1. Introduction: legal costs generated by the present position

The European Commission makes clear in its Explanatory Memorandum to the Proposal for a Regulation on a Common European Sales Law (‘the Proposal’) and in the recitals to the Proposal itself that its fundamental purposes are economic, rather than social or political. Indeed, these purposes are a necessary element within the Proposal as presently put forward, since the Commission rests the European legislator’s competence for enacting the proposed Regulation on article 114 TFEU, which empowers it to take ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’ So, while the Proposal is concerned to explain that its provisions governing consumer contracts give expression to a ‘high level of consumer protection’ (as is again required by this Treaty competence), the protection of consumers is not the purpose of the Proposal.
How then does the Commission envisage that its Proposal will help establish or promote the functioning of the internal market?4 The Commission’s view is that the Proposal would promote and facilitate cross-border economic activity.5 So, while the Proposal acknowledges that it cannot deal with all the ‘obstacles’ which are presently faced by would-be cross-border traders, ‘including tax regulations, administrative requirements, difficulties in delivery, language and culture,’ it adds that
‘traders consider the difficulty in finding out the provisions of a foreign contract law among the top barriers to business-to-consumer transactions and in business-to-business transactions.’6

The Proposal continues:
the need for traders to identify or negotiate the applicable law, to find out about the provisions of a foreign applicable law often involving translation, to obtain legal advice to make themselves familiar with its requirements and to adapt their contracts to different national laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade. Contract-law-related barriers are thus a major contributing factor in dissuading a considerable number of export-oriented traders from entering cross-border trade or expanding their operations into more Member States.

5 This competence is controversial, it being argued that the Proposal does not fall art.114 TFEU as it does not seek to harmonise national law: see K. Riesenhuber, ‘The Proposal for a Regulation on a Common European Sales Law – Competence, Subsidiarity, Proportionality – a Report to the Committee on Legal Affairs of the German Bundestag’ (in German) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998134 (last visited 10 April 2012).
6 Recital 1.
Further into the discussion in the recitals, the Proposal accepts that there are significant differences in the type of legal costs associated with cross-border contracting as between business-to-business (‘commercial contracts’) and business-to-consumer (‘consumer contracts’).

In the case of commercial contracts, the Proposal acknowledges that EU law already contains a legal mechanism for reducing the legal costs involved by providing uniform private international law governing the law applicable to contracts in the Rome I Regulation (‘Rome I’).\(^7\) Under Rome I in principle the parties to a cross-border commercial contract of sale of goods\(^8\) can choose the law\(^9\) applicable to their contract,\(^10\) subject principally to qualifications based on ‘overriding mandatory provisions’ either of the forum\(^11\) or of ‘the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.’\(^12\) Apart from these qualifications, Rome I’s ‘scope of the applicable law’ is very wide, including the existence and validity of the contract or any contract term\(^13\) (and the consequences of nullity), interpretation, performance, the consequences of breach of

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\(^7\) Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (‘Rome I’) [2008] OJ L 177/6. The ‘scope’ of this Regulation is very wide, but not universal. So, while it applies in principle to all ‘civil and commercial contracts’, it excludes a number of types of agreement and issues set out in art. 1(2) Rome I.

\(^8\) Art. 3(1) Rome I does not restrict the freedom of the parties to choose the law applicable to cross-border contracts, but art. 3(3) provides that ‘where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.’

\(^9\) Art. 3(1) Rome I is general rather than restricted to contracts for the sale of goods, but contracts of insurance (even if commercial) are specially governed by art. 7 Rome I.

\(^10\) Under the Regulation, the ‘law’ must be a law of a State, rather than a set of rules such as the Principles of European Contract Law or the Unidroit Principles of International Commercial Contracts: see Dicey, Morris & Collins on the Conflict of Laws (14th edn, 2006 with Fourth Supplement), para. 32-081 (as regards the Rome Convention). Recital 13 Rome I implicitly recognise this position in providing that parties may choose a ‘non-State law’ which will take effect as terms of the contract.

\(^11\) Art. 3(1) Rome I. In the absence of choice, art. 4 sets a default rule for contracts of sale of goods.

\(^12\) Art. 9(2) Rome I.

\(^13\) Art. 9(3) Rome I.

\(^14\) Art. 10 Rome I. The qualification in art. 10(2) is interpreted restrictively:
obligations (including the assessment of damages), the various ways of extinguishing obligations, and prescription and limitation of actions, although it is expressly provided that ‘in relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.’\textsuperscript{15} So, subject principally to the rules on ‘overriding mandatory provisions,’ a cross-border commercial seller of goods or a commercial buyer of goods can decide that it will subject all its contracts to a single national law, thereby cutting down its legal discovery costs very considerably. For this purpose, there is no reason in the Rome I Regulation why such a commercial party should not determine the applicable law by reference to a standard term in the contract.\textsuperscript{16}

This possibility means, therefore, that the main legal costs in commercial sales are to be found in relation to negotiation of the law which the parties choose to govern their law.\textsuperscript{17} The Commission notes that ‘[d]ealing with foreign laws adds complexity to cross-border transactions’\textsuperscript{18} and that ‘the economic impact of negotiating and applying a foreign law is also high,’ especially for SMEs in their relations with larger companies which ‘generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it.’\textsuperscript{19} The idea is, therefore, that as regards those commercial contracts for which the CESL would be available, SMEs would benefit

\textsuperscript{15} Art. 12(2). The line between the substance of the obligation to perform and the mode of its performance may not be straightforward: Dicey, Morris and Collins, op. cit., paras. 32-194 – 32-200 (re. art. 10(2) Rome Convention which is in identical terms.

\textsuperscript{16} Art. 3(2) provides that: ‘the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.’ Cf. the position as regards law governing the law applicable to non-contractual obligations (including as regards liability for pre-contractual negotiations), where the power of choice of commercial parties is restricted to the case where this stems from ‘an agreement freely negotiated before the event giving rise to the damage occurred’: Rome II, art. 14(1)(b).

\textsuperscript{17} The Proposal does not raise the question of the costs of an agreement on the choice of court or jurisdiction agreement. Under the Brussels I Regulation, such an agreement may be effective subject to certain conditions: see, in particular, art. 23 Brussels I. In the case of certain consumer contracts, arts 15 – 17 severely curtail the effectiveness of such an agreement.

\textsuperscript{18} p. 3.

\textsuperscript{19} Explanatory Memorandum, p. ??
from its availability as they would not have to incur legal discovery costs as regards an applicable law more or less imposed on them by their economically more powerful contracting partner. On the other hand, in these circumstances it is unlikely that the SME would incur costs as regards the drafting of standard terms, as they are likely to have to contract on the standard terms of their more powerful partner: their prejudice is therefore substantive rather than relating to this category of transaction costs. The intention is that the availability and choice of the CESL by commercial parties where one party is an SME will enable both parties to reduce their legal discovery costs.

The legal costs which the Commission identifies inhibit cross-border consumer contracting differ significantly from those incurred in relation to commercial contracts: in all but the most unusual case, there is no cost to the trader in negotiating applicable law which it can impose on the consumer. However, under article 6 of the Rome I Regulation, the ability of the contracting parties to choose the law applicable to a consumer contract is significantly qualified where the trader: ‘(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country and the contract falls within the scope of such activities.’ Where these conditions are fulfilled, any choice of law to govern the contract cannot deprive the consumer from the protection of “provisions that cannot be derogated form by agreement” under the law of his or her habitual residence. As a result, any trader contracting cross-border either takes the risk of falling foul of national consumer protection or faces legal discovery costs as regards these legal protections, which are only partially harmonised as a result of EU law’s

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20 Art. 6(1) Rome I.
21 Art. 6(2) Rome I.
own programme of targeted and ‘minimum harmonisation’ of the last two decades.\textsuperscript{22} This results in both ‘legal discovery costs’ and, once properly informed, the cost of drafting standard terms which protect the trader’s position in the light of whatever national protections are discovered – unless the trader simply takes the risk of the existence of such national consumer protection laws and the extent to which its customers will have recourse to them. The aim of the Proposal, though, is to allow cross-border traders to contract with consumers on a single uniform basis (the CESL), which would, in its view, have the practical effect of circumventing the impact of article 6 and therefore avoid these costs.\textsuperscript{23}

For the purposes of the present article, I do not seek to deny the existence of the costs caused by the present position as identified by the Commission; rather I wish to consider the other side of the equation, by identifying the costs which incurred by traders if parties to cross-border contracts of sale of goods\textsuperscript{24} can be governed by the CESL in the way which the Commission envisage. In my view, these costs can be grouped under three headings: the legal framework into which the CESL is set; the relative uncertainty and complexity of the scope of the uniform law contained in the CESL; and the impact of national judicial evaluations in the application of the CESL.

\textbf{2. The legal framework of the CESL}

I have sought to explain elsewhere the technical legal framework in which the CESL is intended to be set by the Proposal.\textsuperscript{25} The most important point to be made here is

\textsuperscript{22} As the Proposal acknowledges at recital 3 in fine.
\textsuperscript{23} I explain elsewhere how this technical circumvention is intended to work and the technical problems to which this gives rise: S. Whittaker ‘The Proposed ‘Common European Sales Law’: Legal Framework and the Agreement of the Parties’ (2012) \textit{M.L.R.} forthcoming.
\textsuperscript{24} The present discussion will be restricted to contracts for the sale of goods.
\textsuperscript{25} Whittaker, op. cit., n. 00 above.
that the CESL does not seek to substitute itself for existing national laws of contract nor to by-pass existing rules of applicable law (notably, the uniform EU rules applicable to contractual under Rome I and non-contractual obligations under the Rome II Regulation).\textsuperscript{26} The proposal is rather that the proposed Regulation, by its legal nature within the system of EU secondary legislation,\textsuperscript{27} would create in the law (or laws\textsuperscript{28}) of each Member State a second, national law of contract governing the contracts and the issues within its scope.\textsuperscript{29} So, for example, as regards sale of goods, English law would consist of (1\textsuperscript{st} regime) a mixture of the common law and the Sale of Goods Act 1979 and (2\textsuperscript{nd} regime) the CESL. Unlike the 1\textsuperscript{st} national regime\textsuperscript{30} (which applies to contracts governed by it by operation of law), the CESL governs a contract of sale of goods only if the parties agree to use it: it is an optional instrument. Given that the Proposal would require the CESL to be available to contracting parties only if the contract is concluded cross-border (as defined by the Proposal),\textsuperscript{31} how does this option relate to existing private international laws of Member States and, in particular, the uniform EU laws in Rome I and Rome II?

The answer to this question is not straightforward, but may be summarised as follows. First, the Proposal distinguishes between choice of applicable law for private international law purposes and the agreement to use the CESL: in particular, the Proposal does not propose that the CESL should be available as a further law to be chosen under Rome I Regulation. Instead, the idea is that normally the parties to a

\textsuperscript{26} Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (‘Rome II’).
\textsuperscript{27} Art. 288 T.F.E.U.
\textsuperscript{28} Some Member States contain more than one legal system. So, for example, in the UK, the law of England and Wales would contain the CESL as would also Scots law.
\textsuperscript{29} Proposal, recital 9.
\textsuperscript{30} This position is complicated by the United Nations Convention on Contracts for the International Sale of Goods (‘CISG’ or the ‘Vienna Convention’) which as regards most but not all Member States governs international commercial sales of goods unless the parties exclude it (as art. 6 provides). The UK and Portugal have not ratified the Convention.
\textsuperscript{31} The Proposal, art 4 defines ‘cross-border contracts’. Member States have the power under art. 13(a) of the Proposal to extend its availability to other contracts.
cross-border contract should choose as applicable law one of the national laws of the
Member States and, within that law, should agree to use the CESL to govern their
contract. This analysis has the advantage of preserving the formal integrity of
existing EU private international law, but it has the disadvantage of considerable
complexity, for it means that any choice of the CESL is framed by (or perhaps
channelled through) existing private international law. This framework has three
main consequences.\(^32\)

First, in principle the issues governed by the CESL in the law of a Member
State could apply to the contract whose parties agree to use it only where those issues
also fall within the scope of the power to choose applicable law under the relevant EU
or national private international law or where that national law (or the national law of
another Member State) happens to be identified as the law applicable under the
relevant default rules of private international law. For this purpose, it is true that the
vast majority of the issues between parties to contracts which are governed by the
CESL fall within the scope of the Rome I Regulation, so that the choice of a Member
State law (within which the CESL is contained) which the Rome I Regulation
generally permits to commercial parties would allow all the provisions of the CESL to
be chosen. However, the CESL also seeks to govern issues which would be
classified as ‘non-contractual’ for the purpose of EU private international law, notably
as regards pre-contractual liabilities (including based on breach of information duties,
for fraud, threats and unfair exploitation\(^33\)) and the restitutionary obligations arising
on avoidance or termination of a contract.\(^34\) Here, the Rome II Regulation severely

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\(^32\) There is a fourth as art. 3 Rome I and art. 8(3) of the Proposal make different provision as regards
partial choice of the applicable law and CESL respectively: Whittaker, op. cit., pp. 000.
\(^33\) Arts 29, 49 & 51, 55 CESL and see below, p. 000.
\(^34\) These would fall within arts 12 and 10 Rome II respectively. Recital 30 Rome II specifically
includes ‘violations of the duty of disclosure’ within art. 12: Dicey, Morris and Collins., op. cit.,
Supplement, para. S35-244.
restricts the power of contracting parties to choose the law applicable, generally
limiting it to agreements entered into after the event giving rise to the damage
occurred or “where all the parties are pursuing a commercial activity, … by an
agreement freely negotiated before the event giving rise to the damage occurred.”
On the other hand, under the default rules put in place for these two situations the
law applicable to the contract would apply also to these non-contractual issues where
the contract has in fact been concluded.

Secondly, the qualifications on the effectiveness of the choice of applicable
law under 9 of Rome I based on the ‘internationally mandatory’ rules of the forum or
of the place of performance of a contractual obligation still apply so as to qualify the
uniformity of the scheme put forward by the CESL: it is not true, therefore, to say
that a trader would not have to find out about national laws other than the CESL. On
the other hand, it is clear that article 9’s exclusion of lois de police is intended to be
narrow and exceptional. This appears both in the definition of ‘overriding mandatory
rules’ as ‘provisions the respect for which is regarded as crucial by a country for
safeguarding its public interests … to such an extent that they are applicable to any
situation falling within their scope, irrespective of the law otherwise applicable to the
contract under [the Rome I] Regulation’ and in recital 37’s requirement that it

35 Art. 14(1)(a) & (b) Rome II Regulation.
36 So, art. 12(1) provides that: ‘[t]he law applicable to a non-contractual obligation arising
out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually
concluded or not, shall be the law that applies to the contract or that would have been
applicable to it had it been entered into.’ S. 12(2) then provides rules for the situation where the law
applicable to the contract cannot be determined, but this would not be the case were the parties to
choose an applicable law under art 3(1) of Rome I and the contract is concluded. Unlike its
predecessor ‘feasibility study’, the CESL does not contain any provisions which would on their terms
apply where no contract is concluded: cf. ‘Commission Expert Group on European Contract Law,
Feasibility Study for a future instrument in European Contract Law’ (3 May 2011) published as Annex
IV to EU Commission, A European contract law for consumers and businesses: Publication of the
results of the feasibility study carried out by the Expert Group on European contract law for
negotiations) & 28 (liability for breach of confidentiality).
37 Rome I, art 9(1).
should be interpreted restrictively\textsuperscript{38} and applied only in ‘exceptional circumstances’. So, in this respect the uniformity achievable under the CESL is no better nor worse than the uniformity achievable by choice of a national law under the general power in Rome I.

Thirdly, in the case of consumer contracts, there remains a degree of uncertainty as to the significance of article 6 Rome I’s preservation in certain circumstances of the protection of the law of habitual residence of consumers. In the view of the Commission, this provision would still apply under the Proposal, but it would not make any difference as the substantive law in question under the CESL would be the same under the chosen law (MS 2\textsuperscript{nd} regime, CESL) and the law of the consumer’s habitual residence (CESL), on the assumption that the consumer in question is habitually resident in a Member State. I have expressed doubts as to whether this finessing of article 6 works at a technical level where the CESL is chosen within a national law \textit{chosen} under the Rome I Regulation.\textsuperscript{39} These doubts could be dispelled by the Proposed Regulation’s disapplying or amending the scope of article 6 Rome I, but this would highlight the scheme’s reduction of consumer protection which this would, at least in certain circumstances, occasion.

How do these technical legal points relate to the costs of the operation of the Proposal’s scheme?

First, the Proposal does not expect parties to commercial or to consumer contracts no longer to need to choose a national law applicable under the private international law instruments: rather, this is expected to be the normal means of identifying the Member State law within which the CESL is contained. True, choice of such a Member State law when coupled with choice of the CESL may not matter as

\textsuperscript{38} In particular, it should be interpreted more restrictively than ‘provisions which cannot be derogated from by agreement’ which appears in arts. 3(3), 3(4), 6(2) & 8(1) Rome I.

\textsuperscript{39} Whittaker, op. cit., n. 00.
much to a contracting party because most of the rules applicable to the contract would be found in the CESL, rather than in the 1st regime of the chosen national law, but at least some of the negotiating costs which the Commission finds in the present position would continue to be reflected in the costs of negotiating whether or not to use the CESL at all and, if so, which Member State law to choose for the purposes of private international law so as to make it available.

Secondly, this technical legal framework does appear very complex. We are told by the Commission that legal complexity discourages businesses and, in particular, SMEs from contracting cross-border. The need to appreciate the workings of the EU private international law instruments and their relationship with the CESL is surely more than we can expect of most non-lawyer traders. Even with the benefit of general legal advice about these questions (which could be used for more than one transaction and more than one country of export or import), the degree of complexity involved is quite likely to generate mistakes and misunderstanding between traders which in the long term could itself discourage cross-border trade. As regards consumers, the average consumer would not be able to follow the complexities involved in this framework at all: this point does not, however, go to the question of an increase in the cost of cross-border contracting, but rather to the genuine nature of the consent of the consumer on which the application of the CESL is predicated.40

3. Scope of the Uniform Rules.

(i) New laws and their interpretation

40 See Whittaker, op. cit, n. 00.
All legal changes generate some initial additional costs as lawyers inform themselves of the new regime and how it differs from the previous, familiar position. For the most part, national laws tolerate these increased legal costs in the interest of the perceived benefits of the legal change in question as a matter of substantive regulation: the reform of the law does not come free. However, there are certain features of the CESL Proposal which are likely to generate more costs than national new laws. Of these, perhaps the most important feature lies in the need to delineate the line between the uniform system of law of the CESL and the national law or laws otherwise applicable under the private international law rules of the forum. In EU law terms, this turns on the ‘scope’ of the CESL, here not in terms of the types of contract or the types of contracting party for which it is available but in terms of the substantive regulation which it sets out. As I will explain, the delineation of the scope of the CESL in this sense is by no means straightforward and would be likely to generate considerable uncertainty and/or legal costs in their judicial resolution.

However, in order to consider the issue of the scope of the CESL in this sense, I need to make a short digression on the problems of interpretation (and therefore the costs) of new legislation.

First, most legal change involves the replacement of one rule or set of rules with others. In a transactional context, the lawyer seeks to assimilate the new position, identify the differences between the new and the old so as to be able to advise their clients as to how to adjust their practice (whether in terms of behaviour or in terms of contractual drafting) as a result of the changes. Gradually, however, as cases involving the old law dwindle and involving the new law increase, old knowledge is replaced with new knowledge, both for lawyers and for their clients. However, this would not be the case as regards the CESL, for the concomitant of the
optional nature of the CESL is that lawyers throughout the EU would need to understand its significance while at the same time retaining their expertise in the ‘old’ law: as the Proposal’s recitals make clear, each EU Member State would contain two contractual regimes and lawyers would have to know both.

Secondly, unless the new legislation is merely declaratory of existing practice, legal change generates new uncertainties of interpretation and significance. How do national lawyers tolerate these uncertainties given the necessary increase in legal costs which they introduce, either at the stage of pre-transaction advice or at the stage of dispute-settlement? I think that there are two main ways.

First, national legal systems possess mechanisms for the reduction of interpretative uncertainty. So, one approach (often favoured by the UK legislator) is that the legislation is drafted in a way which seeks to reduce uncertainties to a minimum, dealing with as many issues as the legislator can foresee and defining any terms used by the legislation where these do not possess existing clear legal significance.\(^\text{41}\) However, this approach is not followed by continental civil law systems in their civil codes, where such detailed regulation is seen as too complex to be accessible to citizens (which remains their ambition), too constraining of future judicial development and, indeed, too cumbersome.\(^\text{42}\)

\(^{41}\) A very prominent example of this can be seen in the Contracts (Rights for Third Parties) Act 1999, which reflects 10 years of intense discussion\(^\text{41}\) and which responds to concerns expressed about legal and transactional uncertainty caused by the change by seeking to answer the questions as to the ambit of the change arising in the course of that discussion: in contrast to the roughly equivalent provision in article 1121 in the French Civil Code of 1804 (which runs to some 20 words), the English law statute has ten sections running to some 2,000 words. Art. 78 CESL contains 236 words. In English law, such a clear significance may be established either at common law (as, for example, ‘misrepresentation’ in the case of the Misrepresentation Act 1967) or by judicial interpretation of the same term used in earlier statutes. So, for example, the expression ‘interest in land’ for the purposes of the formality requirements for the sale or other disposition of an interest in land in the Law of Property (Miscellaneous Provisions) Act 1989 s. 2 is defined by case-law going back to the Statute of Frauds 1677.

\(^{42}\) This does not mean that these same systems do not possess detailed and complex legislation in other areas. So, for example, in French law, while the general provisions govern contract law remain relatively few, the provisions governing residential tenancies look much more like the sort of detailed regulation associated with English law.
Secondly, as regards national legislation interpretative uncertainties are reduced by use of interpretative conventions. Apart from reference to the meaning of words in ordinary linguistic usage, recourse is often made to the purpose of legislation as a whole or to the purpose of particular provisions within the legislation: this is true of both English common law and continental civil law systems, although the extent to which it is true differs both between those systems and within them depending on the substantive legal context. Clearly related to the incidence of such teleological interpretation, national courts may have recourse to the travaux préparatoires of the legislation, although the practical elements and degree of use of these legislative ‘preparatory works’ differ significantly between European laws according both to their political and legislative institutions and according to their traditions.

Thirdly, the wider national legal tradition is drawn on by courts in both common law and civil law systems. So, while the promulgation of the great civil law codifications of France of 1804 or of Germany of 1900 may at first appear to mark a discontinuity with earlier law, also marking or emphasising great political changes (respectively, the unification of the law of post-revolutionary France and unification of Germany with the establishment of the German Empire), there remained a considerable degree of legal continuity after their enactment. Indeed, an important reason why the French Code civil could be written in the broad language and relatively laconic sentences which it enjoys, uncluttered by definitions or explanation, is that it was written in an established legal language and, at least in many areas, drew on the tradition of Roman legal scholarship. This does not mean, of course, that the interpretation given to the words in the civil codes has remained static – this is, indeed, far from being the case. But the national codifications of civil law of

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continental Europe drew on centuries and not merely decades of legal scholarship and legal practice. A particular good example of the significance of pre-codification law under the civil codes can be found in the interpretation of the famous paragraph 242 of the German Civil Code which requires the ‘the debtor to perform according to the requirements of good faith [Treu und Glauben], ordinary usage being taken into consideration’.

Good faith is found in the ancient Roman legal sources of contract law and was later given a much wider significance, but after the promulgation of the German Civil Code this rather narrow formulation in the Code was used both to retain earlier legal thinking associated with what was known as the exceptio doli generalis and to provide a legislative peg for a series of new legal doctrines, of which the control of standard terms by reference to a standard of reasonableness is a very striking example. Overall, therefore, in the case of both the French and the German law codifications, a crucial element in reducing interpretative uncertainty was the presence of a well-established legal tradition and legal language.

How do these national mechanisms for reducing problems of interpretative uncertainty compare with the position in EU law and under the Proposal?

First, as regards EU law generally, the European Court has available many different language versions of any legislative text, each of which is equally authoritative. Sometimes, terminology or phrasing in a particular language version may guide its interpretation; on the other hand, the multilingual nature of EU legislation does mean that the legal text has a somewhat less exalted significance than in some national laws.

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44 For an introduction in English S. Whittaker and R. Zimmermann ‘Good faith in European contract law: surveying the legal landscape’ in R. Zimmermann and S. Whittaker (eds) Good Faith in European Contract Law (CUP, 2000) 7 at 18 – 32 (from which the translation in the text is taken).
45 It is also found in para. 157 B.G.B. as regards contractual interpretation.
Secondly, the Court is concerned to give effect to the purposes of the legislation as stated explicitly in its recitals and as linked to the competence in the Treaties under which it was enacted. In the case of existing legislation in the area of contract law, as elsewhere in the acquis, this is immensely important for, until the Proposal, this legislation has been targeted on particular types of contract or particular issues which have been selected by the EU legislator as particularly worthy of harmonisation. For this purpose, the European Court sometimes has recourse to the travaux préparatoires of EU legislation.

Thirdly, the Court has recognised a series of ‘general principles of EU law’, including the principles of equality, proportionality, legal certainty, fundamental rights and effectiveness. The Court has accepted that, inter alia, it should use these principles in the interpretation of legislation. Apart from these ‘general principles’, the Court has also recognised other ‘principles’ which have proved significant for the interpretation of existing EU legislation in the area of contract law, notably, the principle of the autonomy (or independence) of national laws of civil procedure and ‘principles of civil law,’ including freedom of contract and recovery based on unjust enrichment.

As regards the CESL (if enacted), clearly the European Court as the ultimate arbiter of its interpretation is likely recourse to its existing interpretative techniques, but it also makes provision itself for its own interpretation. As regards its existing techniques, its multilingual nature may at times be used as a help to its interpretation,

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47 On these see T. Tridimas, The General Principles of EU Law (2nd edn., 2006), pp. 29 – 31 on their use as an aid to interpretation of EU law.

even though the work of the Expert Group on which the draft of CESL is based was 
conducted in English and its own feasibility study was drafted in English. Otherwise, 
though, there is something of a problem in identifying the purposes of the CESL’s 
provisions.

First, while the Proposal itself sets out in its recitals its overall purposes and to 
an extent at least explains the thinking of the Commission behind provisions within 
the Proposal’s own articles (the so-called *chapeau* of the Proposal), it does not 
attempt to explain any of the substantive provisions within the CESL. Moreover, 
there is very little published by the Commission as to the work of the Expert Group 
entrusted with the preparatory work (putting forward a ‘Feasibility Study’ for the 
CESL*) and nothing published as to the reasons why it adopted particular provisions 
or their wording or why, on occasion, the Commission decided not to follow its 
advice.

Secondly, the substantive legal background of the CESL itself differs 
significantly from the type of background provided for legislation enacted by national 
laws. For these purposes, a distinction can be drawn between those provisions in the 
CESL which reflect (or, sometimes, are closely related to) existing EU legislation 
(where existing case-law or scholarly commentaries would be helpful) and those 
which are not. In practice for this purpose, the provisions of CESL can be put in the 
following groups.

(i) provisions which are directly drawn from the *acquis*:*

provisions specifically governing consumer contracts; the provisions

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*The ‘operational conclusions’ of the Commission Expert group published by the Commission are 
not very revealing for these purposes, though they do set out the issues considered by the Group: see 
http://ec.europa.eu/justice/contract/stakeholder-meeting/index_en.htm

*To this category should also be added the provisions in CESL governing the non-conformity of the 
goods applicable to commercial as well as consumer contracts, which stem from Directive 99/44/EC on
governing interest on the late payment of debts;\textsuperscript{51} and the provisions governing electronic distance contracts.\textsuperscript{52}

(ii) provisions of ‘general contract law’

As regards all of the provisions in (ii), there is no case-law governing their interpretation.

However, this does not mean that there is no background to these ‘general contract law’ provisions. The work of the Commission’s Expert Group was based on the academic work of the Study Group for a Civil Code, whose provisions governing contracts within the \textit{Draft Common Frame of Reference}\textsuperscript{53} were themselves closely related to the provisions earlier set out by the \textit{Principles of European Contract Law}.\textsuperscript{54}

These fundamentally academic works set out in their notes how they relate to existing national laws and in their comments how they may apply in particular types of situation. Where a provision in the CESL can be seen to be closely related if not even identical to a provision in the PECL and/or the DCFR it is highly likely that the Advocates General of the European Court would refer to their accompanying notes and comments for the purposes of interpreting the provisions in CESL.\textsuperscript{55} Having said that, however, there are two important limitations on the possible usefulness of these annotations, quite aside from the presence in the CESL of some provisions which do not have any direct relationship with provisions in these earlier European contract law

\textsuperscript{51} Arts 166 – 167 CESL. The EU law background is concerned only with commercial debts: Directive 2011/7/EU on combating late payment in commercial transactions, recasting Directive 2000/35/EC.\textsuperscript{52} Art. 24 CESL.


\textsuperscript{55} Indeed, the European courts have already done so: \textit{Masdar (UK) Ltd v EC Commission} (T–333/03) [2007] 2 All E.R. 261 (Court of First Instance); \textit{Hamilton v Volksbank Filder eG} (412/06) A.G. Poires Maturo at [24] (referring to time limits for the exercise of a right as being a “principle common to the laws of the Member States” and citing the possible future DCFR).
provisions. First, there is a relative scarcity of explanation of the policy choices made by the groups responsible for drafting the provisions in question.\textsuperscript{56} In part, this is to be explained by a general sense of what was thought proper for legal scholars embarked on such an enterprise as the setting out of ‘principles of European contract law’ to refer to in the elaboration of their texts: reference was thought to be properly made to the different European national legal traditions but then, rather than looking for some common denominator or majority position, the groups sought to identify the ‘best solutions’ to the problems which they identified.\textsuperscript{57} However, the relative absence of explicit assessment of considerations of policy in relation to the content of these instruments means that the actual reasons why one approach is preferred in the text to another is unclear. This is important for present purposes since there is no genuine \textit{single} background legal tradition in contract law on which the European Court can draw for the interpretation of the provisions actually included within the CESL: there are, instead, several families of legal tradition and, within each family, contrasts of both policy and technique. This is not to deny that there are a number of common elements and even common historical strands within the national contracts laws of Europe – but, as often in law, the devil is in the detail, where here at least significant differences remain.

How, then, does the CESL seek to deal with the problem of its own interpretation? Its solution is both simple and radical. Article 4 CESL provides that:

1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.


2. Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.

Article 4 makes clear, adopting the position taken by the European Court as regards many provisions within existing EU law, that its provisions are to be interpreted ‘autonomously’, that is, a distinctly European and non-national position must be taken. For this purpose, a court must take account of its ‘objectives’ and ‘principles underlying it’. I have already explained that the identification of ‘objectives’ of particular provisions may sometimes be very difficult, but to a limited extent this is helped by the CESL itself expressly setting three ‘general principles’ in its first three articles to which, no doubt, a court would have recourse for the purposes of interpretation: freedom of contract, a ‘duty to act in accordance with good faith and fair dealing’ and an obligation of cooperation in performance of their contractual obligations. For the majority of English common lawyers, this approach to interpretation of a legal instrument is unfamiliar, but it reflects traditional continental European approaches to the interpretation of national civil law codifications.

(ii) Establishing the scope of the CESL

At this stage I wish to return to the problem of the delineation of the scope of the substantive regulation of the CESL. For, article 4’s reference to ‘issues within the scope of the Common European Sales Law but not expressly settled by it’ merely

58 Arts 1 – 3 CESL.
poses the question when silence on a particular issue of the CESL is to be read as meaning that the issue falls outside its scope and when is it to be read as meaning that its falls within this court’s duty of creative interpretation. If an issue falls outside the scope of the CESL, then it falls to be governed by the national law applicable; but if it falls within the scope of the CESL, then the court is required to construct a rule to deal with it. Here, there is something of a contrast with continental civil law codifications, as their aim is to be not merely ‘coherent and consistent’ but complete within their broad scope of the general regulation of civil law relations: there are no substantive issues left outside their scope, even though particular issues may be the subject of qualification or exceptions outside the code, whether by more particular codifications (such as those governing commercial relations or consumer protection) or ‘special legislation’.

The CESL is not, of course, a codification of the civil law; nor is it even a codified statement of the law governing contracts generally. Rather, it sets a group of rules specifically governing three types of contract (sale of goods, supply of digital content and contracts for the supply of related services) within a framework of the most prominent issues of ‘general’ contract law. Unlike a civil code or even a contract law code, it leaves out a number of general issues which it could have regulated, some of which were indeed governed by the PECL and/or the DCFR. Indeed, the Proposal’s recitals state that not all of the private law (or even contract law) issues arising between parties to a contract governed by the CESL are to be governed by the CESL. Recital 27 states that ‘the matters of a contractual or non-contractual nature that are not addressed’ in the CESL:

include legal personality, the invalidity of a contract arising from lack of
capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.\(^{59}\)

This list is not particularly long, but the implications of some of its members are not clear. I will give three examples.

(a) CESL and extra-contractual liability

The question whether and how the CESL governs or otherwise affects the non-contractual liabilities of parties to a contract who have chosen to use it is unclear. Recital 27 assumes that some non-contractual matters are within the scope of the CESL, but then excludes from its scope ‘the law of torts’. For these purposes, it should be noted that, very broadly, non-contractual obligations or liabilities can either be restitutionary (based on the need to reverse an unjust enrichment) or arise under the law of torts (which I shall term ‘extra-contractual liability’). Some ‘obligations to return what [the recipient] has received’ do fall within the scope of the CESL, as Part VII makes express provision for ‘restitution’ consequential on the avoidance or termination of a contract. No express provision is made there or elsewhere in the CESL for restitution consequential in other circumstances, notably, on the holding by a court that a contract term under which money has been paid (for example, a penalty

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\(^{59}\) Emphasis added.
clause or a variation of price clause) has been held unfair and ‘not binding’:

presumably, the court would be expected to apply the provisions in Part VII by analogy under its interpretative duty in article 4 CESL.

However, the position of extra-contractual liability is more complex. As earlier noted, a number of provisions in the CESL impose liability on the parties to a contract in respect of their pre-contractual behaviour. As a matter of national European laws, these liabilities are sometimes classified as contractual, sometimes as non-contractual and sometimes as a ‘tertium quid’, but under the EU private international law instruments they are seen as non-contractual and this classification appears to have been taken by the drafters of the Proposal, for (as earlier noted) its recitals assume the relevance to the question of the legal framework of the Rome II Regulation on non-contractual obligations and its provisions themselves appear to distinguish between ‘liability for loss caused by breach of duty’ (the terminology used as regards pre-contractual liabilities) and the remedy of damages for non-performance of a contractual obligation. This being the case, there would appear to be no provisions in the CESL governing the legal incidents of non-contractual liability in damages. Does this mean that these issues are outside the scope of the CESL?

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60 See art. (fraud, etc etc).
62 Rome II, art. 12 ‘culpa in contrahendo’.
63 See esp. art. 29(1) CESL.
64 Art. 106(1)(e) (buyer’s remedy of damages); art. 131 (1)(d) (seller’s remedy of damages); art. 155(1)(e) (remedies of customer in contract for related service contract). All these provisions then cross-refer to chap. 16 CESL concerned damages and interest. These are expressed in terms of the obligation, so art. 159 CESL provides that ‘[a] creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused. It is clear that the ‘obligations’ described whose non-performance gives rise to a claim for damages is contractual rather than non-contractual (see the definition of ‘contract’ as ‘an agreement intended to give rise to obligations or other legal effects’ (Proposal, art. 2(1)) and the heading of, e.g., Part IV ‘obligations and remedies of the parties to a sales contract or a contract for the supply of digital content’
Recital 26 provides that the CESL should ‘settle the sanctions available in case of the breach of all the obligations and duties arising under its application’, specifically including the grounds of invalidity of the contract in the context of which precontractual liability arises, but it may be difficult for a court to obey article 4’s interpretation injunction given that some of the provisions in Chapter 16 are not merely expressed in language which lends itself to extra-contractual liability, their rules seem inapposite to govern it without considerable adaptation. So, for example, the ‘general measure of damages’ in article 160 CESL is instantly recognisable as the ‘expectation interest’ or ‘performance interest’ measure (termed by German lawyers the ‘positive interest’) applicable to contract, but *not* to tort.\(^\text{65}\) While it may be possible to adapt this test to an extra-contractual claim for damages, for example, for fraud, in order to do so one would have to say that all the examples of pre-contractual liability are based on ‘breach of duty’, whereas some of them are so expressed, and some are not.\(^\text{66}\) Moreover, the test for remoteness of damage in Chapter 16 is recognisable as a contractual test: ‘the debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance’.\(^\text{67}\) Here, the difficulty is not the language of foreseen or foreseeable loss (which could be adapted for use for pre-contractual liabilities), it is the setting of the relevant time as being the ‘time when the contract was concluded’ rather than, as would be expected, the time when the breach of duty was committed. Moreover, it is unclear how the rules governing remoteness of damage would relate to the proviso in the provision which imposes liability in

\(^{65}\) There is no provision for an alternative reliance interest measure of damages for claims for non-performance of contractual obligations.

\(^{66}\) Liabilities for breach of information duties and for fraudulent non-disclosure are so expressed (arts 29 & 49(1) CESL respectively); claims for damages based on fraudulent misrepresentation (art. 49(1)), threats (art. 50) and unfair exploitation (art. 51) are not. The general provision in art. 55 ‘damages for loss’ is expressed neutrally.

\(^{67}\) Art. 161 CESL.
respect of these pre-contractual liabilities, that the person potentially so liability
‘knew or could be expected to have known of the relevant circumstances’.  

A further difficult aspect of the extent to which extra-contractual liability is
included within the scope of the CESL is found in relation to ‘product liability’. A
seller’s liability in damages to the buyer for the non-conformity with the contract of
goods sold is directly governed by the CESL, but two questions are less
straightforward. First, under the national laws of Member States a seller may be
liable extra-contractually either under legislation implementing the Product Liability
Directive of 1985 or under national extra-contractual liabilities other than based on a
defect of safety, which Member States were allowed to maintain after the coming into
force of this Directive. Given that recital 27 states that ‘the issue of whether
concurrent contractual and non-contractual liability claims can be pursued together
falls outside the scope of the Common European Sales Law’, it would appear that the
question whether a buyer can rely on such an extra-contractual liability rests with the
law otherwise applicable to the claim, rather than with the CESL. In terms of the
identification of this applicable law, express provision is made for ‘product liability’
in the Rome II Regulation and the first possibility countenanced in what is termed the
‘cascade’ of possible connecting factors is ‘the law of the country in which the
person sustaining the damage had his or her habitual residence when the damage
occurred, if the product was marketed in that country’. If this conflicts rule
identifies the law of a Member State as applicable, the Product Liability Directive

68 Art. 51, in fine.
69 Art. 87(1)(c) CESL. ‘Conformity of the goods’ is explained in art. 100 CESL.
administrative provisions of the Member States concerning liability for defective products (‘1985
Directive’).
71 This was expressly permitted by 1985 Directive, art. 13.
72 Rome II, recital 20.
73 Art. 5(1)(a) Rome II.
itself requires that the liability which it imposes exists whether or not there is a contract between the parties.\textsuperscript{74} However, the incidence and content of other ‘product liabilities’ would remain a matter for the (unharmonised) national laws otherwise applicable and may lead to difficulty. So, for example, the Product Liability Directive leaves open the possibility of claims against ‘producers’ and ‘suppliers’ on the basis of a ‘latent defect’ under the law of sale. In the French context, this has remained an important basis for the imposition of liability for products, not merely as between the parties to contracts of sale, but also to sub-buyers by what is termed ‘action directe’.\textsuperscript{75} For French law, the sub-buyers’ claims are ‘necessarily contractual,’\textsuperscript{76} but the European Court has held that they are ‘non-contractual’ for the purposes of the Brussels Convention of 1968\textsuperscript{77} and would be most likely to hold them non-contractual for the purposes of applicable law, falling within article 5 Rome II’s provisions on ‘product liability’. Again, therefore, any such claims would remain entirely unaffected by the CESL scheme and would fall outside its scope.

On the other hand, article 78 CESL recognises that the possibility of rights under the contract of sale being granted to a ‘third party’ by the parties to the contract, ‘the nature and content of the third party’s right [being] determined by the contract.’\textsuperscript{78} This article provides that the rights and remedies for the third party are ‘the same’ ‘as if the contracting party was bound to render the performance under a contract with the

\textsuperscript{74} So, for example, in French law the general rule is that a party to a contract cannot claim on the basis of an extra-contractual liability against the other party to the contract (\textit{la règle de non-cumul des responsabilités contractuelle et délictuelle}), but the 1985 Directive caused the French legislation implementing it to make express provision to the contrary: art. 1386-1 C. civ. (as inserted by \textit{loi} no. 98-389 of 19 may 1998).


\textsuperscript{77} Case C-26/91 Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS).

\textsuperscript{78} Art. 78(2) CESL.
third party’;\textsuperscript{79} it also provides that the third party may reject the right so conferred on him by notice, as long as this is done before it has been expressly or impliedly accepted.\textsuperscript{80} So, for example, a person (the ‘customer’) asks an SME retailer to order goods from a particular manufacturer, the SME indicating this fact, and the goods later prove ‘defective’ and cause loss or harm to the customer. Here, the consumer/SME could be seen as a ‘third party’ to the contract of sale between the manufacturer and the retailer under article 78 CESL or as a claimant under the relevant ‘product liability’ law governing his or her claim as identified by the Rome II Regulation.\textsuperscript{81} For this purpose, and despite recital 27’s statement that the question of the concurrence of claims in contract and tort is not within the scope of CESL, the third party’s right of rejection under article 78 CESL allows the customer/third party to reject the contractual claim (under CESL) and claim instead under the extra-contractual ‘product liability’ claim.

(b) ‘Illegality and immorality’

Recital 27 of the Proposal excludes from the scope of the CESL invalidity arising of a contract arising from illegality or immorality. So, a simple example as regards sale of goods falling within this exclusion would concern the types of goods considered to be \textit{res extra commercium}, but there are a number of more difficult questions arising from the law of illegality, notably, as to the categories of illegality of purpose and their effects. Recital 27 seeks to exclude these altogether from its scope and thereby

\textsuperscript{79} Art. 78(3)(a) CESL.
\textsuperscript{80} Art. 78(4) CESL.
\textsuperscript{81} This puts aside the possibility that the retailer could be seen as the agent of the customer for these purposes: but the law of agency (‘representation’) does not fall within the scope of the CESL: recital 27. It is to be noted that art. 78 CESL makes no requirement as to the character of the third party, whether consumer or SME.
would place them within the law otherwise applicable under Rome I, either on the basis of the parties’ choice or the usual default rule which identifies the law of the habitual residence of the seller. However, as earlier noted, the application of this applicable law may sometimes be ousted by article 9(3) Rome I governing ‘overriding mandatory provisions,’ which allows a court to give effect to ‘the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.’ As a result, where a contract is governed by the CESL, the questions of illegality and immorality of a contract (and their effects) could be governed either by the applicable law (the law chosen by the parties or the law of the seller’s habitual residence) or by the law of the contract’s performance. The exclusion of invalidity of the contract on the ground of illegality and immorality from the scope of the CESL therefore leaves existing uncertainties in place.

(b) ‘Civil procedure’

My third example of a difficult question as to the scope of the CESL concerns the relationship of its rules to the laws of civil procedure of the forum. This is not addressed by the recitals nor the text of the Proposal, but both the Rome I and Rome II Regulations (following classic private international law) exclude from their scope ‘evidence and procedure’ while making provision as regards ‘burdens of proof.’ In principle, therefore, issues of ‘civil procedure’ would remain for the law of the forum. However, in the area of EU consumer law, the line between harmonised EU law and

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82 Art. 4(1)(a) Rome I (the qualifications are found in arts 4(3) & 4(4) Rome I).
83 Art. 9(3) Rome I.
84 Art. 1(3) & 18 Rome II: art. 1(3), arts 21 & 22 Rome II.
unharmonised national procedural law has proved a difficult one in recent years, especially in relation to the question when a court must raise issues of consumer protection law of its own motion and with what consequences. As I have argued elsewhere, it would undermine the effectiveness of the consumer protection provisions in the CESL if a court were able to take a different view of this question in applying the CESL. If it were to follow its existing context in the context of the consumer *acquis*, the European Court would require a national court to raise of its own motion any provisions of the CESL protecting consumers.

A rather different line between substance (for the CESL) and procedure (for the law of the forum) may be found in the case of enforcement mechanisms for court orders. Under the CESL, a buyer’s first remedy is to ‘require performance, which includes specific performance, repair or replacement of the goods or digital content’. While the availability of this remedy is qualified by later rules, the question arises as to how in practice it is to be enforced. Here, the position across the EU differs considerably. So, in English law a court order for specific performance of a contract (when granted) is supported by the law of contempt of court, itself backed by the sanctions of imprisonment, unlimited fine or sequestration of assets. By contrast, in French law, in principle a court may impose instead fixed monetary payments for each day, week or month of non-performance of the court order (*astreintes*): these are to be fixed at a level which should encourage the litigant to obey the order, but are not backed by a power similar to committal for contempt. This therefore serves as an

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86 Whittaker, op. cit. n. 00.

87 Art. 106(1)(a) CESL.

88 Arts 110 – 112 CESL.
example of the sort of legal issue which remains determined by national laws, whether under the CESL or under harmonised private international law: the practical effect of remedies provided by the CESL or a law chosen by the parties or identified by private international law default rules still includes elements of the law of the forum.

(iii) Examples of determining the scope of European instruments

Before leaving this discussion, I wish to consider two situations in which the European Court has already determined issues of the scope of existing secondary legislation (directives and regulations).

First, the majority of EU directives affecting contract law require only ‘minimal harmonisation’ and this means that, in principle, they permit national legislatures to go further in their implementation than the directive requires. This is true of a good deal of the consumer acquis and also the two principal examples of directives affecting commercial contracts.\(^89\) This does not mean that the directives do not have issues of scope, but generally speaking in implementing these directives Member States have either set out the legislation in a way which follows the European scheme precisely (known in the UK context as ‘copy-out’) or has sought to avoid difficulties and ambiguities of scope (as well as issues of fit with existing national laws) by extending the ambit of the European rules (known in the UK context as ‘gold-plating’). The former leaves issues of the scope of the legislation for the courts; the latter are held lawful as within the power expressly provided to do so by the directives themselves.\(^90\)

\(^{89}\) See Directive 2011/7/EU on combating late payment in commercial transactions art. 12(3) (more protective measures for commercial debtors permitted).

\(^{90}\) E.g. Case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) (in relation to art. 4(2) of the Unfair Terms in Consumer Contracts
On the other hand, where a directive is expressed or is interpreted as creating ‘complete harmonisation’, its scope becomes more pressing. A good example of this may be found in the Product Liability Directive of 1985 which was held by the European Court in 2002 to require ‘complete harmonisation’ within its scope principally on the ground that the purpose of the directive was to avoid the distortion of competition and the effect on the internal market caused by differing rules on producer liability. The 1985 Directive imposes liability not merely on manufacturers (‘producers’) but also on mere suppliers, but in the latter case allows them to avoid liability by identifying the producer or their own supplier within a reasonable time. Under its implementing legislation, however, France imposed liability on suppliers without these possibilities of escape (following earlier national case-law and a political concern to protect the victims of products). In this respect, the European Court held that France was in breach of the ‘complete harmonisation’ required by the Directive by imposing a liability on suppliers more onerous than set out by the Directive. On the other hand, the ‘damage’ recoverable under the European product liability regime is restricted to personal injuries and death and to damage to property other than the product itself (where recovery is excluded), where the property ‘is of a type ordinarily intended for private use or consumption’ and ‘was used by the injured person mainly for his own private use or consumption.’ France had not restricted its implementing legislation in this way but had allowed recovery for damage to property (as for other types of harm) in all circumstances, following a national

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91 Directive 1993); Case C-453/10 Pereničová v SOS finance, spol. sro paras (in relation to art. 6(1) of the same directive).
93 Art. 3(3) Directive.
94 Art. 9(b) Product Liability Directive.
principle of ‘full reparation’. Having noted its previous case-law holding that the 1985 Directive creates ‘complete harmonisation’ but only within its scope of application, the European Court held that the provision defining the ‘damage’ recoverable defined the scope of the Directive, with the result that Member States are free to impose liability on whatever basis on producers or suppliers for harms falling outside the situations set out in this definition. So, restrictions on the conditions of liability of suppliers fall within the scope of the Directive (and its full harmonisation), but the conditions on the damage recoverable do not. This distinction is difficult to explain from the perspective of the purposes of the 1985 Directive as identified by the Court itself.

However, it may be thought that this example is inapt to explain the likely approach of the European Court to an instrument of the breadth of the CESL. Perhaps, therefore, a better example of the sort of difficulties which would need be faced may be found as regards the EU private international law instruments, whose ambit is much broader. For this purpose, the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments offers a number of useful examples, some of which may be directly helpful in explaining some of the provisions of the CESL. Inter alia, the Brussels I Regulation seeks to ‘unify the rules of

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95 Art. 1386-2 al. 2 C. civ. The principle is known as le principe de la reparation intégrale.
96 Case C-258/08 Moteurs Leroy Somer v Dalkia France paras 24 & 25.
97 Ibid. at para. 30.
98 Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’).
99 One example could be found in exclusion found in the definition of ‘sales contract’ in art. 2(k) Proposal of ‘contracts for sale on execution or otherwise involving the exercise of public authority’. This exclusion is evocative of the interpretation given to the restriction of the Brussels Convention/Brussels I Regulation to ‘civil and commercial matters’ following its decision in Case 29/76 LTU Lufttransportunternehmen GmbH & Co KG v. Eurocontrol [1976] ECR 1-1541.
conflict of jurisdiction\textsuperscript{100} in ‘all the main civil and commercial matters apart from certain well-defined matters’.\textsuperscript{101}

One of the exclusions from the scope of the Brussels I Regulation provides that ‘[t]he Regulation shall not apply to … arbitration’.\textsuperscript{102} Despite this apparent clarity, as Magnus and Mankowski observe, ‘the exclusion of proceedings concerning arbitration matters from the Regulation has given rise to considerable difficulties in Member States’.\textsuperscript{103} Writing in 2007, they note a ‘division of opinion between the Member States on the width of the exception’ visible in the Schlosser Report (an official academic explanatory memorandum)\textsuperscript{104} and the later apparently very wide interpretation given to the exclusion in \textit{Marc Rich},\textsuperscript{105} where the European Court declared that the intention of article 1(2)(d) was ‘to exclude arbitration in its entirety including proceedings brought before national courts’.\textsuperscript{106} However, in 2009 (to the grave disquiet of London commercial lawyers), in \textit{West Tankers} the European Court held that this exclusion did \textit{not} apply so as to allow the grant of an anti-suit injunction granted by the English High Court against proceedings in Italy brought in breach of a clause providing for arbitration in London.\textsuperscript{107} Instead, the Court held that, while the anti-suit proceedings themselves did indeed fall within the exclusion owing to their subject-matter,\textsuperscript{108}

Even though proceedings do not come within the scope of [the Brussels I Regulation], they may nevertheless have consequences which undermine its

\textsuperscript{100} Recital 2.
\textsuperscript{101} Recital 7.
\textsuperscript{102} Art. 1(2)(d) Brussels I.
\textsuperscript{105} Case C-190/89 \textit{Marc Rich} [1991] ECR I-3855 (applying the exclusion to legal proceedings the subject-matter of which is arbitration).
\textsuperscript{106} Case C-190/89 para. 18.
\textsuperscript{107} Case C-185/07 \textit{Allianz SpA v West Tankers Inc.} Para. 23.
effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it [by the Regulation].\textsuperscript{109} The question of the validity of the arbitration agreement fell within the jurisdiction of the court seized of the claim otherwise available under the Regulation,\textsuperscript{110} and, in the European Court’s view, this means that national court must be allowed to consider its own jurisdiction in the light of its view of this validity.\textsuperscript{111} Allowing an anti-suit injunction ‘also runs counter to the trust which the member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under [the Regulation] is based.’\textsuperscript{112} Whatever one thinks of the substance of this result, it can be seen that what at first appears to be straightforward exclusion can be nuanced by reference to the purposes and principles of the uniform legislation in question. This, in turn, has led to a further legislative proposal to reform the Brussels I Regulation so as to deal more satisfactorily with the relationship between the EU regulation of international litigation and international arbitration.\textsuperscript{113} 

The purpose of this discussion has been to explain why questions of the scope of an instrument as wide-ranging as the CESL are going to be both complex and difficult to resolve without recourse to litigation ultimately before the European Court. The legal costs involved with the resolution of these questions of scope would normally arise only after a trader had decided to use the CESL to govern its

\textsuperscript{109} Para. 24.
\textsuperscript{110} Here, art. 5(3) ‘
\textsuperscript{111} Para. 26 – 27.
\textsuperscript{112} Para. 30.
\textsuperscript{113} See Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) Com (2010)748final, p. 3 (‘the interface between arbitration and litigation needs to be improved’) and see also at para. 3.1.4.
cross-border contracting and faces a dispute. Many traders faced with the question whether an issue under dispute falls within the CESL or under the law otherwise applicable may choose to settle without litigation and, while commercially sensible, this would delay the clarification of the law through judicial ruling. Here, therefore, we find a different kind of ‘legal discovery costs’ from the ones envisaged by the Commission in its Proposal.

4. National judicial evaluations

Under existing EU harmonising legislation, the role of the European Court is to provide authoritative interpretations of the law and this is enabled by the system of ‘preliminary rulings’ under which national courts ask the Court questions on the proper interpretation of EU legislation. However, the finding of facts and the application of the law so interpreted by the European Court remains in principle for national courts. Put simply, this means that the line between law and fact is also the line between the proper role of the European Court and of national courts.

In many situations the line between law (and its interpretation) and fact (and its application) is fairly straightforward, but it becomes rather less so in the context of the interpretation and application of complex legal norms or standards. Here, in principle, the Court leaves the ‘assessment of facts’ (including what I would term their characterisation in legal terms) to national courts, although sometimes it will provide ‘guidance’ to a national court as to how to go about applying the legal

114 Art. 267 TFEU.
interpretation which it has provided in response to a request for a preliminary ruling.\textsuperscript{115}

The general position may be well illustrated from the approach of the European Court to its role in relation to the assessment of unfair terms under the Directive on unfair terms in consumer contracts 1993.\textsuperscript{116} This composite standard sets out a basic test where ‘contrary to the requirement of good faith, [a term] causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’\textsuperscript{117} and then sets out a number of factors which are to be taken into account\textsuperscript{118} and an ‘indicative list’ of terms which may be unfair.\textsuperscript{119} In an early case, in \textit{Océano Grupo Editorial} a national court asked whether it was empowered under EU law to consider the fairness of a national jurisdiction clause in a consumer contract of its own motion; the European Court replied that it had such a power and added that such a clause ‘must be regarded as unfair’ under the test of unfairness in the Directive where it set the jurisdiction as being the place of business of the trader far away from the domicile of the consumer.\textsuperscript{120} However, when in \textit{Freiburger Kommunalbauten GmbH} \textsuperscript{121} the European Court was asked directly by a national court to decide whether a clause in the consumer contract before it was unfair within the meaning of the 1993 Directive, it refused to do so, noting that:

\textsuperscript{115} See, e.g. Case C-366/98 \textit{Geffroy} paras [18] – [20] (the Court explaining ‘misleading labelling’); Case C-358/08 \textit{Aventis Pasteur SA v OB} paras 50 – 64 (the Court giving elaborate guidance as to the application of ‘putting into circulation’ of a product in the context of supply by a parent and affiliate company for the purposes of foreclosure of liability under the Product Liability Directive).
\textsuperscript{116} Another example may be found in the assessment of the ‘defect’ in a product for the purposes of the Product Liability Directive: see Whittaker, \textit{Liability for Products}, pp. 492 – 494.
\textsuperscript{117} Art. 3(1) Unfair Terms in Consumer Contracts Directive 1993.
\textsuperscript{118} Ibid., art. 4.
\textsuperscript{119} Ibid. art. 3(3).
in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Art.3 of the [1993] Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.\footnote{122}{[2004] 2 C.M.L.R. 13 at [19]–[21].}

Given the range of factors which the Directive requires to be taken into account in assessing the fairness of a contract term “the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”\footnote{123}{[2004] 2 C.M.L.R. 13 at [21].} So, while the European Court:

may interpret general criteria used by the Community legislation in order to define the concept of unfair terms . . . it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.\footnote{124}{[2004] 2 C.M.L.R. 13 at [22] distinguishing (at [23]) Océano Grupo Editorial SA v Murciano Quintero [2000] E.C.R. 1–4941 on the basis that the clause there satisfied all the criteria necessary for it to be judged unfair without consideration of all the circumstances in which the contract was concluded or the advantages and disadvantages which the term would have under the applicable national law.}

As a result, it is generally for a national court to decide whether a contract term is unfair within the meaning of art.3(1) of the Directive.\footnote{125}{[2004] 2 C.M.L.R. 13 at [25]. See also Mostaza Claro v Centro Móvil Milenium SL (C–168/05) [2006] ECR I-10421 at [22]–[23].} It may be added that this purely legal analysis is needed as a matter of the practicalities of judicial administration,\footnote{126}{See A.G. Geehoed’s Opinion para. 29 in Case C–237/02 observing that “[t]his is not merely a question of the clear demarcation of powers as between the Community and the Member States, but also one of the economical use of legal remedies. Given the general nature of the term ‘unfair’, the multiplicity of terms, both as regards form and content, which currently appear in consumer agreements could give rise to continual references for preliminary rulings.”} as the European Court of Justice is not organised to consider the

\footnote{122}{[2004] 2 C.M.L.R. 13 at [19]–[21].}
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\footnote{126}{See A.G. Geehoed’s Opinion para. 29 in Case C–237/02 observing that “[t]his is not merely a question of the clear demarcation of powers as between the Community and the Member States, but also one of the economical use of legal remedies. Given the general nature of the term ‘unfair’, the multiplicity of terms, both as regards form and content, which currently appear in consumer agreements could give rise to continual references for preliminary rulings.”}
number of cases which would be generated if it sought to decide whether particular
terms in particular contracts were or were not unfair within the meaning of the
Directive. This approach has been followed on a number of occasions by the
European Court which has emphasised that the application of this test requires
consideration of ‘the facts of each particular case’, so that, notably, even the finding
by a court of the commission of an ‘unfair commercial practice’ in using a standard
term does not in itself mean that the term is ‘unfair’ within the meaning of the 1993
Directive.\textsuperscript{127}

This division of function between the European Court and national courts has
important implications for the extent to which the uniformity intended by the CESL
would be reflected in a uniformity of application throughout the courts of the EU. In
the case of the regulation of unfair contract terms itself,\textsuperscript{128} it is true that one of the
reasons why the task of assessment falls to national courts under the 1993 Directive
(the need to consider the national legal context of the clause) does not apply under the
CESL (which provides at least much of the legal context for the terms), but in my
view this is not likely to mean that the European Court would take upon itself
decision-making as to whether or not a particular clause would or would not be unfair
in the circumstances.\textsuperscript{129} The most which it is likely to do is to provide guidance to
national courts as to the factors which it should take into account given the

\begin{itemize}
\item \textsuperscript{127} See Case C-453/10 \textit{Pereničová v SOS finance, spol. sro} at para. 46 and see at para. 44 referring to
\textit{Freiburger Kommunalbauten} and intervening caselaw.
\item \textsuperscript{128} The general test of unfairness of terms in consumer contracts in the CESL is modelled closely on the
test in the 1993 Directive (art. 83 CESL) although it is supplemented by two sets of lists of terms
which are either deemed unfair in all circumstances or presumed to be unfair unless the contrary is shown (arts 84 & 85 CESL).
\item \textsuperscript{129} Cf. H.-W. Micklitz & N. Reich, \textit{The Commission Proposal for a “Regulation on a Common
European Sales Law (CESL)” – Too Broad or Not Broad Enough?” EUI Working Paper Law 2012/04,
para. 47 who argue that ECJ would not follow its caselaw in \textit{Freiburger Kommunalbauten} following
which the ECJ cannot interpret the general clause of Art. 3 of the [1993 Directive], because it requires
an assessment of Member State contract law’.
\end{itemize}
circumstances as revealed from the preliminary reference.\textsuperscript{130}

However, this caselaw has important implications for other evaluative concepts or norms within the CESL, of which the most prominent is ‘good faith and fair dealing.’ There is not space here to consider all the implications of use of this concept in the CESL, but, as already noted, it is set as the content of a duty by way of ‘general principle’ and it is also used as part of other tests or rules:\textsuperscript{131} a broad duty of information in commercial contracts;\textsuperscript{132} ‘not pointing out relevant information’ in the context of avoidance on the ground of mistake\textsuperscript{133} and ‘fraudulent non-disclosure’ (in both of which ‘good faith and fair dealing’ is explained further)\textsuperscript{134}; contractual interpretation\textsuperscript{135} and the implication of contract terms.\textsuperscript{136} ‘Good faith and fair dealing’ is defined by the CESL as:

‘a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.’

In my view, this definition serves only to emphasise how open is the ‘standard of conduct’ thereby required.\textsuperscript{137} While the \textit{Freiburger Kommunalbauten} caselaw reserves for the European Court a role in the interpretation of the criteria of this standard, given the content of this definition it is very likely to leave the understanding of these concepts as well as their application to the facts to national

\begin{footnotes}
\item[130] See above, n. 00.
\item[131] Unlike the Feasibility Study art. 27(2), there is no duty to negotiate in accordance with good faith and fair dealing in the CESL. Unlike the Feasibility Study (arts. 91 & 92), the CESL’s provisions on excused non-performance and on change of circumstances make no reference to good faith and fair dealing: see arts. 88 & 89 CESL respectively.
\item[132] Art. 23(1) CESL. Cf. the more specific approach drawn from the \textit{acquis} for consumer contracts: arts 13 – 20 CESL.
\item[133] Art. 48(1)(b)(iii) CESL.
\item[134] Art. 49(1) & (3) CESL.
\item[135] Art. 59(h) CESL.
\item[136] Art. 68(1)(c) CESL.
\item[137] See also Proposal, recital 31.
\end{footnotes}
courts. What is more interesting is the extent to which different significances will be given to ‘good faith and fair dealing’ either by the European Court or by national courts depending on the particular normative contexts in which it is used.

How does this discussion relate to the question of the costs of the operation of the CESL? First, the breadth of the general principle of good faith and fair dealing and its very open-textured nature lead to considerable uncertainty and, in my view, therefore room for legal argument once a dispute between the contracting parties arises. In particular, it is not uncommon for disputes between commercial parties to turn on or at least involve different perceptions between them as to what ‘good faith’ required or requires of them in the circumstances. Secondly, however, good faith and fair dealing does not merely give rise to the costs typically associated with legal uncertainty and unpredictability. The division of function between the European Court and national courts suggests that much of the substantive impact of ‘good faith and fair dealing’ will be worked out by national courts in the light of the facts as they find them and their perception of the right and wrong of the matter: what English judges sometimes refer to as ‘the merits’. Now, it is true that, unlike English law, most continental civil laws already contain a very general principle of good faith in contracts, but this communality of sources or conceptual approach does not mean that the different laws either use the concept for the same purposes nor even understand what it requires in the same way where they do use it for the same purposes. In understanding the impact of ‘good faith and fair dealing’ national judges are likely to draw on their own experience of its requirements in the national context, especially given that this experience will continue in their decision-making under their ‘1st regimes’ of contract law. If this is true, in practice a trader contracting cross-border

138 Whittaker and Zimmermann ‘Coming to terms with good faith’ in Good Faith in European Contract Law pp. 690 – 694.
under the CESL will need to understand the likely practical effect of ‘good faith and fair dealing’ in the courts likely to be seized of any dispute: local legal knowledge would remain important for cross-border trade.