In Defence of CESL

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Abstract: From a law-and-economics perspective, the European Commission’s proposal for the introduction of a Common European Sales Law (CESL) has been criticised for overregulating consumer sales law in Europe and for being likely to yield more costs than benefits. In defence of CESL, it is submitted that its optional nature may mitigate the risk of overregulation and provide an opportunity for firms to tailor their activities to consumer preferences in different markets. Furthermore, although the introduction of an optional instrument may increase transaction costs, it does not seem to be excluded that the benefits of increased cross-border trade may (on a long-term basis) outweigh these costs. Finally, in order to evaluate the institutional choices underlying the proposed rules of CESL, it is suggested that the further analysis of these rules should take into account the legal-political as well as the legal-economic backdrop to European contract law.

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.’

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. 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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2 This paper will, in particular, respond to the 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 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 recognising 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 emphasised. 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

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3 For an overview and economic assessment of the mandatory consumer provisions, see O. Bar-Gill and O. Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law’. For
2 CESL competing with national sales laws

Richard Epstein’s criticism of the proposed CESL emphasises the instrument’s strong regulatory nature and the considerable amount of mandatory consumer protection provisions included in the proposal. As regards the first point, Epstein observes that ‘the Brussels Commissioners do not explain why or how this one single strategy works better than a decentralized approach that continuously puts multiple Member States in direct competition with each other’. As concerns the second point of criticism, Epstein stresses the ‘threadbare justifications’ given by the European Commission for CESL’s new consumer protection provisions that, according to Epstein, are ‘truly breathtaking in their scope’.

To illustrate the problem, Epstein discusses the position of a firm doing business both in its own Member State and in the EU market. If this firm were to follow local rules in the national market and the CESL standard for cross-border transactions, Epstein argues ‘[t]hat 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, 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. the Rome I Regulation. In principle, firms could choose to use their national law both for local and cross-border contracts. They would, thus, in principle not incur extra costs because of the co-existence of different standards for different markets.

B2B contracts, the number of mandatory provisions in CESL is much more limited, as follows from Art. 1 jo. 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).

5 Epstein, op. cit., p. 7. See Bar-Gill and Ben-Shahar, op. cit., for an overview and critical assessment of the consumer protection techniques used in CESL.
6 Epstein, op. cit., p. 8.
7 See further section 4 below.
9 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, op. cit., p. 4-5 and section 3 below.
In the second place, 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 ‘neutralises’ Article 6 of the Rome I Regulation. 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 (Article 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 (Article 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 will then not have to consult provisions of national law anymore.\(^\text{10}\) Rather than raising transaction costs, this could reduce the costs of doing business across borders.

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 harmonisation regime (full harmonisation,\(^\text{11}\) minimum harmonisation,\(^\text{12}\) or co-existence of national and EU standards) matters for the determination of the level of the harmonised standard in comparison to existing national standards.\(^\text{13}\) 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 harmonisation (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,'


\(^\text{11}\) Full harmonisation means that a measure of EU law sets a standard that Member States are not allowed to deviate from.

\(^\text{12}\) Minimum harmonisation leaves Member States the possibility to maintain or introduce stricter mandatory requirements than those provided for in the acquis communautaire, eg national rules offering a higher level of consumer protection than EU law.

which will be exactly tailored for the consumers’ preferences of that country, given that it is being served by the more efficient foreign firms.

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 harmonised standard rather than local standards that do not fully correspond to consumer preferences.

As Eric Clive observes 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.’

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. 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 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).

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. In his opinion, it is likely that the introduction of the CESL

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14 Ibid., p. 290.
17 See further section 4 below.
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 invest whether CESL is superior to the law they use in terms of efficiency and distribution.19

Furthermore, Posner submits that although uniformity costs (i.e. the costs of loss of variation of available bodies of law, where the 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.’20

Does this cost/benefit analysis provide sufficiently convincing reasons for abolishing the idea of an optional instrument for European contract law? 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. On the other hand, the gains of being able to serve a bigger market on the basis of the CESL might be

19 Ibid., p. 5.
20 Ibid., p. 6.
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, maximisation 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.\textsuperscript{21} 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.

4 Social goals and institutional choice in European contract law

The analysis of the competitive strength of 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 were too restrictive?\textsuperscript{22} 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’.\textsuperscript{23} 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


\textsuperscript{22} Posner, \textit{op. cit.}, p. 9.

to characterise the Romantic Movement as antiscientific in general. 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. Reason did not have to rule out imagination.

Looking at present-day EU 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. 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 criticised for remaining silent on the legal-political goals reflected in measures of EU contract law and the idea of social justice underlying this field. 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 harmonisation, 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.’

Admittedly, this position might be criticised 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? 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?

24 Holmes, op. cit., p. 318.
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 harmonisation of rules of (consumer) contract law on the balance of private autonomy and social solidarity between contracting parties.30

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.31 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.32 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 harmonising measures of contract law would require the elaboration of the choice for regulation over other institutions.

4.2 The many concepts of social justice in European contract law

So far, the analysis presented in this paper has focused on ‘European contract law’ in 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 view takes inspiration from the distinction of ‘many concepts of social justice in European private law’ made by Hans Micklitz. 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’. 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’. 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 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 redistribute 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’.

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 judgments (EU freedoms v. national social policies), and its Mangold and Kücükdeveci judgments (a general principles of EU law affecting national law on employment contracts). Moreover, the

34 Ibid., p. 22.
difficult legislative process leading up to the enactment of the Consumer Rights Directive\textsuperscript{38} forms an illustration of the collision of different EU and national ideas of consumer protection.

4.3 Unweaving CESL

In this light, the evaluation of the Commission’s proposal for a CESL necessitates an inquiry into not only the economic goal of 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 best 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 proposed analysis. 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.’ (CESL, p. 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.’ (CESL, p. 9)

‘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.’ (CESL, p. 16, recital 8)

Finally, the reference to fundamental rights in recital 37 might be exploited to deliberate the value choices made in CESL’s specific provisions.\textsuperscript{39}


5 Conclusion

In summary, having addressed some of the legal-economic concerns about 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:

1. The high number of mandatory consumer protection provisions included in 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, CESL functioning as a ‘2nd regime’ under the applicable law to a contract may mitigate costs, since this construction ‘neutralises’ consumer protection provisions that would have applied on the basis of Article 6(2) of the Rome I Regulation.

2. Although short- 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.

3. The possible success of 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.