CESL OR CRD – WHICH INSTRUMENT WILL WIN THE RACE FOR THE BEST SYSTEM OF CROSS BORDER SALES IN EUROPE?

JULES STUYCK

KU Leuven

Introduction

In full the title of this contribution would read: "*the Common European Sales Law or the Consumer Rights Directive – which Instrument will win the Race for the Best System of Cross Border Sales in Europe?*".

This may seem a rather strange question. At least it needs some clarification. The first section of this article (I. Scope) will try to clarify the question. Obviously this article will deal with the relationship between CESL and CRD. It will look at the nature and scope of CESL (section II.) and of CRD (section III.). I will raise some general questions about the relationship between the two (section IV.). I will then examine some specific areas (section V.); V.1. unfair terms; V.2. Pre-contractual information duty for point of sales contracts; V.3. The right of withdrawal; V.4. Remedies of the buyer. After that I will raise some questions about regulatory competition (section VI.). I will summarise the advantages and disadvantages of the two regimes (section VII.) and finally make some concluding remarks.

I. The Scope of this Article and Clarification of the Title

The subject of this article is strange, because the Common European Sales Law is not yet there, it is just a proposal for a regulation and a very much contested one. On the other hand the Consumer Rights Directive, Directive 2011/83, is already there and will have to be implemented by

the end of 2013. Eventually, however, if and when CESL is adopted, in whole or in part, it will certainly compete with national provisions implementing the Consumer Rights Directive (and other EU directives, in other words the consumer acquis). This is inherent in the very nature of CESL. CESL harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating *within each Member State's national law* a second contract law regime for contracts within its scope. The second regime should be identical throughout the Union and exists alongside the pre-existing rules of national contract law[1].

CESL should apply on a voluntary basis, upon an express agreement of the parties, to a cross border contract[2]. This is the so-called optional character of CESL. Where parties have not opted in for CESL, the "ordinary" national regime (possibly on the basis of Article 6(2) of Regulation 593/2008, Rome 1) will apply. So there might be two competing systems. Hence the question can be asked which one will be the most successful. If CESL is adopted and is often chosen by parties in practice, it might win the race. If however it is unsuccessful, CRD and the "ordinary" consumer acquis, or better: national law implementing the consumer acquis, will win the race. This means that we are faced with a new form of regulatory competition. I will reflect a little bit on regulatory competition further in this article, but first I will compare the two bodies of law, their respective nature, scope, and advantages, and other aspects of their relationship.

It should be observed from the outset that CESL claims to adopt a high standard of consumer protection. Having personally examined many aspects of CESL in light of this claim, I can agree that overall it is right. This is not the place to go into a detailed analysis of the level of consumer protection in CESL. Suffice it to say that already the Expert Group on European Contract Law appointed by the European Commission, when drafting their proposal (which has been published by the Commission as the so called "*Feasibility Study*"), have taken into account the then CRD proposal as it progressed. It can also be observed that CESL deals with

1 See recital 9 of the proposal.
2 Recital 9, last sentence.

several aspects of consumer protection that are absent in the consumer acquis, in particular in relation to remedies (part V of CESL).

II. Nature and Scope of the CESL

I will first look at the nature of the scope of CESL and then compare it with CRD.

As explained above CESL is a second national law regime within each Member State national law, within the meaning of Rome 1. Some contend that it is rather a 28th (or 29th regime if one takes Scottish law is different from English). I will not go into the discussion about the exact nature of the CESL regime. For my purpose it is more important to look at its scope.

According to Article 5 of the "Chapeau" the common European sales law may be used (only) for:
(a) sales contracts;
(b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price;
(c) related service contracts, irrespective of whether a separate price was agreed for the "*related service*".
"*Related service"* (see Article 2 (m)) means "*any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supplier of the digital content; it excludes:*
(i) transport services,
(ii) training services,
(iii) telecommunications support services, and
(iv) financial services".

In other words CESL applies only to sales contracts, contracts for the supply of digital content (even if under national law this would normally be a contract for the supply of services) and finally services that are related (ancillary) to a sales contract, such as maintenance and repair.

As to the personal scope of CESL, it applies to B2C contracts and to B2B contracts when one party is an SME (Article 5 Chapeau). However, Member States may extend CESL to all B2B contracts (Article 13 (b) Chapeau)). Finally CESL is only eligible for cross border contracts (Article 4 Chapeau), but Member States may extend its eligibility to domestic contracts (Article 13 (a) Chapeau). In B2C relations "*cherry picking*" is excluded. Here CESL may not be chosen partially, but only in its entirety (Article 8 (3) Chapeau).

Numerous aspects of contract law fall outside CESL's scope. Recital 27 mentions the following matters of a contractual or a non-contractual nature that are not addressed by CESL: 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. All these issues are basically non harmonised national law, except for an aspect of non-discrimination law: Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Probably some of the non-harmonised areas such as capacity fall outside the Union's legislative competence. It means that the CESL regime will basically be complemented by non harmonised national law.

III. The Scope of the CRD and the Consumer Acquis

As explained in the introduction, the competition will not be one between CESL and CRD only, but between CESL and the national law implementing the consumer acquis, including CRD. Basically, for consumer sales contracts, where parties have not opted into CESL, the consumer acquis

will apply. The scope of the consumer acquis is both broader and narrower than that of CESL.

The consumer acquis contains rules that are not limited to contracts for the sale of goods, digital content and related services. The rules on unfair contract terms (in Directive 93/13/EC, which has not been substantially amended by CRD), apply to all B2C contracts. The consumer acquis contains rules on a pre-contractual information duty and the right of withdrawal for distant contracts and off premises contracts, including contracts for the provision of services (for financial services there is a specific directive 2002/65). It contains a general pre-contractual information duty for all other contracts than those that are concluded at a distance or off premises. Finally it contains rules on conformity, delivery and passing of risk for sales contracts only, as well as some other consumer rights for sales contracts, service contracts and contracts for the supply of water, gas, electricity, or digital content (fees for the use of means of payment, communication by telephone and additional payment). In other words the consumer acquis contains rules that apply to all type of consumer contracts (for the supply of goods, digital content, as well as any service contract).

On the other hand the issues of consumer protection covered by the consumer acquis are limited. Just a few examples. The consumer acquis does not deal with requirements for the conclusion of the contract (cfr. Article 30-39 CESL), defects in consent (cfr. Articles 48-57 CESL), interpretation (cfr. Articles 58-65 CESL), contents and effects (cfr. Articles 66-78 CESL), a comprehensive set of rules on the obligations of the business and remedies for the consumer (cfr. chapters 10 and 11 of CESL), with the exception, essentially, of rules on non-conformity, damages and interest (cfr. chapter 16 of CESL), restitution (cfr. chapter 17 of CESL), prescription (cfr. chapter 18 of CESL).

IV. The Relationship between the CESL and the CRD: Some Questions

First, it should be remembered that for B2C sales contracts, including those relating to digital content and related services, CESL will only apply

where parties have opted in. Where they have not, the national provisions implementing the consumer acquis, including CRD, will apply. Both, in case of the application of the "ordinary" national law, implementing the consumer acquis, and in case of a choice for CESL, the contractual relationship will be governed by a certain number of provisions that are non-harmonised national law (those provisions outside the scope of both the consumer acquis and CESL). However CESL covers a larger number of issues, including provisions on the conclusion of the contract, defects and consent, interpretation, seller's remedies, damages and interests, late payments, restitution and prescription. This means that there would be less scope for uncertainty under CESL about how purely national law will complement the regime.

Another advantage of CESL is its straightforwardness. It is not a mix of full and minimum harmonisation, but a set of uniform rules. By contrast the consumer acquis consists of fully harmonised rules but also of a great number of rules that are only minimally harmonised: unfair contract terms, the general information duty for on premises sales in CRD, guarantees and so on.

Many criticise the illusion underlying consumer law legislation that consumers understand their rights, or even that they would bother about which law applies when they buy cross border. This has to do with the complexity of legal rules. Both CESL and the consumer acquis are far too complex for consumers. In this respect the standard information notice, appended to CESL has the advantage of making the law more accessible to consumers. On a more general level one may accept that the complexity of the law may be justified by the consideration that in case of a dispute between the parties to a contract, even where one of the parties is a consumer, lawyers (the parties' attorneys, a judge, an arbitrator, ...) will have to agree and find a solution on the basis of precise legal texts. The function of the law is primarily a reliable dispute resolution mechanism and not a kind of catechism. Admittedly, legislatures have to strive to adopt rules that are as simple as possible even if these rules are meant to help legal professionals to resolve disputes, but it may still fall short of a simple *vademecum* for the man in the street.

Also, the optional character of CESL may be seen as an advantage. It is freely chosen by the parties. In practice it will be chosen by the business, but the consumer's consent has to be made explicitly in a separate statement. A final advantage of CESL, compared to the consumer acquis, is that there is more commonality between B2B and B2C. There is no need for businesses to take into account two different set of rules when they sell to consumers and businesses alike.

Some will argue that CRD has the advantage, for consumers, to define a clearly high level of consumer protection. Again, it has not been shown that (overall, or for major parts of it), CESL would not contain a level of consumer protection that is as high as the one of the consumer acquis.

Apart from the respective advantages and disadvantages of the two systems, there are other aspects of their relationship. Another question that may arise is whether the simultaneous application of two different regimes will not lead to new distortions in the internal market. This might not really be a problem for businesses, since they will either see an advantage in opting in for CESL, or they will do "business as usual" according to the rules of the consumer acquis. However, consumers might be confused. They may also be confused by the existence of the CESL regime for cross border situations, while for domestic situations they will be subject to the consumer acquis rules. This would seem to militate for an extension by the Member States of CESL as an optional instrument to domestic contracts.

The question may indeed arise: what happens when parties chose CESL for a non cross border contract, where the relevant Member State has not extended the scope of CESL to domestic contracts? Especially where the provisions of CESL are more favourable to consumers than those of national law transposing the consumer aquis. Another source of confusion may be that only the consumer acquis will in all circumstances apply to services that are not "related" to a sale within the meaning of Article 2 (m) Chapeau, for example a separate maintenance contract relating to the goods sold but not concluded at the same time.

V. Some Specific Areas

In this exercise of comparison between CESL and CRD I will look in some more detail into the following issues:

– unfair contract terms,
– pre-contractual information duty,
– right of withdrawal and
– remedies.

V.1. Unfair contract terms

Directive 1993/13 on Unfair Contract Terms is a minimum harmonisation directive, leaving the Member States the possibility to increase the level of consumer protection. Some Member States have done so by not limiting the control to non-negotiated terms. Others have not excluded core terms (terms relating to the price or the very subject matter of the contract). CESL on its part is limited to non-negotiated terms and does expressly exclude the protection against (unfair) core terms (Article 80 (2) CESL). It could be argued that in respect of unfair contract terms CESL is therefore less protective for consumers than the consumer acquis. However, this is only so for the minority of Member States that have a stricter regime. Admittedly, a decrease of the level of consumer protection may also be the result of the existence of long black lists in the Member States, whereas Directive 1993/13 only contains an indicative list. CESL contains both a black and a grey list but these lists are exhaustive. It is nevertheless submitted that in view of the details of its black and the grey lists CESL reaches a high degree of consumer protection in respect of unfair contract terms, albeit probably not as high as the protection given in some Member States.

By contrast, the unfair contract terms directive does not contain a general duty of transparency regarding contract terms, while Article 82 CESL does. Still with respect to the black and grey lists of Article 84 and 85 CESL, the question will arise how these lists will work. Are the items really well chosen? How will judges from different jurisdictions look at it? In the present state of the law there is no EU law in that regard, since the list appended to Directive 1993/13 is purely indicative.

Another interesting question is how the black and grey lists of CESL will influence the application of the general clause of directive 1993/13?

V.2. Pre-contractual information duty for point of sales contracts

It should be noted that the list of information to be given under both instruments (CRD and CESL) is quasi identical. However, Article 5 of CRD is a minimum harmonisation provision. Article 20 CESL on the other hand contains an exhaustive list.

It is therefore not excluded that in certain national law regimes Member States, implementing Article 5 of CRD, maintain or introduce a long list of data to be included in the pre-contractual information, giving consumers a higher protection than the exhaustive list of Article 20 CESL. However, it would not seem that today this is really the case in a significant number of Member States. A final point is that Article 5, (2) of CRD contains an opt out for Member States regarding day-to-day transactions. CESL does not provide for the application of the information duty to day-to-day requirements.

V.3. The right of withdrawal

The cooling off period, during which the consumer can exercise his right of withdrawal is basically the same under both instruments: 14 calendar days. The commencement and the effects of the right of withdrawal are basically the same as well.

On the other hand there is a shorter list of exceptions to the right of withdrawal in CESL, but this is largely due to the fact that its scope is more limited, in particular its non applicability to non related service contracts. With regard to the obligations of the parties in the event of withdrawal, again there are no essential differences between the two regimes.

On one specific point CRD may be more protective. Article 9 (3) of CRD allows Member States to maintain existing prohibitions on traders in off premises contracts to collect payment from consumers during the

withdrawal period. According to CESL the trader can never be prevented from requiring payment during the cooling off period.

V.4. Remedies of the buyer

Under the CRD (the consumer acquis) there is no comprehensive system of remedies. Only the specific remedies for non-conformity of the Consumer Sales Directive (repair or replacement, and in subsidiary order: price reduction or replacement) are provided for. Furthermore under Article 18 of the CRD failure to deliver can lead to the termination of the contract, after (normally) the expiry of a period of cure (Article 80 (2) and (3)). In addition to that remedies according to national law apply (Article 18 (4)). CESL on the other hand contains a full range of remedies in Article 106, including the right to withhold performance, the right to damages, and no right of cure in B2C contracts, which is more protective for consumers.

VI. Regulatory Competition

In his paper on "*Legal Diversity and Regulatory Competition: which Model, for Europe*?", Simon Deakin[3], explains that the idea of regulatory competition was first formalised within the framework of modern welfare economics in the mid 1950 in relation to the issue of the production of local public goods. A school of thought about regulatory competition is this theory known as "*competitive federalism*". Deakin refers to Roger Van den Bergh[4]. Roger Van den Bergh has argued that the Cassis de Dijon case law on mutual recognition leads to regulatory competition. Sometimes this process has been described as a "*race to the bottom*", the so-called "*Delaware*" effect, known in company law in the United States, where companies would typically establish in the State of Delaware because the legal requirements there are the lowest. As Deakin explains the Delaware race to the bottom has also been described regarding the case law on

[3] S. Deakin, "Legal Diversity and Regulatory Competition: which Model for Europe?" Centre for Business Research, University of Cambridge, Working Paper Nr 323, March 2006, p. 2; *European Law Journal 2006*, 440-454.

[4] R. Van den Bergh, "Subsidiarity principal in European Community Law: some insights from law and economics", *Maastricht Journal of European and Competitive Law,* 1994.

the right of establishment of companies under the TFEU, notably in the *Centros*[5] judgment.

The story about regulatory competition might also tell us something about competition between two sets of rules within one and the same legal order, but this would necessitate some further research. In this context attention would also be drawn to a discussion on full and minimum harmonisation, where it has been argued that full harmonisation stifles regulatory competition, whereas minimum harmonisation encourages this kind of competition[6]. This debate could, to a certain extent, be transposed to the debate about CESL (optional) and CRD/consumer acquis (full harmonisation and sometimes minimum harmonisation). The outcome of a comparison of advantages and disadvantages of both systems in the light of regulatory competition will probably be much more nuanced.

On the other hand, since CESL and CRD/consumer acquis are supposed to co-exist, with regard to a certain number of issues competition will be guaranteed, and this competition will take place at levels where presently it is absent.

To sum up: how will competition between two "*national*" legal regimes work, where the parties can opt into one regime and where the other regime is applicable by default? Furthermore competition can only work if there is sufficient knowledge about the respective advantages and disadvantages. How would businesses and consumers know about which regime is the best and for whom? In any event it's the business who will make the choice and the consumer will probably not be in a position to rectify this choice. Eventually, the process is further complicated by the varying role of Member States' specific general contract law and consumer law outside the scope of both regimes.

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5 Case C-212/97, Centros, [1999] ECRJ-1459.

6 See P. Rott, "Minimum Harmonisation for the Completion of the Intrenal Market? The Example Consumer Sales Law" (2003) *C.M.L.Rev.* 1107-1135, ; S. Weatherill, "Supply of and demand for internal market regulation : strategies, preferences and interpretation", in N. Shuibne (ed.), *Regulating the Internal Market,* Cheltenham, Edward Elgar, 2006, 29-60.

VII. Summary of Advantages and Disadvantages of CESL and CRD

To summarise what has been said before, the advantages of CESL would seem to be the following:

1) its more comprehensive nature with regard to sales, which leads to less uncertainty about how purely national law will complement the regime;
2) its optional character, freely chosen by the parties (in practice by the business);
3) the greater communality between B2B and B2C, meaning that a business will not have to envisage teo very different systems for its relations with other businesses and consumers respectively.

The advantages of CRD and the consumer acquis are:

1) its broader scope, including services, but, of course, limited to some issues;
2) the fact that the consumer acquis has been partly confirmed by the case law of the ECJ, whereas notions of CESL are new in that respect and it is uncertain to what extent the interpretation given by the Court of Justice on notions of the consumer acquis can be transposed to CESL;
3) a last advantage may reside in the fact that CRD/consumer acquis, leaves a certain room for national flexibility in the implementation of the rules, whereas CESL is a uniform system of law.

VIII. Some Concluding Remarks

1) CESL is more comprehensive in the field of sales law and might therefore be more attractive for businesses (and consumers) in order to avoid the uncertainties of differing national law regimes.
2) If CESL is not chosen by a Member State for domestic contracts, the choice for CESL might be less obvious for consumers who would have to cope with two different regimes. The question may

arise whether they will easily understand whether they are buying cross border when buying on line?

3) Can CESL be successful so long as it is limited to goods, digital content and related services, or can it only succeed if its application is extended to all kinds of regular B2C (and B2B) contracts?
4) And then, finally, does this all matter? Shouldn't we just wait how things to develop, i.e. how CESL, if adopted, will work in practice and how it will co-exist with the consumer acquis? After all, CESL is supposed to be a pilot, and, whatever happens with it, ... Rome has not been built in one day.

SUMMARY

CESL or CRD – Which Instrument will Win the Race for the Best System of Cross-Border Sales in Europe?

JULES STUYCK

The question posed in this paper is whether the Common European Sales Law (CESL) or the Consumer Rights Directive (CRD) wins the race for the best system of cross-border sales in Europe. This question assumes that the CESL, which is still a proposal, will be adopted, which is uncertain as we go to press.

The article deals with the relationship between the future CESL and the CRD, or rather the consumer acquis, including the CRD. First, I make a general comparison of the nature and the scope of the CESL and the consumer acquis. CESL is optional – to be chosen by the parties – and has a broader substantive scope than the consumer acquis but it is limited to contracts for the sale of goods, digital content and related services and, as a matter of principle, to cross-border contracts. The consumer acquis is the default regime. Some of the rules apply to all consumer contracts but the number of questions covered by the consumer acquis is rather limited.

Numerous aspects of (consumer) contract law fall outside the scope of both CESL and the consumer acquis.

Then some general questions are raised about the relationship between the two instruments. The paper focuses on some specific areas: unfair terms, pre-contractual information duty for point of sales contracts, the right of withdrawal and remedies of the buyer. Then the paper discusses briefly the new form of regulatory competition that will take place if CESL is adopted and opted. I conclude with some comparative advantages and disadvantages of the two regimes and wonder whether CESL is to be successful so long as it is limited to goods, digital content and related services.

RESÜMEE

CESL oder CRD – Welches Instrument erweist sich als das Bessere im Wettbewerb um die Regelung des europäischen grenzüberschreitenden Kaufs?

JULES STUYCK

Die im Titel – und in der Studie – gestellte Frage ist, ob wohl das Common European Sales Law (CESL) oder die Verbraucherrechte-Richtlinie (CRD) den Wettbewerb um die geeignetste Regelung der europäischen grenzüberschreitenden Käufe gewinnt. Diese Frage setzt voraus, dass das CESL, bei dem es sich derzeit noch um einen Entwurf handelt, verabschiedet wird. Dies ist jedoch zurzeit noch nicht sicher.

Die Studie gibt einen Überblick über die Beziehung zwischen dem geplanten CESL und der (bereits verabschiedeten) CRD, oder anders formuliert dem *consumer acquis*, das auch die CRD mit einschließt.

Zunächst werden im Allgemeinen der Charakter und der Geltungsbereich des CESL und des *consumer acquis* auf dem Gebiet des Verbraucherschutzes miteinander verglichen. Das CESL kann von den Teilnehmern der Transaktionen freiwillig gewählt werden und ist – was den gegenständlichen Geltungsbereich betrifft – breiter, als das *consumer acquis*. Zugleich erstreckt sich aber sein Geltungsbereich lediglich auf den Kauf und Verkauf von Waren und digitalen Inhalten, auf die diesbezüglichen Dienstleistungen und selbstverständlich auf grenzüberschreitende Verträge. Das *consumer acquis* ist der Standard-Regime. Bestimmte Regeln sind auf alle Verbraucherverträge anzuwenden, aber die vom *consumer acquis* gedeckten Fragen sind eher beschränkt. Zahlreiche Aspekte des Verbrauchervertragsrechts fallen nicht in den Geltungsbereich des CESL und des *consumer acquis*.

Im Weiteren gibt die Abhandlung im Zusammenhang mit dem Verhältnis der beiden Instrumente einen Überblick über einige allgemeine Fragen. Konkret erwähnt werden dabei: unlautere Vertragsbedingungen; vorvertragliche Informationspflichten; Rücktrittsrechte; sowie zur Verfügung stehende Rechtsbehelfmöglichkeiten für Käufer. Anschließend kommt die Studie kurz darauf zu sprechen, dass – falls das CESL verabschiedet wird, und vorausgesetzt, dass die Parteien über seine Anwendung verfügen – ein neuartiger Wettbewerb zwischen der rechtlichen Regelung der einzelnen Länder entstehen kann. Schließlich wird ein Überblick über bestimmte Vorteile und Nachteile des CESL und der CRD gegeben und die Frage gestellt, ob das CESL wohl erfolgreich sein kann, wenn es sich lediglich auf Waren, digitale Inhalte und diesbezügliche Dienstleistungen bezieht.