THE COMMISSION PROPOSAL OF A REGULATION FOR AN OPTIONAL "COMMON EUROPEAN SALES LAW" – TOO BROAD OR NOT BROAD ENOUHG?

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SUMMARY: I. *Concluision too broad – NPT broad enough? instead: a need to readjust the scope of CESL*. II. *Conclusions on modalities of contracting and on unfair terms in B2C transactions*. III. *Conclusions (sales law and related services)*.

I. CONCLUISION TOO BROAD – NPT BROAD ENOUGH? INSTEAD: A NEED TO READJUST THE SCOPE OF CESL

The paper started with the somewhat provocative question of whether the proposal, together with the CESL, could be regarded as being "too broad" or, conversely, "not broad enough". Both readings of the existing material seem to be possible *and must be critically scrutinised under the proportionality criteria*:

- *"Too broad"* by including general rules of contract law and the law of obligations which are not specific to sales law, which do not meet specific problems of cross-border transactions in the internal market, and, therefore, need not be included in the CESL. As a result, this may amount to an "overextension" of its preclusionary effect on national law and may in that respect be contrary to the principles of proportionality.
- On the other hand, it may be "*not broad enough*" in respect of the extremely narrow definition of the "consumer". This will create conflicts with national law under the still existing minimum harmonisation principle. Moreover, the exclusion of financed sales and lease contracts does

not seem to meet the realities of modern marketing. The service sector which takes up about 70 % of the EU-BSP has found very little attention in the CESL, with the exception of the somewhat unfortunate regulation of "linked service contracts".

This paper did not discuss the substantive provisions of the CESL, neither with regard to B2B nor with regard to B2C contracts; this will be done in separate contributions on "modalities" (by Hans-W. Micklitz) and "sales law" (Norbert Reich). While there may be a perceived need to have a specific EU instrument for cross-border B2C contracting, this is not necessarily the case with regard to B2B contracting where already the (somewhat narrower) CISG exists and where hardly any mandatory provisions can be regarded as an impediment to trade. Contracts with SMUs which CESL regards as B2B transactions may well be put under the cover of B2C, at least to a limited extent as far as protective objectives similar to consumer transactions should be pursued. It may also be difficult to clearly distinguish between B2B and B2C contracts, particularly with regard to the applicability of general contract law.

The proposal, as has been shown throughout the analysis in this paper, will raise a *"basket of uncertainties"*, many of which are new to EU law and will require judicial answers by the ECJ in the spirit of uniformity. This need has been provoked by the principle of autonomous interpretation within the scope of the CESL with sometimes difficult borderlines. However, the possibility of uniform interpretation is certainly an advantage of the CESL against other international instruments in contract and commercial law, in particular the CISG, but will create its own *transaction costs* like search costs of traders and consumer —respectively their associations— of finding right and tenable solutions for unsettled questions, length and expenses of proceedings before the ECJ under Art. 267 TFEU, the need to reformulating contract terms, the adaptation of the CESL to new technological and economic developments. Whether the CESL as an optional instrument in whatever form will be an attractive legal model for traders cannot be predicted now; it must still pass its practice test. Whether consumers will be better off if they contract with traders under the CESL, or whether they risk losing familiar protection under national law also waits to be seen.

The authors of this study suggest to rethink the much too broad and to some extent unconvincing approach, as has been shown throughout this paper, of the CESL in a somewhat more narrow and at the same time more realistic direction:

- It should be limited to cross-border B2C transactions, thus excluding B2B contracting where other instruments exist (either freedom of choice under Rome I, or CISG) which do not seem to cause problems to the functioning of the internal market.
- The concept of B2C transactions should be extended in its personal scope as envisaged in Recital 17 of the CRD. Therefore, the definition of "consumer" in Art. 2 (f) of the Proposal should be supplemented by the following paragraph: "*If the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer*".
- It requires further discussion on whether and how far transactions with SMEs should also to a limited extent be included. The current concept of customer protection in telecommunication, energy and financial services might serve as the starting point for the development of appropriate concepts.

II. Conclusions on modalities of contracting and on unfair terms in B2C transactions

The results of the study concerning off-premise and distance contracts can be summarised as follows:

1. The Feasibility Study (FS) tries to attain a high level of consumer protection. The contrasting of the FS and the CESL with the recently adopted Consumer Rights Directive 2011/83 (CRD) however remains ambivalent. In some cases, the standards in CESL resp. FS are higher, sometimes lower than in the CRD. Unfortunately, the provisions in CESL and CRD are not always identical. Law application and interpretation thereby become unclear.

2. A general critique must be directed again an individualisation of protective provisions and against an increasing separation of rules which should be regarded as belonging together, as shown with respect to the distance selling directive. The discrepancy of contract law provisions and rules on unfair commercial practices is not in the interest of the consumer. Their combined effects under collective redress requirements should be one of the objectives of an optional instrument.

3. From a consumer point of view it should be regarded as problematic that several consumer friendly decisions of the ECJ have been "overruled". This concerns the reduction of the right of withdrawal to one year after non-information, the introduction of an obligation of the consumer to pay

for the use of a product during the withdrawal period. Also the new provisions on costs for sending back the product are not in the interest of the consumer. One wonders whether this will help cross-border B2C transactions.

4. Another unsettled problem concerns the determination of the language for the transaction. In both the FS and CESL, the trader will be allowed to unilaterally determine the language.

5. There are no provisions on linked contracts in the FS resp. CESL. It seems that only contracts of limited volumes will be governed, financed by using credit cards. But even in these cases it would have been necessary to regulate payment modalities. The FS resp. CESL are silent on that point, will the exception of implementing the *Gysbrechts* judgment of the ECJ (case C-205/07). The authors seem to take the view that the Payment-Directive 2007/64 regulates these questions which is not the case because it does not concern the consequences of payment by card. The chargeback-system as used in the US would have been of help to settle these questions.

The results of the analysis of the parts on the control of unfair terms in the FS resp. CESL show the following results:

1. The FS aimed at a consolidation of the discussion about the control of unfair terms. Therefore relevant new approaches could not be expected when drafting the CESL. Central objectives of consumer protection were left aside, like the increased importance of price clauses, especially in financial markets, the blurred delimitation of individually negotiated from pre-formulated clauses, the limited effects of injunctions against unfair clauses in individual proceedings. One has the impression that the control of unfair clauses works the more "efficiently" the less relevant it is in B2C transactions, and the less it costs to business.

2. It should be remarked positively about the proposals of the FS that the general clause has been reformulated which however was taken back in the CESL. This would have allowed a merger of different legal cultures. An important step would be the introduction of black and grey lists, even if their importance in the EU context remains vague without additional explanations. On the negative side of the CESL the limitation of control to pre-formulated clauses and the exclusion of the control of clauses on the main subject matter and the price must be criticized.

III. CONCLUSIONS (SALES LAW AND RELATED SERVICES)

The following conclusions may be drawn from the discussion of parts IV and V of the CESL based on the FS:

1. As a general observation, it must be stated that the FS and the CESL try to attain a "*high level of consumer protection*", usually closely following the *acquis* where it exists or is in the offing. Certain differences in Member State consumer protection law do not seem to be of such great importance that they actually challenge the entire project of the FS/CESL. However, there are many examples where a discrepancy between the *acquis* and the FS has been found to exist, some achieving a *higher level* of protection, others implying a "lowering" of protective standards without giving a reasonable explanation for that. The reduction of the prescription time from three to two years has not been explained. It must be made sure that the final version of the CRD, and the CESL based on the FS, are made *compatible* with each other and provide for an equally high level of protection. The trader should not be given an incentive to use the CESL in order to lower consumer protection standards, at least in cross-border transactions.

2. As a consequence of this objective, most (but not all) provisions on B2C relations are *mandatory*. If not expressly determined as mandatory, certain terms with an impact on B2C contracts will have to be evaluated by referring to unfair terms legislation, which does not meet the *standard of legal certainty* needed particularly in cross-border transactions. The FS uses a rather inchoate technique as it lists separately each and every provision which is mandatory, instead of providing in its opening articles that all B2C provisions are mandatory as such, unless specifically formulated as default rules.

3. As a more fundamental critique, it has been shown that the scope of application of part IV and even more so part V is simply too *narrow* and will not attain the practical relevance the EU Commission is hoping for, in particular in cross-border transactions, in that:

- The concept of the "consumer" is too restricted, particularly in the (frequent) case of "mixed contracts"; in the CESL setting, it could probably not be extended by Member State law, as has been explained in the Chapeau-paper by Micklitz/Reich;
- The concept of "sales contract" has been shaped by the somewhat dated concept of a single "*spot contract*", while in practice businesses in consumer markets use more and more complex arrangements, e.g. "subscription" type contracts as long-term "open-end" arrangements,

complex "contract packages" containing elements of financing and service, or a combination of both;

- The scope and content of part V on "Services related to a sales contract" seem to be incomplete, contradictory and will not provide legal certainty of cross-border B2C transactions.

4. The special and rather sketchy rules on "*digital content*" which have a broad application must still undergo a test to see to what extent they are compatible with aggressive marketing techniques of right holders which may not conform to consumer choice and needs, in particular with regard to unfair use restrictions by contract clauses seemingly legitimised under copyright reasons. Mere information rights may not suffice to strengthen the rights of the consumer who acquires in good faith digital content. On the other hand, once the professional seller has supplied the information as required, eg on lack of interoperability, the consumer will not have a remedy against the seller. The information requirement *de facto functions as an exclusion clause.*

5. The *technical language* of the FS and the CESL is rather complex by making isolated references to the DCFR. It is regrettable that the terminology of the CRD and the FS/CESL has not been coordinated (for instance the terms "rescission" in the CRD and "termination" in the FS/CESL; the term "reasonable" is frequently used in the FS/CES, but much less in the CRD). Many other ambiguously worded provisions will create additional interpretation problems both for national and finally for EU courts under the requirements of the reference procedure. As an overall assessment, the FS/CES do *not meet the requirements of legal certainty* as a prerequisite of making transactions —whether B2C or B2B— easier and less costly in the internal market.