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UNWEAVING THE CESL : LEGAL-ECONOMIC REASON AND INSTITUTIONAL IMAGINATION IN EUROPEAN CONTRACT LAW

CHANTAL MAK*

1. Introduction

With its proposal for the introduction of an optional Common European Sales Law (CESL), the European Commission aims at further developing the European Union's internal market for goods and related services:

“The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.”¹

Is the proposed CESL likely to help the European legislature achieve its ambitious aims? And what factors should play a role in determining whether the introduction of an optional instrument for sales law will yield the envisaged results?

From an economic perspective, legitimate concerns have been raised regarding the CESL's potential role in the development of the internal market. The CESL's costs may outweigh its benefits and its introduction might pose a risk of overregulation of sales law in Europe.² In light of this criticism, it might not be a wise idea to go through with the enactment of an optional instrument for European contract law.

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1. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (“Proposal”), COM(2011)635 final, 4.

2. This paper will, in particular, respond to and elaborate on points raised in the contributions of Eric Posner and Richard Epstein.

While acknowledging the importance of these concerns, in this paper it will be argued that the assessment of the proposed instrument should be extended to other dimensions of European contract law. The evaluation of CESL should not only take into account economic aspects, but also needs to consider the social model of European integration as a backdrop to the idea of an optional instrument. Since measures of European contract law tend to pursue different objectives than measures of national laws, a comparison of the CESL to competing national sales laws has to address the different concepts and conceptions of social justice underlying the legal orders in which they are embedded. In particular, EU law's functional nature (i.e. it being instrumental to the development of the internal market) makes it pursue different ideals than national sales laws and social policies. For that reason, a reading of the Commission's proposal and explanatory memorandum in light of the social goals forming part of the EU agenda may clarify the choices made and provide arguments in defence of CESL.

The paper is structured as follows. First, it will examine the argument of overregulation, focusing on the relationship of the CESL to existing national regimes of sales law in the EU (section 2). Whereas the introduction of a dual standard for local and cross-border contracts might entail higher transaction costs, it is submitted that CESL's optional nature mitigates possible negative consequences of adding a new instrument of contract law in the EU. It may even create an advantage insofar as it allows businesses to tailor their activities to consumer preferences in different markets. Subsequently, the argument that CESL's costs may be higher than its benefits will be addressed (section 3). A response is given to some of the main concerns about CESL's costs and benefits. While recognizing the need for serious contemplation of the cost/benefit picture, it will be suggested that the economic analysis of CESL puts into question the objective underlying the instrument and, more in general, the motivation behind the European Commission's agenda for European contract law. Finally, therefore, the analysis will be broadened to the debate on the social justice dimension of this field of law (section 4). It will be argued that a theoretical framework for the evaluation of rules contained in the proposed CESL should take into account not only economic aspects, but also different concepts and conceptions of social justice in EU law and in the laws of the Member States. This will allow for the assessment of the institutional choices made for the pursuit of social goals through CESL's rules.

For the sake of clarity, the following premises should be emphasized. The analysis focuses on the proposal for a CESL in relation to existing measures of contract law (i.e. national sales laws of the EU Member States as well as relevant measures of EU private international law) rather than assessing CESL solely on its own merits. Moreover, it primarily addresses

business-to-consumer (B2C) contracts, since opting into CESL will most likely influence these contracts to a greater extent than it will affect business-to-business (B2B) contracts, given the larger number of mandatory provisions for consumer contracts included in the Commission's proposal.³

2. CESL competing with national sales laws

Richard Epstein's criticism of the proposed CESL rests on the "general presumption that regulation of business behaviour is a harm until shown to be good".⁴ Among other objections to the trade-off reflected in the set of terms laid down in the CESL, he emphasizes, first of all, the instrument's strong regulatory nature and, second, the considerable amount of mandatory consumer protection provisions included in the proposal. In Epstein's view, "the chief objection to the CESL is that it will not unlock its full potential because the options that it provides will impose a heavy set of mandatory terms that are likely to make it less attractive than the current regimes now in place by the Member States".⁵

As regards the first point, the instrument's regulatory nature, Epstein observes that the CESL "flatly prohibits any inter-jurisdictional competition over contract terms to deal with the question of vertical competition".⁶ In his opinion, however, "once the CESL is made explicitly optional for each trading party, subsidiarity no longer requires that only the CESL be made available to facilitate cross-border trade. Nothing in the principle of subsidiarity prevents the European Commission from letting *any* Member State provide its preferred set of optional terms for all traders to use in their cross-border transactions, regardless of location."⁷ As concerns the second, related point of criticism, Epstein stresses that the European Commission only gives "modest justifications" for CESL's new mandatory consumer protection provisions that, in his opinion, are "truly breathtaking in their scope".⁸

3. For an overview and economic assessment of the mandatory consumer provisions, see Bar-Gill and Ben-Shahar's contribution on "Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law". For B2B contracts, the number of mandatory provisions in CESL is much more limited, as follows from Art. 1 read with Art. 2 (good faith and fair dealing), Art. 81 (chapter on unfair contract terms), Art. 171 (section on late payments by traders) and Art. 186 (modification of prescription periods by agreement).

4. See Epstein's contribution "Harmonization, heterogeneity and regulation: CESL, the lost opportunity for constructive harmonization", end of section 1.

5. *Ibid.*, section 7.

6. *Ibid.*, section 4.

7. *Ibid.*, section 4.

8. *Ibid.*, section 4. See Bar-Gill and Ben-Shahar, *op. cit. supra* note 3, for an overview and critical assessment of the consumer protection techniques used in CESL.

Epstein's criticism of the limits set to regulatory competition in the Commission's proposal corresponds to concerns expressed in the European debate on CESL. The introduction of CESL as a "2nd regime" in the national laws of the Member States gives it an advantage over competing national laws. The reason for this is to be found in rules of private international law: in today's European contract law, a firm always has to take into account consumer protection rules of the law of its customers. Article 6(2) of the Rome I Regulation stipulates that, although parties may make a choice of law,

"such a choice may not . . . have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1 [i.e. the law of the country where the consumer has his habitual residence]"

This means that firms cannot contract out of mandatory consumer protection rules existing in the laws of consumers. The introduction of CESL will bring a change in this respect, given the fact that it will be introduced as a "2nd regime" in the laws of the EU Member States. Accordingly, for cross-border contracts the applicable law can still be the one chosen by the parties (Art. 3 Rome I). Yet, if parties opt into CESL, the mandatory consumer protection rules will be the same in both the chosen law and the law applicable by default (Art. 6 Rome I), since both legal systems encompass CESL as an optional regime. For any aspects of the contract falling within the scope of the optional instrument, parties should then not have to consult provisions of national law anymore.⁹

Introducing CESL as a "2nd regime" in national laws, and thus circumventing the consequences of the Rome I Regulation, puts the

9. On this aspect of CESL, see also Hesselink, "How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", 19 *European Review of Private Law* (ERPL) (2011), 198–201. Doubts as to the Commission's interpretation have been expressed by Eidenmüller, Jansen, Kieninger, Wagner and Zimmermann, "The Proposal for a Regulation on a Common European Sales Law. Deficits of the Most Recent Textual Layer of European Contract Law", *Max Planck Private Law Research Paper No. 12/14*, at 16–17 (available at <ssrn.com/abstract=2118570>; last visited on 13 Jan. 2013), who observe that: "[T]he Commission's line of thinking presupposes that the choice of the CESL alters the proper law of the contract as determined objectively according to Art. 6(1) of the Rome I Regulation: as a result of the parties' choice of the CESL, the proper law of the contract which is the subject of comparison under Art. 6(2) of the Rome I Regulation ceases to be the Member State's autonomous, domestic law and becomes the 'CESL section' of that Member State's law. Yet this argument is flawed. For, according to the Commission, the choice of the CESL is made *after* the law of a Member State has been fixed as the governing law following the applicable conflicts rules. Nevertheless, in determining the applicable law, the Commission already uses this choice as a vehicle to determine the practical result of the application of the conflicts provisions."

instrument in an advantageous position in respect to national sales laws. On the other hand, advantages of standardization are withheld from local and national laws, which could be more open to experimentation and innovation than CESL.¹⁰ Stefan Grundmann is of the opinion that this distinction is unjustified because a home country principle can easily be introduced within the scope covered by CESL, given the largely harmonized nature of e-commerce and sales law regarding the relevant topics.¹¹

True as this may be, CESL's foreseen regulatory-competitive advantage over the national sales laws of the Member States, in my opinion, does not by definition make it a harmful tool for governing cross-border transactions in the EU. Much depends on CESL's potential to enhance trade by convincing firms that currently only conduct business within a national market to extend their business across national borders, and inducing firms that already do so to further expand their transnational activities under a uniform, European regime.

Taking the analysis one step further, then, the question arises what is the position of a firm doing business both in its own Member State and in the EU market.¹² How attractive is the CESL to this type of entrepreneur? If the firm were to follow local rules in the national market and the CESL standard for cross-border transactions, it might be argued that such a dual standard would create at least two bad consequences. The firm would be forced to market goods on two different standards, which would entail higher costs. Moreover, the dual standard would make it more difficult to supply one of the key protections extended by firms in voluntary markets to consumers with limited knowledge only, namely a pledge of equal treatment to all of its customers regardless of location.

While the Commission's motivation of the proposed CESL indeed continues to raise questions,¹³ the introduction of a dual standard in itself might not be as bad as it seems. First of all, CESL is of an optional nature. That means that firms will not be forced to use it, but may continue to apply national regimes to their contracts. The law applicable to a cross-border contract in the EU will be determined by the choice of the parties or by the rules of private international law governing the contractual relationship, cf.

10. Grundmann, "Editorial. CESL, Legal Nationalism or a Plea for Appropriate Governance", 8 *European Review of Contract Law* (ERCL) (2012), 243.

11. *Ibid.*, 242.

12. This situation was the subject of debate during the Chicago conference. Therefore, I take the liberty to reproduce some of the points that were addressed there, trusting that their relevance to the topic may make up for the fact that they possibly do not fully reply to the final version of Epstein's contribution.

13. See *infra* section 4.

the Rome I Regulation.¹⁴ Within certain limits, Article 3 of the Rome I Regulation gives parties the freedom to choose the applicable law. Accordingly, a firm wishing to sell goods or services abroad as well as at home may decide to offer cross-border contracts under the same law as domestic contracts. In principle, even after the CESL coming into force, firms could thus choose to use their national law both for local and cross-border contracts.¹⁵ They would not incur extra costs because of the co-existence of different standards for different markets¹⁶ and would treat customers equally, independent of their place of residence.

In the second place, following the current proposal, opting into CESL will offer firms engaging in cross-border activities an advantage in comparison to contracting under any of the national sales laws of the Member States, insofar as the envisaged way of implementation of the proposed instrument indeed “neutralizes” Article 6 of the Rome I Regulation. Rather than raising transaction costs, this could reduce the costs of doing business across borders. What is more, insofar as Member States will extend the availability of the CESL to domestic transactions (Art. 13(a) of the proposed Regulation on a CESL), firms can make sure to treat customers in an equal manner, irrespective of whether they contract from abroad or from within the Member State. It should be noted, however, that the price of such efficiency inevitably seems to be the erosion of national conceptions of social justice that are reflected in national mandatory consumer protection rules.

In the third place, the question arises what are the benefits of pledging equal treatment to customers regardless of their location. In this context, and in defence of CESL, attention may be drawn to the relation between the instrument’s optional nature and its substance. Gomez and Ganuza persuasively argue that the choice of a harmonization regime (full harmonization,¹⁷ minimum harmonization,¹⁸ or co-existence of national and EU standards) matters for the determination of the level of the harmonized

14. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, O.J. 2008, L 177/6.

15. As indicated earlier, these cross-border contracts would remain subject to the limitations set by the Rome I Regulation, in particular Arts. 6 and 9.

16. This does not mean that the introduction of an optional instrument may not entail other costs, even if the firm continues to use national law for all its contracts. See Posner, “The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition”, section 3.1, and *infra* section 3.

17. Full harmonization means that a measure of EU law sets a standard that Member States are not allowed to deviate from.

18. Minimum harmonization leaves Member States the possibility to maintain or introduce stricter mandatory requirements than those provided for in the *acquis communautaire*, e.g. national rules offering a higher level of consumer protection than EU law.

standard in comparison to existing national standards.¹⁹ A system of co-existing rules, such as the one foreseen by introduction of the CESL, according to their analysis would perform better than minimum harmonization (i.e. the setting of a minimum standard of consumer protection in EU law):

“The reason is that in this case, the optimal harmonized standard under co-existence of harmonized and national standards allows the more efficient firms to be fully able to serve all markets: the market with the pre-existing lower standard will be served with that national standard, and the other market – that of the country with a previous higher standard – will be served with the harmonized standard, which will be exactly tailored for the consumers’ preferences of that country, given that it is being served by the more efficient foreign firms.”²⁰

A choice between national sales law and the CESL could thus have the benefit of doing justice to the diversity of preferences of consumers. It would improve businesses’ market positions by giving them the opportunity to use the harmonized standard rather than local standards that do not fully correspond to consumer preferences.

As Eric Clive observed on his blog:

“To some extent this will be self-policing. The nature of the CESL as an optional instrument means that businesses will simply not choose it if it contains excessive consumer rights. They will have to balance the advantage of escaping from the possibly unknown mandatory consumer protection provisions of the consumer’s own country (already forced on them by Article 6(2) of the Rome I Regulation if they direct their activities to that country) against the disadvantage of having to comply with the consumer rights provisions in the CESL.”²¹

This is in line with Epstein’s analysis, insofar as it suggests that the likelihood of businesses offering contracts under the optional instrument depends on the standard of consumer protection provided by the instrument.²² From an economic perspective, the question arises what might be the consequences of firms’ “self-policing” in terms of costs and benefits. If the level of mandatory

19. Gomez and Ganuza, “An economic analysis of harmonization regimes: Full harmonization, minimum harmonization or optional instrument?”, 7 ERCL (2011), 287.

20. Ibid., 290.

21. Edinburgh blog on European Private Law News, 17 Apr. 2012, <www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8912> (last visited 13 Jan. 2013).

22. Epstein, op. cit. *supra* note 4. See also Low, “Will Firms Consider a European Optional Instrument in Contract Law?”, 33 *European Journal of Law and Economics* (2012), 521–540, <www.springerlink.com/content/4183211716710j20/> (last visited 13. Jan 2013).

consumer protection indicated by CESL is so high that firms will not be inclined to offer any contracts under this regime, the costs of introducing CESL might outweigh any possible benefits. On the other hand, firms might want to offer contracts under the CESL's consumer protection regime to signal to consumers that they are willing to contract under a regime that provides a high level of consumer protection and, thus, enhance consumer confidence. From a legal-political perspective, these considerations affirm the strong link between technical aspects of rules of contract law (form) and the social goals reflected and pursued in contract law (substance).²³

3. Costs and benefits of introducing CESL

Eric Posner's criticism on the proposed CESL is aimed at the European Commission's expectation that the optional instrument will improve the functioning of the internal market by stimulating cross-border trade.²⁴ In his opinion, it is likely that the introduction of the CESL will increase rather than reduce transaction costs. Moreover, the CESL's potential benefits will probably not exceed these transaction-cost harms.

Posner's scepticism is based on the consideration that transaction costs increase because parties must inform themselves of an additional body of law and negotiate over which of an increased number of alternative bodies of law will apply to their contract. He counters the argument that transaction costs would not increase because parties could ignore the CESL and continue using the national law they prefer. Parties will make costs to investigate whether CESL is superior to the law they use in terms of efficiency and distribution.²⁵

Furthermore, Posner submits that although uniformity costs (i.e. the costs of loss of variation of available bodies of law, where people in different jurisdictions have different preferences over optimal contract law) may decline, the benefit of the CESL is likely to be slight. Among other things, the reason for this is that businesses might not offer consumers the possibility to contract under CESL at all, in particular given the considerable number of mandatory consumer protection rules included in the instrument: "[T]he strong emphasis on consumer protection is at war with the main goal of encouraging cross-border transactions."²⁶

Does this cost/benefit analysis provide sufficiently convincing reasons for abolishing the idea of an optional instrument for European contract law?

23. See further *infra* section 4.

24. Posner, *op. cit. supra* note 16, section 1.

25. *Ibid.*, section 3.1.

26. *Ibid.*, section 3.1.

Although it is true that contracting parties will have to make an initial investment to learn about the efficiency and distributive effects of CESL, it is not said that the balance of these costs with the benefits of using the optional instrument will be negative. Two situations can be distinguished.

In the first place, businesses may already be conducting cross-border trade, as in Posner's example of a legal system with two States, France and Germany. Businesses offering their products in more than one EU Member State may be presumed to have learnt the laws of the countries they are dealing with in order to capture potential gains under national laws (up to a maximum of 26 legal systems). In that case, the additional costs of studying CESL will be comparable to the costs of learning the law of a Member State that the business would like to extend its commercial activities to. In comparison to such a national law, an investment in learning CESL will have the benefit that it can be used in all EU countries and is available in all official languages.

In the second place, businesses that are not yet offering their goods and services to consumers in other countries may be encouraged to start doing so under the optional common regime. For these companies, taking full benefit of the European internal market might indeed imply having to study the laws of all Member States to see where they offer advantages.²⁷ On the other hand, the gains of being able to serve a bigger market on the basis of the CESL might be such that businesses may choose to use only this optional instrument rather than invest in studying national laws.

Notwithstanding the importance of considering the potential economic disadvantages and advantages of CESL, finally, maximization of welfare is only one dimension of European contract law. Posner acknowledges this to the extent that he considers (and rejects) the possible justification of CESL on grounds of political symbolism.²⁸ Still, even the political argument of building a European identity through contract law might be considered to highlight only one side of the debate. The question arises whether it is possible to conceive of a theoretical framework for the evaluation of CESL that does justice to the interplay between its economic, political and legal dimensions.

27. The European Commission's assertion that as a result of the introduction of the CESL "the need for traders to find out about the national laws of other Member States would be limited to only some, less important, matters" (Proposal, 4) seems overly optimistic. In a similar sense, for B2B contracts, see Bernstein's contribution to this issue.

28. Posner, *op. cit. supra* note 16, 9–12, discussing Hesselink's defence of CESL as a contribution to the "thickening" of the moral dimension of European identity; Hesselink, "The case for a Common European Sales Law in an age of rising nationalism", 8 *ERCL* (2012), 342–366.

4. Social goals and institutional choice in European contract law

The analysis of the competitive strength of the CESL in comparison to existing national sales laws and of the likely costs and benefits of introducing such an optional instrument offer two instructive critiques of the European Commission's agenda for European contract law. They question the suitability of CESL to achieve what is in general thought to be its objective, namely to maximize consumer welfare. But what if this view on CESL's goals were too restrictive?²⁹ In other words, what if it were only one account of what European contract law is about and it could be enriched by adding another dimension, namely the contemplation of the social goals pursued in this field? In the following, some of the main points of discussion in the body of literature on "social justice in European contract law" will be indicated and will be related to the law-and-economics debate. The aim of this exercise is not so much to argue for favouring one perspective over the other, but rather to consider the entanglement of legal-political and legal-economic philosophies and see how it reflects on CESL.

4.1. *Legal-economic reason and institutional imagination*

In December 1817, during a heated debate at a dinner party of the Lake Poets, later to become known as the "immortal dinner", John Keats famously remarked that Isaac Newton's optical experiments had "destroyed all the poetry of the rainbow, by reducing it to a prism".³⁰ In other words, science could be deemed to have destructive and reductive effects on the beauty of nature and imagination. As later commentators have put forward, however, it would go too far to characterize the Romantic Movement as antiscientific in general.³¹ Its members endorsed a variety of related but not uniform views on the matter. Indeed, as some of the poets acknowledged, the scientific explanation of the refraction of light did not have to diminish the genuine and beautiful existence of rainbows in nature, through the natural prism of raindrops and the perception of the human eye.³² Reason did not have to rule out imagination.

Looking at present-day European contract law, it appears that something similar to the Romantic poets' debate can be found in the legal-economic analysis of the proposal for an optional instrument for European sales law. By

29. Posner, *op. cit. supra* note 16, section 4.

30. Immortal dinner, as recounted by Dawkins, *Unweaving the Rainbow* (Penguin, 1998), pp. 38–39; Holmes, *The Age of Wonder: How the Romantic Generation Discovered the Beauty and Terror of Science*, (Harper Press, 2008), pp. 318–319.

31. Holmes, *op. cit. supra* note 30, 318.

32. *Ibid.*, 321, referring to Coleridge.

focusing on the efficiency of the proposed instrument and its specific rules, the analysis risks undervaluing alternative views on the nature and function of the CESL. As is, however, submitted here, legal-economic scrutiny does not have to exclude the contemplation of other social goals that may be pursued through the further harmonization of contract law in Europe. In fact, a combined analysis, aimed at clarifying the legal-economic and legal-political choices made in the CESL, could serve the further development of a European contract law that aligns economic efficiency and social justice.

A starting point for this analysis can be found in the academic reactions to EU legislation in the field of European contract law. The European Commission's agenda is strongly focused on market integration and refers to measures of contract law as being instrumental to the development of the EU's internal market. This technocratic approach has been criticized for remaining silent on the legal-political goals reflected in measures of EU contract law and the idea of social justice underlying this field.³³ In the words of the Study Group on Social Justice in European Private Law, it would conceal the "real issues" raised by proposals for further harmonization, being that:

"proposals for the construction of a European contract law are not merely (or even primarily) concerned with a technical problem of reducing obstacles to cross-border trade in the Internal Market; rather, they aim towards the political goal of the construction of a union of shared fundamental values concerning the social and economic relations between citizens;

the governance system of the multi-level pluralistic European Union requires new methods for the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law."³⁴

Admittedly, this position might in turn be criticized for legal as well as economic reasons. First, the relationship between values and European contract law is still the subject of debate. To what extent, for instance, is it possible to conceive of this field as relating all rule-solutions to one central value, or rather to describe and analyse it as endorsing a plurality of values?³⁵

33. Study Group on Social Justice in European Private Law, "Social justice in European Contract Law: A manifesto", 10 *ELJ* (2004), 653–674; Collins, *The European Civil Code: The Way Forward*, (CUP, 2008), p. 33, referring to a "competence distortion".

34. Social Justice Group, *op. cit. supra* note 33, 656–657.

35. Mak, "Hedgehogs in Luxembourg? A Dworkinian reading of the CJEU's case law on principles of private law and some doubts of the fox", 20 *ERPL* (2012), 323–346; Hesselink, "How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law", in Niglia (Ed.), *Pluralism and European Private Law*, (Hart Publishing, forthcoming 2013).

Second, the nature and place of value judgments in economic theory is not uncontroversial either: to what extent should the economic analysis of questions of contract law take a normative turn?³⁶

Still, it may be argued that the Social Justice Group's Manifesto makes a convincing case for taking into consideration the effects that the enactment of rules of contract law have on the economic and social relations between European citizens. In particular, when comparing EU contract law with national legal systems, consideration has to be given to the impact of the harmonization of rules of (consumer) contract law on the balance of private autonomy and social solidarity between contracting parties.³⁷

An important argument for broadening the methodological scope of analysis of measures of European contract law, moreover, is that it can provide insights into the institutional choices made to pursue certain social goals.³⁸ The "real issues" identified by the Social Justice Group relate to the broader question of choosing the institutional framework for pursuing goals of social policy in European contract law. Simplifying to a large extent, institutional choice may involve the political process, the market process and the judicial process.³⁹ While the European Commission's agenda for European contract law focuses on market malfunction and ways to remedy this, it barely articulates the (reasons behind a) choice between markets and political processes (regulation). Furthermore, it leaves the role of courts in the development of European contract law unmentioned. Arguably, the justification for harmonizing measures of contract law would require the elaboration of the choice for regulation over other institutions. In regard to the CESL, more specifically, the questions to be answered are: what social goals it pursues, what other institutions are available to achieve these goals and, finally if the CESL is the best, or rather least imperfect,⁴⁰ alternative.

4.2. *The many concepts of social justice in European contract law*

What does "social justice" mean in a multi-layered legal order? So far, the analysis presented in this paper has focused on "European contract law" in

36. For a recent overview of the debate on the "fact-value" dichotomy, see Putnam and Walsh, *The End of Value-Free Economics* (Routledge, 2011). See also Sen, *The Idea of Justice* (Allen Lane, 2009).

37. Social Justice Group, op. cit. *supra* note 33, in particular 653–657.

38. This line of argument takes inspiration from Neil Komesar's work on institutional choice and comparative institutional analysis. See Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press, 1994); and Komesar, *Law's Limits. The Rule of Law and the Supply and Demand of Rights* (CUP, 2001).

39. Ibid. On the role of legal academics in the development of institutions, see also Mangabeira Unger, "Legal Analysis as Institutional Imagination", 59 MLR (1996), 1–23.

40. Cf. Komesar, op. cit. *supra* note 38.

general, understood as comprising measures of EU law affecting matters of contract law as well as the comparison of the contract laws of the EU Member States. A further specification is necessary. The reason why the assessment of CESL in economic terms alone may be considered to tell only part of its story, is that EU contract law can be understood as reflecting its own concept of social justice, which is of a different nature than that of the Member States. Where a legal-economic comparison of EU measures (e.g. CESL) and national law (e.g. sales law) can be conducted according to similar criteria for all systems (e.g. facilitative and regulatory rules, techniques of consumer protection), it may be defended that its results should be related to a legal-political comparison of the legal systems in which the rules of sales law are embedded. This could serve the identification of the social goals pursued through the CESL in its interplay with domestic laws.

This view takes inspiration from the distinction of “many concepts of social justice in European private law” made by Hans Micklitz.⁴¹ On the basis of a historical investigation into the emergence of “social justice” in Western-European countries in the 19th Century, Micklitz describes the development of three patterns of justice: a) the English model, “a liberal and pragmatic design fit for commercial use”; b) the French model, “a forward-looking political design of a (just) society”; and c) the German model, “an authoritarian paternalistic-ideological though market-oriented design”. He submits that EU law does not seem to correspond to any of the national models, but rather may be considered to put forward a concept of social justice of its own.

Micklitz suggests that “in the European Court of Justice jargon, the ‘European legal order’ and the ‘European constitutional charter’ have yielded, over the last fifty years, a *genuine* model of justice”.⁴² This he terms “access justice” (*Zugangsgerechtigkeit*), meaning

“that it is for the European Union to grant access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market – and to the European society insofar as this exists”.⁴³

This type of justice, in Micklitz’s view, has two constitutive elements, which both have a horizontal dimension, meaning that they may affect legal relationships between private parties. In the first place, EU law gives

41. Micklitz, “Introduction”, in Micklitz, *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing, 2011), pp. 3–57.

42. *Ibid.*, p. 22.

43. *Ibid.*, p. 5.

subjective access rights, such as those granted in labour, anti-discrimination and consumer law; and in the second place it incorporates anti-discrimination rights, concerned with the creation of equal access conditions to labour and consumer contracts. “Access justice” must thus be distinguished from social distributive justice and allocative libertarian justice. It does not aim at social protection in a redistributive perspective, nor does it pursue a European principle of freedom of contract; rather, it affirms that

“[t]he legal system is responsible for establishing tools which transform the *theoretical* chance [of participating in the market and reaping the benefits of the market] into a *realistic* opportunity, thereby eliminating all sorts of barriers which hinder the assertion of the claim to access”.⁴⁴

Comparing this distinct concept(ion) of social justice in EU law with the national models of social justice of the Member States offers an explanation for tensions between EU law and national laws on matters of contract law. Striking examples of such tensions can be found in employment law, e.g. the European Court of Justice’s *Viking* and *Laval* judgments⁴⁵ (EU freedoms v. national social policies), and its *Mangold* and *Kücükdeveci* judgments⁴⁶ (a general principle of EU law affecting national law on employment contracts). Moreover, the difficult legislative process leading up to the enactment of the Consumer Rights Directive⁴⁷ forms an illustration of the collision of different EU and national ideas of consumer protection.

To what extent can European social justice, understood as “access justice”, be seen as a goal underlying the CESL and can it be reconciled with national conceptions of justice? At first blush, two points of doubt present themselves. In the first place, it may be asked whether contract law should be instrumentalized to pursue ideas of social justice and in particular this one. In the second place, it may be questioned whether the pursuit of “access justice” is likely to improve the legal position of the European consumers it is aimed at, namely those in a weaker position.

As to the first point, contract law arguably does not offer optimal means of redistribution of wealth; from a law-and-economics perspective, taxation and subsidies might yield less imperfect results. It has, accordingly, been put forward that legal rules, including those of contract law, should not be

44. *Ibid.*, p. 37.

45. Case C-438/05, *Viking Line*, [2007] ECR I-10779; Case C-341/05, *Laval*, [2007] ECR-11767.

46. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981; C-555/07, *Seda Küçükdeveci v. Swedex*, [2010] ECR I-365.

47. Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct. 2011 on consumer rights, O.J. 2011, L 304/64.

concerned with redistribution of income but exclusively with efficiency.⁴⁸ Furthermore, there is no agreement on the extent to which theories of justice, such as those developed by Rawls, Dworkin, Nussbaum and Sen require contract law to perform a redistributive task. Yet, in reply to critics, may it not be asked why contract law should *not* take into account any requirements of social justice? Given contract law's facilitative role in the exchange of primary goods, a case can be made for it belonging to Rawls's basic structure of a just society.⁴⁹ Contract law as an institution would promote background justice and regard the distribution of primary goods, in accordance with Rawls's principles of justice, rather than the redistribution of wealth. True, this might imply a "sacrifice to efficiency".⁵⁰ Still, the question is if efficiency should be the only guiding principle in European contract law or if, as is argued here, contract law's impact on social justice necessitates further consideration of its potential to achieve certain social goals. A strong argument in favour of the latter view is also given by the application of Nussbaum's capability approach⁵¹ to European contract law.⁵² If contract law in the EU is understood to provide a regulatory structure to the market,⁵³ then it is both instrumental and constitutive to people's capabilities – the availability of contract options is an element of the individual's freedom.⁵⁴ Contract law may, thus, be considered as one of the institutions responsible for the enhancement of capabilities. From this perspective, theories of justice are not indifferent to the role and functions of contract law.

The second point of doubt refers to a serious concern raised in economic literature on consumer protection law. Do protective rules actually benefit the weaker consumers they aim to empower, or do they (potentially) have the effect of benefitting stronger consumers, even at the expense of the weak? Stronger consumers, it is argued,⁵⁵ are more likely to invoke protective measures, such as the right to withdrawal, and will thus reap the benefits of

48. E.g. by Kaplow and Shavell, "Why the legal system is less efficient than the income tax in redistributing income", 23 *The Journal of Legal Studies* (1994), 667–881.

49. Klijnsma, "SMEs in European Contract Law: A Rawlsian Perspective", Centre for the Study of European Contract Law Working Paper 2010/05, <ssrn.com/abstract=1678622> (last visited 13 Jan. 2012); Kordana and Tabachnik, "Rawls and Contract Law", 73 *The George Washington L.Rev.* (2005), 598–632.

50. Kaplow and Shavell, *op. cit. supra* note 48, 667.

51. Nussbaum, *Creating Capabilities. The Human Development Approach* (Belknap Press, 2011).

52. Tjon Soei Len, "European contract law and the capabilities approach: On distributive responsibility for contract law", in Weidtmann, Hölzchen and Hawa (Eds.), *The Capability Approach on Social Order*, (LIT Verlag, 2012), pp. 132–148.

53. In line with Social Justice Group, *op. cit. supra* note 33.

54. Tjon Soei Len, *op. cit. supra* note 52, p. 144.

55. E.g. by Ben-Shahar and Bar-Gill, *op. cit. supra* note 3, section 1.

extra protection that all consumers pay for. This could result in a regressive cross subsidy. Whereas the idea of “access justice” is to give weaker consumers a real opportunity to participate in the European internal market, the argument goes, pursuing it through consumer protection rules such as those laid down in the CESL could result in having these consumers subsidise the benefits enjoyed by stronger consumers who already enjoy market access. A development in that direction would endanger the core of “access justice” pursued through means of European contract law. Indeed, it would imply that the CESL could neither help achieve the European Commission’s economic aims, nor contribute to social justice. At this point, however, criticism on the CESL, and other substantive legal measures of consumer protection, seems too harsh. The rules themselves are not as such encouraging cross subsidy; rather, their enforcement could have this unintended side effect, since stronger consumers may have a greater propensity to invoke them than weaker consumers. While the CESL might be able to achieve certain social goals, it is dependent on enforcement mechanisms for its full realisation.

4.3. *Unweaving the CESL*

In light of the previous considerations, the evaluation of the Commission’s proposal for a CESL necessitates a further inquiry into not only the economic goal identified in the proposal (maximising welfare), but also into the legal-political objective underlying it (access justice?). On this basis, it can be compared to the existing regimes of sales law available in Europe, namely those of the Member States. Finally, for specific questions of contract law, an assessment may then be made of which institution is in the least imperfect position to achieve the aims set out by CESL, the market, the political process or the judicial process.

It would go beyond the scope of this paper to fully elaborate the suggested analysis. This would require the articulation and application of an integrated theory of optional rules of European contract law. Yet, some citations from the Commission’s proposal may illustrate where references to legal-political goals (compatible with the idea of “access justice”) can be read in the instrument:

“Consumers would benefit from better access to offers from across the European Union at lower prices and would face fewer refusals of sales. They would also enjoy more certainty about their rights when shopping cross-border on the basis of a single set of mandatory rules which offer a high level of consumer protection.”⁵⁶

56. Proposal, 4.

“By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.”⁵⁷

“The Common European Sales Law should represent an additional option increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade.”⁵⁸

The European legislature, thus, proposes the CESL as a means of facilitating consumer access to cross-border contracts. Importantly, some of the legal-political goals it sets out to reach closely relate to economic aims – access justice does not rule out efficiency. The economic objectives mostly regard empirical claims as to the CESL’s potential to lead to “lower prices and . . . fewer refusals of sales”, and to remove “additional transaction costs and legal complexity”. In light of the legal-economic and legal-political concerns raised in respect to the proposal, further analysis is called for to establish whether the CESL embodies optimal institutional choices in regard to specific questions of consumer protection that would allow it to reach these goals.⁵⁹

Finally, coming back to the issue of institutional choice, the CESL’s possible success in achieving the aforementioned goals does not depend on the European legislature alone. As concerns the division of competences between legislature and judiciary, and the institutional choice between political and judicial processes, the optional instrument gives openings for the further development of rules of European contract law. In this context, particular attention should be paid to the role assigned to courts in giving effect to the CESL regime. The considerable number of references to general clauses such as “good faith” and “reasonableness” implies that courts, in particular and probably in final instance the CJEU, will be required to interpret and

57. Proposal, 9.

58. Proposal, 16, recital 8.

59. Ben-Shahar and Bar-Gill, *op. cit. supra* note 3.

supplement CESL's rules.⁶⁰ Interpreting the proposed rules may not be an easy task, given the little guidance provided in the instrument itself.⁶¹ Moreover, it will most likely not be an inexpensive exercise, since courts may have to study national laws in order to be able to interpret and apply the CESL.⁶² Yet, the open texture of these provisions in principle allows the judiciary to contribute to the achievement of goals of social justice within EU law (access to the market) and within the national legal systems involved in specific cases. If the proposal is eventually adopted, thus, one of the main dilemmas to tackle will be how to optimise the recourse to the costly judicial process institutionalized in preliminary reference procedures.

5. Conclusion

In summary, having addressed some of the legal-economic concerns about the CESL and having related them to the legal-political background to the proposed instrument insofar as it regards B2C contracts, the following conclusions may be drawn.

Firstly, the high number of mandatory consumer protection provisions included in the CESL could, from a law-and-economics perspective, be considered to lead to overregulation of consumer sales contracts in Europe. On the other hand, the introduction of a dual standard for local and cross-border contracts gives firms the opportunity to offer contracts under a standard that is tailored to consumer preferences in different markets. Moreover, the CESL functioning as a "2nd regime" under the applicable law to a contract may mitigate costs, since this construction is meant to "neutralize" consumer protection provisions that would apply on the basis of Article 6(2) of the Rome I Regulation.

Secondly, although short-term to medium-term transaction costs may increase as a consequence of introducing CESL, the benefits of additional choice of products and increased cross-border trade should not be ignored as they may be high enough to lead to a positive balance. This depends on whether businesses will offer new cross-border contracts under the CESL and consumers will opt into the instrument.

60. Whittaker, "Identifying Legal Costs of the Operation of the Common European Sales Law", in this special issue, rightly points out that a considerable part of the interpretative work may be delegated to national courts, insofar as the ECJ has ruled that the specific application of "good faith" is left to the national courts of the EU Member States; Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v. Hofstetter*, [2004] ECR I-3403.

61. Whittaker, *ibid*, section 4.

62. As noted *supra* section 3.

Finally, the possible success of the CESL should not be assessed on the basis of a legal-economic analysis alone. This analysis should be complemented with a legal-political analysis of the concept of social justice reflected in the rules of CESL, and its relation to national concepts of social justice. A similar, multi-disciplinary approach should be applied also to other legal measures in the field of European contract law.