Public Supply of Optional Standardized Consumer Contracts: 
A Rationale for the Common European Sales Law?

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1. From codification-in-waiting to optional standardized contracts: Another view of the CESL

The Proposal for a Regulation on a Common European Sales Law (CESL) that was published by the EU Commission on 20 October 2011 is widely regarded as a late descendant of the grand idea of a private law codification. This idea has occupied the minds of countless lawmakers and academics since the 18th century and, with the notable exception of common law jurisdictions, has enjoyed a huge success throughout the world despite persistent talk of crisis and decay. What makes this idea still loom large in the European imagination? In a nutshell, a codification is a piece of legislation that claims to be the sole source of law within its scope. In view of their exclusionary function, codifications are a powerful instrument of asserting control over the production of private law: by a state vis-à-vis non-state actors, by a legislature vis-à-vis courts, or by the federal level of government vis-à-vis the state level of government. Only half jokingly, we may also regard a codification as an instrument used by academic drafters in order to immortalize their ideas (or themselves) and thus to assert superiority over their academic rivals.

The buzz about the CESL can only be explained against this background. The mere creation of an optional sales law is no sufficient reason for the amount of anger and excitement caused by the project. Parties to cross-border sales in the EU are in principle free to choose the law governing their contracts from a broad range of options, including not only the 28 or so contract laws of the EU Member States, but also the unknown number of contract laws provided by states worldwide. Moreover, as far as B2B transactions are concerned, the bulk of intra-EU trade in goods (as well as of world trade

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* This is a preliminary draft. Please note that the footnotes have not yet been completed.
1 Doc. 2011/0284 (COD).
2 Cf. the classic exposition by Wieacker 1954. This is also reflected in a catchy definition by Gilmore 1961: "A 'code' [...] is assumed to carry within it all the answers to all possible questions." Curiously, Bentham as one of the first authors who clearly grasped this idea came from a common law background. However, his attempt to convince President James Madison to introduce a codification of US law utterly failed; see on this episode Gilmore, Ages.
3 Cf. Wieacker 1954 and 1969, and more generally, concerning the relationship between private law and the state, the contributions in Jansen and Michaels 2008.
4 Regarding the UK, Scottish law is generally counted separately.
5 Cf. Art. 3 Rome I Reg.
in goods) is already subject to the transnational opt-out regime of the UN Convention on Contracts for the International Sale of Goods (CISG).6 If another sales law is added to this list, one may wonder about its chances to succeed against incumbent competitors. But this is hardly an upsetting issue. The real point is that, for better or for worse, the CESL is treated as a significant step towards a European codification of private law preempting (codified and judge-made) private laws of EU Member States. Earlier statements by EU organs were rather frank in stating this aim.7 The academic travaux préparatoires that culminated in the nine-volume Full Edition of the Draft Common Frame of Reference provide in fact a blue-print for such a codification.8 The Commission’s present proclamation of a preference for an optional code of limited scope that leaves national laws untouched is therefore quite plausibly just a tactical move that is necessary in the light of the strong resistance put up by the Member States against a codification and the lack of support by stakeholders, namely business and consumer associations, for such a project.

Taking the optional, non-exclusive character of the CESL seriously may thus be seen as a sign of political naivety. However, even if this is true, discussing the CESL as an optional instrument can contribute to our general understanding of the forms and functions of optional law. More specifically, by taking the Commission at its word, the intrinsic coherence of the concept of the CESL as it stands can be put to a test, and, provided the concept proves not completely useless, suggestions for improvement can be made. Since the idea of an optional instrument in the field of EU contract law was ventured some time ago,9 academic writers have undeniably swallowed this bait, and have produced a fast-growing body of literature on the pros and cons of an optional EU instrument in the field of contract law.10

My contribution is intended to present this discussion from an angle that may seem unusual. The optional instrument has so far predominantly been perceived as an optional contract code. Contract codes generally provide a legal framework for contracts among private parties, limiting their contractual freedom to a certain extent, but mainly supporting them with default rules where transaction costs are too high for contractual solutions. My perspective will be different: I will treat the body of B2C rules provided by the CESL as a supply of optional standardized contracts. Contracts are standardized where across different (though not necessarily all) suppliers and customers in a given market, individual contracts mainly consist of the same pre-defined boilerplate

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6 Within the EU, the opt-out regime established by Art. 1(1)(a) CISG merely leaves out exports from the four Member States that have not adopted the CISG, i.e. the UK, Ireland, Malta and Portugal.
7 Cf. Parliament resolutions dating from 1990s.
9 The earliest reference seems to be de Ly 1993 (“13th legal order”).
identifiable by the same label, allowing for individual variations only to a very limited extent, in particular regarding the quality and quantity of the contract goods and the contract price. Standardized contracts are generally familiar as a product of coordination between private actors. Academic research on self-regulation has brought to light numerous examples of model contracts drafted by private organizations that, by being used as boilerplate in standard form contracts, lead to standardization.\footnote{Collins, Cafaggi 2008.} In the debate about European contract law, it has been demanded to take account of these collective private efforts in the preparation of legislative steps.\footnote{Cafaggi 2008.} I can’t see that this has really happened.\footnote{The impact of stakeholder meetings is rather dubious; cf. complaints of stakeholders, e.g. Brachert.} But this does not preclude us from looking at a legislative measure as an optional standardized contract supplied by the state and not by private actors. The essential difference between this form of legislation and the classic concept of a contract code is this: while a code mainly consists of a collection of default rules the parties may selectively stick to or diverge from, an optional standardized contract is a body of rules that can in principle only be adopted or rejected as a whole and at best allows for limited variations. Otherwise, the standardized contract would lose its key-feature of being simply identifiable by its label, which will prove decisive for the purpose of this paper. In short, a code is a loose bundle of default rules, while an optional standardized contract is a tight bundle of default rules with a name attached to it.\footnote{Cf. Bachmann 2008 with a similar distinction between "soft" and "strict" concepts of optional law. In Bachmann's terminology, a loose bundle of default rules is "soft" while a tight bundle of default rules is "strict".} To be sure, the notion of optional standardized contracts supplied by states is not new: in the field of company law, states (and, more recently, the EU) habitually provide optional standardized contracts with a particular name.\footnote{Cf. e.g. Hertig and Mc Cahery 2006; Klöhn 2012.} What I am going to do is to explore the benefits of such a concept in the field of market transactions between businesses and consumers.

My reason for reading the B2C part of the CESL as a supply of optional standardized contracts can easily be explained. It will strike even a casual reader of the CESL that B2C contracts governed by this instrument are bound to be uniform to a large extent. On the face of it, it seems that the wealth of mandatory rules in favor of consumers, combined with a rigid policing of standard terms, imposes a particular model of high-quality contracts (at correspondingly high prices) on market participants that may suit the preferences of some consumers, but drives out low-quality contracts (at lower prices) for which demand may also exist. However, what could be regarded as undue restrictions of contractual freedom in a proper codification, may possibly turn out as requirements for the development of optional standardized consumer contracts under an EU or "blue button" label. While not precluding cheaper low-quality contracts

\footnote{Cf. Schulte-Nölke 2009 and 2011.}
under another label, EU or "blue button" contracts may allow to satisfy demand by consumers with a preference for high-quality contracts where otherwise, due to adverse selection driven by reading costs, only low-quality contracts would be offered.

In part 2. of my paper, I will argue that, in principle, a plausible rationale for the strategy pursued by the Commission can be found in the welfare increasing effect of a public supply of optional standardized consumer contracts. In part 3., I will examine the feasibility of such a result if the CESL is introduced into the context of EU consumer contract law as it stands. As will be shown, the emergence of standardized EU or "blue button" consumer contracts under the CESL is unlikely to have beneficial effects unless restrictions on the competition of consumer laws are abolished that can be found on the level of private international law (in the Rome I Regulation) as well as on the level of substantive law (in a number of EU directives harmonizing the consumer laws of Member States).

2. 

Public supply of standardized contracts as a solution to the problem of reading costs

2.1. The double purpose of the CESL in the field of B2C contracts: Transaction cost saving device and instrument of consumer protection

Having said that, despite lingering doubts about the honesty of the proposal, I would take the Commission at its word in order to assess the intrinsic coherence of the project, the preamble of the Proposal is a natural starting-point for my analysis. The preamble shows that, as far as B2C transactions are concerned, the CESL is meant to serve a double purpose.

The first purpose of the CESL, which embraces both B2C and B2B transactions, is to serve as a transaction cost saving device. Differences between national contract laws within the EU cause transaction costs for cross-border trade. According to the preamble, "traders consider the difficulty in finding out the provisions of a foreign contract law among the top barriers in business-to-consumer transactions and in business-to-business transactions".17 This claim is based on the findings of two Eurobarometer surveys.18 As I have argued elsewhere,19 the approach of these surveys is methodologically flawed, and the Commission seems to exaggerate the significance of their results as to the magnitude of trade barriers resulting from divergences between national contract laws. However, the existence of transaction costs caused by diverging

17 Recital (1) of the Proposal.
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contract laws cannot be denied. Whenever suppliers find themselves in a situation where their cross-border transactions are not subject to the same contract law as their domestic transactions, additional law-related costs ensue. In the field of B2C transactions, this problem is aggravated by limitations on the effect of contractual choice-of-law clauses imposed by EU legislation: As follows from Art. 6(2) of the Rome I Regulation, a consumer who is addressed in his country of residence will always enjoy the protection granted to him by his country of residence irrespective of the law chosen in the contract. A choice-of-law clause in favor of his domestic law will therefore not save a supplier the expense of researching and, possibly, adjusting to the laws of all home countries of his customers. If, for a moment, we take this choice-of-law restriction for granted (I will discuss it later in section 3.2. of this paper), it is quite obvious that a uniform contract law that is immune against the interference of the consumers’ domestic laws can be useful.

The second purpose of the CESL, which specifically applies to B2C transactions, is to ensure that consumers who enter into a transaction under the CESL receive a contract with high-quality terms, i.e. with a high level of legal protection. The underlying idea is that the CESL will be established as a "quality brand" that makes cross-border purchases more attractive for consumers. As stated in recital (11) of the Proposal,

"[t]he Common European Sales Law should comprise of a complete set of fully harmonised mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis."

At first view, the way in which the high level of consumer protection provided by the CESL is praised without qualification as a unique selling point to consumers is either blatantly disingenuous or shockingly ignorant. It seems that either EU lawmakers do not know, or that they expect consumers not to know, that consumers will not receive the legal benefits bestowed on them for free. Not even the elaborate Standard Information Notice that is meant to inform consumers before they make a binding choice for the CESL contains the slightest hint that consumers will collectively have to pay for the costs of these benefits. However, the Proposal’s silence about the price effect of the consumer protection granted by the CESL does not necessarily mean that there is no rational policy explanation behind it that also takes account of the costs. Basically, I can think of three possible approaches to explaining the consumer provisions of the CESL:

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20 For a review of the transaction cost argument in the context of EU harmonization measures, cf. Wagner 2002.
21 Art. 9 of the Proposal together with Annex II.
• A high level of consumer protection may be chosen with a **redistributive purpose** in mind. This purpose is clearly detectable among the advocates of a strong EU consumer law. Roughly speaking, a cross-subsidization between the class of consumers who can look after themselves and do therefore not need mandatory protection mechanisms as highly as the price to be paid for them, and the class of consumers who can't and therefore receive a positive pay-off from the imposition of these measures may be welcome as a form of wealth redistribution (or solidarity) between "stronger" (supposedly richer) and "weaker" (supposedly poorer) citizens. However, apart from the crudeness of such an equation, even if redistribution is accepted as a goal, contract law is certainly neither an effective nor a cheap way to achieve this goal.

• The second explanation for the B2C regime established by the CESL rests on the assessment of **welfare effects of mandatory consumer protection in general**, i.e. of consumer protection rules as part of a code that is meant to apply to all B2C transactions within the scope of the legislation. These effects are positive with regard to a particular provision if the overall benefits generated by it exceed its overall costs. As a consequence, the justification of the B2C rules of the CESL turns on the question whether these rules, if seen as a part of a code that universally applies to all market participants, would have welfare-increasing effects. However, as other contributions show, there is little hope that the CESL will pass this test. But it is submitted that this test is not adequate if the optional character of the CESL as a whole is taken seriously. Even though it's a take-it-or-leave-it situation, the CESL technically allows for a decision for or against the bundle of protective instruments contained in it, which sets it apart from ordinary mandatory consumer protection.

• The third approach, which is the one pursued in this contribution, tries to develop the rationale of the B2C part of the CESL from an assessment of the **welfare effects of optional standardized contracts**. The peculiar take-it-or-leave-it situation resulting from the combination of the optional character of the CESL as a whole with a rigid internal structure that does not allow cherry picking among its rules is exactly what can be observed with standardized contracts. While the question whether the CESL really matches the idea of a standardized contract will be answered later, the potential benefits of a public supply of standardized B2C contracts in general have to be discussed first.

### 2.2. The problem of reading costs and how standardization can help to solve it

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23 Micklitz, Hesselink ..
24 Cf., from an autonomy perspective, Canaris, and, from a law & economics perspective, Kaplow and Shavell. Cf. also Eidenmüller 2009 (with regard to the DCFR).
25 Eidenmüller et al. 2012; contributions to this conference.
26 Infra, section 3.1.
As a contract that is simply identifiable by its label, a standardized contract is suitable as a cost saving device. Standardized contracts do not only spare parties the cost of drafting a contract. They also relieve parties of the need to read contracts, provided that there is an enforcement mechanism that ensures conformity of the contract terms that were actually used with the advertised label. This is a feature that makes standardized contracts an obvious candidate for the solution of the information problem associated with boilerplate.

As is well known, B2C contracts are predominantly *standard form contracts* (not to be confused with *standardized contracts* as defined in section 1). Consumers generally don’t read these contracts. Reading (and understanding) boilerplate is costly, and usually not worth the effort. Not having read the contracts offered to them, consumers do not know whether they are offered high quality or low quality terms. They will therefore not honor high quality with a correspondingly high price. This information problem will in the end prompt firms to offer contract terms of the lowest permissible quality, and consumers to offer a price that matches this quality. In such a setting, demand for any quality that is higher than the lowest permissible quality will not be satisfied even if there is a significant group of consumers with such a preference that would be worth catering for. Theoretically, this inefficient outcome would be avoided if a sufficient number of consumers could read the contracts at no cost so that firms would be deterred from offering only the lowest permissible quality. But even if there were such a group of sophisticated readers (which does not seem likely), firms may be able to develop strategies leading to a separation between this group, who would get the terms they desire, and the majority of non-readers, who would still be offered only low quality terms. Hence, in the absence of coordination, markets cannot be trusted to produce efficient outcomes.

Apart from specific requirements for a valid contractual consent, which we may conveniently discard as not really important for the solution of the problem, the conventional European attempt to prevent such a downward spiral of adverse selection is a regulation of standard terms that sets their minimum permissible quality significantly higher than the minimum threshold for individually negotiated terms. While the space for individually negotiated terms is only limited by general prohibitions

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27 Katz 1990; cf. also Akerlof etc.
28 I do not deny that it is possible to come up with scenarios in which “one-sided” terms may be efficient, as has been shown by Bebchuk and Posner 2007. However, in particular regarding the European context, I do not believe that the firms’ concern about their reputation as a non-legal requirement of Bebchuk’s and Posner’s concept is sufficiently developed.
29 Schwartz and Wilde 1978.
31 E.g. Sec. 305(2) of the German Civil Code.
32 Ben-Shahar 2009. For empirical insights from the US that may also be true for the EU, cf. Marotta-Wurgler 2008 and 2009.
of illegal or immoral contracts, standard terms are subject to the more stringent
criterion of "unfairness".\footnote{33} By raising the lower floor for the quality of standard terms,
lawmakers try to reach a better equilibrium. Firms will of course continue to offer terms
of the lowest permissible quality. But it is hoped that, due to the regulation of the
minimum quality on the basis of the unfairness test, these regulated terms suit
customer preferences better than unregulated terms of a lower quality so that the
public intervention is altogether beneficial. This is clearly a demanding task:
theoretically, a judge or a legislature should define a quality level at which, on balance,
the overall net gain resulting from the benefits for consumers with a preference for the
regulated (or a higher) quality and the losses for consumers with a preference for a
lower quality is maximized. As with any kind of product regulation, there is an
undeniable risk of not hitting the mark and thus causing welfare losses instead of gains.
To put it differently, the present European regulation of standard form contracts leads
to a quasi-mandatory standardization at the level established by the "unfairness" test.
Whether this level is efficient or not, is anyone’s guess.\footnote{34}

This is a reason to look for an alternative concept, which could be provided by optional
standardization. As has recently been shown by Wickelgren in a model that partly builds
on previous work by Che and Choi,\footnote{35} if competing firms can offer standardized contracts
with distinguishable names from a finite set, and reading costs are not too large, an
equilibrium results "in which firms offer the most efficient contracts from the set of
distinguished contracts and consumers purchase the most efficient contracts without incurring
any reading costs".\footnote{36} This result confirms an intuition that follows from the idea of
offering contracts, like other products, under a label. Such a label may be neutral as to
the quality of the contract ("blue", "red" etc.) as long as it is ensured that contracts with
the same name contain the same terms. With the introduction of labeled contracts,
consumers who choose contracts without reading them, but recognize labels and prices
gain the chance to compare between contracts offered to them by different sellers. Hence,
with regard to contract terms, a consumer is put into the same position as with regard to
technological features of competing products he is offered: he may not understand
different technologies, but if each technology comes under a distinct name, there is a
basis for a comparison. Once comparability is established, and provided that markets
are sufficiently competitive and transparent so that information about the quality of the
labeled contracts will be dispersed, markets can be trusted to produce efficient
outcomes.

34 Cf., however, Harel and Procaccia 2009 (to be discussed).
35 Che and Choi 2009.
36 Wickelgren 2011.
Needless to say, the idea of a competition of standardized consumer contracts borrows heavily from the idea of a competition of corporate forms, in which standardized contracts labeled "Delaware corporation" or "Aktiengesellschaft" compete with each other. However, it should not be overlooked that a market for standardized consumer contracts poses one problem less than the market for corporate forms: unlike corporate charters that affect interests of third parties such as creditors, consumer contracts are generally a bilateral affair.

2.3. The case for a public supply of optional standardized contracts

If it is true that, as a solution to the problem of reading costs, standardization of consumer contracts can have welfare-enhancing effects, the next question is why markets cannot be expected to produce a sufficient supply of standardized consumer contracts so that state intervention is called for in order to make up for this failure. Let me suggest several, albeit preliminary answers to that question.

First of all, individual suppliers are unlikely to step forward with a tried and tested model contract that is placed at the disposal of competitors for use under a common label. Following a similar argument made in the discussion of administrative approval of boilerplate, there is no incentive to incur the costs of developing such a contract if competitors can free ride off the frontrunner's efforts. Moreover, a supplier who tries but fails to establish a standardized contracts may face reputational losses, which again is a risk not shared by imitators.

Secondly, collective arrangements may be prevented by transaction costs. Not surprisingly, the bulk of examples for self-regulation by standardized contracts is placed in B2B settings where it seems that collective arrangements tend to be favored by conditions such as a limited number of participants on both sides of the market, market transparency and homogeneity of the products and interests involved. In a B2C context, these conditions are less common, not least because the demand side of the market is constituted by a myriad of consumers with diverging interests and, despite consumer associations, hardly a common voice.

Thirdly, and again not surprisingly, where collective agreements on standardized B2C contracts can be found, such as in the German retail banking and insurance sectors, these agreements are usually exclusively formed by firms without any involvement of the consumers concerned. There is no reason to believe that these one-sided arrangements are more than just a horizontal joint venture with the aim of getting as close as possible to the lowest standard permitted by the law (and of spreading the risk of overstepping the limits among competitors). This may lead to economies of scale in

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39 AGB Banken, AGB Sparkassen, AVB.
the production of "court-proof" boilerplate, but does not cure the inefficient outcome caused by adverse selection. In addition, even if these agreements do not violate EU antitrust law if they merely establish "open" standards and leave out sensitive issues such as prices,\(^4\) they may also raise competitive concerns.\(^5\)

For these reasons, it seems that a state intervention is justified. However, state intervention that takes the form of an optional standardized contract, while at the same time allowing for competing standardized contracts that may be produced by other states or by collective arrangements of private actors is less prone to error than the introduction of a quasi-mandatory standard. Ignoring the costs of legislation for a moment, any optional standardized contract that contains terms of a higher quality than the terms offered under unregulated conditions will lead to a welfare increase even if there is only a small group of consumers who are willing to pay the price for these terms. In the worst case (if no-one wants to buy these terms), no benefits are generated, but also no losses. However, due to the platform character of optional standardized contracts (with tax-generating legal services linked to it), states have an incentive not to produce such a failure, but to create sets of terms with a quality that is appealing to consumers so that a large market share can be captured. If we assume that consumer preferences are not uniform, but spread on a scale between high and low quality terms we may expect that this competition leads to an efficient equilibrium that consists of multiple standardized contracts of varying quality. Once again borrowing from the lyrics of the corporate competition song, we may call this a "race to the tops" (with a mountain range and not just a single mountain looming in the dawn of efficiency). So much for the theory. Now back to reality.

3. The feasibility of a welfare increase generated by the CESL

3.1. The B2C part of the CESL as a supply of standardized contracts

As far as its internal structure is concerned, the CESL is undeniably suited as an optional standardized contract, or rather as several optional standardized contracts if we consider varieties such as the distinction between goods and digital contents separately. There are three tools that tie together its provisions so that a tight bundle of default rules results as is required for a standardization. In the first place, in B2C relations, the CESL may not be chosen partially, but only in its entirety.\(^6\) Secondly, B2C contracts governed by the CESL are to a large part subject to mandatory rules in favor of consumers.\(^7\) Contract terms falling within their scope may only diverge from these

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\(^4\) Cf. EU Commission, Horizontal Guidelines.


\(^6\) Art. 8(3) of the proposed Regulation.

\(^7\) Withdrawal rights, remedies for defects ...
rules if they are even more favorable to consumers, which, in most cases, is unlikely to happen. Thirdly, all other contract terms (except for individually negotiated terms) are subject to the unfairness test. As I have already explained, this leads to a quasi-mandatory standardization.

The combination of the optional character of the CESL as a whole with a tight and practically insoluble bundling of its B2C rules has been criticized by a group of leading German academics. They claim it would be plainly contradictory to regard consumers as capable of deciding on the choice of the CESL as a whole and at the same time to deprive them of the right to diverge from its single elements. It should have become clear by now that I do not share this criticism. The EU or "blue button" label can only perform its information function if the product sold under this label in principle contains EU or "blue button" terms only. One could of course think of diversifying the EU supply by developing additional contracts under separate labels. But it would be fatal for an optional standardized contract if the terms offered under its label significantly diverged from the model. It would also not really be feasible to force a seller to offer a full set of high quality terms when using the label und then to give consumers the right to reject any terms which they regard as unnecessary protection. Such a right would only make sense if it came along with a right to demand a discount, which does not seem practicable.

Apart from the existence of a tight bundle of default rules with a label attached to it, successful standardization also depends on the conformity of the actual terms used in individual transactions with the advertised label. Mere invalidity of terms that diverge from the mandatory rules or from the "unfairness" standard provided by the CESL to the disadvantage of consumers is probably not enough to prevent cheating: there is at least anecdotal evidence that firms deliberately use invalid terms because due to information deficits, a sufficiently high proportion of their customers comply with it to make this profitable despite potential reputational losses. However, EU law provides additional instruments for the supervision and enforcement of compliance with the requirements of mandatory consumer protection. Under Directive 98/27/EC, public bodies and private organizations representing collective consumer interests are entitled to bring actions for an injunction in order to prevent infringements of EU consumer law. In addition, the use of invalid standard terms is considered to fall within the scope of Directive 2005/29/EC concerning unfair commercial practices. As a consequence, competitors are also allowed to take legal action. Even if there is still no mechanism for

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44 Art. 83-85 CESL.
45 Eidenmüller et al. 2012.
46 (Cases).
47 This would require an amendment of the Directive so that the CESL is included in the list of consumer protection instruments in the Annex of the Directive.
48 Köhler 2010.
collective redress (such as class actions) under EU law,\textsuperscript{49} the existing instruments seem to ensure compliance to a considerable degree.

Finally, seeing the CESL in the light of the idea of an optional standardized contract has the advantage of discharging its drafters from the reproach of having widely missed the target of setting an efficient level of protection. In contrast to a mandatory standard for contract terms, an optional standardized contract does not have to aim at one particular point on the scale between low and high quality terms where the aggregate net benefit of all consumers is maximized. As consumers have the choice between different levels of protection,\textsuperscript{50} and their preferences will most likely not be the same, a one-size-fits-all solution is anyway unlikely to succeed. So there is in principle nothing to say against aiming at the premium segment of consumer demand with an optional contract that contains a bundle of high quality terms. Roughly speaking, this is an equivalent to the strategy of German luxury car manufacturers who, at least for the time being, seem to make healthy profits. Such a strategy may of course fail if it turns out that there is no demand. But then again, the only loss is the waste of resources for drafting the optional contract.

3.2. \textit{Obstacles to a competition of standardized consumer contracts caused by the present regulatory framework of the EU}

While there is nothing inherently wrong with the general concept of the CESL,\textsuperscript{51} if we look at it as an example for optional standardized contracts, this does not apply to the context of EU consumer law in which the CESL will be embedded. Let me recall that the introduction of optional standardized contracts is meant to solve the problem of reading costs which stands in the way of a functioning market for B2C contract terms. Hence, optional contracts do not provide for efficient results by themselves, but merely for the basis of a competition among B2C contracts that gives reason to expect an efficient outcome. Therefore, if optional contracts are implanted into a setting that does not allow for regulatory competition, they will have no beneficial and possibly even pernicious effects. This is the crucial point of my critique of the Commission’s proposal.

First of all, by introducing a choice-of-law restriction for B2C contracts in Art. 6(2) Rome I Regulation that guarantees consumers the standard of protection of his country of residence, the EU has effectively prevented any meaningful legislative competition on the horizontal level between states as the consumer’s domestic law will always prevail unless foreign law offers a higher standard of protection.\textsuperscript{52} However, it is important to

\textsuperscript{49} (latest preparatory steps)
\textsuperscript{50} Even if only one optional standardized contract is introduced, the (unlabeled) contract with the lowest permissible quality is an alternative.
\textsuperscript{51} This does not preclude that the CESL is a less than perfect piece of legislation for many other reasons; cf. e.g. Ackermann and Franck 2012; contributions to DNotI 2012; Eidenmüller et al. 2012; Zimmermann 2012; Martens 2012 ...
\textsuperscript{52} See generally Kieninger 2002; Rühl 2011 ...
note that the EU’s own consumer sales law is not subject to this limitation: Due to the trick of treating the CESL as part of the law of each Member State, the effect of Art. 6(2) Rome I Regulation is neutralized.\textsuperscript{53} To put it simply, if a resident of an EU Member State chose the CESL, he cannot rely on a higher level of protection granted under the domestic law of his home state because, by virtue of EU legislation, the CESL is also part of the law of his home state and thus provides the benchmark for the test under Art. 6. By fixing the conflict-of-laws framework in such a way, the EU made sure that the CESL is the only law that can universally be applied to cross-border B2C contracts throughout the EU without any interference of national consumer laws. The CESL is thus given a head start as a transaction cost saving device it would not enjoy but for the ties imposed by the EU on the contract laws of Member States and non-Member States alike.

Moreover, vertical competition between the EU and its Member States is further restricted by EU directives providing for a (minimum or full) harmonization of the most important aspects of substantive consumer law.\textsuperscript{54} These measures basically impose the same level of consumer protection on the Member States as can be found in the CESL. So even if, under the EU conflict-of-laws-regime, Member States were put on a par with the EU by being allowed to provide optional standardized contracts that could be chosen throughout the EU, as is the case with the CESL, Member States could not enter the competition by offering low-quality terms to price-sensitive consumers who are not willing to pay for withdrawal rights, extensive remedies for defects, and the like.

Considering these conditions, there is no room left for a competition of optional standardized contracts to develop.

4. Conclusion

By suggesting a public supply of optional standardized contracts, I hope to invigorate the debate on legislative techniques of consumer protection. We all know the pros and cons of traditional mandatory rules, and most of us are rather disillusioned about the impact of information duties, which have very much been en vogue in the EU during the last decades.\textsuperscript{55} Due to their interesting feature of being instantly recognizable by their label, standardized contracts can help to solve the information problem that is a main source of imbalanced B2C relationships. By introducing optional standardized consumer contracts, states may initiate a market process that leads to an efficient outcome. I do not deny that there are loose ends and risks associated with this idea, as with any other concept that builds on the beneficial effects of competition for the development of legal

\textsuperscript{53} Cf. Roth 2012; Leible 2012.
\textsuperscript{54} Dir. ...
\textsuperscript{55} See Ackermann 2009; Schön FS Canaris ... for a critique.
rules. However, considering the dead end we seem to have reached with other tools, this is an alternative worth exploring.

By reading the CESL as an optional standardized contract, I tried to give it the best possible rationale if we take the drafters at their word. This helps to make sense of the rigid internal structure of the CESL as a tight bundle of default rules that excludes cherry picking. From this perspective, it is also comprehensible that, by setting a high protective standard, the CESL aims at an upscale segment of the market for contract terms that many consumers may not belong to. However, on the downside, by excluding regulatory competition, the broader setting of EU consumer law is clearly irreconcilable with the concept of optional standardized consumer contracts. In order to implement this concept in the EU, both the choice-of-law restriction for consumer contracts and the substantive harmonization of Member State laws would have to be scrapped so that Member States, third states and private organizations would be allowed to join the competition by providing other standardized contracts. As this idea would no doubt be regarded as sheer political madness, I am not seriously suggesting this. But I am serious about this: the plan to pile an optional EU consumer contract law on top of an existing regulatory regime that ties down all potential competitors is not about creating alternative options for the European consumer law market so that the best options prevail, but about monopolizing this market. This takes me back to where I started: the best possible explanation for the CESL is really to ignore its optional façade and to see it as part of a creeping codification of contract law that is ultimately meant to preempt Member States’ laws.