – in the part 3. As it is easy to notice, the structure of the Proposal is not user-friendly. Regarding that problem, the European Law Institute (ELI)⁶ has stated that the Proposal would be easier to understand if it would be only one Instrument – not three different parts – as there is duplicated article numbers in the Proposal and in the CESL, and also some of the provisions presented in the text are not located in the most suitable part⁷.

⁵ COM(2011) 635 final, documents and information available at Pre-Lex:
http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=200899

⁶ See more in <http://www.europeanlawinstitute.eu/>

⁷ Proposal for a Regulation on a Common European Sales Law: Making the Proposal simpler and more

The CESL is applicable to cross-border contracts: (a) concluded online or by phone (distance contracts); (b) parties have explicitly chosen to use CESL as governing law (opt-into); and (c) other party is trader and other party either consumer or small or medium size enterprise (SME). The Commission's intention of the proposed CESL is provide cross-border sales securer for consumers and transaction expenses lower to traders. Idea is that traders can use one single set of rules trough the EU and consumers can rely that their rights are protected wherever Member State trader has its residence. As lowering transaction costs – if we believe that to be effect of common rules – consumers would benefit the CESL as lower prices in online sales.⁸ However it is quite clear that the proposed CESL does not meet objectives of lowering costs and making cross-border sales simply and securer for both parties. In fact the CESL creates complicated structure of opt-in tool and mixture of rules of national law and the CESL. Benefits for B2B sales – other party being SME – are also unclear. ICC Commission on Commercial Law and Practice stated on its position paper 2012, that there is no need for the CESL in B2B sales and in June 2013 ICC delegation met MEPs to lift their opinion to remove B2B sales from scope of the CESL⁹.

The Commission states that *the proposal is meant as a contribution to enhancing growth and trade in the internal market on the basis of freedom of contract and a high level of consumer protection, in line with the principles of subsidiarity and proportionality*¹⁰. The Commission continues that the CESL creates a uniform rules which covers contract's life-cycle as a whole. The idea behind the 2nd national contract law regime is to make sure that the CESL is usable to those transactions which are most important to cross-border sales.¹¹ However, as it will become clear later in this thesis, the CESL is not able to function as the Commission presents. The CESL is too complicated to apply and its scope does not cover

certain, p.7

⁸ See more on European Commission website on Contract Law, available at:

<http://ec.europa.eu/justice/contract/>

⁹ See more ICC press release and document No. 460/662 – 12 July 2012, available at ICC Website:

<http://www.iccwbo.org/News/Articles/2013/ICC-urges-Members-of-the-European-Parliament-to-remove-B2B-sales-from-scope-of-Common-European-Sales-Law/>

¹⁰ Communication from the Commission COM(2011)636 final, p.7

¹¹ Ibid.

the whole life-cycle of contracts.

The CESL is, as the Commission states it, to create features as follows: 1. 2nd contract law regime common to all Member States; 2. An optional tool which can be applied only if parties are agreeing so; 3. Uniform set of sales contract rules; 4. Applicable only for cross-border sales; 5. Consumer protection rules which are identical in the whole EU; 6. Rules covering practical issues of cross-border contracts; and 7. Only one party needs to have residence in the EU.¹²

It can be widely argued if the CESL is right tool to harmonize Member States sales laws – and is harmonization even needed. Those questions are however more political than legal and therefore they are not analyzed in this thesis. Thus it is quite clear that the CESL is not going to be success as a sales law – as can be seen e.g. its problematic applicability analyzed in this thesis. However, the CESL has already been subject of great academic, and political, discussion and therefore it will have effects to future European Private Law – becoming into force as it is written or not.

Lack of consumers' trust to their rights and traders' possibilities to conclude contracts covered by different laws of Member States are the problems making cross-border sales less attractive in the EU – especially online purchases. Therefore the Commission has lot of interest to create tools to improve online sales.¹³

2.2 Where is the CESL now?

The European Parliament, as well as academic and public discussion, has not shown positive signal for adopting the Proposal. The CESL has create lot of discussion, working papers, publications and seminars and still it is unsure will it become in force in future. Discussion continues, and the latest was held¹⁴ on 10 July 2013 when Standing Parliamentary Committee on Legal Affairs held workshop on The Proposal on Common

¹² Communication from the Commission COM(2011)636 final., pp. 7–8

¹³ Ibid.

¹⁴ In this thesis situation of the CESL is followed till 30 July 2013.

European Sales Law¹⁵.

In May 2013 the Committee of Legal Affairs gave the draft report on Amendments 206-531 to the Proposal where the Committee proposes that European Parliament rejects the Proposal. The Committee proposes instead of regulation using directive on minimum harmonization which in practice should be done by extending the already existing the Directive on Consumer Rights. Main reasons for rejecting the Proposal are: 1. EU does not have legislative power to replace contract laws of Member States; 2. consumer protection is provided by other legislative tools in EU; and 3. interpretation of the proposed CESL would vary to state to state and therefore rules would not be same to everyone.¹⁶ The draft report suggests also that the definition of consumer should be extended and other definitions should also be harmonized to be equal with definitions set in the Consumer Rights Directive. The CESL covers also digital content, but the report proposes also free digital content to be covered by the CESL.¹⁷ The draft report clearly pointed its opinion that the CESL should not be adopted in regulation, but implemented to the Consumer Rights Directive. However, the draft report is mixture of arguments against the CESL but it fails to provide real solution for the next step. In e.g. proposal the draft report establishes are partly written in form of directive (as the draft report proposes), but some of its proposals speaks the CESL as regulation and proposes actions to be implemented in way of regulation. Therefore the draft report fails to present real option for the Proposal.

One of main problems of the CESL is how to interpret rules commonly trough the EU. The Proposal states that the CESL shall not be interpreted through *any other law*¹⁸. Courts of Member States would face great challenges handling cases and therefore been many times forced to ask opinion of the ECJ. In case law the ECJ has stated that if scope of the national law falls into rules of EU law, shall national rules be interpreted in conformity with EU law¹⁹. Thus everything outside of CESL's scope would be interpreted through national

¹⁵ More information available at:

<http://www.europarl.europa.eu/committees/en/juri/events.html?id=workshops#menuzone>

¹⁶ Draft Report Klaus-Heiner Lehne, Luigi Berlinguer PE505.998v01-00

¹⁷ Ibid.

¹⁸ See more in recital 29 of the Proposal

¹⁹ Case C-555/07

laws.²⁰

2.3 Possible Effects of the CESL to Future European Private Law

The CESL has met lot of criticism and therefore no one can say if it comes into force and if it does in which format. Therefore it is only guessing what will be the effects of the CESL to European private law. There is going on guessing concerning the CESL's future role. Smits argues that – as we have seen in case of the CESL – Commission is not following such rules as the PECL and the DCFR when drafting new legislation. If the CESL fails to come into force it might not have any effects to future drafting of common contract rules in Commission.²¹

3. EUROPEAN CONTRACT LAW

Harmonization of European contract law belongs in area of civil justice where the EU does not have exclusive legislative competence. Therefore harmonization in contract law area has been focused to specific sectors, such as consumer protection. However, projects towards common European contract law has been taken such as the Principles on European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).²² These two projects will be discussed more closely in following chapters.

Field of European contract law is pluralist and there is not found common European rules covering contracts in the internal markets. Hesselink argues that it is possible to find multiple answers to the question *how many systems of private law there are in Europe*. Hesselink founds six different answers: as many as Member States; as many as Member States and EU law together; only the EU law system; one system including all systems globally; partly overlapping and contradicting systems; and the last option is that there is no existing system at all. The question might feel irrelevant, but when it is asked that what are the sources of European private law, the question comes more relevant. It is easy to notice that in private law area there is pluralism of legal systems. Different solutions of contract

²⁰ Smits 2012, pp. 10-11

²¹ Ibid., p.9

²² Storskrubb 2011, p. 315

laws are resolutions of different political approaches. Therefore Hesselink argues that perhaps solution is found through *terms of substantive principle of law*, which, however, leaves the question concerning the system of European private law open.²³

3.1 Development of European Contract Law

The EU started the work towards the European contract law in 2001 when the Commission *Communication on European contract law*²⁴ published and public consultation was launched. The public consultation was the basis for the *Action Plan*²⁵ which came out in 2003. The Action Plan proposed that European contract law should be developed by publishing a Common Frame of Reference. The Draft Common Frame of Reference (DCFR) published in 2008. The DCFR is academic text which provides toolbox for future legislation of European contract law. In same time with the work of international academic network – establishing the DCFR – the *Association Henri Capitant des Amis de la Culture Juridique Francaise* and the *Société de Legislation Comparée* was conducting analytical work which results are found from the published *Principes Contractuels Communs*.²⁶ In 2010 the Commission published the Green Paper²⁷ to propose different solutions to establish European contract law rules. The Green Paper provided four different options to harmonize contract law rules. The Commission launched consultation regarding different option and received over 300 answers from Member States, business, organizations, academics, and so on²⁸. Optional instrument was supported either on individual set of rules or with support of toolbox.²⁹ In June 2011 the Parliament gave its strong support³⁰ to implement option 4, optional instrument, and intention was to launch new set of optional rules before the 20th anniversary of the Single Market³¹ which took place in 2012. And so was the latest step on the road toward common European contract law, as we are well

²³ Hesselink 2012, p.1–2, and 41

²⁴ Communication on European contract law COM(2001)398

²⁵ Action Plan COM(2003)68

²⁶ See more in Communication from the Commission COM(2011)636 final

²⁷ Green Paper COM (2010) 348 final

²⁸ Results are found in Impact Assessment SEC(2011)1165 final

²⁹ See more in Communication from the Commission COM(2011)636 final

³⁰ Ibid.: *The Parliament voted with a four-fifths majority in support of optional EU-wide contract rules that would ease cross-border transactions.*

³¹ Which took place in October 2012. See more in websites of the anniversary:
http://ec.europa.eu/internal_market/20years/singlemarket20/

known, taken in form of the Commission proposal on Common European Sales Law. Steps mentioned above are examined more closely in following chapters.

3.1.1 The Principles of European Contract Law (PECL)

The PECL is structured similarly as *the UNIDROIT Principles*³² – principles applying to international contracts. The PECL is conclusion of work of the Commission on European Contract Law which objective was to establish the PECL becoming contract law covering all Member States. So-called Pavia Group, the Academy of European Private Lawyers, published the European Contract Code – Preliminary Draft. The Study Group on a European Civil Code drafted an enlargement to the PECL.³³

The PECL sets out four objectives³⁴ to achieve in field of contract law. First one is parties' possibility to choose neutral principles offer by the PECL³⁵. Thus, as the Rome I determine that in the EU contracting parties must choose *a national legal system* to govern their contract and therefore it is argued that the PECL can be only used as a basis – not governing rules – of the contract³⁶. However, opposite arguments has been stated, and also Smith argues that actually the PECL is possible to choose for governing law. If parties are choosing arbitration proceeding to way to solve possible disputes, applicability of the PECL is not problematic at all. However, as long as the applicability in national courts remains uncertain, it is not favoring to choose the PECL governing contracts.³⁷ Second objective set to the PECL is to offer source for legislators adopting new rules³⁸. Third objective is to serve the EU legislators a toolbox and source for interpretation³⁹. Last goal is to set ground for future European contract law⁴⁰.

³² International organization the UNIDROIT published the UNIDROIT Principles of International Commercial Contracts in 1994. See more on the UNIDROIT websites www.unidroit.org and on homepage of the Principles www.unilex.info

³³ Cordero Moss 2004, p.46–47

³⁴ Parts I and II, xxiii and art. 1:101 PECL; cf. Part III, xv ff.

³⁵ The PECL: Parts I and II, art 1:101 and 1:101 (2) "Express adoption"

³⁶ Smits 2005, p. 3

³⁷ Ibid., p. 3

³⁸ Parts I and II, xxii, xxiv, Comment D to art. 1:101 (at 96-97); Part III, xv. Also see Option 2 of the Communication on European Contract Law, o.c., no. 52 ff.

³⁹ Parts I and II, xxii ff. and art. 1:101 (1) PECL.

⁴⁰ Parts I and II, xxiii; idem in Part III, x.

3.1.2 The Draft Common Frame of Reference (DCFR)

*The Action Plan*⁴¹ established on 2003 and it stated that development of European contract law shall follow already taken acts and not propose a binding European contract law⁴². The Action Plan is the result of the Commission *Communication on European Contract Law*⁴³ which launched public consultation to examine issues concerning diverge of national contract laws – the Action Plan presents the answers of the consultation. To provide more coherent and quality European contract law, the establishing of a Common Frame of Reference was suggested.⁴⁴

The DCFR presents toolbox of *principles, definitions and model rules* for legislators to future consumer and commercial contract rules. Therefore the DCFR covers the field of civil law and stands on floor built by previous researches, in e.g. *the PECL*⁴⁶, *the CISG*⁴⁷ and *the UNIDROIT Principles*⁴⁸, on that field. The DCFR is to create rules covering also B2C contracts, which are not covered by instruments mentioned above.

The DCFR basis on Member States' laws and it is an academic text which has a structure of civil codes of Continental Europe. Hesselink argues that the DCFR is *comprehensive, systematic, and coherent* as required for ideal codification.⁴⁹ The DCFR can be used an answer on finding source of European contract law – actually the DCFR is a source of a whole European private law, but as my focus in this thesis is in contract law, I will be examining the DCFR through contract, not private, law. Fact that the ideological base of the DCFR is not political, but purely academic makes the DCFR more neutral than politically

⁴¹ Action Plan COM(2003)68, 12.2.2003

⁴² Cordero Moss 2004, p.49

⁴³ COM(2001)398, 11.7.2001

⁴⁴ See more the Green Paper COM(2010)348 final, p.2

⁴⁶ See more in chapter 3.1.1 *The Principles of European Contract Law (PECL)*

⁴⁷ The Vienna Convention on International Sale of Goods (CISG) developed by the United Nations Commission on International Trade Law (UNCITRAL) applying to B2B sales contracts

⁴⁸ UNIDROIT Principles of International Commercial Contracts, developed by the The International Institute for the Unification of Private Law (UNIDROIT)

⁴⁹ Hesselink 2009, pp.923–925, see also Hesselink, Martijn W. (2006) *The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience*

colored texts.⁵⁰

Hesselink argues that through directives harmonized European consumer protection and a national contract laws creates a competitive environment where the DCFR is able to serve as a reference to subjects of law which are left outside of the European consumer protection directives⁵¹. In other hand this means that contract law areas not covered with directives protecting consumers are harmonized by the DCFR effecting as a toolbox for legislators and courts.

3.1.3 The Green Paper

The Commission published the *Green Paper*⁵² 2010 on purpose to provide better legal certainty to the internal markets. Difference between national contract laws creates uncertainty which is seemed to harm functional markets. Therefore the Commission published the Green Paper to set options towards a European contract law. After the Paper was published a public consultation took place for selection one of the proposed options.⁵³

Greatest concern of the Commission is to provide the growth of the internal markets in economic view of point. Therefore the Commission seeks to find way to harmonize national contract laws to make barriers for active cross-border consumer sales lower. This economic need for the EU legislative acts is also recognized in *the Stockholm Programme for 2010–2014*⁵⁴ where it is stated that economic activity in the internal market should be supported by the actions of European judicial area. Also *the Europe 2020*⁵⁵ supports actions toward cheaper transactions for consumers concerning cross-border purchases. The solution for achieve the goal of functional and consumer friendly prices is seen to be able to achieve through optional European contract law.⁵⁶

⁵⁰ Hesselink 2009, p.925

⁵¹ Ibid., p.927

⁵² Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and business, Brussels, 1.7.2010, COM(2010)348 final

⁵³ See more the Green Paper COM(2010)348 final, p.2

⁵⁴ Council act of 2 December 2009, No 17024/09

⁵⁵ The Commission Communication Europe 2020, COM(2010)2020, 3.3.2010

⁵⁶ See more the Green Paper COM(2010)348 final, p.3

The Expert Group was set up by the Commission to work for the new instrument of European contract law with a task to refer parts from the DCFR related to contracts and thus revise selected parts to become new instrument for European contract law. Also other sources than only the DCFR was examined.

The Green Paper proposed seven different options creating new European contract law instrument. *Option 1: Publication of the results of the Expert Group* would create publication released by the Commission including text for legislators to adopt new rules. *Option 2: An official “toolbox” for the legislator* states two effects: (a) possibility to the Commission to adopt Communication or Commission Decision for provisions to future European contract law. The toolbox could be used for Commission proposals or when revising already adopted rules. The second effect, (b) Interinstitutional agreement, would be a toolbox between the Commission, Council and Parliament where these institutions can refer when drafting new rules. *Option 3: Commission Recommendation on European Contract Law* would encourage incorporating the Commission Recommendation to national contract laws. This could lead to situation where Member States reviews national rules and adopt new rules from the instrument. Second option is that Member States could recognize the instrument as an option for national contract law, such as international contract law rules which can be chosen by the parties⁵⁷. *Option 4: Regulation setting up an optional instrument of European Contract Law*, would create an instrument of 2nd contract law regime. This would mean rules applicable to parties as an second option for national rules. *Option 5: Directive on European Contract Law* would harmonize common rules for contract laws for consumers and would act in connection with upcoming Consumer Rights Directive. *Option 6: Regulation establishing a European Contract Law* could replace national rules and that way to harmonize contract laws across Europe. Problem with proposed regulation is that the principles of proportionality and subsidiarity do not support replacing national laws as rules of domestic contract are not necessary to be adopted in the EU level. Last option proposed, *Option 7: Regulation establishing a European Civil Code*, would cover also private law rules others than just contract law. Same issues arise than with

⁵⁷ International contract law rules, such as the CISG and the UNIDROIT Principles, are applicable only to B2B contracts and therefore consumers cannot benefit from those rules.

option 6.

3.2 Consumer Policy and Protection

Maastrich Treaty in 1993 established explicit legislative competence on consumer policy. Before Maastrich consumers' interest was noticed but consumers were seen more passive than active actors. Consumer protection has developed from case law as the Court has found rules which limits consumers' choice on internal markets. Providing more freedoms consumers to choose the EU is liberalizing markets and making competition on internal markets more secure. Therefore consumer policy is important for functional free markets. Treaties express consumer more as passive actor, but the Court approaches more consumer's interest.⁵⁸

Before the Maastrich Treaty and explicit legislative competence consumer policy was developed by soft law measures. In 1975 *Council Resolution*⁵⁹ pointed out five rights for consumer: health and safety; economic interest; redress; information and education; and right to be heard.⁶⁰

3.2.1 Consumer's Interest

The Court held in the case *GB-INNO-BM v. Confederation du Commerce Luxembourgeois* that consumer must be seen as individual as consumer's residence freely travels between Member States and thus purchases shall be done under same circumstances as other residence of Member State where consumer lives⁶¹. Famous ruling *Cassis de Dijon*⁶² is an example of collision of public interest and consumer's free choice. The judgment stated that individual consumer have the choice to make, not German public authorities.

3.2.2 Principle of Mutual Recognition

In meaning of civil justice the principle of mutual recognition acts between national courts handling cases related to measures of civil justice. As far as judgments of national courts

⁵⁸ Weatherill 2011, p.837–839

⁵⁹ Council Resolution OJ C92/1

⁶⁰ Weatherill 2011, p.844

⁶¹ Case-362/88

⁶² Ibid.

are filling requirements of minimum quality there should be cooperation between courts to found mutual recognition of judgments.⁶³ In meaning of the internal market the principle of mutual recognition supports free movement of goods. Thus if product is legally approved in any of Member States, it shall be treated in same way in all Member States. In other words national bans are prohibited. Therefore it has important role to provide same goods for consumer in every Member State. Thus, limitations to the principle of mutual recognition can be accepted if consumer protection – product safety – requires so.⁶⁴

The principle of mutual recognition in meaning of civil justice would make it possible to follow judgment given in other Member State regarding contractual relation governed by the CESL. However, in case of contract to opt-into the CESL, judgments would not be that easily followed in different countries, as contract to opt-into is always governed by national law. One of main problems with the CESL is that the totally new rules do not have any kind of case law to explain interpretation of the rules. Therefore opting into the CESL would be some kind of jump to the unknown for parties. Regarding contract to opt-into the CESL national courts need to consider if the contract is valid under national law. After certain number of these judgments there would be at least some kind of national guides which kind of contracts are valid under national laws. Traders would be able to create concept of taking into consideration all different national requirements. However, it still leaves question if contract to opt-into the CESL would be valid in way it is determined in the CESL. To protect parties' confidence to the CESL interpretation should be equal in different national courts. Even with the mutual recognition this is not possible as far as there is no judgment from the ECJ which would consider the right interpretation of the CESL, as the CESL explicitly states that it shall not be interpret through any national laws.

The principle of mutual recognition in the meaning of the internal market does not have meaning in the case of opting-into the CESL. The Consumer Rights Directive, which will be discussed in Chapter 3.3.1, harmonizes national consumer protection rules fully, and

⁶³ Storskrubb 2011, p. 318

⁶⁴ See more about *the mutual recognition principle in the single market* in European Union websites, available at:

http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/l21001b_en.htm

Last time visited 1.9.2013

therefore the principle of mutual recognition does not have much use in future concerning consumer protection. As if product or service is lawful in one of the Member States, it shall be it in all Member States and any limitations cannot be done by reasons of consumer protection.

3.3 Current Situation on European Consumer Contract Law

Consumers are protected in the EU with legislative acts to provide high level consumer protection through the whole EU. The Rome I is providing conflict of law rules to protect consumers on contracts where other than consumers national law applies. Therefore consumers can rely that they are protected by national law rules even in case of dispute arising.⁶⁵

3.3.1 The Consumer Rights Directive

*Proposal for a Directive on consumer rights*⁶⁶ was submitted after it was proposed in *the Action Plan*⁶⁷ to fill legislative gaps on the field of consumer protection as well as review the consumer acquis⁶⁸. However, the Consumer Rights Directive is not effective enough to address all problems arising from diverse of national contract laws. Most difficult of these problems is that traders are obliged to, referring Article 6 of the Rome I, apply different contract laws. Problems to traders' possibilities offer their product to consumer in all Member States is infringing the function of internal markets. The Commission sees that there is lot of potential not used in cross-border consumer sales. And to use that potential, Europe needs a common European contract law rules – which cannot be provided by the Consumer Rights Directive.⁶⁹

*The Consumer Rights Directive*⁷⁰ replaces existing *distance selling directive*⁷¹ and *doorstep selling directive*⁷². Directives on *consumer sales*⁷³ and *guarantees and unfair contract*

⁶⁵ See more the Green Paper COM(2010)348 final, p.5

⁶⁶ COM(2008)614, 8.10.2008

⁶⁷ Action Plan COM(2003)68, 12.2.2003, see more on chapter 3.1.2 *The Action Plan*, 2003

⁶⁸ See more the Green Paper COM(2010)348 final, p.2

⁶⁹ Ibid., p.5

⁷⁰ Directive 2011/83/EU on consumer rights

⁷¹ Directive 97/7/EC on the protection of consumer in respect of distance contracts

⁷² Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises

terms⁷⁴ remain in force amended. The Consumer Rights Directive will apply to contracts falling its scope after 13 June 2014.⁷⁵ Legal basis for the directive is found from the Article 114 TFEU – same as to the CESL.

3.3.1.1 Scope of the Consumer Rights Directive

Article 3 of the Consumer Rights Directive: *Scope*

1. This directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer.

[...]

5. This Directive shall not affect national general contract law such as the rules of validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.

[...]

The scope of the Consumer Rights Directive is wide and thus it is covering main part of consumer contracts in different areas in the internal market. However, as seen above from the Article 3 of the Directive, the CESL and the Directive has partly same scope. This is even more complex when the CESL states that its aim is to protect consumers from diverge of national rules. Those national rules which are supposed to be eliminated by the CESL are based on the Consumer Rights Directive and other directives concerning consumer protection. Therefore the Commission states that the CESL is needed to protect consumers from the rules provided by the EU.

3.7 General Principles on European Contract Law

3.7.1 Freedom of Contract

Principle of freedom of contract is a fundamental principle – a guiding principle – of contract law. In e.g. the PECL Article 1:102 states that *parties are free to enter into a contract*. However, freedom of contract can be – and it is – limited by mandatory rules in certain situations. Freedom of contract can be limited by mandatory choice of law rules or protecting weaker party. Also public policy, in the EU competition law is one of examples,

⁷³ Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees

⁷⁴ Directive 93/13/EEC on unfair contract terms in consumer contracts

⁷⁵ See more in the Commission's website of the Consumer Rights Directive

http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm. Last time visited 1.9.2013

narrows parties' freedom. In some Member States the principle of freedom of contract is respected in its indirect commitment, which means that the principle does not have exact provisions stated in law. In other Member States, there is definition expressing specific limitations to the principle by excluding illegal contracts outside of the parties' contractual freedom. Freedom of contract is not just freedom to choose contracting part, but freedom to choose form and terms of the contract. Also pre-contractual negotiations are falling into the scope of the freedom of contract, as parties are free to choose to conclude a contract or to break off negotiations without contract.⁷⁶

3.7.1.1 The Common European Sales Law

Recital (30) of the Regulation: *Freedom of contract should be guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.*

Parties' freedom of contract is limited in the opt-into mechanism of the CESL. The opt-into mechanism requires parties taking certain steps in certain order to be able to apply the CESL. Those steps limits parties' freedom as, even that the CESL does not mention it, it leads to situation where parties has to able somehow to proof that opting into the CESL has been done as required. Therefore form of a contract to opt-into the CESL is not free. The Regulation states that party autonomy should be restricted only when necessary, and if doing so, it shall be done providing clear provisions. It is easy to argue that this is not the case in the CESL. The CESL does not clearly mention that contract to opt-into the CESL is concluded under national law, and do not make any statement how required opting into the CESL shall be done in practice. In e.g. how parties shall proof that all requirements are filled, and who has burden of proof.

3.7.2 Principle of Good Faith

The Principle of Good Faith was recognized already in Roman law and it is one of the general principles of contract laws across the Europe.

⁷⁶ Wicker etc. 2008, pp. 423–431

Relationship between parties is divided into two phases, pre-contractual and performance of the contract. The Principle of good faith is ruling the pre-contractual phase of negotiations, where parties shall act in good faith. In German law⁷⁷, good faith exists on general rule applying to both, pre-contractual duties and performance of the contract and similar approach is found in Italian law⁷⁸ as well. However, the principle of good faith does not exist in every international legal act neither jurisdictions. English law does not generally recognize the principle of good faith. In English contract law parties are obliged only by the concluded contract, not duties set outside of parties' expression.⁷⁹

3.7.2.1 The Common European Sales Law

The Regulation states that the principle of good faith and fair dealing provides guidance to parties' contractual relationship. Thus it sets the general requirements for parties' behavior.

Recital (31) of the Regulation: The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. [...]

Good faith and fair dealing applies in the case of agreement to opt-into the CESL under national law. If national law recognizes the principle, then it applies to pre-contractual negotiations of opting-into the CESL. The principle has more importance when sales contract is concluded under the CESL as the principle then applies to pre-contractual negotiations of the sales contract. It does not seem likely that the principle of good faith and fair dealing plays a big role in opting into part, as agreement to opt-into the CESL does not constitute financial lost to parties, even in backing off from negotiations in last minute. Therefore the principle of good faith and fair dealing is not examined further in this thesis.

⁷⁷ See more on Articles 241 and 311 BGB

⁷⁸ See more on Articles 1175, 1337, and 1375 Codice Civile

⁷⁹ Cordero Moss 2004, pp.126 and 133

4. LEGISLATIVE COMPETENCE OF THE EUROPEAN UNION

EU law has primacy against national rules. Primacy means that if national rules are against EU law, national rules steps aside. It does not depend on which kind of legislative power the EU has on such policy area and therefore if the EU has used its legislative power it always has primacy against national laws. This approach to EU law was found in case *Costa v. ENEL*⁸⁰ where the ECJ stated that Community law cannot be override by national measures. Thus EU law is *sui generis* as it creates its own legal system with no similar one in the world.

The Lisbon Treaty made rules clearer, and now specific areas of competencies – exclusive, shared, and supporting, coordinating or supplementary action – are determining legislative acts. For setting limits for competences of the EU, the principle of subsidiarity was revised by the Lisbon Treaty and it is now found in *the Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality*. However, even that the Lisbon Treaty provides clear limits for competences there is still room for questioning the boundaries of competences. In the category of shared competence it is necessary to examine how the EU uses its legislative power to find out what are the limits of Member States' competences.⁸¹ Legislative competence is examined in following chapters: Article 5 TEU sets basis for the competencies including principles of subsidiarity and proportionality; Article 2 TFEU determines shared competence and Article 4 TFEU areas falling into shared competence; Legal basis for harmonization is found from Article 114 TFEU as well as in some cases in Article 352 TFEU.

4.1 Internal Market

The Lisbon Treaty states objectives of the EU policies. The Treaty of the European Union (TEU) states the objectives⁸² and the Treaty on the Functioning of the 'European Union (TFEU) sets the ways how to achieve such objectives⁸³. Articles 1 TEU and 1 TFEU determine that both Treaties has a same legal value and therefore distinction between

⁸⁰ Case 6/64 Laminio Costa v ENEL

⁸¹ Craig and De Búrca 2011, pp.73, 100–101

⁸² See more in Article 1 TEU

⁸³ See more in Article 1 TFEU

Treaties shall not be made. Treaties shall be read in way where first articles sets overall objectives of the EU policies, following articles setting tools for the objectives set in earlier articles. Last part contains specifying rules for using given tools.⁸⁴

Basis for the internal market is found from Article 3 TEU which sets out objectives of the EU, where Article 3(3) states an establishment of an internal market. Legislative competence is determined in Article 4 TFEU which concerns area of shared competence. Tools for achieving objectives of the internal market are set out in Article 26 TFEU. Specifying rules are found in Articles 27–37 TFEU. Free movement of goods is ruled in Articles 28–29 TFEU and prohibitions in Articles 34–36 TFEU.

4.1.1 Legislative Basis on Consumer Protection

Consumer policy is action under specific policies of the Community, e.g. economic policy, and all other laws where the position of consumer exists. *The Directorate-General with responsibilities for consumer affairs* was set by the Commission, later known as SANCO, expressing the Commission's interest towards consumer policy. In 2009 changes made and contract and marketing were replaced from SANCO to DG Justice, Liberty and Security. Consumers' effect for internal markets was noticed by the Commission in its Strategy for 2007-2013⁸⁵ which stated one of its objectives to protect consumers against risks individual consumer cannot cope.⁸⁶

Legal basis on today's consumer protection in the EU is found Articles 4, 12, and 169 TFEU.

Article 169 TFEU: 1. *In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*

2. *The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:*

⁸⁴ Kiikeri 2010, p.235

⁸⁵ EU Consumer Policy strategy 2007-2013

⁸⁶ Weatherill 2011, p. 845

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

[...]

First paragraph of the Article 169 TFEU states protection of consumers' economic interest and sets objective of high level consumer protection. Paragraph states clearly that the EU is actor in way to ensure certain level of protection. Second paragraph states that harmonization of the internal market shall be done in accordance of Article 114 TFEU.

Article 12 TFEU: Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Article 12 TFEU express the character of consumer protection as a policy involved with multiple fields in the EU. Consumer protection is adopted through product security and by harmonizing rules of contractual relations in B2C contracts. Therefore consumer protection has wide applicability in European law and multiple characters to achieve aims of the policy. To develop European consumer protection, the ECJ and the EU institutions have adopted principles to define consumers' rights. Consumer *acquis* has taken steps towards common consumer protection rules in the EU.⁸⁷ Most famous judgment dealing issues of consumer protection is case of *Tobacco Advertising*⁸⁸ where the ECJ held that common rules for consumer protection are needed because of diverge of national laws causes obstacles for trade. Development after the *Tobacco Advertising* has been towards more strict legislation from the EU. Maximum harmonization has been used to adopt the Unfair Contract Terms Directive and latest tool of maximum harmonization is the Consumer Rights Directive, coming into force in 2014. European consumer protection is balancing between different consumers – others needing higher protection than others. Another balance to find is between the EU, to protect markets, and Member States, to protect individuals. Consumer's free choice is to be protected but not with infringement of free movement of goods.

⁸⁷ Weatherill 2011, p. 852

⁸⁸ Case 376/98

4.2 Basis for Legislative Competence – Article 5 TEU

Article 5(1) TEU⁸⁹ states that the principle of conferral governs the limits of EU competences and the principles of proportionality and subsidiarity governs the use of the competences. EU has competence to act only in those limits – in other words attributed competence – embodied in the Article 5(2) TEU⁹⁰. *Notion of implied power* is recognised in international legal systems but its formulation is more complex⁹¹. In e.g. the Court approached in the case 176/03 *Commission v Council*⁹² wider formulation of the notion of implied power, and stated that even when legislative action did not fall directly in the Community's competence it was taken to achieve environmental protection which is related to taken action and therefore the Treaty objective, in this case environmental protection, provides necessary competence. In later case law⁹³ it has been stated that application of wider formulation shall be exemption from the narrower application. Thus, narrower formulation – where legislative power exists if the act is *reasonably necessary* – has stronger acceptance⁹⁴.

4.2.1 Principle of Subsidiarity

The principle of subsidiarity determines how the legislative competence shall be used. The Lisbon Treaty establishes the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality and the Protocol (No 1) on the Role of National Parliaments in the EU, which shall be read together⁹⁵. It is important to notice that the Protocol (No2) does not apply to others than draft legislative acts⁹⁶. *The Protocol provides for recourse to the ECJ for infringement of subsidiarity under Article 263 TFEU, in an action brought by a Member State*⁹⁷. However, it is not likely to see that the ECJ would easily null any legisla-

⁸⁹ Article 5(1) TEU: *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*

⁹⁰ Article 5(2) TEU: *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*

⁹¹ Craig and De Búrca 2011, p.77

⁹² Case 176/03

⁹³ See more Case T-240/04 and Case T-143/06

⁹⁴ Case 8/55

⁹⁵ Craig and De Búrca 2011, p.95–96

⁹⁶ The Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 3

⁹⁷ Craig and De Búrca 2011, p.98

tive act because of infringement of subsidiarity.⁹⁸ *The Impact Assessment Guidelines*⁹⁹ offers a framework where problems arising from the judicial review concerning substantive measures of subsidiarity can be considered¹⁰⁰

The Principle of subsidiarity is written in the Lisbon Treaty and therefore it has same effect as the other Treaty provisions.

Article 5(3) TEU: *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”*

[...]

Article 1 of the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality state that the EU shall ensure *constant respect for the principle of subsidiarity*. In the Maastrich Treaty the principle of subsidiarity was determined in Article 5 EC which stated that subsidiarity considers only in areas outside of the exclusive competence. However, as the Maastrich Treaty did not set the clear scope of the exclusive competence, applicability of subsidiarity was neither clearly stated.¹⁰¹

4.2.1.1 Evolution of the Principle of Subsidiarity

The principle of subsidiarity developed from concern regarding vertical division between powers of Member States and the EU and thus the Maastrich Treaty presented idea of limiting legislative competences. Article 5 of the Maastrich Treaty stated that in other than areas of exclusive competence the Community shall use its legislative power in accordance with the principle of subsidiarity and only as far as necessary to act in the Community level.¹⁰² After the Amsterdam Treaty provided a Protocol on the Application of the Principles of

⁹⁸ Craig and De Búrca 2011, p.98

⁹⁹ Impact Assessment Guidelines, SEC(2009)92

¹⁰⁰ Craig and De Búrca 2011, p.99

¹⁰¹ Ibid., p.94

¹⁰² Craig 2011, p.59

Subsidiarity and Proportionality the Commission was able to justify legislative acts based on statements of the Protocol.¹⁰³

Subsidiarity has been challenged front of the ECJ only few times, and therefore its real character has not been examined enough. When comparing number of subsidiarity cases – approximately 10 pure subsidiarity case – to number of legislative acts the EU has took, it is clear that subsidiarity has not been commonly used challenging the EU competence.¹⁰⁴

4.2.1.2 The Principle of Subsidiarity and the CESL

The House of Commons gave its Reasoned Opinion where it stated that the Proposal does not respect the principle of subsidiarity. Neither with the procedural rules by the Protocol (No 2) or the principle of subsidiarity as a meaning of Article 5 TEU.¹⁰⁵

The House of Commons states that the procedural requirements which are not followed are: No *detailed statement*, as required in Article 5 of Protocol 2, provided; Article 5 TEU statement of decisions close to citizens of the EU is not applied; And that the Proposal will have effectives to national contract law and national parliaments do not have enough time (8 weeks given to submit Reasoned Opinions of Member States) to make search of all possible effects of CESL.¹⁰⁶

4.2.2 Principle of Proportionality

The principle of proportionality is to protect individuals' rights. In Article 5(4) the principle is expressed narrowly and it has been the ECJ which has gave more precise meaning to the principle. The court has found the principle of proportionality as one of the fundamental principles of EU law.¹⁰⁷

¹⁰³ Craig 2011, p. 59-60

¹⁰⁴ Craig and De Búrca 2011, p. 99

¹⁰⁵ Reasoned Opinion of the House of Commons submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. Available at: <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20110284/ukcom.do>

¹⁰⁶ Reasoned Opinion of the House of Commons

¹⁰⁷ Tridimas 1999, p.89-90

Article 5(4) TEU: *Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The principle of proportionality sets that the way achieving legislative objectives must be obligatory and appropriate. Suitability means the relationship between the ways and conclusion of the act, and necessity means choosing the best choice of competing interests¹⁰⁸. Scope of the principle's application is in both, legislative and administrative acts. The principle can be seen having three different functions: 1. *Ground of review of EU measures*; 2. *Ground of review of national measures affecting one of the fundamental freedoms*; and 3. *Governing EU legislative competence*. Interest to be protected in three functions differs and therefore the ECJ's review varies in case to case.¹⁰⁹

The Principle of proportionality states that EU shall adopt only acts which are necessary for achieving legislative objectives of policies. Therefore the EU can use its competence only if objectives are not reachable by acts of Member States and only as far as it is necessary to achieve set aims.¹¹⁰

4.2.2.1. Elements of the Principle of Proportionality

If the principle of proportionality applies it should be found in three step test: first step is the above mentioned suitability, second step is necessity, and the third step is proportionality *stricto sensu* which means that even if the restrictiveness shows right choice been made it need also show that applicant's interests are not excessive effected.¹¹¹

Definitions of suitability and necessity are not clearly expressed in private law. It might be result of rules concerning EU legislative power on private law as well as guiding principle of contractual freedom. However, Cauffman argues that as the proportionality test is

¹⁰⁸ De Bùrca 1992, p. 113

¹⁰⁹ Tridimas, 1999 p.89-90

¹¹⁰ Ibid., p.118

¹¹¹ Ibid., pp. 91-92

generally used in field of EU human rights law it seems reasonable to require all three elements of the principle of proportionality also in EU contract law. Following the principle of proportionality is handled through its two opposite characters, as Cauffman presents it, one in public law and one in private law¹¹².

Contractual freedom comes over the principle of proportionality. Thus in collision of principles the principle of freedom of contract comes before the principle of proportionality – if the principle of freedom of contract is effecting as a whole. Where contractual freedom is limited with legislation the principle of proportionality applies. Cauffman states that the test of proportionality is applicable in strict way when EU law provides that Member States shall confirm sanctions which are effective, proportionate and dissuasive.¹¹³

In area of private law principle of proportionality has two different dimensions. First dimension is its meaning related to legislative power of the EU. Articles 5(2) and 5(4) TEU determines that the EU shall use its legislative power only as much as it is necessary to achieve goals set in the Treaties. In harmonisation of contract law, proportionality in meaning of mentioned articles is always discussed.¹¹⁴ So called proportionality test is used to determine compatibility of national contract law and fundamental freedoms of the EU. Any rules cannot go beyond what is necessary to reach objectives of EU law. Thus e.g. consumer protection must be in balance with Article 35 TFEU free movement of good contrary¹¹⁵.

Contract law character of the principle of proportionality deals with balance between parties' rights and obligations. In case law the General Court recognised the role of the principle of proportionality in case *Distilleria F. Palma* and stated that the principle of proportionality regulates all actions – including contractual actions – of Community law and states the principle of proportionality as a general principle governing contractual

¹¹² Cauffman 2013, pp.3 and 10

¹¹³ Ibid., p.11

¹¹⁴ Ibid., p.3

¹¹⁵ Case C-205/07

relations¹¹⁶. Thus it shall be taken into consideration always when discussing of European contract law.¹¹⁷ The Principle of proportionality exists – in character of contract law - in several EU legislations. Article 3(1) of the unfair terms directive rules that contract terms shall be seen unfair when parties' rights and obligations are not in balance. Impacts of the principle of proportionality are often seen ways to rule remedies for non-conformity. E.g. under the consumer sales directive consumer has with some requirements right to require replacement of goods.¹¹⁸

4.2.2.2 Principle of Proportionality and CESL

Principle of proportionality is not explicitly stated – in meaning of contractual relations - in the CESL but its influence is found throughout many Articles. One of those is Article 2(1) of the CESL determining that parties shall act in respect of good faith and fair dealing which requires taking other party's interest into consideration and that way promotes balance between contracting parties and contract terms – respecting difference between trader and consumer as consumer protection is provided through legislative acts in the EU. Related to that the CESL determines that contract is avoidable if other party knew other party being in economically difficult situation or having urgent needs and other party takes advantage from it¹¹⁹. Article 83 of the CESL states rules of unfair contract terms in B2C contracts sets clear definition of the principle of proportionality is protecting consumer against contract terms which are not individually negotiated and causes imbalance in rights and obligations of parties¹²⁰. As in other legislative acts protecting consumers also in CESL rules on remedies for non-performance are in respect to the principle of proportionality^{121 122}.

¹¹⁶ Case T-154/01

¹¹⁷ Cauffman 2013, p.4

¹¹⁸ Ibid., pp. 6-7

¹¹⁹ See also Articles 74(1) and 75(2) of the CESL

¹²⁰ See more in Article 83 of the CESL

¹²¹ See more in Articles 109, 110, 111, 113, 117, 120, 132, 133, 137, 173, 176 of the CESL

¹²² Cauffman 2013, pp. 8-9

4.3 Shared Competence

Article 2 TFEU¹²³ provides various categories of EU competences, e.g. exclusive competence, shared competence, and EU's action for support and coordinate. In time of European Community (EC) shared competence was distinct from EC and Member States' competence. There was no possibility to Member States act on the field of the Community competence. In early 1990s development presented exclusive and non-exclusive powers. The Court found that if the Community has not act on its competence Member States' competence last till the Community competence is used.¹²⁴

Shared competence is determined in the Article 2(2) TFEU¹²⁵ and the areas of shared competence are found in the Article 4 TFEU¹²⁶ - however the list is not exhaustive as shared competence applies in areas not related to exclusive competence or supporting, coordinating or supplementing actions determined in the Articles 3 and 6 TFEU¹²⁷. If the EU exercises its competence, Member States' loose theirs. This means that if EU uses its power e.g. by minimum harmonization, Member States have power to act issues not covered by EU legislation. Thus the EU can either use its competence covering the whole area or only for some questions in it - leaving rest questions under Member States' power¹²⁸. It is also possible that the EU is not using its power at all.¹²⁹

¹²³ Article 2 TFEU [...]2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. [...]

¹²⁴ Cremona 2011, p. 245

¹²⁵ Article 2(2) TFEU: When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

¹²⁶ Article 4 TFEU: 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas :
(a) internal market; [...] (f) consumer protection; [...] (j) area of freedom, security and justice; [...]

¹²⁷ Craig and De Búrca 2011, p. 83

¹²⁸ Protocol (No 25) on the Exercise of Shared Competence, Sole Article: With reference to Article 2(2) of the Treaty on the Functioning of the European Union shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

¹²⁹ Craig and De Búrca 2011, pp. 84-85

Areas determined in Articles 4(3) and 4(4) TFEU makes it possible to Member States exercise their competence even in cases where the EU uses its own. This rule covers areas of e.g. research, technological development and space, where the EU can provide activities such programmes.¹³⁰

Article 4 TFEU: 1. *The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.*

2. *Shared competence between the Union and the Member States applies in the following principal areas:*

(a) *internal market;*

[...]

(f) *consumer protection;*

[...]

Shared competence is ruled in Article 4 TFEU which states that categories not determined in Articles 3¹³¹ and 6¹³² TFEU falls within the category of shared competence¹³³.

Shared competence has different variations in different areas. Thus it is an umbrella term and means that shared competence differs in the area of four freedoms. Thus it is not possible to provide one module of shared power.¹³⁴

4.4 Article 114 TFEU

Article 26 TFEU sets achievement of internal market which shall be considered when adopting legislation based on 114 TFEU¹³⁵. *Tobacco Advertising case*¹³⁶ is an example of

¹³⁰ Craig and De Búrca 2011, p. 85

¹³¹ Article 3(1) TFEU: *The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.*

¹³² Article 6 TFEU: *The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.*

¹³³ Craig and De Burca 2011, p.83

¹³⁴ Ibid., p. 85

¹³⁵ Weatherill 2011, p. 846

¹³⁶ Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419

missing connection between Articles 114 (at that time Article 95 EC) and 26 TFEU. In the judgement the Court stated that there was lack of valid legal basis as using the Article 95 EC as general power did not meet requirements for using the Community's legislative power. Valid legal basis requires objectives for improving conditions of the internal markets.

Article 114 TFEU: 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[...]

3. The Commission, [...] will take as a base a high level of protection [...]

Scope of the legislative competence of harmonization under Article 114 TFEU is broad – obstacles already existing or seen in future¹³⁷. Case law shows that Article 114 TFEU is used for legal basis for the enacted measure¹³⁸.

Legislation covering rules towards functional internal market is based on Article 114 TFEU which requires ordinary legislative procedure including majority vote in voting procedure of the Council¹³⁹. Article 114(3) TFEU sets high level consumer protection one of the Treaty objectives, as well as Article 12 TFEU determines consumer protection being in measures of implementing EU policies¹⁴⁰.

Article 114 TFEU does not rule any kind of *minimum rule-making*¹⁴¹ nor form of the action how legislation under it shall be adopted. Minimum harmonization, where only minimum requirements are set on the EU level, is the presumption on fields of the internal markets and consumer protection, which both are falling into the category of shared competence.

¹³⁷ Weatherill 2011, p.848

¹³⁸ Craig and De Burca 2011, p. 76

¹³⁹ Weatherill 2011, p. 846

¹⁴⁰ Ibid., p. 848

¹⁴¹ See more on Articles 169(4), 153(4), and 193 TFEU

Minimum harmonization leaves room for Member States adopt stricter legislation – if they require so. However, lately there has been action towards to maximum harmonization also on area of consumer protection.¹⁴²

4.4.1 Doctrine of Direct Effect

Doctrine of direct effect has its effect to all binding legislation of the EU – the Treaties, international agreements and secondary legislation. Direct effect is seen either in broad or in narrow sense. Broader sense means that if the criteria of direct effect - clear, precise and unconditional - meets, individuals have right to enforce their rights front of national court. In narrower meaning direct effect means EU legislation's capacity create rights to individuals. Establishment of direct effect was done in *Van Gend & Loos*¹⁴³ case. Direct effect creates complex concept concerning directives. Directives' has vertical, but not horizontal, direct effect. However, there is exemptions and so-called indirect effect which all together makes doctrine of direct effect concerning directives one of difficulty fields of EU law.¹⁴⁴

In *Munoz and Superior Fruticola case*¹⁴⁵ advocate general Geelhoed rise up relationship between direct effect and direct applicability of regulations. The question concerned circumstances where a person may claim before national court to another person to comply with provisions of regulation. In other words the issue concerned the procedural questions to enforce Community law before national court. Geelhoed argue that regulations creates *directly effective public-law obligations vis-à vis the authorities and also confer rights on those persons as against the same authorities*. The question was that can those obligations be enforced between two persons and can individual claim another person to withdraw infringement of such provision. Secondary law provisions have direct effect and those provisions can be enforced front of national court without any transforming actions of a state - as long as enforced provisions are clear, precise and unconditional. Question of obligations between two persons - in other words, question of horizontal direct effect - is

¹⁴² Weatherill 2011, p. 850

¹⁴³ Case 26/62

¹⁴⁴ Craig and De Burca 2011, pp. 180-186

¹⁴⁵ Case C-253/00

fundamental with directives, but in case of regulations it is not. Provisions of regulations have direct effect based on regulations' nature in Community law and national courts have a role to protect those provisions - also between persons. Geelhoed argue concerning the horizontal direct effect of regulations, that *I would go one step further: the question is whether the concept of direct effect is still in fact relevant in the case of binding provisions of regulations [...]*. However, all said above, all provisions of regulations does not confer rights individuals can enforce front of national court. Only provision which affords protection to interest where individual is relying. This requirement should be seen merely loose and with the fact that provisions provides normally protection more than just one interest. Therefore doctrine of direct effect shall be the presumption and its applicability shall be evaluated case-by-case.¹⁴⁶

4.4.2 Regulation

Regulation has a nature as a binding and directly applicable legal instrument in all Member States¹⁴⁷. Regulation is directly applicable and it has direct effect. Requirements for direct effect are that *provisions of a regulations* - which are directly applicable - shall be *clear, precise, and relevant to situation of an individual litigant*¹⁴⁸. If an article of regulation where individual's claim is based meets criteria of being clear, precise and relevant to situation of litigation, direct effect exists. Therefore the criteria shall be fulfilled in precise article, not within whole regulation.¹⁴⁹ Direct effect of regulations was confirmed in *the Slaughtered Cow*¹⁵⁰ case. In the case court held that implementing the regulation shall be done in way to respect the direct applicability. Therefore Member States are not allowed to make any restrictions to direct effect with implementing acts of regulations.

Directly applicable – determined in Article 288 TFEU – means that regulations creates individuals' rights which are enforceable front of national courts. Directly applicable means also the way how regulations are becoming to national norms. Thus, regulations become

¹⁴⁶Opinion of Advocate General Geelhoed 13 December 2001

¹⁴⁷See more Article 288 TFEU: [...] *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.* [...]

¹⁴⁸See more Case C-403/98

¹⁴⁹Craig and De Burca 2011, p. 190

¹⁵⁰Case 39/72

part of Member States' jurisdiction without any separate acts of national authorities. Therefore individuals' rights based on regulation are enforceable as soon as regulation comes into force.¹⁵¹

4.5 Conclusion on Legislative Competence

Maximum harmonization in area of consumer protection and the internal market is expanding the legislative competence of the EU. As maximum harmonization do not leave any kind of choices for national legislation. Adopting maximum harmonization the Commission is actually transferring the competence completely away from national legislators¹⁵². The EU is already ruling major part of purchases where consumer is involved, and therefore major parts of national contract laws are already harmonized even in fact that exact European contract law harmonization is still missing. Question arises is it really necessary that the EU regulates all consumer laws within the EU, as it also includes national laws applying purely domestic purchases. Consumer policy is a part of shared competence, and therefore it is hard to find reasons why consumer protection has to be adopted by maximum harmonization which does not leave any measures to national laws covering also purely domestic actions which do not need to be adopted in the EU level for protecting functional internal market.

5. LEGAL BASIS ON THE COMMON EUROPEAN SALES LAW

The regulation creates the CESL harmonizing Member States' contract laws without replacing already existing national legislation. Therefore creation of *second national law regime*¹⁵³ was made by regulation which will be part of national laws without any transforming acts. Parties can choose if contract is governed by the CESL or by national contract law. Thus, use of the CESL is voluntary. The CESL is applicable on contracts of cross-border sales when other party is either a consumer or Small or Medium size

¹⁵¹Craig and De Burca 2011, p. 105

¹⁵²Weatherill 2011, p. 855

¹⁵³The Proposal COM(2011)635 final: Explanatory memorandum, p.8. *It harmonises the national contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but creating within each Member State's national law a second contract law regime for contract covered by its scope that is identical throughout the European union and will exist alongside the pre-existing rules of national contract law.*

Enterprise (SME). Legal basis for the CESL is found from Article 114 TFEU and with respect of principles of subsidiarity and proportionality.¹⁵⁴

In the case of the CESL choice of legal instrument is based on the need for binding instrument creating legal certainty and uniformity for making cross-border sales more secure for consumers and SMEs' as well as keeping transaction costs low for traders. There was no need to replace national laws but create a second option for sales.¹⁵⁵ In the EU there is three legal instruments; regulation, directive, and decision. It is normal that these instruments are used side-by-side. Also several soft law instruments exists providing achievement of goals of EU policies. Foundation of the three legal instruments is found from Article 288 TFEU. Selection of the used instrument and procedural rules to make such instrument are found from Articles 296 and 297 TFEU. However, there is no specific rules identify which instrument shall be select. Therefore every case is evaluated individually and adopted instrument selected in respect of principle of proportionality.¹⁵⁶

Hierarchy of norms in EU law states the Treaties and Charter of Rights as constitutional rules. Others come, in descending order, as follows: *general principles of law; legislative acts; delegated acts; and implementing acts*. Thus the three legal instruments are equal to each other. Therefore it is not possible to give higher position e.g. to regulation before decision or directive. Hierarchy between legal instruments depends on their nature as a legislative, delegated, or implementing act.¹⁵⁷ However, definitions of *legislative, delegated, or implementing act*¹⁵⁸ are formal and subject only to the legislative procedure.¹⁵⁹

5.1 Legal Basis – 114 TFEU

5.1.1 Relation to Article 26 TFEU

The Consumer Rights Directive Recital (4): *In accordance with Article 26(2) TFEU, the internal market is to compromise an area without internal*

¹⁵⁴The Proposal COM(2011)635 final: Explanatory memorandum, pp. 8-10

¹⁵⁵*Ibid.*, p. 10

¹⁵⁶Craig and De Burca 2011, p. 103–104

¹⁵⁷*Ibid.*, pp. 103–104

¹⁵⁸See more Article 289(3) TFEU: *Legal acts adopted by legislative procedure shall constitute legislative acts.*

¹⁵⁹Craig and De Burca 2011, p. 105

frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity.

The CESL, as also the Consumer Rights Directive, is based Article 114 TFEU that requires relation to Article 26 TFEU. The Consumer Rights Directive sets out the needed relation between objectives of consumer protection and the internal markets. Same arguments are useable referring to the CESL.

6. APPLYING THE COMMON EUROPEAN SALES LAW

6.1 Scope of the CESL

Articles 3-7 the Regulation states what kind of contracts the CESL can be applied. Article 3 of the Regulation sets the optional character of the CESL, which means that the CESL must be explicitly chosen by the parties.

6.1.1 Territorial Scope

Article 4 the Regulation determines that the applicability of the CESL is possible only to cross-border contracts¹⁶⁰. Contract is seen as a cross-border contract in B2B cases when habitual residences of the parties are in different countries and one of these countries is a Member State of the EU. In B2C contracts requirements are that trader's habitual residence is in different country than consumer's home address, the delivery address, or the billing address and one of these countries must be a Member State of the EU. The habitual residence shall be as determined in the CESL in *time of the agreement* contract to have a cross-border character. Therefore the CESL is available also to contracts where other party is outside of the EU. To apply the CESL on B2C contracts where the consumer's residence is outside of the EU requires – as well as when the consumer's residence is in the EU – that

¹⁶⁰ The CESL may become applicable also to domestic contracts. See more in the Regulation, recital 15: [...] *Member States should be free to decide to make the Common European Sales Law available to parties for use in an entirely domestic setting.*

national law makes it possible to choose the CESL. Issue of conflict of law rules is discussed in the following chapter 6.2 Private International Law Rules. Question arises what is the exact meaning of *trader's habitual residence*. In the Regulation this is meant to be *the place of central administration*, which follows definitions presented in Article 19(1) Rome I. Article 54 TFEU uses same expression. However, there is no judgment from the ECJ where the meaning would be explained precisely.¹⁶¹ In B2C contracts the Habitual residence of the trader is not likely to become issue as far as purchase been made through internet and trader's business is located in different Member State. However, if trader has storage in same Member State where consumer lives and delivery is though made domestically, it might arises question if the CESL is applicable.

6.1.2 Material Scope

The material scope of the CESL is determined under Articles 5 and 6 the Regulation. The CESL is applicable to *sales contracts, contracts for the supply of digital content, and to related service contracts*. Outside is left contracts of mix-purpose which includes any elements other than mentioned above. Also B2C contracts where trader uses *a form of a deferred payment, loan, or other financial accommodation* to grant credit for the consumer are left outside of the scope.

6.1.3 Personal Scope

The CESL can be applied to contracts where other party is trader and other party is either a consumer or a small or medium-sized enterprise (SME). Definitions of a trader and a consumer are found from the Article 2 the Regulation. A trader is SME if it does not employ more than 250 persons, and an annual turnover is less than EUR 50 million¹⁶².

The briefing notes of the ELI statement¹⁶³ states that applicability of the CESL to B2B contracts is making the proposed rules too complicated. Complexity of this requirement is arising when applying criteria of SME. Strict requirements forces parties to make sure if

¹⁶¹ Harvey and Schillig 2012, p.45

¹⁶² See more in Article 7(2) the Regulation: [...] (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million [...]

¹⁶³ See more in Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law

other party really is SME and thus the CESL is applicable.¹⁶⁴ If the requirements are not met the CESL is not applicable and therefore it may lead into - similar situation as it can arise also on B2C contracts – where contract is concluded with mutual understanding but applicable law is something else, most probably determined by the Rome I, than parties agreed.

6.2 Private International Law Rules

In the EU conflict of laws rules – determining which law is applicable - are set in the Rome I¹⁶⁵ regulation, and in case of Denmark, Finland, France, Italy, and Sweden¹⁶⁶, in the Hague Convention¹⁶⁷. In consumer contracts these rules limits parties' possibilities to choose governing law of their contract and therefore rules must be respected when parties intends to apply the CESL. The Rome I determines also limitation in case of domestic situations and overriding mandatory provisions. In this thesis focus will be in the Rome I and its rules concerning choice of law of consumer contract.¹⁶⁸

The CESL is about to create second national contract law regime, which means that it is applicable alongside with national contract law and therefore rules of private international law takes precedence over the CESL.¹⁶⁹ The Rome I, as well as the Hague Convention, requires that in consumer contract parties shall choose substantial law of other party, presumption national law of consumer. This limitation means that to apply the CESL it must be national law of other party. Question arises, is it? According to the Rome I mandatory rules of consumer protection applies and parties cannot override those rules by choice of law. However there are requirements before rules of the Rome I apply: act of trader must been targeted to country of consumer's residence.¹⁷⁰ For B2C contracts the Rome I allow parties to choose only substantial law of one of the parties. Thus the CESL is

¹⁶⁴ Proposal for a Regulation on a Common European Sales Law: Making Proposal simpler and more certain, p.7

¹⁶⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

¹⁶⁶ Status table available at: http://www.hcch.net/index_en.php?act=conventions.status&cid=31

¹⁶⁷ Hague Convention on the Law Applicable to International Sale Goods 1955

¹⁶⁸ Bisping 2012, p.3

¹⁶⁹ Rühl 2012, p.2

¹⁷⁰ Bisping 2012, p.5

applicable only if national law of state applies. Therefore applying the CESL requires take into consideration conflict of laws rules before choice of law can be done.¹⁷¹

The CESL presents 2nd regime of national contract law regime. In the Proposal Commission states that the CESL do not have effect to applicability of the Rome I¹⁷². Thus the CESL is applicable only if the Rome I, or the Hague Convention, states that national law applies. Parties are not able to override rules of private international law and therefore parties' agreement to opt-into the CESL is valid only as private international law determines so.¹⁷³

6.2.1 CESL as an 2nd National Contract Law Regime

As already indicated above applicability of the CESL is connected to national law – the CESL can be chosen if national law applies. Thus applicability depends on national laws' applicability but do not require any actions made by national legislator. The CESL is directly applicable in wording as it comes into force – but not applicable without national law. Compare it to the CISG which is applicable without national law and thus rules of private international law does not need to be considered when choosing it.

The Rome I Article 6(1) determines that consumer's national law applies and thus makes it possible to choose the CESL to govern B2C contracts. However, Article 6(2) sets limitations to B2C contracts that consumer's national law applies over the chosen law if national law guarantees higher protection to consumer than the law parties has choose. Thus the CESL applies only if level of consumer protection is equal or higher than provided by consumer's national law.¹⁷⁴ Does it mean that if the CESL cannot be applied as a whole set of rules that otherwise valid agreement to opt-into the CESL loses its validity (one requirement to opt-into the CESL) and applicable law is determined either by parties' choice or conflict of law rules.

¹⁷¹ Bisping 2012, p.7-8

¹⁷² Explanatory memorandum of the Proposal, p.6

¹⁷³ Rühl 2012, p.8

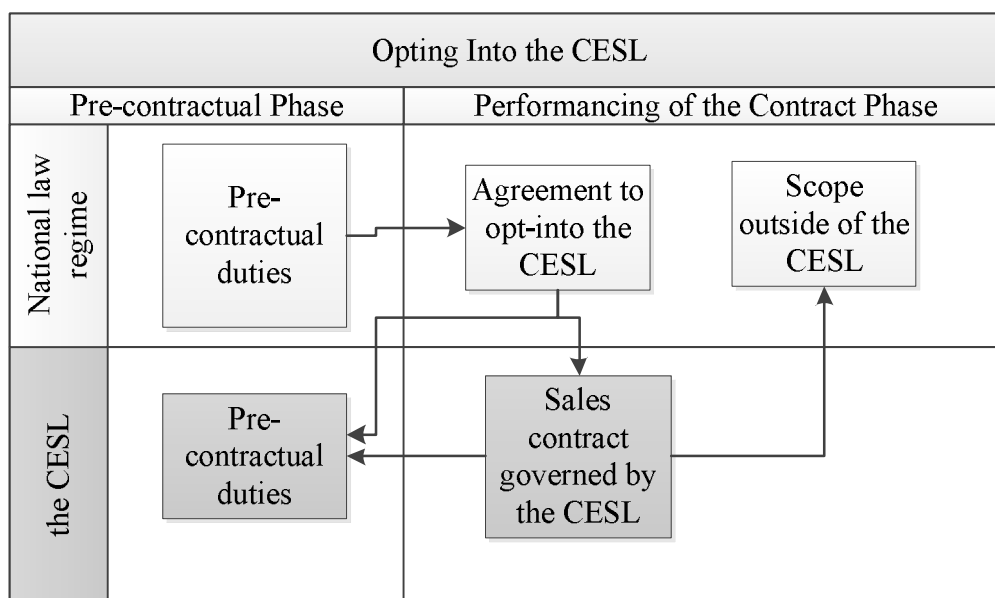
¹⁷⁴ Ibid., p.10

7 OPT-INTO THE COMMON EUROPEAN SALES LAW

Conclusion of a contract under the CESL is determined in Articles 30-39 CESL. The Articles follow mostly formation of the DCFR and also international texts such as the CISG. Something totally new presented by the CESL is the opt-into mechanism.¹⁷⁵ Use of the CESL is based on voluntary and so parties must give an agreement to opt-into the CESL. As following the focus is on B2C contracts, it is necessary to mention that in B2B contracts applies Article 8(1) which states only that parties may choose the CESL by giving an agreement to do so. Further requirements, founded in following chapters, apply only to B2C contracts.

7.1. Requirements to Opt-Into the CESL in B2C Contracts

Articles 8 and 9 of the Regulation determine requirements to opt-into the CESL: (a) Separate and explicit agreement by consumer, Article 8(1)(2); (b) Trader shall confirm consumer's agreement, Article 8(2); (c) The CESL must be chosen in its entirety, Article 8(3); and (d) Trader must provide the Standard Information Notice (SIN) to consumer before the agreement to opt-into the CESL is bound, Article 9(1).



Picture 1. Opting into the CESL as the Commission proposes.

¹⁷⁵ Harvey and Schillig 2012, p.2

7.1.1 (a) Explicit and Separate

Article 8(1) the Regulation: *The use of the Common European Sales Law requires an agreement of the parties to that effect. [...]*

Article 8(2) the Regulation: *In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. [...]*

If parties – in B2C contracts mostly trader – wants to use the CESL they must give an agreement to opt-into the CESL before the rules are applicable. As an agreement must be given *before* opting-into the CESL and as without *valid* agreement the CESL is not applicable it follows that the agreement to opt-into the CESL is given under national law. If the agreement is valid, as the CESL requires, the CESL becomes applicable. The Regulation only determines the format of the agreement, but the substantial requirements are left under national laws¹⁷⁶. Does this mean that if substantial requirements are not met, an agreement to opt-into the CESL is not valid?

Explicit and separate agreement is not a choice of law clause, which is normally seen as a part of a contract, but the agreement creates an individual contract between parties which states a choice of law for a sales contract separate from the contract of the agreement. Harvey and Schillig argues that as the agreement is not choice of law as its usual sense therefore the Article 6(2) Rome I does not regulate the agreement to opt-into the CESL. Thus if the agreement is valid – meaning the contract of the agreement is valid under national law – rules of the Rome I cannot make the agreement null. However, the Rome I still rules the national law covering the contract of the agreement¹⁷⁷.

7.1.2 (b) Confirmation of the Consumer's Agreement

Article 8(2) the Regulation: *[...] The trader shall provide the consumer with a confirmation of that agreement on a durable medium.*

The Article 8(2) does not state which agreement it means, but there is no reason to other

¹⁷⁶ Harvey and Schillig 2012, p.2

¹⁷⁷ Ibid., p.4

interpretation than *that agreement* refers to agreement to opt-into the CESL as stated in previous chapters of the Article 8. Harvey and Schillig argues that if trader has fulfilled pre-contractual information duties by providing the SIN to consumer before consumer is giving the agreement to opt-into the CESL trader is not forced to provide the confirmation to consumer to make the agreement valid as Harvey and Schillig sees that mentioned argument refers to the second sentence of the Article 9(1) the Regulation.¹⁷⁸ I do not agree this argument, as there is clear requirement for trader to confirm consumer's agreement. Confirmation requirement is in line with other steps required opting into the CESL, as the mechanism is about double-checking parties' intention to use the CESL. Therefore it is reasonable that trader gives confirmation when acceptance is received. This interpretation is also supported by the CESL itself, as in the definition of durable medium stated in Article 2 of the Regulation, it is said '*durable medium*' means *any medium which enables a party to store information addressed personally to that party*. Therefore it shall be required that trader confirms and stores consumer's statement in way it is possible to find and evidenced later by both parties. This cannot be done before consumer has given required statement.

7.1.3 (c) In Its Whole

Article 8(3) the Regulation: *In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety*. Only in relations between trader and consumer are limited to not choose the CESL partly, therefore it must be seen that in B2B relations the CESL can be chosen only partially¹⁷⁹. Article 1(2) CESL states that *parties may exclude the application of any of the provisions of CESL*. This, however, does not mean possibility to make free choice concerning opt-into mechanism which is stated in the Regulation, not in the CESL itself.

7.1.4 (d) Informed Choice

Article 9(1) the Regulation:

[...] in relations between a trader and a consumer the trader shall draw the consumer's attention [...] before the agreement by providing the consumer with the information notice in Annex II [...]

¹⁷⁸ Harvey and Schillig 2012, p.10

¹⁷⁹ Ibid., p.15

The CESL requires that in B2C contracts consumer must be informed about the CESL before consumer's agreement to opt-into the CESL can become valid. It is the pre-contractual information duty laid down to trader. If the CESL is validly chosen to cover a contract then also pre-contractual duties are determined by the CESL. Annex II of the Proposal present *the Standard Information Notice (SIN)* which shall be given to consumer before consumer is giving agreement to opt-into the CESL. In practice the SIN will be provided with a hyperlink where the SIN can be founded in language of consumer's state.

Trader can fulfill information duties simply providing the SIN to consumer either in printed copy or in electronic version. As Article 9(1) rules that if contract is concluded by telephone the SIN must be provided afterwards it can be interpreted that the duty to provide the SIN cannot be filled orally.¹⁸⁰

7.2 Scope of the Option

It can be argued if narrow scope of the applicability is want parties' needs. Set of uniform rules would be easier to adopt and thus more effective for lowering transaction costs for traders¹⁸¹. The CESL requires that an agreement to opt-into the CESL and an agreement to conclude sales contract are interpreted separately. This rise a question when an agreement to opt-into shall be given and how long it is valid? This question has two different approaches concerning (a) pre-contractual phase, and (b) performing phase. It should be asked that how long an offer and acceptance concerning opt-into the CESL are valid. Trader is bound by its offer even if consumers' acceptance is not binding. Therefore presumption is that trader is bound to opt-into the CESL as long as consumer has either accepted validly or rejected the offer. Pre-contractual phase of a contract to opt-into the CESL will be governed by national law, and therefore effect of good faith – or other pre-contractual duties – is not founded from the CESL, but from the applicable national law. And if contract is concluded, it is still governed by national law. Therefore in e.g. principle of good faith will apply only if national law states so. Offer and acceptance – or other recognized way to conclude a contract – applies and determines validity of a contract to opt-into the CESL. How long

¹⁸⁰ Harvey and Schillig 2012., p.11

¹⁸¹ Smits 2012, p.6

trader is bound by its offer? In online sales trader most probably gives an offer via websites as general offer for every consumer going to purchase goods using trader's websites.

Trader is bound by its offer even if the SIN is not provided and consumer therefore not able to give valid acceptance. Even if a contract to opt-into the CESL is concluded validly as determined in the CESL, it cannot change the fact that contract is either valid or not under national law and therefore rules of the CESL cannot determine how parties shall act before concluding a contract to opt-into the CESL. The CESL has power to determine which kind of agreement is valid to opt-into the CESL. This is because the CESL sets requirements to its applicability. But it cannot determine agreement's pre-contractual phase, as the CESL is not applicable to that part of negotiations. Negotiations regarding offer and acceptance to opt-into the CESL are done under national law which states how contracting parties shall act.

7.3 Format of a contract to opt-into the CESL

If an agreement to opt-into the CESL shall be concluded in explicit form stated in the CESL, it means that the statement to opt-into the CESL shall express steps taken. Therefore contract should state on which order agreements been given and in which point necessary information duties are fulfilled.

Can contract to opt-into the CESL be concluded orally? The CESL states that there is no required format for contract – sales contract. If national law allows contract to be concluded in orally, it shall be seen that then also a contract to opt-into the CESL can be validly concluded without written form.

7.4 Does an Agreement to Opt-Into the CESL even need to be Valid?

Does the agreement to opt-into the CESL need to be valid under national law? The CESL requires steps which shall be taken in right order to make valid agreement to opt-into the CESL. It does not require that the agreement is valid under national law – which will be governing law of the contract to opt-into the CESL. Thus, is it even necessary to have valid contract under national law, as the agreement to opt-into the CESL and the agreement to conclude the sales contract shall be interpreted autonomously and without any prejudice to

national law. Therefore I argue that it is irrelevant in meaning of the sales contract governed by the CESL if the agreement to opt-into is valid under national law, as far as it fulfills requirements of the CESL.

Article 8(2) the Regulation: *In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement [...] which is separate from the statement indicating the agreement to conclude a contract. [...]*

Article 8(2) the Regulation uses definition of *agreement to conclude a contract*. Therefore it should not be seen that the meaning of *the agreement* is reference to a contract, but parties' expressed intention. Thus, wording above in same Article, *the agreement on the use of the Common European Sales Law*, shall be read in same definition. Therefore *the agreement on the use* shall not have meaning of *the contract to the use*, but *parties' intention to use*. If the agreement is given the definition of parties' intention – beside of a contract – in the CESL, it means that the CESL does not require that the contract to opt-into the CESL is valid as a meaning of a contract under national law. As far as requirement of a valid agreement in a meaning of the CESL is fulfilled, the CESL is applicable for parties.

7.4.1 Definitions of an Agreement

The traditional definition of an agreement has two dimensions: (a) *to a category of contract or "convention,"* and (b) *a form of expression of consent*. The term has also a third dimension exists in special contexts. In special cases *an agreement* can refer to a bilateral expression which might be act towards something similar situation as contract – convention. Generally this definition is found when in French term used is *accord*, which refers to convention similar – but different – from a contract.¹⁸²

An example of the term used to express the consent can be found from the Directive on distance contracts, where an agreement is expressing consumer's right to withdraw the

¹⁸² Tenenbaum etc. 2008, pp. 16–19

contract¹⁸³. Other example is found – also from field of consumer protection – in the Directive on unfair contract terms^{184, 185}. Therefore it is arguable that in European consumer protection acts the term an agreement has been used in meaning of to express the consent.

Article 8 the Regulation: *Convention d'application du droit commun européen de la vente [...]*

2. Dans les contrats entre professionnels et consommateurs, **la convention** d'application du droit commun européen de la vente n'est valable que si le consentement du consommateur est donné par une déclaration expresse distincte de celle exprimant son **accord pour conclure un contrat**. Le professionnel délivre au consommateur une confirmation de cette convention sur un support durable.[...]

Article 8(2) the Regulation: *Agreement on the use of the Common European Sales Law [...]*

2. In relations between a trader and a consumer **the agreement** on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the **agreement to conclude a contract**. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.[...]

In the French translation of the CESL the word used for *an agreement* is *convention*. The term used to *conclude* a sales contract, is *accord*. Term *convention* can be used in French when expressing definition of an agreement or a contract in meaning of meeting of wills to create binding effects¹⁸⁶. Thus it can be seen that mentioned in previous chapter regarding the use of translations between terms *an agreement* and *accord*, is not the case in the CESL. As mentioned above, normally French term *accord* refers to similar situation as a contract, but not exactly to a contract. However in the CESL the term *accord* is used to express *an agreement to conclude a contract*. It is not easily find the exact meaning of the Article's wording. To give one more example, in Finnish translation term used to express *an*

¹⁸³ [...] the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts: – for the provisions of services if performance has begun, with the consumer's agreement [...]

¹⁸⁴ [...] giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement [...]

¹⁸⁵ Tenenbaum etc. 2008, pp. 16–19

¹⁸⁶ Ibid., p. 3

agreement is term *sopimus*¹⁸⁷, which is translated into English as a *contract*.

However, in French and English version different terms are used to express mutual understanding to opt-into the CESL and to conclude sales contract. In English version parties' shall give *an agreement* which is separate from *contract*. This gives an understanding that *an agreement* is not used here as a synonym to *contract*. This definition gets support also from other legislative acts of the EU in area of consumer protection. In French required *convention* is separate from *accord pour conclure un contrat*. Same logic applies as in English. Different terms are used for an agreement and to a contract. However, as said earlier, in French term *convention* has similar definition as term *contract*, and thus difference between these two is not clear.

Widely applied definition in the Member States is that an agreement means a change of an offer and acceptance. Same approach finds also in the PECL and the DCFR. In other words, it is meeting of parties' wills. Meeting of wills – an agreement – is not enough to create a contract, which requires that parties' intention is to have binding contract. French law is making difference between a contract and a convention, but in e.g. in English law this distinction is not found. In French law the term *engagement* is generally used to refer to obligations and a source of them.¹⁸⁸

In narrow sense of a term, a contract has a definition as an agreement and intention of parties' to take obligations. Therefore term contract express that parties has taken an obligation to fulfill. In narrower sense term contract means legitimate consequences parties. Consequences are effects rising from a contract depending on the nature of parties' intention. Definition of contract is explained in only one legal text, which is the Directive on package holidays which states, that *the agreement linking the consumer to organizer*

¹⁸⁷ 8 artikla Yhteisen eurooppalaisen kauppalaian käytöstä sopiminen [...] 2. Elinkeinonharjoittajan ja kuluttajan välisissä suhteissa *sopimus* yhteisen eurooppalaisen kauppalaian käytöstä on pätevä vain jos kuluttaja on antanut suostumuksensa nimenomaisella lausumalla erillään siitä lausumasta, jolla hän on suostunut sopimuksen tekemiseen. Elinkeinonharjoittajan on toimitettava kuluttajalle vahvistus kyseisestä sopimuksesta pysyvällä välineellä.[...]

¹⁸⁸ Tenenbaum etc. 2008, pp. 22–26

*and/or the retailer.*¹⁸⁹

What would parties benefit if an agreement to opt-into the CESL is interpreted with narrower definitions as it would be a contract to opt-into the CESL? Either it is contract or an agreement, it will be determined under national law. So it is national contract law which provides definitions of the meeting of parties' wills. However, it may have important effects also in view of the CESL, even that the CESL cannot cover definition applied under national law. If opting into the CESL requires valid *contract* between parties to opt-into, it means that if validity of the contract is revoked, it will effect to the sales contract governed by the CESL as well. But if rules of the CESL sets that it is enough as long as parties' has gave an agreement and followed other requirements of the opt-into mechanism, the CESL is applicable to the sales contract. Within this interpretation the sales contract governed by the CESL would not need to be governed by some other law in case where the agreement to opt-into the CESL is revoke, or even null under national law. This interpretation is favored by the CESL as there is no explicit expression of the form of the agreement to opt-into. This leads to interpretation that as long as requirements set in the CESL are met, validity under national law is not a problem for applying the CESL. Second favor for this interpretation is found from the terms used in Article 8 of the Regulation. As discussed earlier, different terms are used to express parties' will to use the CESL and to conclude sales contract.

If valid contract to opt-into the CESL is not required, what is required? Reason for use of the different terms in Article 8 of the Regulation may be reasoned because of the fact that the agreement to opt-into the CESL does not create any other obligations and rights for parties' than just use the CESL as governing law, and therefore wider definition of term contract could be misleading if used describing situation of the opt-into mechanism. However, this interpretation, where valid *contract* to opt-into the CESL is required, leads unfriendly situation to parties. If opting into is possible only through valid contract, the contract can be challenged under national laws, and therefore it is possible that the CESL has been chosen to govern the sales contract, but after other party challenging validity of

¹⁸⁹ Tenenbaum etc. 2008, pp. 3–7

the contract to opt-into, governing law of the sales contract changes and cannot be anymore the CESL. Thus it could be possible that consumer has concluded binding contract under the CESL, but after litigation situation arises where consumer is bound by some other law he or she was not chosen.

7.5 Conclusion on the Opt-Into Mechanism

The opt-into mechanism of the CESL is about to create something new to European contract law. As noticed in chapters above, the opt-into tool is an innovative idea and ideology behind it is to protect consumer. However, it fails in its every objective and in format presented in the Regulation the opt-into tool is harming parties' legal certainty and making the CESL almost impossible at least extremely unpleasant to apply. All steps must be taken before the CESL becomes applicable. Also the form of the steps must be followed as determined in the Regulation. Rules are complex and "a cherry top of the cake" is that different language versions vary and different interpretations are more than possible.

If trader fails to provide the SIN before the consumer is giving an agreement to opt-into the CESL, the consumer is not bound by the agreement before the SIN is provided. In cases where the sales contract has concluded e.g. by telephone, if the agreement is valid and the CESL applicable, if trader fails to provide the SIN to consumer before the agreement to conclude the contract is given, the CESL is not applicable to that sales contract. Therefore the trader is bound by the consumer's agreement to opt-into the CESL as soon as consumer has given it, the consumer is not bound by his agreement to opt-into before trader has provide the SIN.¹⁹⁰ After trader has offer to opt-into CESL the agreement is bounding¹⁹¹. Does this means that when trader offers to use the CESL to contracts online trader is already bound by the agreement, or can agreement be seen to given only after consumer starts to buy, and then electronically trader offers? Does there need to be pre-contractual relationship to give an agreement? How long trader is bound by the agreement? If consumer cancels purchase and returns to websites on next day or next week, is trader still bound by an agreement – as trader has possibility to recognize consumer as a same person

¹⁹⁰ Harvey and Schillig 2012, p.12

¹⁹¹ Ibid, p.17

with an IP address – or is it seen as a new consumer and new offer? If so, it means weakness to consumers' rights as it may be possible to be able to make choice to use the CESL consumer must cancel the action and became back later on.

Should the agreement to opt-into include explicit reference to sales contract where it applies, or can the agreement to opt-into be made for general basis? An agreement to opt-into is governed by national law and steps required in the CESL must be taken as stated in the CESL. All other provisions shall be done under national laws. The CESL requires that the agreement is explicit, but how explicit it should be?

To conclude a contract to opt-into the CESL in way that it fulfills all requirements set in the CESL, parties shall take required steps in required order and to be able to proof that steps are took. Steps required in the CESL in required order are: 1. trader's offer to use the CESL, in its entirety, as governing law of a B2C sales contract and provides the SIN to consumer; 2. consumer agrees trader's offer to use rules of the CESL to govern a sales contract and an agreement is explicitly stating consumer's will to opt-into the CESL; 3. trader confirms consumer's explicit statement. Required steps have been taken and contract to opt-into the CESL is concluded. Again, the CESL requires mentioned steps taken validly before opting-into the CESL becomes possible, but national law which governs the contract to opt-into the CESL does not require mentioned steps. Thus if parties fails to took steps in correct order or fails to provide information, there might be valid contract between parties under national law. However, this valid contract is not valid in meaning of opting-into the CESL. Valid contract under national law, but invalid in meaning to opt-into the CESL, is not likely to cause any problems – in case that a sales contract is not concluded – because the contract to opt-into the CESL express parties' intention to govern sales contract by the CESL and if sales contract is not concluded the former contract does not create any obligations or rights parties to revoke on.

Another question is that could it be possible that when valid – under national law – contract to opt-into is concluded but sales contract fails in some reason, could there be situation where other party suffers losses and can therefore have right to remedies? In e.g. if contract

to opt-into fails to be valid in meaning to opt-into the CESL as consumer's agreement includes expression to conclude sales contract, and thus fails to be separate agreement. The contract is governed by national law and in theory it could be possible that situation like this could cause damages to other party. In B2C contracts consumer is however protected by the Consumers Right Directive which states limits for national laws.

8. COMPARATIVE APPROACH TO THE OPT-INTO MECHANISM

The opt-into mechanism of the CESL, which is explored in previous chapter, will be here compared to uniform contract law rules, such as the UNIDROIT Principles, and to the studies of European contract law, such as the PECL and the DCFR. Neither of mentioned rules includes similar opt-into mechanism as the CESL. Therefore the mechanism is not comparable one to one basis, but need to be compared in way of interpretation.

The second approach of comparison is to find analogical interpretation through already existing rules. Contract laws in the EU are based on national rules and therefore it can be argued that the European contract law is something based on the general principles of national contract laws. One unique system in Europe is the doctrine of consideration in English contract law.

The scope of the PECL is found from Article 1:101, which states that the PECL creates *general principles* of European contract law and can be applied to contracts when parties agree contract to be governed by the *lex mercatoria*. The UNIDROIT Principles are not a model law – merely the Principles are to create equal interpretation of the rules overall the world. The Principles collects general rules of contracts together and thus presents principles easy to apply worldwide. Therefore those have been used as an inspiration also to the PECL and the DCFR, and therefore interpretation of the CESL can be argued through the Principles. The Principles can be used either as an inspiration for parties drafting a commercial contract, or parties are free to apply the Principles to regulate the contract as an international set of rules.¹⁹²

¹⁹² Cordero Moss 2004, pp. 45–46

The UNIDROIT Principles are applicable to international commercial contracts. Therefore – as same conditions lay on other uniform rules as well – rules cannot be applied in B2C contracts. When parties are willing to apply the rules for their commercial contract, only required act is mutual agreement to apply the rules¹⁹³. Principle of freedom of contract is found from Article 1.1 of the UNIDROIT Principles, same principle is found in the CESL, recital (30) of the Regulation, where it states that *party autonomy should be restricted only [...] for reasons of consumer protection*. Consumer protection reasons are seen as a possibility to limit consumers' freedom to choose contracting law.

8.1. English Contract Law

Doctrine of consideration is found in English contract law – in only jurisdiction in the EU. Therefore it can be argued that the consideration requirement is as unique as is the opt-into mechanism of the CESL. Consideration is *fundamental prerequisite* meaning that a contract cannot be concluded without consideration¹⁹⁴. Comparing requirement of concluding the contract it is noticeable that in the PECL and in the UNIDROIT Principles are based on the idea of an offer and acceptance. Article 2.1.1 of the UNIDROIT Principles states the contract is concluded *by the acceptance of an offer*. If clear offer and acceptance are not changed, contract is also seen as concluded when parties has some other way shown their agreement to contract. Article 2:101 of the PECL determines that parties' shall have intention to become legally binding and give such agreement to conclude the contract.

Focus here – as in the whole thesis – is to opt-into mechanism of the CESL. Therefore I am not searching more closely how the sales contract is concluded under the CESL. However, Article 30 of the CESL states that concluding the contract is based to an offer an acceptance. Pre-contractual duties applying on B2C contracts states also in Article 13 of the CESL that on B2C contracts trader has to fulfill pre-contractual information duties *before the contract is concluded or the consumer is bound by any offer*¹⁹⁵.

¹⁹³ See more in (I) Preamble (*Purpose of the Principles*)[...] *They shall be applied when parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.*[...]

¹⁹⁴ Weitzenböck 2012, p.2

¹⁹⁵ See more information duties in Article 13 *Duty to provide information when concluding a distance or off-premises contract*, and in Article 24 *Additional duties to provide information in distance contracts concluded by electronic means*, and concluding a contract in Article 30 *Requirement for the conclusion of a contract of*

Consideration is to support the offer by an action. Thus consideration is an action towards to make the offer binding. Action may be taken also towards to third party if it is necessary for achieving contracting parties' objectives. As consideration is part of English jurisdiction, its definitions is found from case law.

8.1.1 Doctrine of Consideration and the CESL

Analogical interpretation between consideration and the opt-into mechanism of the CEL can be presented as follows:

(a) Opt-into mechanism of the CESL: $X+Y+TC=Z$

(b) Doctrine of consideration: $X+Y+C=Z$

Where: X is an offer, Y is an acceptance; TC is trader's confirmation, C is consideration; and Z concluded contract.

In sales contracts consideration is required. Normally it is act of payment or transfer of goods¹⁹⁶. However, contract to opt into the CESL is not creating any payment or delivery obligations. Consideration is to make offer effective and therefore it could be seen that trader's confirmation is to confirm offer to opt-into the CESL.

Article II.-4:101 of the DCFR state explicitly that there is no other requirement to conclude the contract than parties' intention and agreement. Same in the PECL Article 2:101. Concluding contract governed by the CESL is not requiring consideration. Therefore as long as sales contract is governed by the CESL consideration is not need to be discussed. But problem may arise if the agreement to opt-into the CESL is either missing or invalid and the applicable law will therefore be national law – in England it is English law.¹⁹⁷

the CESL

¹⁹⁶ Harvey and Schillig 2012, p.23

¹⁹⁷ Ibid., p. 24

9. IMPROVING THE OPT-INTO MECHANISM

9.1 The Statement of the European Law Institute

The European Law Institute (ELI) proposes in its statement¹⁹⁸ how to improve the CESL. The ELI states its suggestions article by article. Following I will concentrate to articles concerning opt-into mechanism. The ELI propose that the Article 8 of the Regulation determining the opt-into mechanism would be replaced with new article stating new rules for applying the CESL in B2C contracts. Proposed new Article 8, now as Article 4, would make opting into the CESL less complex. The ELI is arguing that the problem with Article 8 of the Proposal is adopting *extremely complicated* opt-into mechanism which is actually weakening consumer's trust to the rules than making those more favorable. Consumer's trust is not likely to rise as the opt-into mechanism is structured like the CESL would be bad decision for consumer. Trader is obliged to provide the SIN to consumer before the agreement to opt-into the CESL can become valid. The SIN is therefore making the opt-into mechanism more complicated and it is also giving misleading information to consumer.¹⁹⁹

The ELI proposes that the opt-into mechanism would be replaced with new Article 4, which is as following:

Article 4 Agreement on the use of the Common European Sales Law

1. The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of this Article as well as the relevant provisions in the Common European Sales Law concerning the conclusion of a valid contract.

2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law requires express consent on the part of the consumer. The trader shall:

(a) draw the consumer's attention to the intended application of the Common European Sales Law before the agreement;

(b) provide the consumer with a hyperlink to the website

<http://ec.europa.eu/>... or, in all other circumstances, indicate this website or

¹⁹⁸ Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law

¹⁹⁹ Ibid. pp. 131–132

*the information hotline..., where the consumer will get, for each Member State, concise information on the consumer's rights under the Common European Sales Law compared with under the national law of that Member State
[...].*²⁰⁰

Proposal's main idea is that applying the CESL would be possible by an agreement with both parties and the agreement would be given under rules of the CESL. In B2C contracts an agreement to use the CESL becomes valid after trader fulfills information duties set in the article.²⁰¹ Therefore the ELI statement proposes to remove the opt-into mechanism and adopt instead of it the choice of law clause included in the sales contract. Thus, as the proposed article states, validity of choice of the CESL would be question under rules of the CESL, and not under national law. Proposed article determines also that in B2C contracts consumer shall give an *express consent* and trader is obliged to provide information before consumer gives consent to use the CESL²⁰². Following the ELI proposal it could be possible to apply the CESL, when: (a) trader provides necessary information to consumer; (b) after consumer is informed, trader offers to agree governing the sales contract by the CESL; (c) and consumer agrees trader's offer without any modifications.

In case trader fails to provide obliged information to consumer, the ELI proposes following:

*Article 4 Agreement on the use of the Common European Sales Law
[...]*

*3. Where the trader has failed to comply with the requirements under paragraph 3, the consumer shall not be bound by the agreement to use the Common European Sales Law until the requirements have been complied with and the consumer has expressly consented subsequently to the use of the Common European Sales Law.
[...]*²⁰³

²⁰⁰ Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law. pp. 131–132

²⁰¹ Ibid. pp. 132–133

²⁰² Ibid. pp. 132–133

²⁰³ Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law. pp. 132–133, Paragraph 5 of the proposed Article 4: [...]4. *Notwithstanding the rule in paragraph 1, the Common European Sales Law shall govern compliance with and remedies for failure to comply with the pre-contractual information duties, and other matters that are relevant before the conclusion of a contract, where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law. Where the trader has also made reference to*

Proposed Article 4(3) states that agreement to opt-into the CESL is not binding to consumer if trader does not fulfill its information duties. Proposal is quite similar with the CESL and it can be read in way that trader is bound by its offer even if information duties are not fulfilled. However, consumer can accept the offer but is not bound as long as information is not received. Thus consumer needs to give a new agreement to use the CESL after receiving required information.

Overall, the ELI argues that the CESL is not clear and predictable, as laws should be. Rules of the CESL are so complicated that there is need for courts to interpret rules before anyone can be sure what kind of decisions is to be expected.²⁰⁴ Second point to be remembered is that when rules are dealing B2C contracts it is more unexpected that the disputes arising from contracts would lead to litigation, at least in the EU level. That is result of the fact that normally consumers purchases goods with low value and therefore heavy litigation process is not something consumer seeks. Therefore the Proposal is not useful for B2C contracts when parties are not aware of exact meaning of the rules. Consumers needs rules they can rely on, and rules that provides fast solution to disputes – if necessary.

9.2 Committee on Legal Affairs, Amendments 206-531

Justification

The European Union does not have the power to carry out a comprehensive harmonisation of sales law. Even if used optionally it would deprive national law of its effects and curb the powers of the Member States. Consumers are already sufficiently protected by existing law, and so there is no need for regulation at European level. Furthermore national law offers a greater level of legal certainty, while there is no guarantee that the CESL would be uniformly interpreted throughout Europe²⁰⁵.

The Committee on Legal Affairs proposes that the Parliament do not adopt the Regulation. Main proposal is that the CESL should be implemented to the existing Consumer Rights

other legal regimes, this is without prejudice to the rules of the law applicable under the relevant rule of conflict of laws.

²⁰⁴ Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law, p.35

²⁰⁵ Committee on Legal Affairs, Amendments 206-531, p. 3/173

directive. I agree the proposal on parts when it arguments against adopting two legislative instruments – the CESL and the Consumer Rights Directive – acting in the same field. However, I do not agree that implementing the CESL into the Directive would create any benefits for consumer, nor traders or the internal markets. The Consumer Rights Directive is harmonizing Member States’ laws fully, which means that there will be no more diversity between consumer protection rules. Rules of the CESL would not bring much more to the Directive as it exists already.

The Committee argues that the EU does not have legislative power to replace contract laws, but yet it is proposing that the CESL should be implemented in the Directive of maximum harmonization. Thus, the proposal is that rules of the CESL would be implemented in measures of minimum harmonization. Either minimum or maximum, the Consumer Rights Directive is actually limiting Member States competence much more than the regulation of 2nd national law regime. The directive forces to change national laws and leaves no choices for Member States. The regulation would create only 2nd regime and leave Member State to decide if they want to keep their national rules in force, or to change those. Therefore the regulation would respect national competences better and would in fact be more suitable act to legislation in the EU level. If the Consumer Rights Directive would not been adopted already, would regulation be more suitable way to use legislative competence of the EU. This is because the Directive harmonizes also purely national contracts, which clearly are not necessary to harmonize in the EU level.

Legal certainty is very important for consumers and therefore the EU should not adopt legislation which is not clearly understandable also to consumers. Therefore the CESL and the Consumer Rights Directive should be one single act. One single act would also make definitions simpler, as now the CESL and the Directive states their own definitions which are not exactly same.²⁰⁶

9.3 Uniform rules instead of 2nd Regime

Problem with proposed 2nd regime is that Article 6 of the Rome I applies and may lead to

²⁰⁶ Committee on Legal Affairs, Amendments 206-531, p. 3/173

situation where rules of the CESL cannot be applied because of national law rules provides higher protection to consumer. Therefore it is necessary to rethink formation of common rules for consumer contracts. Rühl argues that the 1st regime, a uniform law, would make it possible to apply the rules without taking private international rules – in this case Article 6 Rome I – into consideration. Therefore parties could rely that if they agree to opt-into the CESL, the sales contract would be covered by the chosen rules without any exceptions according conflict of law rules.²⁰⁷

If the CESL would create 1st regime instead of 2nd regime its applicability would be possible by parties' valid agreement and independent from applicability of national law. Thus CESL would be effective without application of private international law rules, which would eliminate rules of the Rome I. It would mean that applicability of the CESL would be subject of rules of the CESL – not conflict of laws rules²⁰⁸.

Uniform law can be applied by parties' agreement to do so. Thus if the CESL would take a character of uniform rules, it would be applicable without any link to national law. It would also mean that the Rome I would not apply.²⁰⁹ I agree with Rühl that the CESL would be easier to apply and would create more reliable set of rules if it would be uniform law. It would be applicable to all parties willing to do so. Application would be simple and would not need any connections to national contract laws. If scope of the uniform rules would be for all sales of good – including B2C and B2B contracts – in the internal market, it would create useable tool for every actor in those markets. It would create rules applicable to all contracts and without link to national law. Those rules would be more easily interpreted through the EU and without complex opt-into mechanism parties could rely that rules they have choose will apply to sales contract.

²⁰⁷ Rühl 2012, p.12

²⁰⁸ Ibid., p.12–13

²⁰⁹ Ibid., p.12

10 CONCLUSION

10.1 Legislative Competence of the EU

The EU has legislative power only if objectives are not possible to reach by legislative acts of Member States, and power can be used only as far as it is necessary to achieve those aims.²¹⁰ Therefore legislative act to be proportionality it should be asked: (a) is chosen way suitable (*suitability*) for aimed conclusion; and (b) has the best option chosen (*necessity*).

Objectives of the CESL are to harmonize the internal market and make cross-border purchases more favorable to consumers and traders. Is there other option to achieve these aims than to adopt binding regulation? Could those other options be more suitable for the wanted result? Scope of the CESL is in B2C and B2B contracts, where other party is SME. This scope is found quite problematic. In view of the principle of proportionality the scope is as problematic as in parties' view. In the EU level there is already lot of legislation covering area of consumer protection. Consumer protection is widely harmonized by directives and the Consumer Rights Directive will provide even tighter harmonization by adopting maximum harmonization. Directives forces Member States to change their laws fitting into frameworks of the directives, and after the Consumer Rights Directive, everything falling into the Directive's scope will have exactly same rules through the EU. Therefore it is hard to find arguments in favor to the CESL. If the CESL would provide harmonized contract law rules to all actors in the internal market it would be suitable to adopt such regulation, but as long as the CESL only duplicates already existing the EU level consumer protection rules, it is not providing anything new. Therefore it would be more suitable to adopt rules in already existing directives. Simply rules would be easier to understand and consumers would not be forced to make decision which law protects their rights best. One of main argument for consumer protection is that consumers do not have enough knowledge and they are not aware enough of rules determining cross-border sales. It is not making any sense to force consumer decide which rules are most suitable. In fact consumers are not able to compare different options and make real choice. Last, but not least, the Commission is about to create competing consumer protection rules. And the competition is between the Consumer Rights Directive and the CESL, not between the EU

²¹⁰ Tridimas 1999, p.118

level legislation and national laws.

Maximum harmonization by the Consumer Rights Directive will harmonize all national laws fully and therefore different national consumer protection rules will no more exist after year 2014. Directive on maximum harmonization is act of using the EU legislative competence in its most effective way, and therefore blocking all legislative acts of Member States on the field of consumer protection. As Weatherill states, the EU transfers the competence completely from Member States legislators²¹¹. The EU legislation of consumer protection is covering wide area of B2C contracts and therefore it can be asked if there is anything left to the CESL anymore. The CESL is to set option for national rules, but as discussed earlier, national rules are equal to the EU rules, and therefore the CESL is actually creating option for the EU rules.

The Consumer Rights Directive is coming into force in 2014 and yet already the Commission is proposing option for those rules. The CESL states that it provides high level of consumer protection – same as the Directive. Why there must be option for the Directive? I argue that there is no need for the CESL anymore. If the Consumer Rights Directive would have been adopted in measures of minimum harmonization, or not adopted at all, then there would be room for optional instrument. The CESL would be necessary if the scope of the CESL would include all purchases including B2B contracts without limitation to SMEs. Then the CESL would create optional contract law rules for the internal markets. But as long as the scope is similar with the Directive, there is no need for duplicate consumer protection rules of the EU. It is bit confusing that the Commission argues that fully harmonized national rules are creating obstacles which shall be rejected by adopting option for those fully harmonized laws. The whole consumer protection field should be made clearer and as few as possible legislative acts should be adopted. More there is different act, more consumers – and traders – are confused. Thus, it is not likely that the CESL could lower barriers of cross-border sales in the internal markets. One good thing to remember is, that it is unlikely consumer even knows which law applies to purchases concluded online. At this moment, major of traders do not provide any

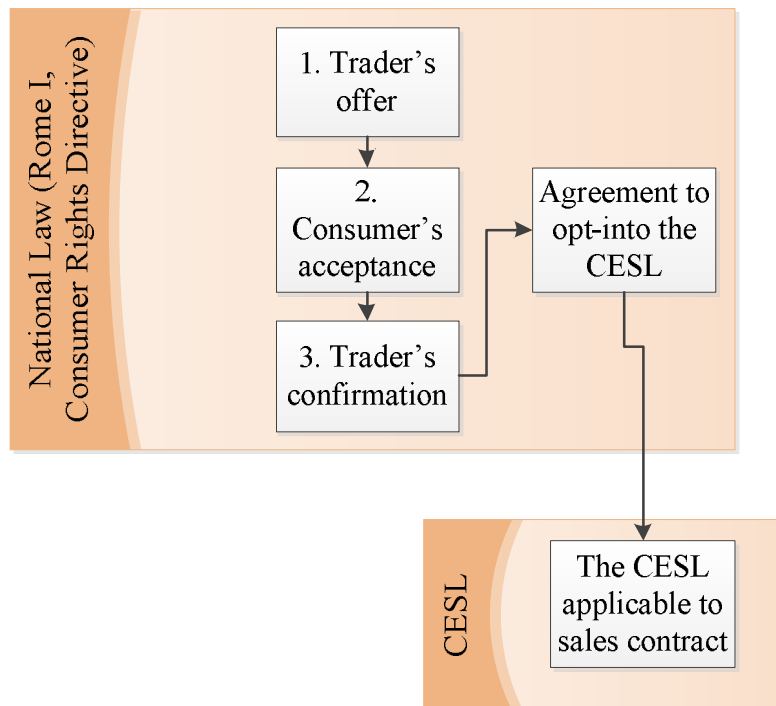
²¹¹ Weatherill 2011, p. 855

information regarding governing law of sales contract on their websites. So it is quite unlikely that consumers are comparing different national laws and making any decisions based on that. Therefore the CESL could not raise consumers' trust to cross-border sales in the internal market. And to traders, the CESL only provides complexity of rules which are obviously raising costs of legal advice.

10.2 Opting Into the CESL

Articles 8 and 9 the Regulation determines requirements to opt-into the CESL: (a) Separate and explicit agreement by consumer, Article 8(1)(2); (b) Trader shall confirm consumer's agreement, Article 8(2); (c) The CESL must be chosen in its entirety, Article 8(3); and (d) Trader must provide the Standard Information Notice (SIN) to consumer before the agreement to opt-into the CESL is bound, Article 9(1). In practice opting-into shall be done in following steps:

1. [requirements (d) and (c) above] Trader's offer to use the CESL governing sales contract in B2C purchases. Offer shall be given before consumer is able to begin purchase goods. The SIN shall be included in the offer, which also states that opting into the CESL will be done by adopting the whole set of rules and though national contract law will not apply to sales contract.
2. [requirement (a) above] Consumer accepts or rejects trader's offer without changes. When offer and acceptance are changed, consumer gives separate and explicit statement to opt-into the CESL. It is trader's obligation that the offer fulfills requirements of separateness and explicitness as stated in the CESL. Consumer only either accepts or rejects trader's offer. Model of an offer and acceptance is basis for contractual agreements in European contract law, and therefore it shall be followed here as well.
3. [requirement (b) above] Trader confirms consumer's acceptance. Confirmation is necessary to provide clear and precise information to consumer. Therefore trader shall state in the confirmation that if parties conclude a sales contract, it will be governed by the CESL.



Picture 2. Steps of the opt-into mechanism.

The SIN shall be provided before consumer can give binding agreement to opt-into the CESL. Therefore the SIN should be given before consumer accepts trader's offer. The CESL provides format of the SIN and therefore traders are able and obliged to use provided form available in all official languages of the EU. Biggest problem with the SIN is in the information it provides. The SIN is unclear and gives an expression that the CESL is something harmful and not safety consumer to choose. Therefore it is fighting against objectives of the CESL which should be providing high-standard consumer protection and let consumer to trust more for their rights in cross-border purchases.

Trader shall make an offer to opt-into the CESL. As consumer's statement shall be separate from the agreement to conclude a sales contract, shall consumer give a statement to opt-into the CESL before it is possible to make any action toward sales contract. In practice this means that it is in trader's obligations to make sure that before consumer can start buying goods. The statement shall be interpreted separately from parties' intention of concluding sales contract. Thus consumer's agreement should be asked and confirmed before any items can be choose in shopping basket on trader's websites. This is because if consumer chooses

goods to purchase before giving statement to opt-into the CESL, the statement is not anymore separate from the sales contract. I argue this basing on the fact that when consumer starts selecting items from trader's websites, this action is pre-contractual negotiations concerning possible following sales contract, and therefore opting into the CESL shall be done before pre-contractual negotiations. As the CESL apply to pre-contractual negotiations if it has been chosen and therefore making legal certainty stronger it shall be seen that the CESL must be selected before any actions toward sales contract. If the CESL could be selected in way of normal choice of law clause, then opting into the CESL should be done under pre-contractual negotiations.

Trader shall confirm consumer's agreement in durable medium. Same requirement is set in the Consumer Rights Directive where its definition is stated similar as in the CESL²¹². Trader shall confirm and store consumer's statement in way it is possible to find and evidenced later by both parties. Trader should store the agreement in form where all steps and whole definition of the offer and acceptance are saved in reliable form. This is important as we have already seen that opting into the CESL can be done only in required order by required agreement, and therefore all steps shall be possible to examine later on if necessary. Consumer shall have access to all of stored information, as the CESL requires. Both parties must have mutual understanding on the agreement, as it is seen as a contract under national law. If any dispute arises from the opt-into contract, both parties shall have similar information how contract is concluded and which law applies.

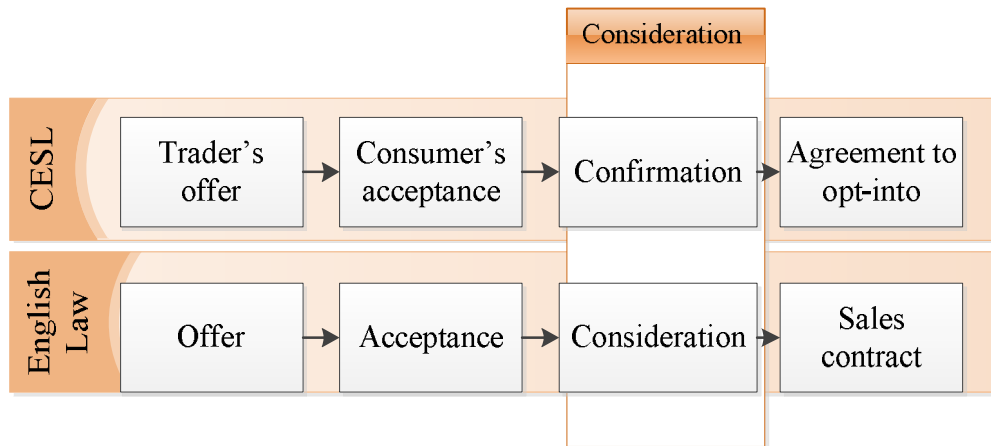
Validity of the parties' agreement to opt-into the CESL is the biggest issue with the opt-into mechanism. All acts done before the CESL becomes applicable are governed by national laws. Therefore parties' agreement to opt-into the CESL is governed by consumer's national contract law. At least it can be presumed so as the Rome I apply. However, parties are free to choose governing law of the agreement, if national law and the Rome I allow do such choice. Trader is bound to opt-into the CESL as long as consumer has either accepted validly or rejected the offer. However, the CESL does not give answer to how long the

²¹² Article 2 of the Regulation: [...] (t) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored [...]

agreement shall be valid. Should parties decide when their agreement expires and could it be applied to more than only one sales contract. The agreement shall be explicit, which could be seen that it can refer only to one sales contract. The CESL does not state clearly what the requirement of explicitness includes. Also time scope of the option is left open. Hesselink argues that as the CESL does not state any requirements that the agreement to opt-into shall be done before concluding sales contract, it should mean that parties' can choose the CESL in any time, including after concluding the contract²¹³. I agree with Hesselink, as the CESL states clearly the steps of the opt-into mechanism, but do not state anything when those steps shall be taken concerning actual sales contract. Therefore opting-into the CESL is possible to make in any point before, during, or after concluding sales contract.

Difference between continental law and English law is one challenge in the EU. This is the case also in field of consumer protection and contract law. English contract law requires that sales contract cannot become binding before consideration. Therefore consideration is requirement for contract's validity. Consideration is unique character in the English contract law, and it is not found in any other national law. The CESL does not require consideration when concluding sales contract. However, the opt-into mechanism includes similarities to the doctrine of consideration. As described in earlier chapters, opting into the CESL requires three steps in certain order. Order may vary, but if it does so, consumer's agreement is not binding as long as trader provides all required information. Thus if the order of the steps vary, the repairing acts will lead to result where steps are taken in the order proposed.

²¹³ Hesselink 2011, p. 9



Picture 3. Comparing the opt-into mechanism of the CESL and the doctrine of consideration of the English contract law.

Picture 2 express similarities between the English law and the opt-into mechanism of the CESL. Trader is obliged to confirm consumer's explicit and separate agreement to opt-into the CESL, and as it is described in the picture above, it can be seen as a trader's confirmation to offer made. Therefore it has similar character as consideration have. Obligation to give separate confirmation is making the offer valid in consumer's cope. Confirmation also includes obligation to store steps taken and therefore it is stating the whole opt-into process to consumer. Therefore I argue that confirmation is obligation which is making previous steps enforce and thus giving power to the agreement to opt-into the CESL.

10.3 New Solution?

There have been several proposals to improve the CESL. The ELI prepared revised articles to the CESL and its opt-into mechanism. In the ELI's proposal the opt-into mechanism would be replaced as a normal choice of law clause included in parties' sales contract. Consumer would still be obliged to give an explicit statement to choose the CESL, but the statement would be included in the sales contract and its validity would be determined by the CESL. Trader's information duties mainly remain as proposed in the CESL.²¹⁴ Proposal makes sense, as it would eliminate effect of national law and need for separate agreement.

²¹⁴ Statement of the European Law Institute (ELI) on the Proposal for a Regulation on a Common European Sales Law. pp. 131–132

This would clearly provide higher legal certainty of governing law. However, the proposal requires still trader to provide necessary information to consumer before the CESL becomes applicable. Therefore it leaves question if required obligations are not fulfilled, could those obligations be filled after concluding the contract or shall the contract then be governed by national law. The ELI's proposal is good and it would make the CESL more clear to understand and easier to apply. But it does not exclude the problem of already existing Consumer Rights Directive and thus the need for the CESL.

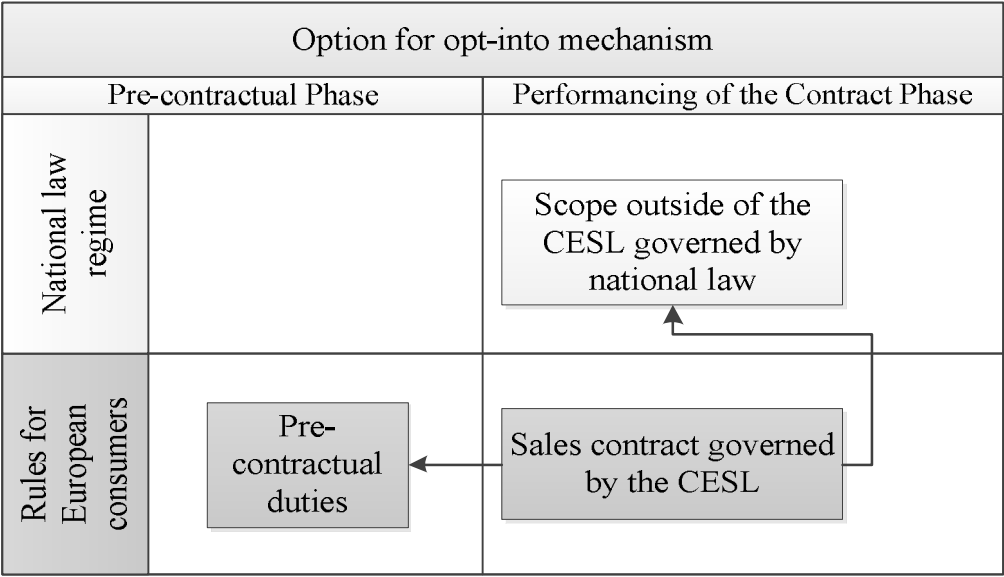
The Committee on Legal Affairs proposes that the CESL would be implemented to the Consumer Rights Directive. The proposal deals with the problem of two separate legislative acts on the field of consumer protection. Therefore it has good point trying to make legislation simpler. However, the proposal fails to express the way how implementing should be done. The proposal says that the CESL should create amendment to the Directive, and those amendments should be done in minimum harmonization. I agree that one single act would benefit by adopting clear rules for consumer contracts. However, I do not see the value the CESL could bring into the Directive. Therefore it would be easier to revise rules of the Directive if necessary, and not trying to include the CESL inside of it.

The CESL has too narrow scope which is making the whole rules useless. Therefore the scope should be wider, including all sales of goods. The ICC Commission stated that in the proposed format there is no need for the CESL in B2B contracts²¹⁵. The statement basis on the definition of SME, determined in the CESL. If the CESL would create uniform contract law rules applicable to all sales of goods, those rules would more likely be interesting for traders and consumers. Problem with the scope of B2B contracts where other party is SME, is the uncertainty where the definition of SME leads. Parties' should be aware if other party is filling requirements of SME or not. And if parties fail to identify other party correctly, the CESL is not applicable. This creates same legal uncertainty as in B2C contracts. Parties should be able to rely on their choice of law in any situation.

The CESL should be applicable through choice of law made by the parties. Choice of law

²¹⁵ ICC press release and document No. 460/662 – 12 July 2012

should be matter of the rules of the CESL, not national law. Therefore I agree the proposal for new opting into the CESL made by the ELI. Benefit of choice of law clause included into sales contract would be that choice of law and other provisions of the contract would be governed by the same rules. One contract for one purchase is much better than two contracts and many different governing laws for just one purchase.



Picture 4. Option to adopt uniform rules for European consumers.

Picture 4 shows how the CESL could be applied if choice of law clause could be included into sales contract. If picture is compared to the opt-into mechanism of the CESL – presented in the Picture 1²¹⁶ – it is easy to notice that the opt-into mechanism presented in the CESL is not practical tool and it is causing legal uncertainty not protecting consumer.

If the CESL would be applicable by parties’ mutual agreement included into sales law, it would not require any extra steps for its applicability. In hypothetic case consumer would be able to choose goods in trader’s websites and move those goods into shopping cart. After choosing products consumer would continue to phase of concluding sales contract and at the same time choose governing law to be the CESL. Trader would provide necessary

²¹⁶ See more in Picture 1 on page 42 of this thesis

information to consumer before proposing the CESL. Both parties could rely on their choice and no references to national law should be taken. Thus, there will remain some provisions left outside of the CESL which shall fall under national law. Those provisions however would not be in major role of the sales contract.

After all, the CESL is proposing very interesting ideas to develop the European contract law. Even that the proposed CESL clearly fails to fill requirements becoming the new element of European contract law, it is creating discussion in academic and political level. These impacts may be even greater than possible effects of the CESL even if it would come into force. At this moment it is hard to see that the CESL would succeed as a legislative act, but I do believe it will be success as opening development toward common contract law rules.