PERSPECTIVES FOR THE EUROPEAN OPTIONAL INSTRUMENT REGARDING COMMON LAW OF CONTRACTS

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Abstract in Polish

Jedenastego października 2011 r. Komisja przedstawiła projekt rozporządzenia ws. wspólnych, europejskich przepisów sprzedaży. W niniejszym artykule zamieszczono kilka krytycznych uwag w odniesieniu do wariantu wybranego przez Komisję. W szczególności jest wątpliwe, czy instrument opcjonalny, który tak dalece zdominowany jest przez "optykę konsumencką" ma jakiekolwiek szanse na akceptację w praktyce obrotu gospodarczego. Skuteczniejszym rozwiązaniem byłoby rozdzielenie przepisów z zakresu ochrony konsumenta od ogólnych norm prawa umów. Te pierwsze powinny się znaleźć w dyrektywach. Zaś ten drugi typ - w instrumencie opcjonalnym. Słusznym jest natomiast skupienie się na ochronie słabszej strony umowy poprzez zachowanie ogólnej równowagi kontraktowej pomiędzy stronami.

Key words in Polish

Europejskie prawo umów; rozporządzenie w sprawie wspólnego prawa sprzedaży; harmonizacja prawa prywatnego.

Abstract

On 11th October 2011 Commission presented a draft of the Regulation concerning Common European Sales Law. The present paper makes certain critical remarks as to the approach taken by the Commission. In particular, it is questionable whether the optional instrument that is to such a large extent dominated by "consumer optics" has any potential of being successful in business relationships. A more effective solution would be achieved by distinguishing between the consumer protection rules and the general rules of contract law. The first type of rules should be contained in the directives. The second type - in the optional instrument. It is however justified to focus on the interests of the weaker parties by securing general contractual balance between the parties.

Key words

European contract law; Common European Sales Law; harmonization of private law.

1. A BIT OF THE HISTORY - WHAT HAS BEEN ACHIEVED SO FAR

The vision of a common, European private law has been discussed in various corners of our continent for several years. It seems that the very idea of a European Civil Code dates back as far as the mid-twenty century.[1] The first modern, comprehensive endeavour to prepare common principles and rules of European contract law was attempted in the 1980s when the 'Lando Commission' commenced its work. More than a decade later, it resulted in publishing the Principles of European Contract Law ("PECL").[2]

Meanwhile, political impetus came from the European Parliament, which in 1989 declared its support for the idea of a European Civil Code,[3] and later – already after PECL was published – from the European Commission. The Commission has proposed a roadmap for the harmonization of European contract law, indicating the various choices that could be taken to that effect (Commission's Communications: European Contract Law of 2001,[4] the Action Plan of 2003[5] and The Way Forward of 2004[6]). However, it abandoned the idea of a European Civil Code. The Commission has announced that its priority will be to create a Common Frame of Reference – a set of rules and principles of private law. This was to at least enhance the quality of the already existing and future EU legislation in the area of private law or – in a more ambitious version – to provide a basis for the 'Optional Instrument', which the parties could choose to govern their relationship. The project was carried out by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (the 'Acquis Group'), which in 2009 presented the final Draft of a Common Frame of Reference (DCFR), being an academic set of

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[1] LEGRAND P., Against a European Civil, p. 59. It is also worth mentioning that a proposal to prepare a pan-Slavic Civil Code was formulated by the Polish scholar R. Longchamps de Berier in 1933 on the Congress of Slavic Lawyers. See MAŃKO R., Unifikacja europejskiego prawa prywatnego z perspektywy społeczeństwa polskiego, fn. 5.

[2] LANDO O. & BEALE H. (eds), Principles of European Contract Law.

[3] Resolution of the European Parliament of 26 May 1989, Endeavours to Harmonize Private Law in the Member States, OJ 1989 C 158/400.

[4] Communication from the Commission on European Contract Law of 11 Jul. 2001, COM(2001) 398 final.

[5] Communication from the Commission to the European Parliament and the Council of 15 Mar. 2003 – A More Coherent European Contract Law, An Action Plan, O.J. 2003 C 63/1.

[6] Communication from the Commission on European Contract Law and the Revision of the Acquis of 11 Oct. 2004: The Way Forward, COM(2004) 651 final.

principles, definitions, and model rules of European private law.[7] DCFR constitutes a comprehensive body of model rules that might serve as basis for a common European contract law or – in future - even a European Civil Code, since it contains not only rules of contract law but also other types of obligations (torts in particular), property law, including proprietary security, and trusts.

The vision of harmonization of European private law, and the European contract law in particular, has given rise to much debate and – as one author has put it[8] – to 'an avalanche of scholarly publications'.[9] Most of the authors favour the harmonization of the

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[7] VON BAR CH., CLIVE E., SCHULTE NÖLKE H. et al. (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) (the principles are contained in the Outline Edition and they are supplemented by extensive commentary in the Full Edition).

[8] SMITS J., A European Private Law as a Mixed Legal System: Towards a Ius Commune through the Free Movement of Legal Rules, p. 328.

[9] See e.g. BROWNSWORD R., MICKLITZ H-W., NIGLIA L., WEATHERILL S. (eds), The Foundations of European Private Law; SCHULZE R., SCHULTE-NÖLKE H. (eds), European Private Law – Current Status and Perspectives; HARTKAMP A.S., VON BAR CH. et al (eds), Towards a European Civil Code; GRUNDMANN S., The Future of Contract Law, p. 490; VAN DEN HEIJDEN M-J., KEIRSE A.: Selecting the Best Instrument for European Contract Law; WHITTAKER S., The Optional Instrument of European Contract Law and Freedom of Contract, p. 371; RIESENHUBER K., A Competitive Approach to EU Contract Law, p. 115; HOWELLS G., European Contract Law Reform and European Consumer Law – Two Related But Distinct Regimes, p. 173; AUGENHOFER S., A European Civil Law – for Whom and What Should it Include? Reflections on the Scope of Application of a Future European Legal Instrument, p. 195; MUAGERI M., Is the DCFR ready to be adopted as an Optional Instrument?, p. 219; TWIGG-FLESSNER CH., Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation? – A way forward for EU Consumer Contract Law, p. 235; MAK V., Policy Choices in European Consumer law: Regulation through Targeted Differentiation, p. 257; HESSELINK M, Five political ideas of European contract law, p. 295; CRISTAS A., Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses What do we want?, p. 314; CARTWRIGHT J., Choice is Good. Really?, p. 335; PICAT M., SOCCIO S., L'Harmonisation d'un droit Européen des contrats: fiction ou rèalité?, p. 371; VOGENAUER S., Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?, p. 143; HESSELINK M., The Consumer Rights Directive and CFR: Two Worlds Apart?, p. 290; LANDO O., Culture and Contract Laws, p. 1; HESSELINK M., European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?, p. 323; LURGER B., The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality, p. 442; SCHULZE R.,

national private laws of the EU Member States in one form or another, or at least agree that more coherence should be introduced to EU legislation in the area of private law. There are some who have shown a favourable attitude towards the most ambitious option, that is, the European Civil Code,[10] although such an alternative is strongly opposed by others (who sometimes refer to it as a 'diabolic idea')[11] and generally considered to be unrealistic or at least premature at the present stage. Some favour the 'American way', namely the 'soft' harmonization through restatements and model laws that would gradually be adopted by Member States and naturally allow the national laws to grow more and more similar.[12] To a similar effect, there are some authors who advocate adopting the optional contract law instrument as a temporary measure, but insist that the final outcome of the harmonization process should be a unified, binding set

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European Private Law and Existing EC Law, p. 3; HEISS H., DOWNES N., Non Optional Elements in an Optional European Contract Law, p. 693; GRUNDMANN S., The Optional European Code on the Basis of the Acquis Communautaire—Starting Point and Trends, p. 709; ZENO-ZENCOVICH V., VARDI N., EU Law As a Legal System in a Comparative Perspective, p. 205; HARTKAMP A., JOUSTR C. (eds), Towards a European Civil Code; TRUILHÉ-MARENGO E., Towards a European Law of Contracts, p. 463; VON BAR CH., A Plea for Drafting Principles of European Private Law, p. 100; CÁMARA LAPUENTE S., The Hypothetical European Civil Code: Why, How, When?, p. 89; LANDO O., The Future Development of European Contract Law, p. 99; GRUNDMANN S., STUYCK J. (eds), An Academic Green Paper on European Contract Law. The topic of Europeanization of private law has also been often discussed in the Polish doctrine. See e.g. OSAJDA K., Perspektywy europejskiego prawa umów: Zielona Księga Komisji Europejskiej o Europejskim Prawie Kontraktów, p. 19; CAŁUS A., Umocowanie do zbliżania prawa prywatnego państw członkowskich w prawie Unii Europejskiej, p. 133; ZOLL F., Europejski kodeks cywilny - wokół wizji nowego prawa prywatnego dla Europy, p. 16; ZACHARIASIEWICZ M.A., Konwencja wiedeńska o międzynarodowej sprzedaży towarów a Reguły UNIDROIT i Zasady Europejskiego Prawa Umów (ze szczególnym uwzględnieniem problematyki odpowiedzialności kontraktowej dłużnika), p. 29; PISULIŃSKI J., O możliwości stworzenia zasad europejskiego prawa zobowiązań umownych, p. 121; KUROWSKA A., Analiza instrumentów prawnych umożliwiających wprowadzenie jednolitych zasad w zakresie prawa umów, p. 63.

[10] VON BAR CH., Paving the Way Forward with Principles of European Private Law, p. 137; LANDO O., Why Does Europe Need a Civil Code, p. 207.

[11] LEGRAND P., A Diabolic Idea, p. 245.

[12] E.g. ZOLL F., Europejski kodeks cywilny, 29. From his later statements made publicly at various conferences and seminars, it seems however that the author has shifted more towards a position favouring a binding European instrument in the area of contract law.

of rules that applies irrespective of the parties' choice.[13] Others have underlined the benefits of the competition between the various sets of rules on private law[14] or advocated for the free movement of legal rules.[15] Along these lines the idea of an optional contract law was developed, although there are some who have argued that yet another set of rules cannot adequately deal with the problem of the legal diversity that constitutes an obstacle to the functioning of the internal market.[16]

European Union on the other hand pursues its own goals. Above all, it aims at removing obstacles in the internal market and in that way attempts to stimulate trade between Member States. The recent initiative that helped to move things forward[17] was the Green Paper on Policy Options for Progress Towards a European Contract Law published by Commission in June 2010, where it laid down policy options for the development and harmonization of the European contract law.[18] The document as such could hardly be seen as a revolution. As explained by the Commission, it was 'to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law'. Again, as in 2003–2004, the policy options for the development and harmonization of the European contract law were set, but no definite answers were advocated. The options defined by the Commission were many and stretched from very modest solutions to the most ambitious concept of the European Civil Code. More specifically, Commission has proposed the following options: (1) publishing the results of the work carried out by the Expert Group on European Contract Law (yet another group of experts established in order to assist the Commission in drafting the new legal instrument),[19] (2) adopting the legislator's 'toolbox', (3) Commission Recommendation on European Contract Law (encouraging the Member States to incorporate the instrument into their national laws), (4) regulation setting up an optional instrument of European Contract Law, which the parties could choose

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[13] PICAT M., SOCCIO S., L'Harmonisation, p. 409.

[14] For example, GRUNDMANN S., The Optional, p. 709.

[15] SMITS J., A European Private, p. 328.

[16] SEFTON-GREEN R., Choice, Certainty and Diversity: Why More is Less, p. 134.

[17] HONDIUS E., Towards a European Civil Code, p. 5; AUGENHOFER S., A European Civil Law, p. 196.

[18] Communication from the Commission of 1 Jul. 2010 (Green Paper from the Commission on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses), COM(2010) 348 final.

[19] Expert Group was founded by a Decision of 26th April 2010, O.J. L 105, 27.4.2011, p. 109.

to govern their relationship, (5) directive or (6) regulation on European Contract Law replacing national laws, and (7) the European Civil Code covering not only contracts, but also other types of obligations.

What has changed since 2003–2004 was the amount of comparative work that has been done by various expert groups, including in particular DCFR (but also other important efforts). In that way or another, the Commission felt it is crucial to take advantage of the results of work prepared by experts and propose a concrete measure in the field of contract law. Launching the public consultation process and inviting various stakeholders to comment on the available choices, the Commission has undertaken to propose further action by 2011-2012. While the Commission declared that it has not taken any decisions as to the policy option that was to be proposed, it was quite clear that the favoured choice was the 'optional instrument'.

Proceeding under a tight time schedule imposed by the Commission,[20] Expert Group has presented a draft of an instrument in the area of contract law (that was to constitute the basis for the further Commission's proposal) on 3rd of May 2011. The working name of the document is the "Feasibility Study for a Future Instrument in European Contract Law" ("Feasibility Study").[21]

Finally, on 11th October 2011, in accordance with earlier announcements, Commission has presented its own proposal of the optional instrument relating to the sales contract – the "Common European Sales Law" ("CESL").[22] This draft will now be discussed in the EU legislative procedure.

2. THE BASIC FEATURES OF THE COMMON EUROPEAN SALES LAW

It is not the purpose of the present paper to provide a thorough analysis of the provisions of CESL that relate to its scope of application, manner in which it will applied or its substantive rules. The very fundamental features on which the proposal is based should

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[20] Cf. RIESENHUBER K., A Competitive Approach, p. 115.

[21] Commission Expert Group on European Contract Law, Feasibility Study for a Future Instrument in European Contract Law, 3.05.2011 (available at: http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf).

[22] Proposal For a Regulation of the European Parliament And of the Council On a Common European Sales Law, COM(2011) 635/4 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF).

however be presented in order to allow for the discussion that will follow later on.

First of all, it should be explained that the Commission's proposal have taken a form of a regulation, which means that it will be directly applicable and binding in all Member States as soon as it enters into force after its publication in the EU Official Journal. However, the Regulation itself contains only the provisions relating to objectives and subject matter of the proposal, as well as to the scope of its application and an agreement of the parties to use CESL. This is referred to as the Chapeau of the Proposal. All of the substantive rules relating to the sale of goods, supply of digital content and related services are contained in Annex 1, which constitutes the actual Common European Sales Law.

Importantly, CESL constitutes an optional instrument, i.e. it will only apply if chosen by the parties in their contract.[23] It is based on the opt-in system, which means that the parties have to actively opt into the instrument (as opposed to the opt-out system under which a given set of rules applies, if the parties fail to exclude it[24]). Moreover, as underlined by the Commission, CESL will constitute a 2nd contract law regime within the national law of each Member State[25] and not an independent 28th legal system within EU. Therefore, a choice of CESL is not to be a genuine choice of applicable law as understood by private international law, but rather a choice between two different sets of sales law within the same national legal system.[26] It does not dispense with a necessity to choose the applicable law of a given state, if the parties wish to locate their contract within a particular national legal system. Furthermore, it does not affect manner in which Regulation Rome I operates.[27]

If looked at in light of harmonization efforts of private law in Europe and particularly taking into account the ambitious plans to create a common European contract law, the Commission's Proposal seems rather modest in its scope. This is because CESL only covers[28]

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[23] See article 3 of the Proposal's Chapeau.

[24] For example CISG is based on the opt-out system. See the United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 11 April 1980, UN Document Number A/CONF 97/19, 1489 UNTS 3 (http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html).

[25] Explanatory Memorandum to Proposal For a Regulation of the European Parliament And of the Council On a Common European Sales Law, COM(2011) 635/4, p. 6.

[26] Explanatory Memorandum, p. 6, supra n. 25.

[27] Explanatory Memorandum, p. 6, supra n. 25.

[28] Article 5 of the Proposal's Chapeau.

contract for the sale of goods,[29] contracts for the supply of digital content[30] and related service contracts, if they are directly and closely related to specific goods or digital content.[31] Basically therefore, CESL is a sales law instrument. It is also made clear that CESL cannot be applied for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services.[32]

CESL – at least as the proposal stands at the present - can only be used in cross border contracts and not in purely domestic transactions.[33] A cross border nature of the contract is determined by the parties' habitual residence,[34] understood as the place of central administration in case of the companies and other corporate or unincorporated bodies, and as principal place of business in case of a trader who is a natural person.[35] However, with respect to the consumer, it is not the actual habitual residence that matters but rather the address indicated by the consumer, either as his or her general address or the delivery address for goods or the billing address.[36]

CESL may be applied both in B2C and B2B contracts. Thus, after considering various arguments, the Commission has decided that the optional instrument should not be limited to the consumer contracts but should also be available in the transactions between businesses. There are two limitations in that respect however. First, the seller must always be a trader, while the other party (buyer) might be either a trader or a consumer.[37] Second, in B2B contracts, CESL may only be

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[29] Since as pointed out by the Commission: "this is the economically single most important contract type which could present a particular potential for growth" (para. 16 of the motives contained in the Preamble to the Proposal) and this was the type of a contract preferred by most of the interested parties that responded to the Green Paper (see Explanatory Memorandum, at p. 7, supra n. 25).

[30] Contract for the supply of digital content is covered by CESL irrespective of whether the content is provided in a tangible medium. Proposal thus covers contracts related to the transfer of digital content for storage, processing or access, and repeated use, such as a music download. See para. 17 of the motives contained in the Preamble to the Proposal.

[31] Para. 19 of the motives contained in the Preamble to the Proposal.

[32] Article 6 of the Proposal's Chapeau.

[33] Article 4 of the Proposal's Chapeau.

[34] Article 4(2) of the Proposal's Chapeau.

[35] Article 4(4) of the Proposal's Chapeau.

[36] Article 4(3)(a) of the Proposal's Chapeau.

[37] Article 7 of the Proposal's Chapeau.

used if at least one of the parties is a small or medium-sized enterprise (SME).[38]

Within its scope (sale of goods, supply of digital content and related services) the proposed Regulation covers a wide range of legal issues. It contains both general rules of contract law (general part), specific rules related to the sale of goods, supply of digital content and related services, as well as extensive coverage of the consumer protection. More specifically, CESL covers issues such as: conclusion of contract and pre-contractual information duties, defects in consent, unfair contract terms and other matters related to the content of the contract, obligations and remedies available to the parties, in particular rules relating to the conformity of the goods or digital content, passing of risk, damages and interest, restitution and finally, prescription. Above all, CESL devotes particular attention to the protection of consumers and contains a wide-ranging regulation to that effect. It covers issues such as pre-contractual information to be given by a trader dealing with a consumer, right to withdraw in distance and off-premises contracts, unfair contract terms and many other matters.

3. IS THERE "CLARITY OF PURPOSE" BEHIND CESL?

One of the things that is bothering about the Commission's Proposal is something that was accurately called by S. Vogenauer as the "clarity of purpose",[39] or, might that be said right away - rather the lack of such clarity behind CESL. There are, so it seems, two aspects to that. First, there was no clarity of purpose at the time when the substantive rules (that are now incorporated in CESL) were prepared. The work was being carried out, the rules drafted, but it was unclear what they were to become. An optional instrument was preferred (although unofficially) since some years already,[40] but it was in no way certain, whether it will be chosen as the basis for the political initiative. Even the Expert Group, when commencing its work in April 2010 was asked to prepare the set of rules that could serve as a model for various types of measures. As pointed out by S. Vogenauer: "The elaboration of the CFR has not been helped by the fact that the Commission has been endlessly dithering with regards to the purposes and the scope of the instrument".[41] Clearly, an uncertainty as to the scope and nature of an instrument make it difficult for those who work on it to create comprehensive, precise and consistent set of rules.

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[38] See article 7 of the Proposal's Chapeau, which also defines the notion of an SME by referring to a number of employees and an annual turnover of a given trader.

[39] VOGENAUER S., Common Frame, p. 182.

[40] See e.g. HOWELLS G., European Contract, p. 175.

[41] VOGENAUER S., Common Frame, p. 182.

Second, and more important for the analysis at hand, there seem to be no clarity of purpose behind CESL itself. Obviously, Commission defines the goals of CESL on numerous occasions. They are expressed in the actual rules of the Proposal, in its motives, and in the Explanatory Memorandum. Article 1(1) states that "The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules". Moreover, it is further explained in the motives 1-4 of the Preamble and the Explanatory Memorandum[42] that the differences in contract laws between Members States constitute an obstacle hindering cross-border trade in EU.[43] Commission makes clear that its goal is to reduce costs incurred by the traders in cross-border commerce[44] and in that way unlock the potential for growth of the internal market. At the same time however, CESL clearly concentrates on the consumers. As expressed in article 1(3): "Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders."[45]

Article 1, the motives contained in the Preamble of the Proposal and the Explanatory Memorandum are not out of the blue. Commission officials have kept on repeating over and over again the same.[46] It seems quite obvious that the mentioned goals are in fact public economic policies pursued by the Commission. Even more, by

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[42] Explanatory Memorandum, p. 2, supra n. 25.

[43] Although an argument that differences in contract laws have a negative impact on the trade within internal market is a simplification. Various studies have shown that it is rather hard to assess the exact impact that these differences have on the trade in EU. See HOWELLS G., European Contract, p. 176, 184.

[44] Article 1(2) of the Proposal's Chapeau.

[45] This purpose is clearly defined also in motives 5-7 contained in the Preamble to the Proposal and in the Explanatory Memorandum, p. 3-4, supra n. 25.

[46] See e.g. V. Reding, The Next Steps Towards a European Contract Law for Businesses and Consumers - presentation delivered at the Conference organized by the Study Centre for Consumer Law of the Catholic University of Leuven and the Centre for European Private Law of the University of Münster in Leuven on 3 June 2011 (available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/411&type=HTML), as well as the views expressed at the conference „Recent Developments in European Private Law - the Influence of European Consumer Law on National Legal Systems", held in Katowice on 23-24 September 2010 (see my report from that Conference published in European Review of Private Law, vol. 19, 2011, No 3-4, p. 497) and at the conference "European Contract Law – Unlocking the Internal Market Potential for Growth" held in Warsaw on 9-10 November 2011.

establishing Common European Sales Law, Commission is not only attempting to stimulate the cross-border trade at the internal market but has in mind an even more ambitious goal, i.e. it wants to challenge the financial crisis.[47]

The legitimacy of the reasons that guide the Commission is beyond doubt. However, what is striking is how these policies diverge from the traditional goals underlying rules of private law. Those traditional private law rules are not laid down to effectuate economic policies. Their purpose is to lay out a playground for the individuals[48] so they can trade in a well-defined and predictable environment.

As mentioned, it is quite clear that Commission's primary target is the consumer transactions (B2C). This is evident both from the statements made by Commission's officials and from the content of the Proposal itself. Nevertheless, CESL was designed to apply also to professional transactions between businesses (B2B), if so chosen by the parties. Therefore, the same set of rules that was designed primarily for consumers is to be applied (so it is hoped) in transactions between sophisticated professional parties. If seen in the light of the ambitious on-going process of harmonization of contract law in Europe and the plans of creating common law of contracts, which the European legislator favours at least since the European Parliament supported the idea in 1989, the decision to extent the scope of application of CESL to B2B contracts creates an impression that Commission does see CESL also as a measure that fulfils these ambitions.

An important question thus arises - what is that the European legislator wishes to achieve? Is it a political aim of busting the European economy and overcoming the financial crisis? Is the new instrument to increase the cross-border sales in consumer contracts and in that way benefit mainly the consumers? Or, does the legislator truly wishes to create classic, private law rules that will shape the contract law for the future generations of Europeans? It appears to me that it may prove impossible to accomplish all of the above ambitious goals at the same time. There is a danger that a failure to adequately satisfy those high expectations (as to the harmonization of European contract law or overcoming the financial crisis in particular), might be considered a failure of the harmonization process in general and cause rejection of the very idea of bringing the private laws in Europe closer together.

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[47] In briefing on 11th October 2011 when CESL was presented V. Reding inter alia said: "*We give an answer to the crisis in order to stimulate trade, boost growth, and increase jobs*". See e.g. information provided by EurActiv (available at: http://www.euractiv.com/consumers/sales-law-answer-crisis-reding-news-508282).

[48] BASEDOW J., The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary, p. 451.

4. DOES CESL HAVE POTENTIAL OF BEING SUCCESSFUL IN PRACTICE?

The success of the optional instrument will depend on many different conditions.[49] The quality of the legal rules that are laid down in CESL will obviously be important, but it may not suffice to guarantee success in practice. Even the best rules will not help the optional instrument in accomplishing its goals, if there will be other, strong disincentives discouraging parties from using it. The success of CESL, or more specifically - whether it will help to increase the cross-border trade in Europe as envisaged, is contingent upon non-legal factors as much as the legal ones.

Let us first look at the consumer's perspective. It is rather clear that the consumers will not evaluate the quality of the rules contained in CESL, nor the degree of the level of their protection. Nevertheless, those factors might be relevant to CESL's success in consumer transactions, if the consumer protection organizations will be convinced that CESL is generally beneficial for consumers and will promote its use in B2C transactions.[50] Still, this does not guarantee that traders will be eager to offer a choice of CESL to the consumers.

What seems to be often underlined by various groups of future users of CESL, is that from the point of view of the consumer there are other factors that discourage consumers from shopping abroad, which might be more important than the rules on the sale of goods or digital content themselves.[51] These include things such as a general lack of trust when contracting with traders from other Member States,

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[49] See e.g. HOWELLS G., European Contract, p. 184.

[50] And that they will be so convinced is not certain at all. Notwithstanding Commission's assurances of the very high level of protection of the consumers in CESL (in almost all respects higher than the most pro-consumer solutions under Member States' legislations), consumer protection organizations seem to be reluctant in concluding that CESL indeed will be beneficial to consumers. They do rather express fears that the level of protection will be lowered and that CESL will not be truly optional for consumers (such opinions were expressed at the Conference „European Contract Law – Unlocking the Internal Market Potential for Growth", which was held in Warsaw on 9-10 November 2011). Cf. HOWELLS G., European Contract, p. 187. Irrespective of whether these anxieties are justified (they clearly seem warranted when it comes to genuineness of the consumer's choice) such an attitude of the consumer organizations may negatively influence the future of CESL.

[51] Such a view was expressed by many of the participants at the Conference „European Contract Law – Unlocking the Internal Market Potential for Growth", which was held in Warsaw on 9-10 November 2011 (in particular by E. Appelmas, director of the European Consumer Centre, L. Cloots from UNIZO-Studiendienst, K. Pluskwa-Dąbrowski from Polish Consumer Federation and B. Wyżykowski from Polish Confederation of Private Employers Lewiatan).

language difficulties, after sales service, unavailability of inexpensive and secure methods of payment, as well as the very problem of the physical distance between the seller and the consumer. These problems will not be removed by CESL.

Furthermore, similar obstacles exist from the point of view of the traders, particularly when it comes to SMEs. They too might be reluctant from offering their goods and services abroad because of the distance to the consumer and the insecurity that results therefrom (relating to fraud or non-payment),[52] as well as the fear of getting involved in a lawsuit in a different Member State that will be too costly to defend.[53]

Clearly, the success of CESL will to a large extent depend also on its promotion and legal education, since people (including lawyers) trust rules, which they are acquainted with[54] and which - preferably - have some case law history that shows how they are used.[55] This concerns both consumers (they will be willing to trust CESL, if they will expect that it is safe and beneficial for them, even though they are not able to assess the content), as well as professionals, who will take advantage of the optional instrument, if they will know its content and evaluate that it has at least some aspects that serves their needs.

Although the various factors mentioned above might have a crucial impact on the success of CESL, the supporters of the idea of an optional instrument are right to say that even if the differences in legal framework are but only one obstacle, to remove that obstacle is nevertheless a step forward. After all, one has to start somewhere.

Irrespective of the above, there is one aspect that relates to the very structure and content of CESL that I find particularly troublesome and that might preclude its broader acceptance in practice. Namely, the draft presented by the Commission is clearly characterized (not to say that it suffers) by what I call "consumer optics". This was underlined even more distinctly and defined as a "consumerism creep" by S. Vogenauer - although with respect to DCFR.[56] M. Storme on the other hand, when referring to the Feasibility Study, speaks of an "attempt to please the consumer champion".[57] Even more, "the consumer optics"

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[52] Cf. HOWELLS G., European Contract, p. 184.

[53] This is sometimes underlined as the single most important reason why traders are unwilling to offer their products to other Member States. See HOWELLS G., European Contract, p. 173 et seq. Cf. AUGENHOFER S., A European Civil Law, p. 215.

[54] Cf. HOWELLS G., European Contract, p. 183.

[55] Id. at p. 177.

[56] VOGENAUER S., Common Frame, p. 172.

[57] STORME M., Fatal Attraction, p. 344.

seems to grow stronger in every new draft of European rules of contract. While DCFR contained important rules on consumer protection, these rules were not clearly dominant (although some argue that they are). No doubt however that they are prevailing in the Feasibility Study and even more obviously in CESL.

The "consumer optics" has two facets. One is the extremely high level of protection of the consumers. This was intended and is reflected in many provisions of CESL. Some (particularly those who speak for the businesses) point out that the level of protection is too high.[58] Whether this is right in principle might be another thing. However, it is rather evident that since the CESL will be an opt-in instrument, and since it will be the trader who will have a decisive influence on whether CESL is chosen for a particular contract, the businesses will not be encouraged to use it after all.[59] What might however persuade traders to offer CESL to consumers is a belief that this in itself would reassure consumers to shop across the borders, since they would feel more secure under the European regime that they would under national law. We shall see which of these two proves to be a more convincing incentive.

The second facet is a clear domination of B2C relationships, if one compares the amount of words concerned with consumer protection and the rest of the text of CESL. The whole text of CESL (only the substantive rules laid down in annex) consists of 24.688 words, while 8.596 out of them are devoted solely to consumer protection. This means that the consumer rules constitute 35% of the whole content of the draft of optional instrument (i.e. more than 1/3!).[60] Moreover, in the structure of the Proposal, the rules on consumer protection relating to a given issue are laid down first and only then there are general rules of contract law applicable to B2B relationships.[61] Finally, there is a general impression from the draft of CESL that it exactly corresponds to what G. Howells felt constitutes a significant danger, namely that the "regime fit for consumers might be imposed on traders".[62]

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[58] There were voices to that effect during the Conference „European Contract Law – Unlocking the Internal Market Potential for Growth", which was held in Warsaw on 9-10 November 2011 (e.g. L. Cloots from UNIZO-Studiendienst and B. Wyżykowski from Polish Confederation of Private Employers Lewiatan).

[59] Cf. STORME M., Fatal Attraction, p. 344.

[60] A similar domination of the consumer rules existed already in the Feasibility Study.

[61] See e.g. part II, chapter 2 of CESL.

[62] HOWELLS G., European Contract, p. 178 who argues that this danger results from the fact that the common European rules of contracts were to a large extent shaped on the basis of the consumer protection acquis

It seems to me that it is questionable whether the optional contract law that is to such a large extent dominated by "consumer optics" has any potential of being successful in business relationships. Obviously, in theory the 1/3 of the rules of the instrument that relate to consumer protection does not apply in B2B transactions, so the traders should not be concerned with them. But in practice opinions are often created on what is the first impression of the given matter. Here, the first impression that the businesses might get from CESL is that it is flooded with the consumer protection rules and that the business reader will discover "his" rules only after digging more deeply into the document. Even if that might not be a problem as such for the professional legal advisors, there might arise a general belief based on a first impression that CESL is simply something not tailored to the needs of business (paradoxically, business lawyers sometimes embrace such convictions too, even, if they are false). This is strengthened by the fact that EU initiatives are already considered as addressed primarily to consumers (clearly not without a reason, since acquis communautaire in the field of private law is mainly concerned with consumer protection) and the same will happen to CESL. Therefore, in my view, a likelihood that CESL (as in a version presented by Commission on 11th October 2011) will be used in B2B transactions is rather low. After all, why would businesses choose such a consumer oriented instrument in the age of an extensive party autonomy, in which the parties are allowed to choose from various set of either national laws (e.g. pro-business English law or a traditionally highly regarded Swiss law) or non-national legal regimes (such as CISG[63] or UNIDROIT Principles[64] or PECL[65] - although the choice of the two latter instruments will not be fully effective[66]).

Besides consumers, the proposal's goal is to aid the small and medium enterprises (SMEs) in their cross-border business activity. This is because it is SMEs that normally refrain from trading with customers from other Member States, since it is too costly for them to expand to

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communautaire, which necessarily meant that the "consumer optics" emanated on what came to be accepted as the general rules and principles of contract law.

[63] United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 April 1980.

[64] UNIDROIT Principles of International Commercial Contracts. A new 2010 version has recently been presented and available at http://www.unidroit.org.

[65] Principles of European Contract Law ("Lando Principles"). See LANDO O. & BEALE H. (eds), Principles of European Contract Law.

[66] The choice of UNIDROIT Principles or PECL will not remove the parties contract from the application of the mandatory rules (ius cogens) of the law of state which is otherwise applicable to the contract at hand in accordance with the private international law of forum. However, more effect might be given to the choice of UNIDROIT Principles or PECL in arbitration.

other markets.[67] Large corporations might need a uniform European contract law much less, as they can adopt the contract to their needs, even if that takes drafting 27 different standard terms and conditions to be used in 27 different Member States.

The Commission is probably aware that its proposal is inapt for the purposes of large businesses and taking that into account went so far as to allow a choice of CESL in B2B transactions only if at least one of the parties is SME.[68] This might be an accurate expectation of that large businesses will not invoke CESL in their transactions. Nevertheless, such a solution is hardly justifiable. After all, why restrict larger businesses from choosing CESL if they so wish (even if that would be extremely rare in practice). One might wonder whether in this way Commission is not creating a self-fulfilling prophecy.

The above important concerns might significantly influence practical success of the optional instrument. The high expectations of CESL (i.e. that it will unlock the potential of internal market and help to overcome the financial crisis) might be difficult to accomplish, what is likely to create an impression that CESL has not stood up to what it was hoped to be. Moreover, if the Proposal will be addressed to businesses but flatly rejected for the reasons that I stated above, it might be seen as a failure leaving an impression that it is hardly ever possible to harmonize the contract law in B2B transactions. Lastly, a narrow scope of application creates a risk that a once ambitious endeavour (i.e. harmonization of the European contract law) will end up as a limited, consumer oriented sales law instrument, that is rarely applied in practice and poorly valued by everybody except the consumers.

5. ALTERNATIVE APPROACH

G. Howells makes an important point when he asks how is that "the project for a European Contract Law became intertwined with moves to harmonise consumer contract law"[69]. Whatever is the answer to that question,[70] this is an unfortunate course of events. Again I wish to

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[67] Explanatory Memorandum, at p. 3, supra n. 25.

[68] Article 7 of the Proposal's Chapeau.

[69] HOWELLS G., European Contract, p. 178.

[70] Some of the reasons which G. Howells mentions include, first, the allocation of the work in Commission's DG SANCO, which has taken interest in supporting academic efforts to create European contract law and, second, the work of Acquis Group entrusted with building basic principles of European contract law upon the acquis communautaire existing in the field of consumer protection. See HOWELLS G., European Contract, p. 178. That the latter might be a wrong starting point is also suggested by AUGENHOFER S., A European Civil Law, p. 201.

draw upon conclusions reached by S. Vogenauer, who argued for distinction between consumer and commercial contract law.[71] A more coherent and effective solution would be achieved by distinguishing between the consumer protection rules and - here I differ with the mentioned author - the general rules of contract law. The first type of rules should be contained in the directives, which could provide for a maximum harmonization to the extent it is necessary to introduce a unified consumer protection all around Europe. The harmonized rules on consumer protection, to the extent they are not contained in the existing acquis communautaire or in the recently adopted Consumer Rights Directive[72] (which is based on maximum harmonization, but the scope of which was importantly narrowed down in its final version), and as far as it will be felt necessary to guarantee uniform rights for consumers, should be contained in further directives devoted to the consumer protection.

The second type of rules – the general contract law should be contained in the optional instrument. Such an optional contract law should apply to all types of parties, including individuals (whether acting as consumers or not) and legal entities (whether SMEs, large business or other entities), i.e. it should be available for all kinds of transaction whether B2C, B2B or C2C. The optional instrument should be a set of traditional contract law rules only, much like what is contained in PECL or UNIDROIT Principles. The consumer protection on the other hand, should completely be omitted from the content of the instrument and left to the directives.

Nevertheless, it is, I think, a justified approach to focus on the interests of the weaker business parties by providing certain rules that would protect their rights under a contract. Thus, the optional instrument could include measures such as for example the unfair contract terms in contracts between traders,[73] the duty to raise awareness of not individually negotiated terms[74] or the general obligation to act in good faith and observe the principles of fair dealing.[75] These should not however be available only for specific types of parties (e.g. consumer, SME) but in any situation under the

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[71] VOGENAUER S., Common Frame, p. 176.

[72] Directive of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, (adopted on 10.10.2011, not yet published in O.J.; available at: http://register.consilium.europa.eu/pdf/en/11/pe00/pe00026.en11.pdf).

[73] See article 86 of CESL.

[74] Article 70 of CESL.

[75] Article 2 of CESL.

contractual relationship (effectively protecting the weaker parties).[76] The underlying idea should not be that much of pursuing any specific policy (e.g. protection of SMEs) but rather of securing the general contractual balance between the parties, by providing for their wide autonomy, but simultaneously by narrowing possibilities for abuse of the pacta sunt servanda principle by stronger contracting parties.[77] Still, a competing point of view should be taken into account, that the more concessions will be made in favour of the weaker parties, the less likely will the optional instrument be chosen in contracts, in which one of the contractors has a dominant influence on its content and the choice of the applicable legal regime.[78]

There are several reasons why in my view, such an alternative approach is justified.

First, the consumer protection - even if important divergences exist between Members States - is already a highly harmonized area of law in comparison to the general law of contracts. As soon as the Consumer Rights Directive will be implemented, the degree of harmonization of consumer protection rules will be even greater (although admittedly not as complete as some would expect). The real differences however, exist between the various Member States with respect to the general rules of contract law. This means that the optional instrument is needed more in the field of general contract law than with respect to the consumer protection.

Second, the rules protecting consumer are mandatory and it is rather difficult to imagine that this is being done otherwise. They have to be imposed on businesses, since their interests are hardly ever concordant with the interests of the consumers. The consumer protection rules, as established in the acquis communautaire, are mandatory after the provision of the directives are implemented in the national legislation. This makes the whole consumer regime mandatory too. CESL on the other hand is from its very nature optional in a sense that the parties (in reality the trader) may decide whether to use it or not, even if the consumer protection rules contained therein are mandatory, and even if the cherry-picking is prohibited.[79] One should remember that if the

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[76] S. Augenhofer has convincingly argued that the concept of protecting someone only because he is acting in the role of a consumer leads to unfair results in some cases. AUGENHOFER S., A European Civil Law, p. 205. The same could be said of the protection granted to the party only because he or she is acting in a given different role (e.g. as an SME).

[77] As noted by S. Augenhofer - the rules that aim at protecting weaker parties are needed because "they show that formal freedom of contract by itself is not sufficient". AUGENHOFER S., A European Civil Law, p. 206.

[78] MUAGERI M., Is the DCFR, p. 227.

[79] See article 8(3) of the Proposal's Chapeau which states that: "In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety".

businesses will consider that the standard of protection of the consumer contained in CESL is too high (and the standard in itself is mandatory), they will not use it in their contract with consumers. The whole mandatory nature of the consumer protection would then be lost.[80]

Third, it is the tradition of civil law in most of the Member States that there is one set of general contract rules that are applicable to all contracts irrespective of who are the parties. Moreover, a view seems to prevail among the experts dealing with the topic that optional instrument should cover both B2B and B2C (and possibly also C2C) transactions.[81] This postulate is achieved if the European optional law contains the general rules of contract law applying to all types of individuals and legal entities.

Fourth, if the consumer protection is removed from CESL, the businesses would not be scared off from the instrument that is flooded with the provisions designed solely for the consumers. On the other hand, even if the protection afforded by CESL to the weaker parties (see above) would deter the largest of the businesses from the instrument, this is a risk that is worth taking. Big businesses might not have an excessive need for the optional regime anyway, while there are many traders of all sizes who would probably feel comfortable with having a common, neutral contract law, that protects the basic elements of contractual balance.[82]

Fifth, as noted by G. Howells, "consumer protection does not necessarily depend upon a particular form of general contract law".[83] Therefore, it is conceivable that while contract law is contained in the optional instrument, the consumer protection is left to directives.

Finally, by providing the common, general rules of contract, EU legislator would achieve an important harmonization success in creating a truly European contract law.

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[80] As observed by S. Vogenauer: "The purposes pursued with an optional instrument cannot be achieved with a set of soft law rules because of the need for mandatory consumer protection provisions. We need hard and fast law in this area, and a Consumer Rights Directive would just do the trick." VOGENAUER S., Common Frame, p. 175.

[81] Recently, e.g. AUGENHOFER S., A European Civil Law, p. 208.

[82] Id. at p. 176.

[83] HOWELLS G., European Contract, p. 178.

6. CONCLUSION

About the time when I was finishing the present paper, an information of Vaclav Havel's death was dispatched. I personally feel indebted to this remarkable man for what he has taught us on concepts of freedom and responsibility. And if I am allowed to say so, I would like to consider myself his student too in a sense of having learned from his writings and speeches. Above all, Havel was however a great European that help CEE countries to come to the point where we are now: integrated in the most ambitious and successful political project of our times - the European Union. To him as well, we owe that we can now discuss future of the common European law of contracts.

The criticism presented above with respect to the approach taken by the Commission towards the optional instrument, as well as with respect to some of the aspects of the draft of CESL, should not prejudice a generally positive assessment of the Commission's initiative. The proposal to create an optional sales law should be welcomed and deserves support. It does create a potential for growth in cross-border sales. Lot of valuable work has been done and it is worth making use of that effort in a concrete manner. Even if the presented draft is settling for less, the work towards European contract law should be continued.

In the present paper I advocated for an alternative approach to the one which was chosen by the Commission, i.e. my case is that it would be far more coherent and effective to leave the consumer protection to the directives and lay down general rules of contract law in the optional instrument. If this option is still politically feasible, it should be recommended.

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