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CRITIQUE OF THE DRAFT REGULATION FOR A COMMON EUROPEAN SALES LAW (CESL) UNDER A CONCEPT OF „REFLEXIVE CONTRACT GOVERNANCE IN THE EU“

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Abstract

Contract law has been in a process of rapid development in the EU in the last years. It has started from rather modest common (now internal) market and consumer protection perspectives where David Trubek has been a critical observer from the outset with a strong interest in alternative modes of regulation like "soft law" and "open methods of coordination (OMC)" beyond the traditional "Community method", based on his socio-legal experiences in a federal system like the US. Following this legacy, the paper first makes reference to EU-consumer legislation which has undergone an attempt of review by modifying the original "minimum" to a "full harmonisation approach" but which resulted in some sort of "half harmonisation" in the recent Consumer Rights Directive (CRD) 2011/83/EU of 18.10.2011. Even more ambitious are EU-Commission plans to introduce an "Optional EU contract law" for businesses and consumers based on prior work of expert commissions consisting mostly of law teachers. This has resulted in a Commission proposal for a "Regulation on a Common European Sales law" (CESL) of 11.10.2011 which raises a multitude of constitutional, political and legal questions. The author challenges the conceptual basis of the proposal under the "necessity test" of the proportionality requirement of Art. 5 (4) TEU. Instead, recourse to the reflections of David Trubek is recommended which would encourage a "reflexive contract governance" as a combination of "hard" and "soft law" methods of regulation, supplemented by the conflicts-of-law method. This approach should meet genuine needs of business for improved market access and guarantee a high level of consumer protection in the EU without creating additional impediments to market integration.

I. "A CONNECTICUT YANKEE (DAVID TRUBEK?) AT KING ARTHUR'S COURT" (EU LAW?)

This paper had originally been drafted to honour Prof. David Trubek, University of Wisconsin Law School who to a surprising extent has contributed to EU law and legal thinking from an outside critical yet well informed and reflexive position. Remembering the well known novel by Mark Twain published in 1889 hailed by many as a triumph, full of genuine insight and sensitivity to social injustices throughout the ages in England even though not very optimistic about improvements promised by law reform, David Trubek can be regarded to be a "A Connecticut Yankee in King Arthur's" (the EU) Court.

David Trubek became known to me when he prepared a study on consumer protection for the "Integration through Law" series edited by Mauro Cappelletti, Monica Seccombe and Joseph Weiler for the European University

Institute (EUI). It resulted in a copious book published in 1987.[1] I had just before published or been responsible – with Hans Micklitz - for a series of studies on Consumer Law in the than 9 Member States of the EC,[2] and this resulted in a series of most rewarding exchanges where I could profit from David Trubek's "insight from the outside" of US federalism to just emerging of EEC/EC/EU internal market and consumer policies. Indeed, the interrelation between open markets and protective policies has been brilliantly developed in his introductory chapter of the 1987 book, where he clearly foresaw that the "further effect of consumer protection law on open borders is that of diversity *per se*. The more variation there is among the laws of member states in common markets, the more costly it can be for a seller to supply all the national markets that are included" (p. 3) – an argument which the EU Commission just recently used in its attempts to create a Common European Sales Law (CESL)[3] to which I will turn later. David Trubek developed a theory of *de iure* and *de facto* so-called "regulatory gaps" which justified Community intervention in consumer policy matters under the then still underdeveloped competence framework of the EEC (he refers to Art. 100 and 235 EEC requiring unanimity). His pleading for a "modern political economy of consumer protection" (p. 7) criticising and going beyond mere liberal principles of "achievable transparency and static intervention" is certainly worth to be remembered under to-days conditions. His insistence on "responsiveness, diffuse interests, and access" of regulation (pp. 10-12) coins requirements and conditions which have become important in later work. At the same time he criticised the then rather haphazard approach of the EEC to consumer policy as consisting "of a series of separate and largely uncoordinated actions which have very different implications of consumer law in Europe and reflect the existence of very different views on consumer protection within the Community institutions" (p. 23). Has this been changed later?

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[1] Th. Bourgoignie and D. Trubek, *Consumer Law, Common Markets and Federalism*, de Gruyter, Berlin-New York, 1987.

[2] N. Reich and H. W. Micklitz, *Consumer Legislation in the EC Countries – A Comparative Analysis*, Van Nostrand Reinhold, New York, 1980; followed by country reports of the then 9 Member Countries of the EC.

[3] COM (635) final of 11.10.2011.

A shift to EU employment policy issues in his later work[4] demonstrated a similar creativity of David Trubek's socio-legal writing and learning, despite – or because – of his position as being on "outsider" to the EC-law governing doctrines like "integration through law", "supremacy and direct effect", and "Community method of harmonisation." The debate on the "*Open Method of Coordination (OMC*)" launched by a Commission White Paper on Governance of 2001[5] found his special interest. It defined the OMC's basic principles of good governance as "openness, participation, accountability, effectiveness, and coherence." This paper proposed a number of measures in this direction. These included better structured relations to "civil society" by involving NGOs (Non Governmental Organsiations), although without questioning the "Community method" of action as a "top-down" way to achieve integration.[6] It was however quite critical towards an exclusive reliance on the OMC method of governance: it "must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions. It should not be used when legislative action under the Community method is possible."[7]

In a joint paper of Joanne Scott and David Trubek, the authors go deliberately beyond the rather restricted and to some extent rhetorical approach of the Commission which they criticse insofar as the EU has not really begun to confront the legitimacy challenge it is facing. European courts, in their opinion, have "tended to ignore, or distort, new governance, in order that new governance can be accommodated by the premises of a traditional, positivist concept of law."[8] They see the advantage of this new type of action

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[4] D. Trubek, *The European Employment Strategy and the Future of EU Governance*, 2003.

[5] COM (2001) 428 final of 25 July 2001; for a broader discussion see C. Joerges/R. Dehousse (eds.), *Good Governance in Europe's Integrated Markets*, OUP 2002; K. Armstrong, Rediscovering Civil Society: The EU and the White Paper on Governance, *ELJ* 2002, 102; E. Szyszak, Experimental Governance: The Open Method of Coordination, *ELJ* 2006, 486; G. de Búrca/J. Scott (eds.), *Law and New Governance in the EU and the US*, Hart 2006; M. Dawson, New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination, EUI Florence 2009; W. v. Gerven, Private Law in a Federal Perspective, in: Brownsword et al. (eds.), *The Foundations of European Private Law*,Hart, 2011, 337 at 343.

[6] At p. 8.

[7] *Id.* at 22.

[8] Scott & Trubek, Mind the Gap: Law and New Approaches to Governance in the EU, *European Law Journal* (ELJ) 2002, 1, 16.

as allowing involvement of the actors concerned *via* "social dialogue."[9] They define OMC as a characteristic of "new governance," which does not aim at hard law subject to implementation and supervision by the CJEU (Court of Justice of the EU), instead acting as a soft law mechanism allowing the participation of social actors, particularly in areas where the EEC had no or only limited regulatory competences like in employment and social policy (now Art. 145, 151 TFEU).[10] They define the following advantages of OMC over harmonization:

- "Participation and power-sharing"
- "Multi-level integration"
- "Diversity and decentralization"
- "Deliberation"
- "Flexibility and revisability"
- "Experimentation and knowledge creation".[11]

In a later paper, Trubek, Cottrell, and Nance have tried to combine soft- and hard-law methods in European integration.[12] This could be a method for combining soft law, with regard to "facilitative" contract law, and hard law, in mandatory law matters like consumer law, non-discrimination, and protection of commercial agents in the internal market.

This author's view toward the White Paper was less critical than that of the above mentioned authors. I'm probably too much a positivist EU lawyer with a preference for legislation and "hard law". In my opinion, governance in the Union would have to use both the traditional "Community method" and new methods like OMC. Particularly important seemed to me forms of law making involving the social actors. In this way it will be possible to try out new forms of *co- and self-regulation* with the participation of those involved. An example have been rules on decision making in the area of Social Policy[13] where the social partners (organizations of public and private employers

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[9] *Id.* at 4

[10] *Id.* at 4-5.

[11] *Id.* at 5-6.

[12] *See* Trubek & al., "Soft Law," Hard Law," and European Integration: Toward a Theory of Hybridity (Univ. of Wisc. Law School, *Legal Stud. Res. Paper Series*, Paper No. 1002, 2005).

[13] Art. 139 EC (now Art. TFEU 153), excluding however measures on pay, right of association, right to strike and to lock-outs; for a discussion see F. Möslein/K. Riesenhuber, Contract Governance – A Research Agenda, *European Review of Contract Law* (*ERCL)* 2009, 248 at p. 263.

together with trade unions) agree on measures to be taken. These may then be transposed into law by Community institutions.[14]

A more specific example of David Trubek's work where our minds and interests met again has been the so-called "Laval"-saga where the CJEU ruled on the incompatibility of social action of Swedish labour unions against a Latvian company intending to post workers in Sweden which were originally to be subject to (allegedly less protective) standards of the home (Latvia) and not the host country (Sweden).[15] The judgment which condemned the action of the Swedish labour unions as incompatible with EC/EU law and made them subject to compensation under Swedish law,[16] aroused strong criticism in academia, including my Bremen colleagues Joerges/Rödl.[17] I had defended the judgment from a perspective of Latvian companies and workers who had been promised free access to the EU labour markets after their accession to the EU in 2004, while restrictions were allowed only under the conditions of the Posted Workers Directive (PWD) 96/71/EEC[18] which, as the CJEU had found, had not been met by Sweden.[19]

A paper of David Trubek[20] advocated a much more subtle and nuanced approach which is concerned with finding a "Union mechanism to balance the economic and the social" which he calls a "reflexive balancing." It

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[14] Reich, *Understanding EU Law*, 2nd ed., Intersentia Mosselen, 2005 at p. 309.

[15] CJEU case C-341/05 *Laval un Partneri Ltd. V Svenska Byggnadsarbetareförbundet et al*.,[2007] ECR I-11767; see also the parallel case C-438/05 *International Transport Worker's Federation and Finnish Seaman's Union vs. Viking Line ABP et al*. [2007] ECR I-10779.

[16] See the judgment of the Swedish Labour Court of 2 Dec. 2009, comment by Bernitz/Reich, *CMLRev* 2011, 603.

[17] Informal politics, formalised law, and the ‚social deficit' of European integration – Reflections after the Judgments of the CJEU in Viking and Laval , *ELJ* 2009, 1.

[18] [1997] OJ L 18/1.

[19] N. Reich, Free Movement and social rights in an enlarged Union – *German Law Journal* 2008, 125; same, Fundamental freedoms vs. fundamental rights – did Viking get it wrong?, *Europarättslig Tijdskrift* 2008, 851 however criticising the (ab)use of the proportionality argument by the Court in Viking; see also E. Engle, A Viking We will GO: Neo-corporatism and Social Europe" in *German Law J* 2010, 635 insisting on the importance of *Viking* and *Laval* for EU labour mobility against neo-corporatist arrangements of the traditional social state like Sweden and Finland.

[20] David Trubek with Marc Nance, The Strange Case of the Posted Workers Directive: EU Law as Reflexive Coordination, unfortunately only available as unpublished paper to the Cambridge Conference of 19 Sep. 2008 on Viking and Laval.

combines "soft" and "hard" law, particularly important in regulating labour relations on an EU level where only limited competences exist.[21] Directive 96/71 is understood as an effort to coordinate the employment law regimes of the home (Latvia) and host state (Sweden) not by prescribing mandatory labour standards, but by authorising the host state to impose specifically listed protective standards under certain conditions on companies and workers from the home state by respecting the principles of non-discrimination and transparency (which he calls universality and foreseeabiltiy). I could only agree with his conclusion "that (it would be unacceptable) to give to unions powers that are denied to the Member States and (thereby) undermine the whole structure of universality and foreseeability that seems to be the core policies behind the PWD".[22]

II. HOW TO BALANCE OPEN MARKETS AND CONSUMER PROTECTION STANDARDS IN THE EU?

The reflections of David Trubek on EU integration and law making in delicate social fields like consumer protection and labour standards may present an interesting and useful approach to take a fresh look on the ongoing and rather controversial discussion about a European (or rather EU) private or more limited contract law.[23] Without overly abusing of David Trubek's insightful remarks on EEC/EC/EU policy making and governance by law he probably would welcome a more coherent approach to consumer policy, including consumer contract law which has been an issue of EU legislative activity, case law of the CJEU and conceptual concerns of the EU Commission for the last 20 years and has been documented elsewhere.[24] But a paradox resulted out of this EU encroachment of a new policy field: instead of making marketing and protection conditions within the EU in the interest of both business and consumers more compatible, the original technique of

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[21] See his paper with Louise Trubek, Hard and Soft Law in the Construction of the European Social Model – The Role of the Open Method of Coordination, *ELJ* 2005, 345.

[22] At p. 22.

[23] I continue the discussion which started with David Trubek's invitation to give a talk at the Wisconsin Law School was published as: Reich, A European Contract Law – Ghost or Host for Integration? *Wisconsin IntLJ* 2006, 425.

[24] Reich, Harmonisation of European Contract Law – with special emphasis on Consumer Law, in: *China-EU Law Journal* 2011, 55-94; Japanese translation in: *Modern Consumer Law*, Vol. 11, pp. 70-85, 12, 79-89.

"minimum harmonization" resulted in an even greater diversity than before.[25] In order to overcome this new "regulatory gap", the Commission devised three contradictory strategies, namely

- the use of conflict-of-laws regulations to coordinate (not regulate!) diversity – similar to Dir. 96/71 which had been so ably analysed by David Trubek in his remarks on the Laval saga;
- a shift to the so-called "full harmonisation approach" – which resulted, as will be shown, in a "half harmonisation";[26]
- the use of OMC-methods in the area of out-of-court dispute settlement (ADR and ODR schemes Union-wide).

The following lines will give a short overview of the existing state of EU "hard" and soft" consumer law, keeping in mind David Trubek's plea for using more flexible regulatory patterns without abandoning the "Community (= Union) method" of mandatory legislation where it is still feasible and necessary.

1. Conflict of law methods

A conflict of law method of balancing open market and consumer protection imperatives in area of contracting had already been proposed by the Rome Convention of 1980 which after ratification by the then 12 Member States became part of their law on 1 April 1991, even though not as an EU instrument but rather an international treaty closely linked to internal market policy. Power to decide on referrals of interpretation was given to the CJEU only by Protocol of 1 August 2004.[27] Consumer protection was regulated in Art. 5 and served as a model for later initiatives:

- On the one hand, it allowed traders freedom of choice –which usually meant choosing their home law – even in consumer contracts; the "default" rule of Art. 4 referred to the application of the "home country" of the trader.

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[25] See the detailed study by Schulte-Nölke et al. (eds.), *Consumer Law Compendium*, 2007.

[26] See Reich, Von der Minimal- zur Voll- zur Halbharmonisierung, *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2010, 7-39.

[27] Details Micklitz/*Reich*/Rott, *Understanding EU Consumer Law*, 2009, para 7.2.

- On the other hand, in a choice of law-situation it provided for a "better protection rule" for the so-called "passive consumer" described in Art. 5 (2): the consumer must not be deprived of the protection provided by the mandatory provisions of his home country.[28]

In principle the same approach was taken over by the later so-called Rome I-Regulation 593/2008 of 17 June 2008 "on the law applicable to contractual obligations",[29] even though its scope of application was considerably extended, in particular in cases where the professional "directed its activities" to the consumers' home country.[30] The "better protection rule" was maintained in Art. 6 (2) in case of choice of law by the professional under Art. 3.[31] I have argued that this provision in most cross-border consumer disputes in the Union allows a fair balancing between the imperatives of an open market on the one hand and the requirements of consumer protection either by EU or/and Member States law. In order to avoid still possible *de iure* or *de facto* "regulatory gaps", for instance by different implementation of consumer directives in the Member states, allowed under the minimum harmonisation principle, professionals and consumer associations should be encouraged to draw up soft-law "codes of practice" allowing a Union-wide guarantee of "high standards" which would make reference to divergent national laws unnecessary.[32] So far this initiative has not yet been taken up, even though

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[28] Supra note 27 paras 7.8-13.

[29] [2008] OJ 176/6.

[30] For a clarification see the CJEU judgment of 7.12.2010, joined cases C-585/08 and C-144/09 *Peter Pammer et al v Reederei Karl Schlüter et al*. [2010] ECR 12527; it is not necessary that the contract be concluded by means of distant communication, opinion of AG Villalón of 24.5.2012 and the Court of 6 Sept. 2012 in case C-190/11 *Mühlleitner v. A. W. Yusufi*.

[31] For a detailed analysis see now Reich, EU Strategies in Finding the Optimal Consumer Law Instrument, (ERCL), 2012, 1 at paras 18, 26; a similar view has been developed by St. Grundmann, Kosten und Nutzen eines Europäischen Optionalen Kaufrechts, paper delivered at a special meeting of the German Zivilrechtslehrervereinigung on 20/21.4.2012 in Cologne, *Archiv für die civilistische Praxis* (AcP) 2012, 502.

[32] This approach has been described in some detail in a joint paper by G. Howells/H.-W. Micklitz/N. Reich, *Optional Consumer Law Standards for Businesses and Consumers*, 2011, which was prepared for the European Consumer Association BEUC accessible at *www.BEUC.eu*.

the EU Commission has supported it in other areas like unfair commercial practices and service contracts.[33] But this is not an argument against it.

2. From "minimum" to "full" to "half" harmonisation

A second strategy used by the Commission to close regulatory gaps in the process of making consumer law compatible with the imperatives of an open internal market has been the so-called "full harmonisation strategy".[34] Even though the "minimum harmonisation approach" found support in the case law of the CJEU, most recently in its *Caja de Ahorros*[35] judgment of 3.6.2010 - though exceptionally subject to limitations under the internal market imperatives[36] - the Commission found that the leeway given to Member states created new impediments to trade in the internal market.[37] They could only be overcome by "full harmonization", that is not allowing Member states to introduce "better consumer protection" provisions within the scope of a directive, for instance on "Unfair Commercial Practices" under Dir. 2005/29/EC and Consumer Credit under Dir. 2008/48/EC.[38] In a series of cases under the so-called black list of Dir. 2005/29 the CJEU supported the strict approach by the Commission and did not allow Member states to set up their own black lists of per se prohibited unfair commercial practices.[39]

When the Commission proposed a "Consumer Rights Directive" on 8 October 2008,[40] it wanted to modify the "minimum harmonisation approach" of 4 consumer contract law Directives of the so-called acquis – 85/577/EEC on Doorstep Selling,[41] 93/13/EEC on Unfair Terms,[42] 97/7/EC on Distance

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[33] For details see *Howells*/Micklitz/Wilhelmsson, *Fair Trading Law*, Ashgate 2006,pp. 185; Micklitz, The Service Directive – Consumer contract law making via standardisation, in: *Liber amicorum Brüggemeier*, Nomos, 2009, pp. 483.

[34] For details see Reich, *WiscInt LJ* supra note 23 at pp. 445.

[35] C-484/08 Caja de ahorros y Monte de Piedad v Ausbanc [2010] ECR I-4785.

[36] C-205/07 *Gysbrechts* [2008] ECR I-9947.

[37] See the references in Micklitz/*Reich*/Rott, supra note 27 at paras 1.8, 1.30, 1.48.

[38] For details I have again to refer to *Micklitz*/Reich/*Rott* at paras 2.19 and 5.10.

[39] C-261 + 299/07 *VTB et al v Total et al* [2009] ECR I-2949 and later cases, C-540/08 *Mediaprint v. "Österreich" Zeitungsverlag*, [2010] ECR I-10909.

[40] COM (2008) 614 final.

[41] [1985] OJ L 372/31.

[42] [1993] OJ L 95/29.

Contracts[43] and 99/44/EC on Sales of Consumer Goods and Associated Guarantees,[44] by the full harmonisation. Its Art. 4 provocatively read:

> "Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection."

This aroused a storm of protest both in academia[45] and in the European Parliament.[46] In a sort of compromise, the final version of the "Consumer Rights Directive (CRD)" 2011/83/EU of 25.10.2011[47] has "fully" harmonised the provisions on "off-premises" (formerly doorstep) and distance contracts, while modifying the "minimum harmonisation approach" of Dr. 93/13 and 99/44 only to a very limited extent. The CRD also contains rules on pre-contractual information, including digital content, on payment clauses and on passing-of risk and delivery not subject to scrutiny here. I have called this approach "half harmonization".[48]

It is well possible that the next round of reviewing the "consumer contract law acquis" will bring again modifications of its scope of application, perhaps this time by way of a directly applicable regulation as I had proposed it already in my Wisconsin paper.[49] A recent study by Twigg-Flesner[50] has

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[43] [1997] OJ L 144/19.

[44] [1999] OJ L 171/12.

[45] Without even trying to make a full reference to the many contributions to this debate, I refer to the papers in G. Howells/R. Schulze (eds.), *Modernising and Harmonising European Contract Law*, 2011. See also Micklitz/Reich, Crónica de una muerte anunciada, *CMLRev* 2009, 471.

[46] See the overview by A. Schwab/A. Giesemann, Die Verbraucherrechte-Richtlinie: Ein wichtiger Schritt zur Vollharmonisierung im Binnenmarkt, *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 2012, 253; A. Schwab was reporting member of the EP for the Consumer Rights Directive; for a critical account see St. Weatherill, The Consumer Right Directive: how and why a quest for „coherence" has largely failed, *CMLRev* 2012, 1279; more positive however O. Unger, Die Richtlinie über Rechte der Verbraucher, *ZEuP* 2012, 270.

[47] [2011] OJ L 303/64.

[48] Reich, supra note 26.

[49] Supra note 23 at pp. 458-463.

[50] Chr. Twigg-Flesner, A Cross-Border Only Regulation for Consumer Transactions in the EU – A Fresh Approach to EU Consumer Law, Springer NY – Heidelberg, 2012.

advocated the elaboration of a Regulation for cross-border consumer transactions only. It would run parallel to existing EU directives and Member State law. This debate shows on the one hand the inherent dynamism and on the other the conflict potential of consumer law making and application in the EU. It will certainly not be solved when this paper is published.

3. OMC and dispute resolution

Since dispute resolution of consumer conflicts with business is a matter left the national law under the - controversial[51] - principles of "procedural autonomy" and only subject to special cross-border instruments aiming at a mutual recognition of judicial and similar instruments according to the general competence under Art. 81 TFEU,[52] the setting up of "alternative dispute resolution mechanisms" (ADR) is left to Member states and to the market partners themselves. The EU only has an indirect competence in that field, namely by including ADR-mechanisms in sectoral directives, as had been done in Art. 24 of the Consumer Credit Dir. 2008/48; similar provisions exist in other consumer relevant instruments.[53] The principles under which such instruments are supposed to operate have been laid down in two Commission recommendations, namely 98/237/EC[54] and 2001/310/EC[55] which were part of the *Alassini* litigation of the CJEU.[56] The CJEU referred also to the principle of effective judicial protection of Art. 47 of the EU Charter of Fundamental Rights, thus "upgrading" "non-binding" recommendations beyond Art. 288 (5) TFEU.

The importance of the case lies in providing certain guidelines as to the principles specific to the online dispute settlement procedures (ODR). The *Alassini* case adds other principles to those set forth in the recommendations.

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[51] For a critical discussion see the contributions of Adinolfi and Bobek in: Micklitz/de Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, Intersentia 2012, pp. 281, 305; D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost*?, Springer 2011.

[52] Again I refer to Micklitz/*Reich*/Rott, paras 7.31-7.45.

[53] Details are given in the Gutachten (study) of H. Micklitz, Brauchen Unternehmen und Verbraucher eine neue Architektur des Verbraucherrechts? for the 69. Deutscher Juristentag, Munich 2012.

[54] [1998] OJ L 115/31.

[55] [2001] OJ L 109/56.

[56] Joined cases C-317/08 and C-320/08 *Rosalba Alassini v Telecom Italia et al.* [2010] I-2213.

It seems that CJEU hints that a procedure by a court of law need not necessarily be the primary entity to decide consumer disputes. The ODR mechanism may be mandatory on two conditions. First, the mandatory nature of the ODR is proportionate to aims pursued. Second, the party required to participate in the mandatory ODR must have the right to bring an action in the court if it is not satisfied with the outcome of the ODR. The ODR procedure must not cause substantial delay for the purposes of bringing legal proceedings and must suspend the period for the time-barring of claims (principle of legality).The ODR should not entail any costs or give raise only to very low costs for the parties (principle of effectiveness/fairness); the ODR mechanisms established in Member States must pay due account to the above mentioned recommendations. Soft law becomes "quasi-hard law" under the scrutiny of the CJEU!

It seems that *Alassini* encouraged the Commission to adopt two proposals concerning ADR/ODR mechanisms in the Union: Proposals for a Directive on Consumer ADR and for a Regulation on Consumer ODR were published on 29.11.2011.[57] The first will make it an obligation of Member States to provide for ADR mechanisms in certain specially defined consumer disputes, including those of traders against consumers (which seems somewhat strange, however!). These mechanisms will have to obey to certain principles like expertise and impartiality, transparency, effectiveness, and fairness. Member states must make sure to inform about "the types of rules the ADR entity may use as a basis for the dispute resolution (e.g. rules of law, considerations of equity, codes of conduct) (Art 7 (1) g). This is an indirect recognition of "soft law" to be used at least in the preliminary stage of a legal dispute.

The ODR proposal wants to establish a Union-wide electronic platform which can be used by consumers from different EU-countries and which will process complaints to the competent national ODR mechanisms. The question of language will be solved by using a Union-wide form which is available in all EU languages.

Again, I will not go into details.[58] What is important is the recognition by EU institutions, in particular the Commission but also the CJEU to use "soft law"

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[57] COM (2011) 793 + 794.

[58] For a first assessment, see Reich, Individueller und kollektiver Rechtsschutz im EU-Verbraucherrecht, Nomos 2012, pp. 47.

mechanisms as an instrument to solve consumer disputes "in the shadow of the law" and of formal court procedures which have proved to be ineffective in particular in cross-border settings.[59] Even though the term "OMC" is nowhere mentioned by the Commission, the proposed policy certainly qualifies for an OMC label. A new architecture of dispute settlement could be the result of these initiatives, leading to a "de-legalisation" of consumer disputes with a stronger emphasis on efficiency and effectiveness in particular in cross-border transactions, and elevating the status of "soft law" as an equivalent to "hard law" which will only give a framework of disputes resolution.

III. OPTIONAL INSTRUMENTS FOR AN OPTIMAL EU CONTRACT LEGISLATION- "GHOST" OR "HOST" FOR INTEGRATION?

1. From the Draft Common Frame of Reference (DCFR) to an "Optional Instrument" (OI)

As already mentioned, the Commission has presented a proposal for an EU Regulation for a Common European Sales Law (CESL). Its adoption – even though it is not likely to take place in the near future – would transform the "ghost" of my Wisconsin paper indeed into a "(permanent?) host" of EU law and integration. Is this a welcome host, or will it remain an unwelcome intruder? This question will be debated in the following lines. Before doing so one should briefly recapitulate the development stages of an EU specific contract law in the last 5 years.

When I wrote my Wisconsin paper, the term "Common Frame of Reference (CFR)" was already coined, and a large group of European civil law scholars had been assembled under the two headings of "Study group" and "*Acquis* group".[60] In 2007/8 a first interim draft CFR[61] was presented to the Commission, which was followed in 2008/9 by a final version,[62]

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[59] See the seminal paper by V. Gessner, Europas holprige Rechtswege, *Liber amicorum N. Reich*, Nomos 1997, pp. 163.

[60] For an overview see Twigg-Flesner, supra note 50 at pp. 46.

[61] C. v. Bar, E. Clive & H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules on European Private Law –Draft CFR Interim Outline Edition*, 2008 Sellier Munich.

[62] C. v. Bar, E. Clive & H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules on European Private Law –Draft CFR Outline Edition*, Sellier Munich. 2009.

supplemented by 6 copious volumes of notes and explanations.[63] An intense academic debate followed.[64] It is not necessary to go closer into this discussion. Three points should be remembered because they are of relevance for the following discussion on a European contract law:

- The principles and provisions contained in the DCFR went far beyond mere contract law; they contained rules on the law of obligations in general (e.g. on non-contractual obligations like tort, unjust enrichment, and *negotiorum gestio*), on a number of specific contracts beyond sales law, particularly in the area of services, and on transfer of property and security interests in movables; some criticized that the authors "over-fulfilled" the mandate given by the Commission.
- The DCFR wanted to integrate mandatory consumer law provisions, particularly those from the *acquis* into the general rules of EU private law which – in contracting - contained mostly "default" rules. Therefore, Art. I.-1:105 (1) of the DCFR provides: „A ‚consumer' means any natural person who is acting *primarily* for purposes which are not related to his or her trade, business or profession". This definition was broader than the traditional one used in the *acquis* to allow the inclusion of so-called "double purpose contracts" which usually would not come into the scope of the consumer protective provisions of EU law according to the *Gruber* case law of the CJEU.[65]
- The legal character of the DCFR remained unclear. In its early communications, the Commission regarded it as a "toolbox" for future legislation – a somewhat dismissive term for the enormous scholarly

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[63] C. v. Bar, E. Clive & H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules on European Private Law –Draft CFR – Full edition*, Sellier Munich 2009.

[64] See Cafaggi/Micklitz (eds.), *European Private Law after the CFR*, E. Elgar 2010; H. Eidenmüller et al., The CFR for European Private Law – Policy Choices and Codification Problems, *OxfJLS* 2009, 659-708; N. Jansen/R. Zimmermann; A European Civil Code in all but name, *CLJ* 2010, 98; M. Hesselink, The CFR as a source of European Private Law, *Tulane LRev* 2009, 919-971; O. Cherednychenko, Fundamental Rights, Policy Issues and the DCFR, *ERCL* 2010, 39; S. Vogenauer, CFR and UNIDRPOIT-Principles of International Commercial Contract: Coexistence, Competition, or Overkill of Soft Law, *ERCL* 2010, 143; P. Larouche/F. Chirico (eds.), *Economic Analysis of the DCFR*, Sellier Munich, 2011; G. Wagner (ed.), *The CFR – A View from Law and Economics*, 2009; not to mention the many French, German, and Italian contributions.

[65] C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-439 decided under the mechanism of the Brussels Convention.

work which went into it. But the Commission certainly did not want to endorse the work formally because of a "competence gap" in the EU Treaties regarding general contract and even more private law legislation in the EU.[66] This had not been changed by the Lisbon Treaty on European Union, rather to the contrary: Art. 5 TEU insisted on a narrow reading of EU competences based on the principle of "conferral" and limited by the provisions on subsidiarity and proportionality to which I will turn later.

Couldn't the provisions of the DCFR be used – at least partially – for an "optional instrument" of EU contract law? Indeed, for many supporters of a EU specific private law the idea of an optional instrument looked like a panacea against the "competence gap" described above, and numerous academic and political contributions discussed matters of competence, scope and relation to national law of an EU OI, filling an entire issue of the European Review of Contract Law (ERCL) after a conference in Leuven in 2010.[67] This debate was to some extent kicked off by a Commission Green paper of 1.7.2010[68] which has been reviewed elsewhere.[69] Many questions found controversial answers:

- The competence basis: internal market under Art. 114 or "reserve competence" of Art. 352 TFEU, the first being subject to majority voting,

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[66] See already my remarks in my 2006 *WisIntLJ* paper supra note 23 at pp. 437-449.

[67] Contributions by Riesenhuber, Sefton-Green, Gutman, Howells, Augenhofer, Maugeri, Meli, Twigg-Flesner, Mak, Gome and Ganuza, Hesselink, Cristas, Cartwright, Rutgers, and Castermans, in the special issue of *ERCL* 2011, 115-366.

[68] COM (2010) 348 final.

[69] C. Herrestahl, Ein europäisches Vertragsrecht als Optionales Instrument, *EuZW* 2011, 7; K. Tonner, Das Grünbuch der Kommission zum Europäischen Vertragsrecht für Verbraucher und Unternehmer – Zur Rolle des Verbrauchervertragsrecht im europäischen Vertragsrecht, *EuZW* 2010, 767; H. Rösler, Rechtswahl und optionelles Vertragsrecht in der EU, *EuZW* 2011, 1; M. Tamm, Die 28. Rechtsordnung der EU: Gedanken zur Einführung eines grenzüberschreitenden B2C Vertragsrecht, *GPR* 2010, 281; J. Cartwright, ‚Choice is good' Really? Paper presented at the Leuven conference on an optional contract law, *ERCL* 2011, 335. A comprehensive study with detailed recommendations has been prepared by a working group of the Hamburg Max Planck-Institute for Comparative and International Private Law, "Policy Options for Progress Towards a European Contract Law", 2011, MPI paper 11/2 = *RabelsZ* 2011, 373 (in the following: MPI-study); Reich, supra note 31 at pp. 5-13 with further references on the questions mentioned below see also: ESC, position paper on options for a European contract law, OJ C 84/1 of 17.3.2011.

the second needing unanimity in the Council and the consent of the European Parliament?

- The personal scope: only B2C or B2B or both?
- The territorial scope: only cross-border or internal and cross-border?
- Use of a so called "blue button" proposed by Schulte-Nölke specially to the needs of e-commerce?[70]

2. The "Feasibility Study" of 3.5.2011 and draft CESL of 11.10.2011

The Commission, eager to push for an EU contract law after long years of only symbolic interest, did not even await the outcome of the consultation procedure and set up an "Expert Group" to study the feasibility of producing an OI on European Contract Law in April 2010.[71] The Expert Group presented its results in record time after one year of work on 3.5.2011.[72] It proposed a draft European Sales Law, including provisions on general contract law, special (mostly mandatory) rules on consumer transactions, but also general rules on the law of obligations like damages, restitution, and prescription. A short consultation period was foreseen which was to end on 1 July 2011. The Commission finally published its draft CESL on 11.10.2011 – again in record time which obviously did not allow any in-depth discussion.

How to approach a long, complex, and many layered document? The Commission has with some modifications – particularly concerning the inclusion of "digital content" which did not figure in the Feasibility study of 3.5.2011 and only found a definition and some information-specific

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[70] Schulte-Nölke, EC Law on the Formation of Contract – from the Common Frame of Reference to the Blue Button', *ERCL* 2007, p. 348f.: „The 'Blue Button' would be an Optional Instrument enabling businesses to set up a European-wide e-shop which has only to comply with one set of rules. Such an Optional Instrument would solve most of the cases likely to arise in B2C as well as B2B and C2C relations. When buying goods in an e-shop the client could easily choose the application of the Optional Instrument by clicking on a 'Blue Button' on the screen showing his or her acceptance of the optional European Law… If the client chooses the 'Blue Button', the optional European Law would derogate the law which otherwise were applicable to the conflict of law rules…", critique Micklitz/Cafaggi, *After the Common Frame of Reference*, 2009 pp. XXX.

[71] Commission Decision [2010] OJ L 105/109.

[72] *http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf*; contributions in: Schulze/Stuyck (eds.), *An optional instrument for EU Contract Law*, 2011; the feasibility study is printed on pp. 217 ff.

provisions in Art 2 (11), 5 (1) g), h), 6 (1) r), s) of the CRD 2011/83 – more or less taken over the content and the concrete proposals of the Expert group. The proposal of an EU OI has a double headed structure:

- The Regulation (with an explanatory memorandum and recitals, as common in EU legal instruments) as such will cover "general EU law matters" (the so-called "chapeau"), like the objectives and legal basis of the instrument, the definitions, the scope of application, the agreement to and enforcement of a fair and transparent "opt-in"-procedure in business to consumer (B2C) transactions, obligations and remaining powers of Member States, and miscellaneous technical issues;
- Annex I contains the detailed provisions (186 articles) of the "Common European Sales Law – in the following CESL", Annex II a "Standard Information Note" explaining an eventual consumers' opt-in. No recitals or explanations are attached to the Annex.

This paper will give only a short overview of the structure and the basic content both of the *chapeau* and annex - without even trying neither to analyse their central provisions nor to go deeper into the already very controversial discussion. The main interest of this paper, as indicated in the opening paragraphs referring to the work of David Trubek, will be to look at its potential contribution to solving or at least alleviating the ongoing conflict between integration and protection in the EU, not to add to the already many most technical comments.

The main points can be summarised as follows:

- The CESL is supposed to be a measure of the internal market in the sense of Art. 114 TFEU and would therefore follow the ordinary legislative procedure by majority voting both in the Council and the EP – a basis certainly to be welcomed by the EP which has always resisted any competence norm where it is not an equal partner like in Art. 352 TFU.[73] This is justified because the proposal removes "obstacles to the exercise of fundamental freedoms which result from differences between national law, in particular from the additional transaction costs and perceived legal complexity experienced by traders when concluding cross-border transactions and the lack of confidence in their

[73] See CJEU case C-436/03 *EP v Council* [2006] ECR I-3733 para 43-44 concerning the legal basis of the European Cooperative Society which was based on Art. 352 TFEU and challenged by the EP which lost its case!

rights experienced by consumers when purchasing from another country – all of which have a direct effect on the establishment and functioning of the internal market and limit competition".[74]

- CESL has a limited personal scope: it is applicable to B2SMU (business to business) contracts where one of the parties is an SMU (small or medium sized undertaking as defined in Art. 7 (2) which can be extended by Member States), or B2C contracts under the narrow definition of the acquis whereby "'consumer' means any natural person who is acting for purposes which are outside the person's trade, business, craft, or profession." This would exclude most dual-purpose contracts, contrary to recital 17 of the new Consumer Rights Directive 2011/83.[75]
- CESL is supposed to be available to cross-border contracting, with the possibility of Member States to make possible its use also for purely internal transactions, Art. 13 a). In B2C situations, the cross-border element is however defined very broadly in Art. 4 (3) depending on the address indicated by the consumer (whether or not it is identical with the habitual residence!); the delivery address for goods; or the billing address. It is therefore not restricted, as one could have imagined by the "blue button" concept, to distance contracts or e-commerce. This means that in a "face-to-face situation" where a consumer in Germany contracts with a company established in Germany but delivery will be done in France, the CESL could be used by a special opt-in, alongside with normally applicable German law.[76] Is that an attractive perspective for business or consumers? Why allow a "journey to the unknown" when all parties are used to contracting according to their legal traditions and no real link with a cross-border element is established, except the rather superficial element of a delivery address abroad as part of the performance of a contract which under normal circumstances in conflict-of- law matters does not have any influence on applicable law?

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[74] Explanatory memorandum at at p. 9.

[75] Critique Micklitz/Reich, The Commission Proposal of a Regulation for an Optional "Common European Sales Law" – Too broad or not broad enough? EUI Working papers Law 2012/04 = www.ssrn-id2013183[1].pdf, Part I paras 18-22 at pp. 12.

[76] See the critique by Twigg-Flesner, surpa note 50 at p. 76.

- Its substantive scope is limited to the "sale of movables", of "digital content" and of "service contracts" related to the sale of goods. Certain combined contracts are excluded, eg. those taking a credit element, Art. 6 (2). This makes the use of the CESL unattractive or even impossible if the trader offers means of deferred payment or a leasing contract.
- The use of the CESL in B2C transactions depends on rather complex and separate information and notification requirements as set out in Art. 8/9 and paralleled by a sort of warning of the consumer, the terms of which are defined in Annex II. In order to avoid cherry-picking, the parties can only choose CESL in its entirety as a complete package, Art. 8 (3). Such strict rules rather discourage than encourage consumers to agree to the use of the CESL. Traders will not find them attractive because they are precluded from using standard terms for the opt-in. The contracting will be split up in two parts: agreement about the use of the CESL, agreement on the contract terms within the framework of CESL.[77] Nothing is said how the opting-in in B2SMU transactions will be done: will Art. 3 of Reg. 593/2008 be applicable here?[78]
- The relation of CESL to the EU acquis and to mandatory national law under Art. 6 (2) of Reg. 593/2008 is by no means clear. The Commission simply writes: "Since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the law of the Member States in this area, where the parties have chosen to use the CESL. Consequently, Art. 6 (2) which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the CESL". Art. 6 (2) is however concerned with differing Member States rules, not with EU provisions. There is already a debate in legal literature how this precedence of the CESL over national law under the conditions of Art. 6 (2) can be assured – otherwise the choice of CESL by the trader would not have any advantage to him because he could,

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[77] Micklitz/Reich, supra note 75 at pp. 18.

[78] Heated controversies have already been provoked by the unclear status of CESL to Reg. 593/2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 176/6 not to be documented here. Flessner, Der Status des Gemeinsamen Europäischen Kaufrechts, ZEuP 2012, 726 rightly points out that once CESL has been chosen by the parties according to Art. 3 it will take priority over conflicting Member state law according to Art. 288 (2) TFEU, including the rules of "better protection" under Art. 6 (2) Reg. 593/2008 concerning "better national consumer law".

even by choosing it in its B2C transactions, not be sure of being confronted with divergent national consumer law resulting from minimum harmonisation which is still possible under Dir. 2011/83 for unfair terms and consumer sales.

- The different parts of CESL contain rather detailed rules on B2SMU and B2C contracting within the above mentioned scope of application. A closer analysis reveals that the provisions relating to B2SMU are mostly default rules, but on the contrary consumer protection rules are meant to be mandatory even in general contract law matters like the remedies for mistake (Art. 56 (2)), contra preferentem-interpretation (Art. 64), terms derived from pre-contractual statements (Art. 69), contracts of indeterminate duration (Art. 77 (2)), unfair terms (Art. 82-85), interest for delay in payment (Art. 167), restitution (Art. 177). Without saying so, CESL contains two completely different sets of rules, namely mostly default rules in B2SMU transactions with some "micro protection" of SMU's against "grossly unfair terms" (Art. 86), while in B2C contracting mandatory provisions are the standard. This hybrid structure is important for a closer analysis of CESL not so much under competence, but rather under proportionality criteria of Art 5 (4) TEU to which I will turn now.

3. CESL as a hybrid contract law – the challenges of proportionality as an EU constitutional principle under Art 5 (4) TEU

The present debate on CESL concentrates on four main controversies:[79]

- The competence basis in EU law: Art. 118 or 352 TFEU;
- the methods and technicalities of the "opt-in" and the effects on national law;
- a detailed analysis of the many rules proposed under coherence and legal certainty aspects, sometimes with express reference to existing national law, including proposals for improvement;

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[79] The – mostly critical – literature has become impossible to follow. Just some examples: Special issue of Vol. 8 *ERCL* 2012, Vol. 4 of *ZEuP* 2012; Vol. 212 AcP 2012; Eidenmüller et al., Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, *Juristenzeitung* (JZ) 2012, 269; separate publication by Wendehorst/Zöchling-Jud (eds.), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts*, Manz 2012. The European Law Institute (ELI) has published an amended and improved version of CESL: *Statement of ELI on the proposal of the Regulation for a CESL*, 2012.

- the relation between mandatory and default provisions, mostly in B2C transactions, including whether the specific level of protection is "high" enough (or not) under Art. 12/169 TFEU, Art. 38 EU Charter of Fundamental Rights.

Quite frankly: this debate is only of a very limited interest to me (and probably not to David Trubek himself!) because it does not answer the preceding and more important question: do stakeholders (business, "SMUs", consumers, other participants in cross- border trade), Member states and the EU itself really "*need*" such an instrument.[80] The "*necessity test*" is not identical with the competence basis but must be met by *all measures* under Art. 114 or 352 TFEU – otherwise it would not have found its separate regulation in Art. 5 (4) TEU.

In the following I will argue that there is *no need for an OI*, whether B2SMU or B2C from an EU constitutional, not only a political argument. Other adequate mechanisms for contracting in the internal market which fulfil the above mentioned double criteria - avoiding unwarranted trade restrictions *and* guaranteeing a sufficiently high level of protection - already exist or can be envisaged within the existing EU *acquis* which simply make superfluous the OI, even if in the legislative process it will be made "more consumer or user friendly", even if some of the technical defects can be overcome, and even if the "market for legal regulations" the Commission is hoping for will accept and make frequent use of it. When discussing the "necessity"-test, some realism about contracting seems to be useful: in most cases, the active partner will propose the contract regime. In B2C transactions, this will always be the business part; the consumer is put on a take-it-or-leave basis; the idea that he can use a "blue button" in his favour seems somewhat far-fetched. In the area of B2SMU-contracting, usually the stronger part will impose the contract terms, not the SMU, unless it is in particularly favourable position.[81]

The insistence on the "necessity" test seems difficult at first glance because the CJEU so far only in one case[82] has indirectly monitored the legality of an EU

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[80] For a critique Grundmann, supra note 31; Twig-Flesner, *Debate on a European Code of Contracts*, Contratto e Impresa/ Europa I-2012, 157.

[81] Twig-Flesner at 163.

[82] Case C-376/98 *Germany v EP and Council* [2000] ECR I-8419 at paras 99-100 indirectly refers to the necessity test which however was not relevant for annulment of the tobacco-advertising Directive; AG Fenelly was much more elaborate in his opinion of 15.6.2000 at para 149.

measure – the infamous and later annulled tobacco-advertising directive 98/43/EC[83] - also on the basis of not meeting the proportionality test. The standard formula used by the CJEU in a consistent line of cases is as follows: It has recognised that "the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments", even though it was bound by the proportionality principle according to the then Art. 5 (2) EC (now Art. 5 (4) TFEU).[84] "Consequently, the legality of a measure adopted in that respect can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[85] But the scope of this case-law should not be overextended: it has never been tested with regard to contract law matters legislated by EU institutions, never has such a complex instrument as the 186 articles of the CESL been put before the CJEU, and never has such a broad mixture of default and mandatory rules been submitted to its scrutiny.

According to Harbo,[86] the Court so far has used a very "moderate" approach in controlling Community and in the future Union law measures under the proportionality test, while it uses much more restrictive language with regard to Member State measures allegedly restricting fundamental freedoms – an approach which I have criticized if compared to the strict proportionality control of Member State measures restricting the fundamental freedoms.[87]

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[83] [1998] OJ L 212, 9.

[84] Case C-491/01 *The Queen v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd. et al*. [2002] ECR I-11453; C-380/03 *Germany v EP and Council*, [2005] ECR I-11573at para 145; C-344/04 *IATA and ELFAA v Department for Transport*, [2006] ECR I-403 at para 80, referring to earlier cases like C-84/94 *United Kingdom v Council* [1996] ECR I-5755, para 58; C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paras 55 and 56; C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 61, recently confirmed in C-58/08 *Vodafone* [2010] ECR I- 4999 para 69 referring to the objective of directly protecting consumers.

[85] Case C-491/01 at para 123.

[86] T.-I. Harbo, The Function of the Proportionality Principle in EU Law, *ELJ* 2010, at 166, 172, 177; for an explanation on applying proportionality in a „procedural fashion" from the viewpoint of the Vicepresident of the CJEU see now K. Lenaerts, The European Court of Justice and Process-Oriented Review, *Yearbook of European Law (YEL*) 2012, 3 at p. 7.

[87] See N. Reich, How proportionate is the proportionality principle, in: Micklitz/de Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012, p. 110.

3.1. No necessity for B2SMU cross-border transactions

However, even under the "manifestly inappropriate" criteria, it could be argued against the Commission that it has not explained why the CESL should also cover general contract law matters like the conclusion, defects in consent and interpretation of a contract, which are not specific to sales (and related services) law, and certain areas of the general law of obligations like damages, restitution, and prescription. Almost all of them must be qualified as default rules in business to business transactions (B2B) which can be modified by party agreement; very few provisions of the CESL contain mandatory rules which could be invoked in particular (but not exclusively) by SMU's, for instance concerning good faith (Art. 2 (3) CESL), remedies for fraud (Art. 56 (1)), "grossly" unfair contract terms (Art. 81/86), damages (Art. 171), prescription (Art. 186). These very broad and general rules which differ among Member States have had no proven impact on cross-border transactions so far. The "impact assessment" of the Commission staff seems to be highly speculative on this point.

In any case, eventual internal market problems can be solved by the B2SMU parties' freedom of choice under Art. 3 of the Rome I-Regulation within the limits of mandatory provisions of paras 3 and 4 of Art. 3 which also apply to B2SMU transactions. With regard to provisions specific to cross-border commercial sales law, most of them are already covered by the Convention on the International Sale of Goods of 1980 (CISG – the Vienna Convention) which will be applicable either under an "opt-out" mechanism of Art. 1 (1) (a), or – for traders not established in the CISG Member States, namely in the UK, Ireland, Portugal, and Malta, by an "opt-in"-possibility under lit. (b). It is true that the EU is not party to the CISG, and that the CJEU has no explicit power of its interpretation, but may refer to and *thereby indirectly interpret* it if a link to EU law can be shown to exist.[88] Still the question remains: Why put a second level on cross-border contracting in related matters when the parties to a B2SMU transaction already have an instrument at their disposal under which considerable legal expertise and experience has already been accumulated, and which may therefore increase the degree of legal certainty which the Commission invokes for B2SMU transactions in the internal market? Why artificially separate international and EU cross-border trade,

[88] In case C-381/08 *Car Trim v Key Safety* [2010] ECR I-1255 para 36 concerning the interpretation of the concept of "place of performance" in Art. 5 (1) b) of the Brussels Regulation 44/2001 the Court referred to Art. 3 CISG.

which will make transactions more complex, instead of giving the parties more clarity about their rights and obligations as promised by the Commission? Therefore, it seems highly doubtful whether under the "necessity"-test the EU has jurisdiction to regulate cross-border B2SMU sales (and related service) transactions at all by adopting the CESL instrument in its present or even in an improved form.[89]

This critical analysis cannot be refuted by arguing that CESL is "only" optional in B2SMU transactions. Optional instruments have to pass the "necessity" test as any other EU legislative act. The "option" is only concerned with its specific application in a contract between B2SMU partners, not with competence of the EU at all to take and propose such a measure to the parties.

3.2. Is there a real "necessity" of CESL in B2C transactions?

In B2C transactions matters are more complex because of the mostly mandatory nature of provisions protecting the consumer under EU and national law reiterated in many judgments of the CJEU.[90] In cross-border transactions this problem is referred to in Art. 6 of the Rome I-Regulation 593/2008, which has been discussed above. The still existing differences between Member State consumer protection laws despite harmonisation at the EU level may warrant the adoption of a more coherent and uniform EU regulation focusing on establishing uniform standards of cross-border B2C transactions.[91] However, the proposed provisions of the CESL must be "necessary" with regard to "content and form". In my opinion, this necessity test is also not fulfilled with regard to those provisions which try to regulate problems specific to B2C transactions and which have already been the object of EU legislation, lately the CRD 2011/83/EU which has fully harmonised the provisions on "off premises" and distance contracts figuring in Art.17-19, 24-

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[89] I follow here the argument used in Micklitz/Reich, supra note 75 part I paras 14-16 at pp. 9; a similar argument has been voiced by Stadler, Anwendungsvoraussetzungen und Anwendungsbereich des CESL, *AcP* 2012, 473 at pp. 489; for a discussion of the (rather marginal) divergences of the CISG and the CESL in commercial cross-border sales transactions see the detailed analysis of Magnus, in: U. Magnus (ed.), *CISG vs. Regional Sales Law Unification*, Sellier 2012, pp. 97, arguing that "there appears to be no virtual necessity to enact an instrument alongside the CISG", p. 121.

[90] The case law has been well analysed in the opinion of AG Trstenjak of 29.11.2009 in case C-453/10 *Jana Perenicova et al v. S.O.S. finac*, [2012] ECR I-(15.3.2012) paras 42-45; see the comment by Micklitz/Reich, *EuZW* 2012, 126.

[91] This is the main argument by Twigg-Flesner supra note 50.

27, 40-47 CESL. Is it really "necessary" to have *two layers of consumer protection* in EU law, one mandatory for both internal and cross-border transactions, another one with "optional mandatory provisions" for cross-border contracting only which however may not always have been coordinated and updated with the existing protective regime of the *acquis?*

In those areas where CESL contains better or different rules, for instance with regard to the professional seller's liability for non-conforming digital content which was not included in the CRD but only in Art. 100-105 of CESL, the protection of the consumer/user of digital content should not depend on whether he or she has opted in or not into the CESL. Another example concerns the differences in remedies in case of a non-conforming good in the CESL and in the CRD: while the CRD limits the first stage remedies of the consumer to replacement or repair without allowing him or her a right to immediate rejection (which however can be introduced by Member State law under the minimum harmonisation principle), such a right is foreseen in the CESL because the seller does not have a "right to cure" (Art. 114 (2)), provided that the non-conformity is not insignificant which has to be proven by the seller. If the trader proposes to the consumer to opt-in CESL and the consumer agrees, the trader would implicitly waive his "right to cure" and allow the consumer like in UK law an immediate right of rejection of a non-conforming good.[92] Not surprisingly, this increase in consumer protection has been met with strong opposition in business circles and in academia.[93] On the other hand, isn't the possibility of immediate rejection the only realistic remedy in cross-border contracting, while repair or replacement may be more costly to the trader?[94] Finally, why should this remedy depend on the opt-in to a complex instrument like CESL whose impact on the protective level the "normal consumer" will usually not be able to assess? Couldn't the trader offer a right of immediate rejection on his own by a voluntary marketing

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[92] Micklitz/Reich supra note 75 parat III, para 16 at p. 79.

[93] Critique by Grundmann, supra note 31; Wagner, Ökonomische Analyse des CESL, *ZEuP* 2012, 794 at pp. 820 (critique from an economic efficiency point of view), disregarding however English law which is familiar with the consumer's right to rejection without a right to cure of the seller; there is no evidence of opportunistic behavior, see Howells/Weatherill, *Consumer Protection Law*, 2005, para 3.6.2; Anderson, UK Sales: Loss of the Right to Reject Goods, Judgment of the Scottish Outer House of 5 Feb. 2010, *ZEuP* 2011, 655.

[94] F. Zoll, Das Konzept des Verbraucherschutzes in der Machbarkeitsstudie für das Optionale Instrument, *Journal of European Consumer and Market Law* (euvr) 2012, 9 at p. 21.

action, perhaps in a soft-law instrument negotiated between business and consumer associations? Does one "need" a legislative instrument for that?[95]

On the other side of the picture, there are some provisions in CESL which seem to lower the extent of consumer protection granted under the CRD or the case law of the CJEU. The consumer protection objective of the remedies in Directive 99/44/EC was expressly confirmed by the CJEU in its *Quelle*-judgment;[96] the question of whether the costs for de-connecting and re-installing non-conforming goods have to be borne by the seller if this has not been expressly agreed in the contract reached the CJEU in the *Putz/Weber* case.[97] In its judgment of 16.6.2011, the CJEU, against the opinion of AG Mazak, clearly placed those costs on the seller, because he delivered a non-conforming good. The seller's responsibility towards the consumer, who installed in good faith the non-conforming goods himself, is not based on fault, but rather on the simple consequence of the non-fulfilment of the seller's contractual obligations which do not end with the passing of the risk (paras 46-47, referring to *Quelle*). The Court also refers to the consumer protection objective of Directive 99/44/EC and to the express statement in Art. 3 (3), that repair or replacement should be effected "free of charge" and without "any significant inconvenience to the consumer". The seller's strict liability is not excluded even if the costs of replacement are disproportionate, because the seller may not refuse the only remedy (replacement for impossibility of repair) which allows the goods to be brought into conformity with the contract (para 71). The costs may however be limited to a "proportionate amount" (para 76), to be determined by the national court by reference to the purchase price. Within the limits of the proportionality principle the choice of remedies usually depends on the consumer. It is not clear that this case law will be taken over by the CESL; at least the consumer cannot be sure that by being encouraged or "persuaded" to opting-in CESL – this will usually not depend on his choice but on the marketing strategy of the trader under which the consumer is put in a take-it- or-leave-it- situation -

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[95] Proposal in the study by *Howells*/Micklitz/Reich, supra note 32; Reich, supra note 31 *ERCL* 2012, 29.

[96] C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen* [2008] ECR I-2685, confirmed by Art. 112 (2) CESL.

[97] Joined cases C-65/09 *Weber* and C-87/09 *Putz* [2011] ECR I-(16.6.2011) against the opinion of AG Mazak of 18.5.2010; case note Luzak, euvr 2012, 35. For the German follow up-case see the judgment of 21.12.12012 of the Bundesgerichtshof (BGH) *NJW* 2012, 1073.

he or she will have the same extent of protection as under the *acquis*. Even more problematic, Art. 112 (1) CESL seems to restrict the consequences of the *Weber/Putz* judgment insofar that the seller only has to take back the replaced items at his expense but does not say that the seller also must cover the costs for re-installing a non-conforming good.[98]

One could therefore argue that the obligation of the EU in its internal market measures to guarantee a high level of consumer protection according to Art. 114 (3) and 169 TFEU cannot be waived by the consumer through an opt-in of the CESL if it contains a lower level of protection than possible under the CRD. The opt-in mechanism of the CESL would create different levels of consumer protection in the EU against the principle of non-discrimination in Art. 12 TFEU and 21 Charter of Fundamental Rights of the EU without being justified by imperative requirements of the internal market. Against recital 58 of the recently adopted CRD, the consumer could be "deprived of the protection granted by this Directive" under the opt-in mechanism of CESL. Even if the choice of the parties to a B2C contract would make reference also to the "default" provisions of CESL and to those mandatory provisions in general contract law which are contained in it, there is still no *necessity* of an OI because under conflict-rules the business party has freedom of choice under Art. 3 of Reg. 593/2008, and Art. 6 (2) with its flexible principle of equivalence can function as a long stop to protect the consumer without placing unnecessary burdens on the trader.[99] The trader can always avoid "being caught" by the consumer protection provisions of the consumers home country by voluntarily agreeing to a high(er) level of protection. There is no "regulatory gap" and hence "no need" which must be closed by allowing the parties to opting into the CESL under EU jurisdiction.

To sum up: It seems arguable that even if the CESL can be based on the existing EU competence provisions, in particular Art. 114 TFEU, its two core elements – to regulate cross-border B2SMU and B2C transactions in the internal market - *do not comply with the necessity test* under the proportionality criteria of Art. 5 (4) TFEU:

- In B2SMU, there is *no need* because of the prevalence of party autonomy and the possibility of choosing the CISG, also available to SMU.

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[98] See the comment by Luzak at p. 40.

[99] Reich, supra note 31 at p. 21.

- In B2C, there is *no need* for an opt-in instrument because this could create an incentive for traders remove mandatory protective provisions under primary and secondary EU provisions; still existing differences in the level of (non-harmonised) Member State consumer protection measures do not seem to present an appreciable impediment to cross border marketing and can be levelled out by an internal market conforming application of conflict provisions of the Rom-I Reg. 593/2008.

IV. OPEN METHOD OF COORDINATION AND CONVERGENCE IN A REFLEXIVE CONTRACT GOVERNANCE IN THE EU

The critique of the legislative approach of the CESL as an OI is not meant as a complete rejection of its usefulness. It is here that Dave Trubek's "flirt" with OMC methods of coordination can be useful.[100] This refers to a broader discussion on "contract governance" in general. In an overview paper based on comparative research in relation to the "corporate governance" paradigm, Möslein/Riesenhuber[101] distinguish four areas of research and practical relevance of contract governance

1) "Governance of contract law" (institutional framework of contract law-rule making)
2) "Governance of contracts" (contract law as an institutional framework for private transactions)
3) "Governance by means of contracts law" (design of contract law as an instrument of steering behaviour and for achieving regulatory results – regulatory function of contract law)
4) "Governance through contract" (contracts as an institutional framework and mechanism of self-guidance by private parties).

In the context of our discussion on the relevance of the insights of David Trubek to EU contract governance, parts 1 and 3 are of particular relevance. The CESL is based on prior comparative law work done by academics, in particular the DCFR. This can be used without formal legislation not only as a "toolbox", but also as a "soft-law" mechanism to develop timely and legitimate solutions to ongoing contract law problems in the EU. It is not a source of law, but certainly a *source of inspiration*. In this spirit, the DCFR has

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[100] I refer again to my *WiscJIL* paper, supra note 23 at pp. 468-470.

[101] Supra note 13, p. 260.

already been used by several Advocate Generals in reference cases to the CJEU concerning private law matters as a source of inspiration and solution which carries with it an EU relevance. Particularly interesting have been opinions of AG Trestenjak in cases *Martin*[102], *Friz*[103], *VB Penzügi Leasing*[104], and *Messner*[105] where she expressly cited several provisions of the DCFR concerning the concepts of fairness, abuse and remedies in B2C transactions. In a similar spirit, AG Poiares Maduro referred to the predecessor of the DCFR, the so-called *Acquis principles*[106] in his opinion in *Hamilton*[107]. In its judgments in the cases *Hamilton*[108], *Messner*[109] and *Friz*[110] the CJEU indirectly followed suit, not by referring expressly to the DCFR, but to "the (general) principles of civil law", like good faith, unjust enrichment, satisfactory balancing and a fair division of risks among the various interested parties. In her last opinion in *Banco Espanol de Credito*,[111] AG Trstenjak mentioned that the recent EU activities concerning CESL would "have an important influence on the further development in the field of consumer protection law". Whether this is true or not will not be discussed here any further. Even though no political commitment of the Commission has been behind this rather "incremental development" of general principles of civil law in the EU without having a formal legislative basis,[112] it comes close to what the former AG van Gerven called the "open method of convergence".[113]

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[102] Case C-227/08, [2009] ECR I-11939, opinion of 7.5.2009, para 51.

[103] Case C-215/08, [2010] ECR I-2947, opinion of 8.9.2009, para 69 at Fn. 62.

[104] Case C-137/08, [2010] ECR I-10847, opinion of 6.10.2010, para 96 at fn. 54.

[105] Case C-489/07, [2009] ECR I-7315, opinion of 18.2.2009 at para 85.

[106] Acquis group, Principles of Existing EC Private Law I, Sellier Munich 2007.

[107] Case C-412/06, [2008] ECR I-2383, opinion of 21.11.2007, at para 24.

[108] At para 24.

[109] At para 26.

[110] At paras 48-49.

[111] Case C-618/10, opinion of 14.2.2012, para 4, fn 10.

[112] For an comprehensive analysis of this development see M. Hesselink, The general principles of civil law: their nature, role and legitimacy, in: Wetherill et al. (eds.), *The Impact of EU Law on Private Law*, OUP 2012, to be published; St. Weatherill, The 'principles of civil law' as a basis for interpreting the legislative acquis, *ERCL* 2010, 74; J. Basedow, The Court of Justice and private law: vacillations, general principles, and the architecture of the European judiciary, *ERPL* 2010, 443; M. Safjan/P. Miklaszewicz, Horizontal effect of

The regulatory function of contract law has been broadly – some say: too broadly[114] - elaborated in CESL by its many mandatory provisions with regard to B2C contracting, against very few with regard to B2SMU transactions. However, this function is entirely dependent on an option by the stronger party, which will normally be the business part, not the consumer nor the SMU. The "mandatory" regulation of the stronger party to a contract depends on its "self-subjection" to regulation – a somewhat paradoxical finding. This however does not make CESL superfluous. It can be used as an instrument for better law making or law application by the EU and Member States, especially their courts of law.[115] It could serve as a source of inspiration for the business and consumer community to negotiate "better contracting" practices. This approach could be the true value of the DCFR and of instruments which followed, including the CESL as sort of guideline for "fair contracting", to be followed up by Commission reports on its practical impact, on *lacunae*, on needs of improvement of rules on digital content (Art. 100-105 CESL) and updating "black" and "grey" lists of unfair clauses (Art. 83-87 CESL).

In linking parts 1 and 3 of the contract governance paradigm, the Commission could issue a *recommendation* as envisaged in option 3 of its Green Paper of 1.7.2010 und could regularly report on how it is accepted or not on the "market for contracting", similar to the proposals of David Trubek concerning the OMC as an alternative to "hard law" under the Community/Union method of regulation in fields where the EU has no genuine competence for action. To remember: even the CJEU seems to accept

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the general principles of EU law in the sphere of private law, *ERPL* 2010, 475; A. Hartkamp, *European Law and National Private Law*, 2012, pp. 109.

113 V.Gerven, Needed: A Method of Convergence for Private Law, in: A. Furrer et al (Hrsg.), *Beiträge zum Europäischen Privatrecht*, Stämpfli Bern, 2006, at 437, 456-460; same, Bringing (Private) Laws Closer to Each Other at the European Level, in: Cafaggi (ed.), *The Institutional Framework of European Private Law*, OUP 2006, 37, 74-77, same, supra note 5 at 344.

114 See Grundmann, supra note 31.

115 See the discussion by Hesselink, A Toolbox for European Judges, in: A. Neergaard et al. (eds.), *European Legal Method*, DJOF Publ. 2011, pp.185, distinguishing European, traditional and political methods; critique because of its immature legal character by Eidenmüller et al., supra note 79, *JZ* 2012, 259 at 288.

the indirect legal value of Commission recommendations in its *Alassini* case law.[116]

[116] Supra note 56 at para 40.