

THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW (CESL) AND ITS GRADUAL EVOLUTION

GIACOMO PONGELLI

Abstract: A fundamental step in the process of establishing a private European law in the matter of contracts is marked by the “Proposal for a Regulation on a Common European Sales Law” (CESL) of 11.10.2011. Not only because of the key-role of sales law as opposed to other contractual models, but also because the proposal disciplines different profiles (such as the conclusion of the contract and formal requirements, the interpretation, the right of withdrawal, the avoidance of the contract resulting from mistake, fraud or threat) that are not peculiar to sales but pertain mainly to contracts in general terms...

SUMMARY: 1. Content and purpose of the present paper. - 2. The CESL in the evolutionary process of European private law. - 3. The role and scope of the CESL. - 4. Field of objective implementation. - 5. Field of subjective implementation. - 6. The implemented normative method: a regulation that introduces an optional law. - 7. Relationships between the CESL and the national laws of each Member State. Coordination and integration profiles.

I. CONTENT AND PURPOSE OF THE PRESENT PAPER.

A fundamental step in the process of establishing a private European law in the matter of contracts is marked by the “Proposal for a Regulation on a Common European Sales Law” (CESL) of 11.10.2011.¹ Not only because of the key-role of sales law as opposed to other contractual models, but also because the proposal disciplines different profiles (such as the conclusion of the contract and formal requirements, the interpretation, the right of withdrawal, the avoidance of the contract resulting from mistake, fraud or threat) that are not peculiar to sales but pertain mainly to contracts in general terms.²

The proposal is the result of the strongly felt need to overcome the differences between individual national contract laws, which hinder the growth of

¹ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final.

² See Castronovo C., “Sulla proposta di regolamento relativo a un diritto comune europeo della vendita”, *Europa e diritto privato*, 2012: 293, which foresees that the prescriptive range of the dispositions will go beyond the field of the sales contract, and that it is possible to suppose its implementation in other types of contract and different obligations compared to those coming from trade. Cf. also, Castronovo C., “Codice civile e diritto europeo”, *Europa e diritto privato*, 2012: 687, where it is stated that the proposal has to be considered as a reduction to the scope of the Draft Common Frame of Reference, which aims to create a European Contract Code.

the European market. The proposal, however, does not constitute a point of arrival: the recent draft report to modify the CESL, issued by the European Parliament on 18.02.2013³, presented amendments to many articles of the proposal. This shows that the debate is still open and involves both the structure and the content of the proposed regulation.

The present paper will analyze the basic structure, features, role and field of implementation of the regulation, without going into the specific content of the CESL. This paper, indeed, is focusing on the initial general principles of the proposal (*chapeau rules*), when the dispositions of the CESL are included in Annex I, entitled Common European Sales Law. According to the modifications suggested in the European Parliament's draft report, that kind of separation confuses and should be removed, and the general principles and Annex I merged into one consolidated and integrated instrument.⁴

II. THE CESL IN THE EVOLUTIONARY PROCESS OF EUROPEAN PRIVATE LAW.

In analyzing the various stages of European private law evolution, it is necessary to distinguish between, on one side, the existing regulations that constitute a nucleus shared by the different Member States (best known as *acquis communautaire*) and that essentially established themselves in the consumeristic field through laws issued for single areas and, on the other, the projects developed by groups of researchers, which were aimed at defining a European law in the private and contractual field, through principles, or through an accurate normative framework.

³ European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013, COM(2011)0635 – C7-0329/2011 – 2011/0284(COD).

⁴ In the European Parliament Draft Report, a set of amendments aims to merge the “*chapeau rules*” with the Annex I regulation. According to the EU Parliament considerations, the division into regulation and annex seems to have created confusion and does appear unnecessary.

Compared to these previous experiences, the proposal for a regulation on the CESL can be considered to possess features of absolute innovation.

With regard to consumeristic legislation, the EU directive has been the main legal instrument employed. This instrument, based upon the principle of minimum harmonization, established a minimum and essential threshold for consumer protection, which enables Member States to guarantee a higher level of protection. This process has left space to afford the single Member States discretion in implementing new directives, so that, even in areas where the EU has intervened, there are different laws operating in the different national legal systems.⁵ Consumers are, therefore, granted more protection within Member States.

To overcome these inconsistencies and to fill the normative gaps, space has been left for a revision of the *acquis* by the EU in the matter of consumerism. This has led to the "*Proposal for a Directive of the European Parliament and of the Council on consumer rights*" of 10.08.2008.⁶ This proposal, influenced by the principle of maximum harmonization, was meant to reconsider and define the eight main directives in the consumeristic field more precisely and within an organic framework. Unfortunately, it was significantly downsized at the second stage, with the final version⁷ concerning only four directives. In particular, Directive 2011/83/EU on consumer rights considers directives concerning distance contracts (97/7/EC), contracts negotiated away from business premises

⁵ Bianca C. M. "Progressive Codification of European Private Law", *An Academic green Paper on European Contract Law*. Eds Grundmann S. & J. Stuyck. Kluwer Law International, 2002, 135, which highlighted how «directives can only assure similar rules whereas Europe must try to reach not similar, but common rules».

⁶ Proposal for a Directive of the European Parliament and of the Council on consumer rights, 08 October 2008, COM(2008) 614 final. This proposal, as indicated in the "explanatory memorandum", had the essential goal of creating a «single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps».

⁷ Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in *Official Journal of the European Union*, 22 November 2011, L 304/64.

(85/577/EEC), unfair terms in consumer contracts (93/13/EEC), and guarantees in the sale of consumer goods (99/44/EC). But its main focus are the first two directives, which it basically replaces.⁸

The lack of a common private legal regulation is an obstacle for cross-border sales of goods and services inside the EU, because the diversity of each national contract law system causes increased expenses and means legal uncertainty for both companies and consumers. Small and medium-sized enterprises (SMEs) with limited resources are generally reluctant to operate outside the national borders, because it means facing different legal systems and foreign national laws that are rarely translated into other languages: laws that would be impossible to understand without the help of legal counsel with specific knowledge of the particular legal system in question.

This situation is a major obstacle to cross-border transactions and limits trade competition among Member States to the detriment of the general interest and the consumer category.⁹

Hence, the so-called “minimum harmonization” is not able to create an efficient, competitive, or dynamic European market. A common legal system is needed to fulfill such goals, which is where the proposal on the CESL comes into play because, by using the normative instrument of the regulation instead of that of the directive, uniform and directly applicable rules can be imposed on Member States.¹⁰

⁸ See Pardolesi R. et al., “La direttiva sui diritti dei consumatori (direttiva 25 ottobre 2011 n. 2011/83/UE)”. *Foro It.*, V, 2012: 177., in particular, see Pardolesi R. “Contratti dei consumatori e armonizzazione: minimax e commiato?”. *Foro It.*, V, 2012: 177.

⁹ See the Green Paper by the Commission on policy options for progress towards a European contract law for consumers and businesses, 01.07.2010, COM(2010) 348 final.

¹⁰ See Galgano F. “Dai Principi Unidroit al Regolamento europeo sulla vendita”, *Contr. e impr. Eur.*, 2012: 1, special edition - *Trenta giuristi europei sull'idea di codice europeo dei contratti*, 3. The article shows how the proposal of 11.10.2011 is basically identical, apart from the different title, to that known as the European Contract Law, developed by the European Community, last version of which dates back to 19.08.2011.

The proposal to implement a regulation constitutes the first, concrete possibility to create a European contract law, as detailed in the Green Paper of the European Commission of 01.07.2010.

The proposal is fundamentally based on the whole of the principles and the rules developed in a European context through the experience of consumeristic legislation, but it has strong innovative profiles, as the intended transition from consumer to general trade market protection, as seen in its entirety.

The proposal is also defined by its dealing with a specific area: sales contracts. Projects from the academic world so far have ambitiously aimed at dictating a uniform regulation concerning European private law in much broader terms,¹¹ and they inevitably faced the insuperable obstacles caused by the level of patriotism and nationalism of certain states, especially France, that did not want to relinquish their own civil law.¹²

Among the most significant projects necessary to mention, from the most ancient to the most recent, are the “Principles of European Contract Law” (PECL)¹³ by the Commission led by Ole Lando and Hugh Beale; the “Acquis Principles” (ACQP)¹⁴; the “Draft Common Frame of Reference” (DCFR)¹⁵,

¹¹ An important example in that case is the project for a European contract law, “*Code européen des contrats*”, developed by the Academy of European Private Lawyers, coordinated by G. Gandolfi, who chose the Italian Civil Code as the model to follow.

¹² Concerning the theme of the relationship between the European law and the national identities, following the idea of “unity” in “diversity”, see Perlingeri P. “Diritto comunitario e identità nazionali”, *Rass. dir. civ.*, 2011: 530 .. The author states that the major differences between the various European legislation are not only of a technical nature, but also of values and principles. On this point, see also Perlingeri P. *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Naples: ESI. 2006: 266; Grossi P. *L'Europa del diritto*, Roma:Laterza, 2007:23.

¹³ The PECL was published in three parts, respectively one in 1995, one in 2000 and one in 2003. For the first two parts, see Lando O. & H. Beale, Commission on European Contract Law, *Principles of European Contract Law. Parts I and II*. The Hague/London/Boston: Kluwer Law International, 2000.

¹⁴ Research Group on the Existing Ec Private Law (ACQUIS GROUP). *Principles of Existing EC Contract Law (Acquis Principles). Contract I*, Sellier, 2007; Id. *Principles of Existing EC Contract Law (Acquis Principles). Contract II*, Sellier, 2009. The Acquis Group set its own goal to reorganize the existing European Contract Law of consumeristic formation, deriving from the European Directives, to create a general common Contract law.

carried out by the study group coordinated by Christian Von Bar; and the publication in May 2011 of the results of the feasibility study on the European contract law led by a group of experts chosen by the EC,¹⁶ with the contribution of stakeholders representing the categories affected by the normative rules.¹⁷

In doctrine, see De Cristofaro G., ed, *I "principi" del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo*, Turin: Giappichelli, 2009, in particular see by Schulze R., "I Principi Acquis. Situazione attuale e prospettive future della ricerca", and the *Introduction* by the same curator. See also Schulze R., "Principi sulla conclusione dei contratti nell'acquis communautaire". *Contratti e impresa Europa*, 2005: 404 .. In criticism, see Jansen N. & R. Zimmermann, "Grundregeln des bestehenden Gemeinschaftsprivatrechts?" *Juristenzeitung*, 2007: 1113.

¹⁵ Von Bar C. & E. Clive, H. Shulte-Nölke *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Munich: GmbH, 2009.. With regard to the DCFR, in doctrine see, in particular, Alpa G. & P. Zatti et al., *Il Draft Common Frame of Reference del diritto privato europeo*, Padova: Cedam, 2009; Meli M. "Armonizzazione del diritto europeo e Quadro Comune di Riferimento". *Europa e diritto privato*, 2008:59 .. Gambaro A. "La riforma del diritto italiano delle obbligazioni e dei contratti nella prospettiva del diritto europeo", *Rivista di diritto civile*, 2006, I, 27 .. For an analysis of the relationship between the DCFR and the Acquis Principles, cf. Pasa B., "The DCFR, the ACQP and the Reactions of Italian Legal scholars", *European Review of Private Law*, 2010, 227 .. Alpa G. & G. Conte, "Riflessioni sul progetto di Common Frame of Reference e sulla revisione dell'acquis communautaire" *Riv. dir. civ.*, 2008, I, 141; Castronovo C. "Quadro Comune di Riferimento e acquis comunitario: conciliazione o incompatibilità?", *Europa e diritto privato*, 2007: 275 ..

¹⁶ European Commission Decision 2010/233/EU of 26 April 2010, setting up the 'Expert Group on a Common Frame of Reference in the area of European Contract Law', *Official Journal of the European Union*, 27.04.2010, L 105/109. The Expert Group is made up of specialists with extensive knowledge of civil law, especially of contract law, chosen from among legal professionals, members of academic institutes and scientific and research departments, and experts of civil society (category associations) from all over Europe. The task assigned to the Expert Group mainly consisted of choosing the contents of the DCFR with direct relevance to the field of Contract Law, simplifying, reorganizing, and updating the content, so as to achieve a hypothesis of "feasibility", that is to say, the possibility of an effective implementation of a European contract law. In the feasibility study, the experts had to keep in mind the Vienna convention on the international sale of goods, the PECL, the Unidroit Principles, and the "*Principes Contractuels Communs*".

¹⁷ For a careful and thorough reconstruction of the evolution in the creation of a European Private law, see Meli M. "Proposta di regolamento - diritto comune europeo della vendita", *Nuove leggi civ. comm.*, 2012:183 .. Cf. also Zimmermann R., "Diritto privato europeo: "smarrimenti, disordini". *Contr. e impr. Eur.*, 2012:7 .., which sums up all the steps taken at a European level in an accurate and in-depth way.

For a clear representation of the past experience and of the current situation, seen with trust and with a positive attitude towards the achievement of future goals in the plurality of the possible alternative solutions, cf. Alpa G., "Towards a European Contract Law". *Contr. e impr. Eur.*, 2012: 115 .. See, instead, the disenchanted perspective of ZACCARIA, "La Commissione sale in cattedra. Basta con i diritti nazionali, solo anticaglie: tutti a scuola di "diritto commune europeo della vendita" ", *Contr. e impr. Eur.*, 2012: 173 .., which, going through the steps taken so far to create a

In particular, in attempting to uniform the legal terminology and referential categories of the European law by forming a general normative basis, the DCFR formulated a complex system of common regulations, sorted in articles, aiming towards a regulation mainly of the contract in its general terms, of the obligations, and of the non-contractual liability. The feasibility study, on the other hand, was an attempt to limit the scope of the DCFR, in order to be able to study the feasibility of an easy-to-use instrument for European contract law capable of guaranteeing certainty and knowability of the law, to the benefit of both consumers and companies. The feasibility study published in May 2011 and updated on 19 August of the same year, constituted the basis for the proposal discussed in the present paper.

Some time ago, the most influential doctrine¹⁸ said that it was impossible to rapidly achieve a European-wide civil law without intermediate steps: to obtain tangible results, it would be more reasonable to proceed with a gradual codification, aimed at regulating the single institutes of private law on a communitarian level step by step.

From this perspective the CESL has been proposed, aiming to create a uniform law in a major and crucial context, that of cross-border sales. The proposal aims to contribute to the reinforcement and growth of sales in the international market on the basis of contractual freedom and a high level of protection for the weak parties, in respect of the proportionality and subsidiarity principles.¹⁹

European private law, sees a "very winding" road, characterised by indecision rather than a logical plan, coming to the conclusion that the actual scenery is "absolutely ungovernable".

¹⁸ Bianca C. M., *Progressive Codification of European Private Law*, *supra*, note 5, 134.

¹⁹ Cf. the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on "A European Common Sales Law to facilitate cross-border transactions in the single market", 11 October 2011, COM(2011) 636 final.

As it will be better examined later,²⁰ the proposal concerns an optional instrument that enriches the single state law, without contradicting it, and which is applicable by agreement of the parties. Thanks to this feature of optionality, the sales law painlessly integrates into the different national contexts as an alternative to the domestic laws.

The method that has been implemented to date to uniform the European law, as already mentioned, is that of harmonization. The proposal brings a radical change, because the CESL is aimed at constituting an alternative legal regime to the national systems, which needs to be defined with completeness and autonomy.²¹

Indeed, if the parties to the contract choose the CESL, that will be the only applicable law, but it will need to be integrated with the national systems in relation to the non-regulated aspects.²²

III. THE ROLE AND SCOPE OF THE CESL.

The differences between the contractual laws of each Member State have a negative influence both on the demand and offer of goods and services, therefore reducing the level of competition and impeding the correct functioning of the internal marketplace.

The proposal aims to tear down these legal barriers that, on one hand, tend to keep consumers away from foreign markets and make them suspicious of purchasing on-line, and on the other, oblige professionals, who direct their activities towards states where their headquarters are not located, to learn and respect the consumer law of the state where the potential buyer has habitual residence (because of Art. 6, EC Regulation No. 593/2008 "Rome I").

²⁰ See, *infra*, par. 6.

²¹ When a legal regime alternative to the existing ones is established, it is not possible to talk about harmonization of the single Member State law. In this regard, cf. also Meli M., "Proposta di Regolamento", *supra*, note 17, 201.

²² Concerning this matter, please refer to paragraph 7 of the present paper.

The business relationships between companies are also hindered by the differences between the various legal systems, because it is necessary to know the law applicable to the contract, which could differ from one state to another.

The regulation on the CESL would overcome such barriers and limits, and create an autonomous and uniform body of regulations for contract law, particularly for sales and rules that protect the weak party. The CESL would have to be considered in the same way as a second regime of contract law within each Member State's national legislation. To underline that the CESL will be part of each Member State's law, the European Parliament, with the recently proposed amendments, focused its attention on the uniform set of contract rules that the CESL will introduce "within the legal order of each Member State".²³

With regard to the relationships between professionals and consumers, if the parties to the contract choose the CESL, it will no longer be necessary to pinpoint the mandatory rules on consumer protection of each Member State. The CESL will only introduce uniform rules that will assure the highest level of consumer protection throughout the EU, allowing professionals to apply the same contractual terms to all cross-border transactions.²⁴ This will have the effect of reducing the costs and guaranteeing a high degree of legal certainty.

IV. FIELD OF OBJECTIVE IMPLEMENTATION.

To define the field in which to implement the CESL, it is necessary to distinguish between objective and subjective criteria.

²³ European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013 *supra*, note 3, amendment 25, 23. The same considerations could be previously found in Pongelli G. "La proposta di regolamento sulla vendita nel processo di creazione del diritto privato europeo". *Nuova Giurisprudenza Civile Commentata*, 2012: 669, 673.

²⁴ On this point see Sirena P., in his report at the Convention "*Verso una regolamentazione comune europea del contratto di vendita*" held at the University of Florence on 9.7.2012, states that the need for a uniform contract model, and therefore for a common legal regime, is particularly evident in electronic commerce: the enterprise, with the simple creation of a website, directs its business towards the foreign state where the consumer lives and, if there is no common legal regime, it should prepare a separate different contract model for each European state in order to adapt to each national legislation, within the meaning of Art. 6 of Roma I Regulation.

In reference to the field of objective implementation, the proposal is applicable to cross-border transactions concerning the sale of goods²⁵, the supply of digital content, and the provision of related services.

From the perspective of a gradual “step by step” harmonization of European private law, the CESL disciplines the most wide-spread and most important contract for commercial trading inside the EU: the sales contract, which is defined in the proposal (Art. 2, let. k) as, “*the contract under which the trader (the seller) transfers or undertakes to transfer ownership of the goods to another person (the buyer), and the buyer pays or undertakes to pay the price thereof*”.

Under Art. 4 of the proposal, the cross-border nature of the contract is determined differently depending on whether the contract is between two professionals, or a professional and a consumer. The first case depicts a framework where the contract has to be considered a cross-border transaction if the parties have their habitual residence in different countries and at least one of which is a Member State. When the contract is between a professional (trader) and a consumer, the contract is considered cross-border only if one of the addresses (residence, delivery, or billing) specified by the consumer is located in Member State other than the country where the professional has habitual residence.²⁶

Although the CESL is intended to have effect inside the EU territory, it cannot be excluded that its legal order will also be applied to international business transactions where one of the parties is from a Third State (i.e., a state outside the EU). To use the CESL, as can be deduced from the provision under Art. 4 of the proposal, at least one party to the contract must have habitual residence in a Member State. The other party, therefore, could have habitual residence in a Third State. In reference to contracts where all the parties are professionals, a coordination issue can be found between the CESL and the

²⁵ In the definitions the word “goods”, refers to tangible movable items (art. 2, let. h).

²⁶ To the purposes of the regulation, the habitual residence of companies and other bodies, corporate or unincorporated, are the place of central administration. The habitual residence of a professional who is a natural person shall be his/her main place of business (Art. 4, par. 4).

Vienna Convention on the International Sales of Goods (CISG)²⁷, which applies only to relationships between professionals²⁸.

Agreement between the parties to apply the CESL to regulate their contract, as with agreement to use any other law, would exclude the application of the CISG.²⁹ The Vienna Convention, in fact, applies to international sale of goods contracts only if the parties do not explicitly exclude its application, or derogate from its provisions (Art. 6 of CISG)³⁰, provided that the parties have their place of business in different states, that both of the states are party to the CISG, and that the rules of private international law lead to the application of the law of a Contracting State (Art. 1, par. 1, CISG). In that case, after a specific agreement by the parties, the CESL could be applied to transactions in which one party has its place of business in a Third State.

The applicability of the CESL only to cross-border transactions has been the object of doctrinal criticism, because it would obstruct internationalization of SMEs.³¹ SMEs would not have the means or the organization to form two

²⁷ United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna in 1980.

²⁸ Art. 2 of CISG excludes the application of the Convention to sales of goods “bought for personal, family or household use”.

²⁹ See, on the same opinion Castronovo C., “Sulla proposta di regolamento relativo a un diritto comune europeo della vendita”, *supra*., note 2, 295.

³⁰ It is generally accepted that the applicability of the CISG can be excluded not only expressly but also implicitly. So, in the case of an explicit opting into the CESL, the application of CISG would undoubtedly be excluded. Difficulties would arise if the parties decide to partially choose the CESL, as this is allowed for B2B relations, because in the case of such *dépeçage*, the CISG should be applied to integrate the excluded aspects. To avoid problems in respecting the intention of the parties, the parties should be very precise in indicating the excluded parts and how those parts are to be governed. On such aspects, cf. Hesselink M. “How to opt into the Common European Sales Law? Brief comments on the Commission’s Proposal for a Regulation”. *European Review of Private Law*, 2012: 201-202; Meli M. “Proposta di Regolamento”, cit: 200-201; Basedow J. et al. “Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 Jul. 2010, COM (2010) 348 Final”, *Rechts Zeitschrift für ausländisches und internationales Privatrecht*, 2011: 371-438. Schwenzer I. “Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods”. Oxford: Oxford University Press. 2010, Introduction to Arts. 1-6.

³¹ Basedow J., “An Optional Instrument and the Disincentives to Opt in”, *Contr. e imp. Eur.*, 2012: 38. In particular, the author states that the CESL “*should be open for general application to both domestic and cross-border contracts. This would allow the choice of the OI (optional instrument) to produce a rationalizing effect*”.

different types of contract; one for sales inside their own state and another, based on the CESL, to be employed in cross-border sales. The consequence of this situation would be the renouncement, by SMEs, to operate outside the national borders, or to use their national contract type even in the relationships with contractors from other Member States, which would lead to a contrast with the rules set by the country where the consumer has habitual residence. This would make us wish for the scope of the CESL to be extended, by adding to its field of application not only cross-border transactions, but also contracts entered into inside a single Member State. According to the proposal (see Art. 13), the possibility to extend the CESL to non-cross-border contracts is actually only provided as an option for the single Member States.

Digital content is to be understood to mean the supply of data in digital form: audio and video recordings, images, digital games, and general software, while financial services, legal and financial advice, healthcare services and gambling, even when rendered online, are excluded.³² Neither electronic communication networks and services, nor the creation of new digital content and the amendment of existing digital content by consumers, is included in the definition of digital content for the purposes of the CESL implementation.

Electronic commerce transactions constitute the area where the CESL is going to be applied the most, because, by using digital technology, they represent the fastest and most efficient method to conclude a transaction between contracting parties resident in different Member States. Hence, a company, by using a simple website, can easily be contacted by consumers in all other Member States: any Internet user who buys music online from a foreign website for example, by paying to download the music file concludes a cross-border sales contracts.

The European Parliament, in its recent draft report of 18.02.2013, proposes to limit the application of the CESL to online or distance transactions only, with

³² Cf. Art. 2, let. j), proposal for a Regulation on a Common European Sales Law, *supra*, note 1.

particular attention to the Internet sales sector, where the idea of an optional instrument such as the CESL could be the ideal tool for online trade.³³

The services related to the sale, which are also disciplined by the CESL, have to be interpreted as those services, linked to the purchased goods or digital content, that concern the installation, maintenance, reparation, or any other processing, provided by the seller of the goods, or the supplier of the digital content, regardless of whether these services require a separate, related service contract.³⁴ Transport services, training services, telecommunication support services, and financial services are all excluded from the definition of related services for the purposes of the implementation of the CESL.

The European Parliament draft report proposes to also introduce the storage of digital content to the related service definition. This addition involves the decision to also apply the CESL to cloud computing, hence the EU Parliament proposes to introduce the recital 17a, which indicates the possibility to use the CESL rules also when digital content, or related services, are provided using a cloud, *“in particular when digital content can be downloaded from the seller’s cloud, or temporarily stored in the provider’s cloud”*.³⁵

Contract law related barriers prevent consumers and traders from fully exploiting the potential of the internal market and are particularly relevant in the area of distance selling, which could be one of the most relevant sector for development of European market. In particular, the digital dimension of the internal market is becoming very important for both consumers and professionals, as consumers increasingly make purchases over the Internet, and an increasing number of traders sell online. Communication and information technology means are constantly evolving and becoming increasingly accessible. Accordingly the

³³ European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013, *supra*, note 3, amendment 55, 35.

³⁴ Cf. Art. 2, lett. m), proposal for a Regulation on a Common European Sales Law, *supra*, note 1.

³⁵ European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013, *supra*, note 3, amendment 8, 11.

potential growth of Internet sales is very high. To increase the internal market efficiency, contracts concluded at a distance, and, in particular online, should be governed by a single uniform set of contract law rules that carry the same meaning and interpretation in all Member States. The CESL should increase the choice available to contracting parties and can be used whenever jointly considered to be helpful to facilitate cross-border trade and reduce transaction and opportunity costs, as well as other contract law related obstacles to cross-border trade.

V. FIELD OF SUBJECTIVE IMPLEMENTATION.

With regard to the field of subjective implementation, the CESL only is applicable to contracts where the seller is a professional (trader); it will never be possible apply it to relationships between two consumers.

With reference to contracts to which CESL is applicable, it is necessary to make a distinction between business-to-consumer contracts (B2C) and business-to-business contracts (B2B). The first occur between professionals and consumers, and they can always be regulated by the CESL, subject, as will be examined later, to both parties agreeing to this legal regime. Whereas with B2B contracts, the field of implementation of the CESL is restricted to contracts where one of the parties is a small or medium enterprise (SME), which would find itself as the weak party, and so in need of the substantial protection guaranteed to consumers. The proposal also establishes the criteria to be met to qualify as an SME, that is to say, an enterprise with less than 250 employees that generates a maximum annual turnover of EUR 50 million or a maximum annual balance sheet total of EUR 43 million.³⁶

Such openness in subjective terms had already been planned in the previously cited Directive 2011/83/EU on consumer rights. Hence, the directive,

³⁶ Cf. Art. 7, proposal for a Regulation on a Common European Sales Law, *supra*, note 1. We must say that the definition of SMEs and microenterprises had already been given by the European Commission with Recommendation 2003/361/EC of 6 May 2003, in *Official Journal of the EU*, 20.5.2003, L 124/36.

in recital 13, introduced an important innovation, giving Member States the authority to extend the application of the rules of the directive to legal and natural persons not considered consumers within the meaning of the directive, with specific reference to SMEs.³⁷ This extension is an indication of the need to introduce new methods of classification to overcome the imbalance inevitably caused not only to the consumer, but also to other categories of subjects in a weak contractual position.³⁸

The CESL goes a step further in regard to the directive on consumer rights, adding SMEs to the field of implementation.

Furthermore, the proposal broadens its applicability: in Art. 13, let. b): it ascribes to each Member State the discretion to also apply the CESL to sales contracts where both parties are professionals, but neither is an SME. Although an option left to the discretion of each Member State, such hypothesis suggests the intention of the European legislator to extend the implementation of the CESL as far as possible. It reveals a strong need for a uniform common regulation that can have a wide ranging use, regardless of the individual qualifications of the professional counterparty.

³⁷ In recital n. 13 of Directive n. 2011/83/EU it is provided that «*Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises*».

³⁸ Cf. with specific reference to the directive, Rossi Carleo L. Ed. *Diritto dei consumi. Soggetti, contratti, rimedi*, Turin: Giappichelli, 2012, 12. The need to overcome the rigid definition of consumer to achieve protection of wider subjective range had already been foreseen by the doctrine. See Bianca C. M., *Diritto civile*, 3, *Il contratto*, Milano: Giuffrè, 2000, 377, where it is stated that the consumeristic legislation is not an exceptional discipline and, therefore, it can be implemented even when a subject, not being a natural person, is subjected to the power of the counterparty, which, while offering its goods and services on the market, abuses its position of strength. On the same theme, cf. also Minervini E. "Status delle parti e disciplina del contratto", *Diritto privato comunitario*, Acts of the Convention held in Camerino on 3-4-5.9.2007, I. Perlingieri P. & L. Ruggeri eds. Naples: ESI, 2008, 435.; Bianca C. M. "sub Art. 3", *Codice Commentato della concorrenza e del mercato*, Catricalà A. & P. Troiano eds, Turin: UTET, 2010: 1662.; Gatt L. "Ambito soggettivo di applicazione della disciplina. Il consumatore e il professionista", *Commentario al capo XIV bis del codice civile: dei contratti del consumatore*, Padova: Cedam, 1999, sub Art. 1469 bis-1429 sexies, 160.

The focus shifts from protection of the consumer³⁹ to the more generic protection of the weak counterparty to achieve a wider safeguard of the global marketplace. This can only be achieved through a set of specific and common rules respected and accepted by all Member States. The elimination of the differences between the various national legislations would create an opening to new distribution channels and cross-border trade relationships would be facilitated, thus expanding the geographical boundary of each national market and promoting the process of internationalization of enterprises, especially SMEs.⁴⁰ The certainty of an applicable law would therefore have the effect of strengthening competition inside the European market and, simultaneously, make it more competitive on an international level.

VI. THE IMPLEMENTED NORMATIVE METHOD:
A REGULATION THAT INTRODUCES AN OPTIONAL LAW.

The proposal, by providing rules for contracts in general and specific rules on sales contracts and related services, establishes a set of regulations in the matter of contractual law, which can be common to all Member States. The complete standardization of European law does not come by imposing modifications to each national law, but by creating a second regime of contract law inside the legal system of every Member State, identical for the whole of the EU, which would have to simultaneously coexist with the internal rules of each Member State.

The instrument of the regulation seemed the most adequate to the European legislator to achieve such a result. Hence, a non-binding instrument, such as a recommendation to the Member States, would not be able to achieve the

³⁹ With regard to the consumeristic field, within the meaning of Art. 2 of Directive 2011/83/EU, it is confirmed the definition, also present in Italy's Consumers Code (Art. 3, lett. a), d.lgs. 6.9.2005, n. 206), which provides that the meaning of "consumer" refers to each natural person who acts for purposes that do not concern his/her business, industrial, artisanal or professional activity.

⁴⁰ To clearly articulate the aim of SME protection in the CESL, see amendment 26 in the European Parliament Draft Report of 18.02.2013, *supra*, note 3, 23.

goal of consolidating and improving the operation of the internal market, while a directive, as we mentioned earlier, would not be adequate to obtain a high level of legal certainty or the essential standardization of the single national legal systems.

Finally, a regulation has been chosen that has the peculiarity of introducing an optional CESL, which is applicable only on a voluntary basis by agreement of both contracting parties.⁴¹ On the contrary, a regulation that replaced the single national laws with a non-optional contractual European law would have been a too invasive a choice: something that would have distorted the legal and cultural basic principles of each Member State.

There has been immediate criticism of the choice of a discretionary instrument. A contradiction has been especially observed between the compulsory effects of the regulation, which imposes rules that have to be immediately and directly implemented by all Member States, and the discretion of such legislation, whose implementation is left to the free choice of the contracting parties, so that the effectiveness of the regulation would be void.⁴² The proposal has been defined as ambiguous, because the authority of the European law would be weakened by the choice of an optional regime, which renders it a non-binding law, reducing it to the condition of “soft law”.⁴³

⁴¹ The institution of an optional instrument is one of the alternative measures that the European Commission proposed in its Green Paper of 1/7/2010 on the possible options for a European Contract Law for consumers and businesses, with the aim of strengthening the enterprise activity and consolidating the trust of consumers in the single market. On this point, cf. ROCCO, *L'istituzione di uno strumento opzionale di diritto contrattuale europeo*, *Contr. e impr. Eur.*, 2011: 798., where it is stated that the institution of an optional instrument would help to reduce the actual fragmentation of the single market and overcome the main obstacles that generally undermine SMEs and consumers in cross-border transactions, and which can be noted, for example, in the language barriers, in the different taxation systems, in the limited access to broadband connection, in privacy issues, and in copyright protection.

⁴² See the critical observations of the reports made by D'amico and, especially, by Basile at the VII “Congresso giuridico-forense per l'aggiornamento professionale”, held in Rome on 15-16-17.3.2012. For a positive evaluation of the basic structure of the proposal see, instead, the report made by P. Sirena at the same Convention. These reports have been published in *Contratti*, 2012, n. 7. Cf also Castronovo C., “Sulla proposta di regolamento relativo a un diritto comune europeo della vendita”, *supra*, note 2, 315, which notes how peculiar it is that the implementation of a regulation depends on an agreement between private parties.

⁴³ In the same direction Basile, *supra*, note 42

However, the Commission had no choice but to opt for a discretionary regime: it was the only solution available that would respect the sovereignty of the Member States by acknowledging the individual legal traditions of each state.⁴⁴ It has been doctrinally⁴⁵ noted that, although the national legal systems are not so different from each other, a compulsory and authoritarian unification process that violates the single identities of each state, removing all the differences and characteristics, cannot be used.

Furthermore, we must note that the proposal under examination maintains the compulsory effectiveness typical of the regulation, obliging each Member State to make the CESL available to any party that wishes to enter into a cross-border sales contract. Such compulsoriness keeps its autonomy with respect to the free choice left to the parties of whether to use the CESL.

So, without the sacrifice of the single national laws, in defense of which there would have been strong oppositions against a non-optional regulation, we hope that the CESL, as expressed before, will be able to achieve its goals, given that the market will want to use the CESL to regulate cross-border trade. The market's common interest can be represented, on one hand, by the interest of consumers to benefit from the high level of protection expected, and on the other, by the interest of enterprises to have more certainty and clearer knowledge of the applicable law.

The collaboration of stakeholders in elaborating the feasibility study should suggest that the categories of weak contracting parties involved will demand the implementation of the CESL, and by doing so marginalize the

⁴⁴ A different opinion comes from Mazzamuto S. "Il diritto europeo e la sfida del codice civile unitario". *Contr. e impr. Eur.*, 2012: 113, who states that the choice of an optional method does not constitute a fallback nor a strategic move to avoid the oppositions of the single Member States, but simply represents the understanding that the most advanced and accurate European doctrine is in favour of an optional contract law.

⁴⁵ Cf. Alpa G. & G. Conte, "Riflessioni sul progetto di Common Frame of Reference e sulla revisione dell'*acquis communautaire*", *supra*, note 15, 174. On the importance of the juridical identities of the single States, see Beale H., "Finding the Remaining Traps Instead of Unifying Contract Law". *An Academic green Paper on European Contract Law*. Eds Grundmann S. & J. Stuyck. Kluwer Law International, 2002, 67 and following.

professionals who refuse to subscribe to the application of this alternative regime. Hence, the proposal, consistent with the objective of achieving a high protection level for consumers and, more in general, for weak parties, contains imperative rules that assure an equal or superior protection to that provided by the actual *acquis communautaire*. Such a perspective fully respects Art. 114 of the Treaty on the Functioning of the European Union (TFEU),⁴⁶ which constitutes the legal basis on which the proposal on the CESL is established, by providing for measures aimed at approximating the legislation of each Member State and guaranteeing a high level of consumer protection.

In accordance with the principles set out in Art. 5 of the Treaty on European Union (TEU)⁴⁷, the proposal is considered consistent with the subsidiarity principle, because cross-border transactions needed intervention from the EU and this could not be achieved at the single national legal system level. Similarly, the Commission has evaluated the proposal in line with the principle of proportionality, either because the field of implementation is limited to the issues related to cross-border sales, also for the choice of the safeguarded subjects, and for the optional feature of the instrument.

The optional feature of the CESL makes it a discipline applicable on the basis of the “opt-in” criteria, whose implementation must come from a specific agreement between the contracting parties. The same regulation explains what requirements must be met, on which depend the validity and efficiency of such agreement, disciplined in an accurate and precise way, with regard to the relationship between a professional and a consumer, under Art. 8 and 9.

First, if one of the parties is a consumer, the agreement on the use of the CESL is valid only if the consumer gives explicit and autonomous consent (Art. 8, paragraph 2). The consensus cannot, therefore, be contained in one of the

⁴⁶ See the consolidated version of the Treaty on the Functioning of the European Union, in *Official Journal of the EU*, 30.03.2010, C 83/47.

⁴⁷ See the consolidated version of the Treaty on European Union, in *Official Journal of the EU*, 30.03.2010, C 83/13.

contractual terms, but must be given separately and, above all, it must be a conscious and informed choice of the consumer. Hence, in addition to the obligations regarding pre-contractual information, the professional has to inform the consumer about the CESL and the intention to use it. To this scope, Annex II to the proposal includes a form entitled ‘Standard Information Notice’, which the professional gives to the consumer, and where all the consumer’s rights are summarized. The notice takes on a crucial role because, if it is not delivered to the consumer or if the agreement to use the CESL is agreed by telephone or by any other means of communication that do not consent the provision of the notice, the agreement is not binding until the consumer has not only received the confirmation of the agreement in a durable medium from the professional, together with the notice, but has also expressly consented to the use of the CESL (Art. 9, paragraph 1). If the contract is negotiated via the Internet, the notice can be given to the consumer in electronic format, but it must contain a hyperlink allowing the immediate and free of charge connection to the website where the legislative text can be found (Art.9, paragraph 2).

Still with regard only to relationships between professionals and consumers, if it has been decided to use the CESL, it cannot be only partially applied: it must be fully implemented (Art. 8, paragraph 3), to avoid difficult integrations with the State’s internal laws, which would nullify the effectiveness of the regulation. In the case of relationships between professionals, the proposal does not state whether the CESL can be only partially applied, but the European Parliament’s draft report wants to introduce the option for traders, where both parties are professionals, to chose partial application of the CESL, specifying that *“exclusion of the respective provisions is not prohibited therein”*.⁴⁸

As we have analyzed earlier, the choice for the optional feature of the CESL inevitably leads to the consequence that it will see its implementation only

⁴⁸ European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013, *supra*, note 3, amendment 66, 41.

when the parties to the contract decide to use it in their specific transaction. It will be possible to consider that agreement true and certain, freely and spontaneously achieved, only when the parties to the contract find themselves in a situation of substantial equality, by having the same level of bargaining power. Otherwise the power of choice of the applicable law will substantially lie with the professional: in B2C contracts or contracts with an SME, only the professional will have the authority to decide whether the offer of his/her own goods on the market will be disciplined by the national law or by the CESL and, in the latter case, will have the authority to impose that choice to the other party.⁴⁹ The consumers, or professionals (SMEs) in a weak position, will only be able to accept the conditions imposed by the professional or turn to another professional.⁵⁰

The proposal lacks accurate rules adequate to discipline the agreement on the use of the CESL when it comes to relationships between professionals, when one is an SME. In such circumstances, it has to be considered that the agreement still needs to be explicit and be agreed in clear terms so that it will not leave any room for doubt in its interpretation. But it remains unclear whether the professionals are bound to provide the notice even when the other party to the contract is not a consumer, but an SME. Such feature will probably be better specified in the definitive version, if the CESL is approved.

⁴⁹ Cf. De Cristofaro G., "Il (futuro) "Diritto Comune Europeo" della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE", *Contr. e imp. Eur.*, 2012: 366, which identifies its own optional nature as a main element of weakness of the future regulation, based on the mechanism of the "opt-in", which makes it unsuitable to assure a free and spontaneous choice to consumers.

⁵⁰ On this point, cf. Basehow J., "An Optional Instrument and the Disincentives to Opt in", *supra*, note 31, 38, who, by drawing a normative framework that actually discourages the contracting parties to adhere, states that the professionals will decide whether the optional instrument will be implemented and employed. Hence, the professionals will hardly make propositions that would make it possible to choose between the CESL and the singles national laws, because such a double option would produce unnecessary high costs considering the different general terms of the contract and the different procedures in the contract's management depending on the applicable law. See also Zimmermann R., "Diritto privato europeo: "smarrimenti, disordini" ", *supra*, note 17, 31.

VII. RELATIONSHIPS BETWEEN THE CESL AND
THE NATIONAL LAWS OF EACH MEMBER STATE.
COORDINATION AND INTEGRATION PROFILES.

The choice of an optional law for cross-border sales contracts enables the integrity to be maintained of the legislation on international private law, disciplined by the regulations "Rome I"⁵¹ and "Rome II"⁵², the first of which concerns the law applicable to contractual obligations and the second, the law applicable to non-contractual obligations. Even if the proposal under exam is approved, whenever the contracting parties decide not to use the CESL, the law applicable to the contract will be freely chosen by the same parties in accordance with Art. 3 of Rome I, while, in the absence of a choice, the decision of the applicable law will occur on the basis of that established by Art. 4 of Rome I.

Cross-border contracts agreed between a professional and a consumer are, on the other hand, disciplined by the law specified under the disposition of Art. 6 of Rome I, which corresponds to the law of the state where the consumer has habitual residence only when the professional is pursuing his commercial activity, which is the object of the agreement, in such country. The same Art. 6, at paragraph 2, also guarantees that the professional and the consumer, after so agreeing, have the freedom of choice of the applicable law in accordance with Art. 3 of the same regulation. However, when the law is decided with the agreement of the parties, it cannot deprive the consumer of the protection afforded by the mandatory rules provided by the law of his/her own state of residence.

Given that Rome I would remain in force even after the approval of the CESL, it seems very important to analyze how the two regulations can coexist. The CESL, given its optional feature, would have to be considered a second regime of contractual law within the national legal system of each Member State,

⁵¹ Regulation (EC) n. 593/2008 of the European Parliament and of the Council, of 17.6.2008, on the law applicable to contractual obligations (Rome I), in *Official Journal of the EU*, 4.7.2008, L 177/6.

⁵² Regulation (EC) n. 864/2007 of the European Parliament and of the Council, of 11.7.2007, on the law applicable to non-contractual obligations (Rome II), in *Official Journal of the EU*, 31.7.2007, L 199/40.

and not as a law external to the single state. Therefore, the agreement between the parties in regard to the use of the CESL would be a choice internal to each state law, representing an alternative that would not be regulated by the international private law (it would not determine the application of a foreign law), but would remain confined within the boundaries of the national law.⁵³ Art. 11 of the proposal is very clear in stating that when the parties have validly agreed to use the CESL for a contract, only the CESL can govern the matters addressed in its rules.⁵⁴

In such situation, then, although the legal dispositions of Rome I are not applicable, there can still be doubt about the consumer's right to be granted the same level of protection provided by the mandatory rules of the law of the State of habitual residence. This issue might be irrelevant: first the CESL would be in force in each state and would be the same for all Member States, without inequalities, and with the consequence that the country where the consumer has habitual residence cannot have, under such a regime, different standards that provide a higher level of protection.⁵⁵ Also, the proposal on the CESL has the

⁵³ Cf., on this point, Meli M. "Proposta di Regolamento", *supra*, note 17, 202; Pongelli G., "La proposta di regolamento sulla vendita nel processo di creazione del diritto privato europeo", *supra*, note 23, 673. See also the European Parliament Draft Report on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 18 February 2013, amendment 3 to recital 10, 8, which clarify that *«the agreement to use the CESL results from a choice between two different regimes within the same national legal order. This choice therefore does not amount to, and should not be confused with, a choice between two national legal orders within the meaning of the conflict-of-law rules and should be without prejudice to them. This regulation will therefore not affect any of the existing conflict of law rules, such as those contained in Regulation (EC) No 593/2008»*.

⁵⁴ To underline that the Common European Sales Law qualifies as a second regime within the legal order of each Member State, and to clarify the relationship of the CESL with the Rome I Regulation, the European Parliament, in the Draft Report of 18.02.2013, proposed an amendment to Art. 11 (amendment 67) specifying that only the CESL shall govern the contract *«instead of the contract law regime that would, in the absence of such an agreement, govern the contract within the legal order determined as the applicable law»*.

⁵⁵ The same opinion in the text can be detected in the European Parliament Draft Report of 18.02.2013, where, proposing amendment 6 to recital 12, it is clearly explained that *«since the Common European Sales Law contains a comprehensive set of uniform harmonized mandatory consumer protection rules, **there will be no disparities** between the laws of the Member States in this area, where the parties have chosen to use the CESL. Consequently, Article 6(2) of Regulation (EC) n. 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, **has no practical relevance** to the issues covered by the Common European*

purpose of creating a higher level of consumer protection, providing mandatory rules able to assure an equal or superior protection to that provided by the European “*acquis*”. It would, therefore, be difficult to identify, outside the CESL, national mandatory rules that impose greater protection of consumer interests.

Implementation of the CESL would consent to the overcoming of the limitations under Rome I on the choice of law applicable to the contract between professionals and consumers.

If the contracting parties decide to use the CESL, this would be the law utterly and exclusively applicable to the contract: Art 8, paragraph 3, of the proposal specifically provides that the CESL cannot be partially chosen, and Art. 11 states that only the CESL governs the matters addressed in its rules.

Another important issue to analyze is, therefore, the way the CESL can be integrated to fill its normative gaps. According to Art. 4 of the dispositions included in Annex I of the proposal, the CESL should be autonomously interpreted and the issues that are not expressly settled by it should 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»*.

The reason for this provision is evident, because the eventual use of other laws for interpretation or integration purposes would bring back the diversity and uncertainty in the law applicable to the cross-border transactions that the regulation proposal aims to avoid by introducing the CESL.

It remains undeniable that there is an absence of precise and accurate indications concerning the interpretation criteria, which could cause uncertainty and unpredictable transaction costs for the contracting parties that wish to apply this legal regime.⁵⁶ It must be especially noted that various aspects related to the

Sales Law as it would amount to a comparison between the mandatory provisions of two identical second contract law regimes».

⁵⁶ Cf., on this point, Baldus C., “Lo strumento opzionale: un'opzione per un nulla concettuale?”, *Contr. e impr. Eur.*, 2012: 67 .. The author reasonably highlights that the proposal is far more

contract in general (e.g., the representation, the change of parties to the contract and assignment, and the condition of effectiveness) have not been disciplined in the CESL. Such normative gaps cannot be filled, as provided by Art. 4, by simply relying on the principles on which the CESL is based. This kind of integration could not be possible even taking into consideration the general principles of the EU law. Basically, the main idea of the Commission was to propose a "self-standing" model, but the inevitable need for eventual integrations with the CESL prevents the proposal from presenting a set of rules able to autonomously maintain themselves as if they were a separate legal system.⁵⁷

Therefore, the only real possibility might be found in regulating the issues not mentioned, through the civil law rules of the Member State whose law would have been applicable in the absence of agreement between the parties to the contract on using the CESL.⁵⁸ So, it will be necessary to resort to Rome I to establish the law applicable to the contract issues not specifically disciplined by the CESL, case by case.⁵⁹

accurate where it deprives the judge of precise criteria of interpretation rather than where it should provide for them. He stated that the legislator does not fulfill his/her tasks when he/she leaves the choice to the national judge instead of providing a solution.

⁵⁷ The same doubts on the effective possibility of interpreting the CESL in an utterly autonomous way are raised by Mickiltz H.-W., "Un futuro "certo" per lo strumento opzionale", *Contr. e impr. Eur.*, 2012:52. Also the European Council, as reported in the document issued on 1.6.2012, n. 10611/12, raised the same issues on the solutions to find in order to resolve the aspects concerning the relationship between the CESL, the national laws of the single Member States, the international private law, and the consumeristic legislation.

⁵⁸ A similar opinion, in contradiction with the Art. 4 of Annex I of the proposal, was given in the report that comes with the proposal (see p. 6), where it is stated that the CESL will not discipline every single aspect of the contract and, therefore, «*the existing rules the Member State's civil law that is applicable to the contract will still regulate such residual questions*». In doctrine, cf. Alpa.G. *Le stagioni del contratto*, Bologna:Il Mulino, 2012, 176 ., who considers almost incomprehensible that the not explicitly disciplined aspects have to be regulated with the principles provided for by the regulation, without relying on the law that would be applicable in its absence. Hence, those contract aspects could hardly be ruled by the general principles formulated in the proposal, or on the basis of its simple interpretation. The author, furthermore, specifically states that, in contrast with Art. 4 of the CESL, it will be necessary to establish the law applicable to the contract aspects not specifically disciplined in the proposal.

⁵⁹ Cf. Pongelli G., "La proposta di regolamento sulla vendita nel processo di creazione del diritto privato europeo", *supra*, note 23, 677.

This opinion has been confirmed by the European Parliament in its draft report of 18.02.2013, which clearly expresses, in the interest of legal certainty, which areas of the contract are covered by the CESL, and which issues are not.⁶⁰ The new Art. 11a that the European Parliament intends to introduce clearly to states that the contract matters not covered by the CESL have to be governed by the relevant rules of the national law applicable under Rome I and Rome II rules. This appears to be the most coherent solution to achieve legal certainty and avoid regulatory gaps in the CESL. The only efficient alternative would be to create a specific discipline inside the CESL for the matters listed in Art. 11a, par. 2 as well. Nonetheless, there will always be some issues that remain uncovered by the CESL, and therefore recourse to national law has to be considered necessary and essential.

The failed attempt to overcome the application of international private law and the need to keep referring to the single national legal systems to integrate the CESL certainly make the proposal less effective and more difficult to implement than was desired. But that does not mean it is not a remarkable work that constitutes a valuable effort, aimed at distancing itself from the traditional instruments for the harmonization of European contract law, to create a uniform set of common rules more focused on the concrete achievement of the expected results.

⁶⁰ See the European Parliament Draft Report of 18.02.2013, amendments 68-71 introducing Art. 11a, which provides a positive list mentioning issues covered in the Common European Sales Law (paragraph 1) and a non-exhaustive negative list on issues not covered that have to be governed by the relevant rules of the applicable national law. In particular, the matters expressly covered by the CESL are: (a) pre-contractual information duties; (b) the conclusion of a contract including formal requirements; (c) the right of withdrawal and its consequences; (d) avoidance of the contract resulting from mistake, fraud, threat, or unfair exploitation and the consequences of such avoidance; (e) interpretation; (f) contents and effects including those of the relevant contract; (g) the assessment and the effects of unfairness of contract terms; (h) rights and obligations of the parties; (i) remedies for non-performance; (j) restitution after avoidance, termination or in case of a non-binding contract; (k) prescription and preclusion of the rights; (l) sanctions available in case of breach of the obligations and duties arising under its application. On the other hand, as expressed in Art. 11a, par. 2 (amendment 70), the matters not addressed in the CESL include the following: (a) legal personality; (b) the invalidity of a contract arising from lack of capacity, illegality or immorality except where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law; (c) the determination of the language of the contract; (d) matters of non-discrimination; (e) representation; (f) plurality of debtors and creditors and change of parties including assignment; (g) set-off and merger; (h) property law, including the transfer of ownership; (i) intellectual property law; and (j) the law of torts including the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.