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The functioning of the CESL within the framework of the Rome I Regulation

NOTE

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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The functioning of the CESL within the framework of the Rome I Regulation

STUDY

Summary

This study is aimed at defining the relationship between the CESL and the Rome I Regulation and examining the extent to which this relationship will encourage B2C cross-border trade, by enabling a professional who wishes to do business throughout the EU to be subject to the mandatory provisions of the CESL, not the overriding mandatory provisions of the State laws of the 27 Member States of the EU. It subsequently examines whether the mandatory provisions of the CESL offer a high level of consumer protection by comparing them to the domestic consumer laws of the countries of the European Union.

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SUMMARY

Background

The European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM (2010) 348/3) has set out the seven possible options for creating a European Contract Law. They range from simple publication of the results of the work of the Expert Group appointed for this purpose, to establishing a proper European contracts code. Half-way between these positions, the European Commission has suggested that 'a Regulation could set up an optional instrument, which would be conceived as a '2nd Regime' in each Member State, thus providing parties with an option between two regimes of domestic contract law'. It is against this background that on 11 October 2011 the Commission published a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM (2011) 635 final). It is worth examining how this Common European Sales Law (CESL) will be able to dovetail with Regulation No 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I). The question is only posed here with regard to B2C relations.

Objectives

In order for the CESL to be a success, the way that it dovetails with the Rome I Regulation must be clear. The CESL must also provide a high degree of consumer protection, without necessarily including all the most far-reaching consumer protection provisions but standing up to comparison with national laws.

To begin with one must examine **how the CESL dovetails with the Rome I Regulation**. The CESL could have been defined either as a 28th Regime, a uniform law applied in advance of any argument regarding conflict of laws, or a 2nd Regime of domestic law. The definition of the CESL as a 2nd Regime of domestic law is conclusive in this respect. Choosing the CESL is not equivalent to choosing an applicable law within the meaning of private international law. It is made secondarily, within applicable law, as a choice between two regimes, the 1st domestic Regime, and the 2nd Regime (the CESL). Doctrinal criticism of this definition is not peremptory. Some authors deny a European regulation's capacity to make national law. Others wonder about the other consequences that defining the CESL as a domestic law might entail (domestic interpretation, compliance with existing directives, transposition of future directives within the CESL, etc.). At best, these considerations provide a means of recognising the hybrid nature of the CESL, which, even if it is a 2nd Regime of domestic law, was nevertheless conceived at European level and 'carried' by a regulation. The fact that it was conceived at European level, for instance, justifies its interpretation by the Court of Justice.

The fact remains that its definition as a 2nd Regime of domestic law makes it possible to ensure the normal operation of the Rome I Regulation. The Regulation has not been supplanted and will help determine the applicable law. Only the overriding mandatory provisions of the 1st Regime have been neutralised, as the Commission explains: *If the parties choose in business-to-consumer transactions the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6(1) of the Rome I*

Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6(2) of the Rome I Regulation). The latter provision, however, can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. ***The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country.*** *Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.* (Explanatory Memorandum, p. 7). In other words, since the optional regime is a domestic 2nd Regime in each Member State, by nature it cannot be ousted by the overriding mandatory provisions of the other State domestic regime, because it replaces it completely when the parties choose it ([1]).
It becomes the domestic regime chosen by the parties.

Detailed study of the interaction of the CESL with the principal texts of the Regulation Rome I shows that there are no real interaction difficulties, provided that the assumptions on which the reasoning is based and the optional instrument's definition as a 2nd Regime of domestic law are accepted.

* However, given that in the event of choosing the optional instrument, the consumer will no longer be protected by the mandatory provisions of the 1st national Regime of consumer law of his/her habitual residence but by the mandatory provisions of the 2nd national Regime of his/her habitual residence, consisting of the CESL, it is important to **compare the level of protection afforded by the CESL with the national law of the countries of the EU**.

The principal effect of this comparison is to show that choosing the CESL does not disadvantage the consumer, because he/she will continue to benefit from a high level of protection. Admittedly, there are some differences, but they are essentially details, except perhaps in the case of a unilateral declaration of invalidity, which does not involve the judicial authorities.

The minor differences will provide an opportunity for consumers in each country to be informed of the differences between the 1st Regime and the 2nd Regime.

[1] See, by analogy, our briefing paper 'Interplay between an optional instrument and national laws', 2010.

1. INTERACTION BETWEEN THE ROME I REGULATION AND THE COMMON EUROPEAN SALES LAW AS AN OPTIONAL INSTRUMENT

1.1 PRELIMINARY REMARKS

1.1.1. Concise statement of consumer protection in the Rome I Regulation

Consumer protection ([2]) in Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) is ensured by two texts.

- Firstly, with regard to the law applicable to consumer contracts, **Article 6 of that Regulation** stipulates that:

'*1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*
a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
b) by any means, directs such activities to that country or to several countries including that country,
and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in Points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4…

Article 6(4) lists a number of contracts to which paragraphs 1 and 2 do not apply.

This Article 6 does not apply to all consumer contracts. It specifies that:

- either the professional must pursue his/her commercial or professional activities in the country where the consumer has his/her habitual residence,
- or that, *'by any means, (he/she) must direct such activities to that country or to several countries including that country'*, this latter expression covering e-commerce and reproducing the wording of Article 15 of Regulation No 44/2001 Brussels I. The term 'passive' consumer is only used in this case, where the consumer has easily found this professional who either resides in the same country as him/her, or directs his/her activities to that country.

It may be that the consumer contract does not satisfy these conditions. This will be the case

[2] O. Boskovic, *La protection de la partie faible dans le règlement "Rome I"* : D. 2008, doctr. p. 2175.

for example if a consumer on holiday in another country than that of his/her residence makes a purchase from a company that does not have a website. This will also be the case if an Internet consumer makes a purchase on the website of a trader who has his/her residence in another state, provided that this website has not directed its activities to the consumer's country[3].

If the consumer contract does not satisfy the above conditions of Article 6 it is subject to Articles 3 and 4 of the Regulation Rome I, which means that the parties can choose the applicable law (Article 3) and that in the absence of choice, *'a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence'* (Article 4(1a)). The question of whether or not the consumer benefits from the protection of certain overriding mandatory provisions (see below, Article 9) will be addressed later on.

If the consumer contract satisfies the above conditions of Article 6, Article 4 of Rome I Regulation is supplanted. This means one of two things:

- Either the parties have not chosen the law applicable to their contract, in which case, the applicable law will be that of the consumer's residence, which the consumer is deemed to be more familiar with. This law will also apply to the form of contracts falling within Article 6 of the Regulation (**Article 11(4) of the Regulation**)

- Or the parties have chosen the law applicable, but in this case the consumer remains protected: indeed, the chosen law *'may not, however, have the result of depriving the consumer of the protection afforded to him/her by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1'*.

Note that this text makes all the mandatory laws of the consumer's residence overriding mandatory provisions.

In fact, in principle, there are two levels of imperativeness in mandatory law.

- The first concerns laws which relate simply to national public policy, but do not establish any crucial values for the organisation of society. Their application cannot be rejected by the will of the parties, but in cross-border disputes they do not pose an obstacle to applying foreign law which is normally applicable pursuant to the rules regarding conflicts of law ([4]).

- The second degree of imperativeness concerns laws which establish values that are genuinely crucial for the organisation of society. Their imperativeness is reinforced and they are termed overriding mandatory provisions (See Article 9(1) of the Rome I

[3] In this respect, the Court of Justice has defined the latter concept of activity directed to the country of the consumer's domicile: '(…) it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them. (OJEU 21 February 2009 Joined Cases C-585/08 and C-144/09, Pammer Reederei Karl Schlüter GmbH & Co. KG (C585/08), and Hotel Alpenhof GesmbH v Oliver Heller (C144/09), Rec 2010 I-12527).

[4] For example, Article 132-8 of the French Commercial Code grants hauliers a guarantee of payment for their services. It is a law of domestic public policy. The parties to the haulage contract could not stipulate a clause contrary to this provision. But the French Court of Cassation considers that it is not *'a law whose observance is necessary in order to safeguard the political, social and economic organisation of the country, to the extent that it would mandatorily regulate the situation, regardless of the applicable law, and thus constitute a "loi de police"'* (Cass. Com 13 July 2010, appeal No 10-12154).

Regulation). Contracting parties cannot include any clauses that would be contrary to these laws. Furthermore, any foreign law that would be normally applicable but is contrary to the overriding mandatory provisions would be supplanted by the latter.

Article 6 of the Rome I Regulation, which specifies that the law chosen in a B2C contract *'may not, however, have the result of depriving the consumer of the protection afforded to him/her* ***by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable*** *on the basis of paragraph 1'*, enables the consumer to invoke all the mandatory laws of his/her place of residence, without having to determine their degree of imperativeness, and therefore without the consumer having to prove that they are crucial for the organisation of society.

The view could therefore be taken that all these laws that are likely to supplant the law chosen by the parties are implicitly defined as overriding mandatory provisions (at least for the purposes of applying Article 6).

This merely indicates that public policy consumer protection laws establish values that are considered crucial in Europe.

- The second text protecting the consumer is the general text of **Article 9 of the Rome I Regulation**, which, having defined overriding mandatory provisions, stipulates that:

> *2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*
> *3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

The question arises as to how to reconcile Articles 6 and 9 of the Regulation (as it arose at the time of the Rome Convention between Articles 5 and 7 of the Convention).

Should it be assumed that the overriding mandatory provisions of the consumer's habitual residence can only intervene in cases provided for by Article 6, the special text for the consumer, and cannot otherwise be invoked under Article 9 ([5]), when the conditions of Article 6 are not fulfilled?

This is the view taken by Paul Lagarde, from the time of the Rome Convention ([6]). The *Bundesgerichtshof* also delivered such an opinion in a ruling of 19 March 1997 ([7]). Thus, if the sale was concluded while the consumer was travelling abroad, a judge in his/her country of residence could not enable him/her to benefit from the protection of local rules. However, other authors have claimed that the Regulation does not preclude Article 9 from having a

[5] It would then be necessary to prove that the mandatory law of the place of residence invoked is not a simple provision of domestic public policy, but has to be defined as an overriding mandatory provision.
[6] The new private international law for contracts since the entry into force of the **Rome Convention** of 19 June 1980: Rev. crit. DIP 1991, p. 287 onwards, particularly p. 316, Footnote 76.
[7] Rev. crit. DIP 1998, p. 610, Footnote P. Lagarde, (Gran Canaria) : to the German Supreme Court, Article 5 of the Rome Convention is a special application clause for overriding mandatory provisions, and contracts which do not fall within the scope of Article 5 cannot benefit from the general application clause for overriding mandatory provisions of Article 7 of the Convention.

role outside the scope of Article 6 ([8]). This is what the French Court of Cassation decided very clearly in a ruling of 23 May 2006 ([9]).

The outcome of this debate is extremely important in practice. Therefore, we consider that, if a consumer who meets the conditions of Article 6 is protected by all the mandatory provisions of his/her country of residence, a consumer who does not meet the conditions of Article 6 is nevertheless protected by the overriding mandatory provisions of his/her country of residence on the basis of Article 9 of the Rome I Regulation.

The relationship between the two provisions (Article 6 and Article 9) is as follows:

-When the conditions of Article 6 are met, the consumer is protected by all the mandatory laws of his/her place of residence. He/she will only have to demonstrate that a public policy law is involved, without have to demonstrate that it is an overriding mandatory provision within the meaning of Article 9;

-When the conditions of Article 6 are not met, the consumer remains protected but he/she must demonstrate that the law that he/she is invoking is an overriding mandatory provision within the meaning of Article 9, i.e. a law which protects a value that is crucial for the organisation of society ([10]).

These consumer protection rules imply that a professional wishing to trade in the 27 Member States of the European Union is subject to the overriding mandatory provisions of the 27 Member States that are the place of residence of the consumers concerned, which may hold back the development of the European market.

This brake could be released thanks to the Common European Sales Law as an optional instrument, provided for under the proposal for a Regulation of 11 October 2011 on the CESL.

But what links would this optional instrument have with the Rome I Regulation?

1.1.2 Text of the Rome I Regulation envisaging the optional instrument

The proposal for a Regulation (Rome I)[11] was very explicit about the links it would have with a possible optional instrument. The future European optional instrument was therefore referred to in its Article 3(2) and it was treated as a non-State body of law, while its Article 22 specified that the Regulation does not affect the application or the adoption of a

[8] See M.-L. Niboyet-Hoegy Jcl. Droit international, fasc. 552-40, No 17. - See also A. Sinay-Cytermann, *La protection de la partie faible en droit international privé*, in *Le droit international privé* : *esprit et méthodes* : Mélanges Lagarde, 2005, p. 737.

[9] Appeal No 03-15637; Rev. crit. DIP 2007, p. 85, note D. Cocteau-Senn ; D. 2006, act. jurispr. p. 1597, obs. V. Avena-Robardet ; D. 2007, pan. p. 1754, obs. P. Courbe and F. Jault-Seseke ; RDC 2006, p. 1253, obs. P. Deumier ; JCP G 2007, I, 109, obs. M. Attal ; Dr. et patrimoine Dec. 2006, p. 80, Footnote M.-E. Ancel ; JDI 2007, p. 537, Footnote A. Sinay-Cytermann. ; see also P. de Vareilles-Sommières, *Le sort de la théorie des clauses spéciales d'application des lois de police en droit des contrats internationaux de consommation (nature de l'article 5 de la convention de Rome du 19 juin 1980)* : Dalloz, 2006, p. 2464 and by the same suthor, *L'ordre public dans les contrats internationaux en Europe. Sur quelques difficultés de mise en oeuvre des articles 7 et 16 de la convention de Rome du 19 juin 1980*, in *Mélanges en l'honneur de Ph. Malaurie*, *Liber amicorum* : Defrénois 2005, p. 394 onwards, particularly pp. 407 to 411.

[10] See above reminder of the distinction between mandatory laws and overriding mandatory provisions.

[11] Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), COM(2005) 650 final of 15 December 2005, p. 5.

possible EU optional instrument. These texts were not retained, but the Rome I Regulation still made reference to a future possible optional instrument. Indeed, it indicates in Recital 14 that:

> ***Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions****, such an instrument may provide that the parties may choose to apply those rules.*

In light of this recital of the Rome I Regulation, the proposal for a Regulation of 11 October 2011 on the CESL indicated the difficulty that the optional instrument of Common European Sales Law should remedy:

> *Pursuant to Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),* ***whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State****. In cases where another applicable law has been chosen by the parties and where* ***the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected****.* (Explanatory Memorandum, p. 2)

It is worth checking whether submission ([12]) to the proposed optional instrument actually helps remedy this difficulty.

Everything seems to depend on whether a 28th Regime was created, a uniform law or a 2nd Regime ([13]). The choice of the proposal for a Regulation is to make the optional instrument **a second Regime** ([14]). That is very clever because, as will be shown, it lets the Rome I Regulation apply without cross-border trade being inhibited as a result.

However, to this end consideration should first be given to the legitimacy of the claim that the optional instrument is a second Regime of domestic law (1.1), before showing in general terms that this facilitates the normal operation of the Rome I Regulation, without the effects that we specifically want to fend off (1.2). The final subject will be the accurate application

[12] In theory, there are two ways in which contracting parties may adopt a body of rules. They may **submit to them** as they would submit to a law, in which case they will have designated the law applicable to their contract and will be subject to any risks associated with this law (particularly legislative changes). Professor Pierre Mayer writes that '*submission means that the law is applicable in the way that it intends to be applied*' (*La neutralisation du pouvoir normatif de l'État en matière de contrats d'État*, J.D.I. 1986, p. 5 onwards, particularly No 38). The contracting parties may also **simply incorporate this regime in their contract**. In this case, the regime's rules will become mere contractual clauses. Consequently, the parties will not be subject to legislative risks (changes in the rules) because they have not submitted to a law but rather adopted contractual stipulations which reflect the terms of that law at a given moment in time.
Article 3 of the proposal for a Regulation stipulates that: *'The parties may agree that the Common European Sales Law* ***governs*** *their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7'.* It therefore really is a question of submission.

[13] Some authors doubt this: *'In our view, this discussion is confusing and surperflous, at least if the above-made assumption is correct that such a contract law would be enacted by EC legislation. In this case, the new contact law will necessarily be both '28th' and 'second' contract law'.* Gérard Dannemann, Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law, http://ouclf.iuscomp.org/articles/acquis_group2.shtml.

[14] We use this expression although it would be preferable to say a second regime as it is possible that there may be a third. For example, in France, in a B2B cross-border contract of sale, there will be a choice between French law, the Vienna Convention, or the CESL.

of the interaction between the texts of the Rome I Regulation and the CESL (1.3).

1.2. ON THE DEFINITION OF THE CESL AS A SECOND REGIME OF DOMESTIC LAW

In order to be in a position to assess this definition, we should at first reiterate the definition options that were available (1.1.1), the choice of the European Commission (1.1.2) and the doctrinal challenges to this definition (1.1.3).

1.2.1. The different possible definitions

The European Commission had the choice of making the optional instrument a 28th Regime, a uniform law, or a second Regime.

1.2.1.1 A 28th Regime

If the optional instrument had been a 28th Regime, the first question would be whether the parties can choose it.

In fact, Article 3 of the Rome I Regulation does not say that the parties could choose a non-State law, which is what the 28th Regime would be. Only Recital 14 of the Regulation seems to permit it, which creates legal uncertainty. Furthermore, some Member States apply the Hague Convention of 15 June 1955 on the law applicable to the international sales of goods instead of the Rome I Regulation in relation to sales ([15]). It has been suggested ([16]) that, if the CESL was a 28th Regime, it is uncertain whether choosing the CESL complies with the said Hague Convention.

Moreover, would choosing a European instrument conceived as a 28th Regime have achieved the expected results, i.e. the opportunity to trade throughout the European Union under a single regime?

The hypothesis here is that of a 28th Regime chosen as the applicable law following distortion of the conflict rule. Accordingly, choosing the 28th Regime a priori would have been treated as a choice of law and it would therefore have been subject to said Article 6, which would have allowed it to be supplanted when confronted with a national law affording greater consumer protection ([17]).

It is, however, uncertain whether the European nature of the 28th Regime would have had priority, and whether the principle of primacy would have taken with it all the consumer protection laws. The Rome I Regulation is also a European text, of the same hierarchical value as the Regulation which would have established a 28th Regime. It is not therefore sufficient to invoke the principle of primacy to resolve any difficulties. In addition, if the 28th

[15] Under Article 25 of the Rome I Regulation.
[16] Giséla Rühl, *The Common European Sales Law: 28th regime, 2nd regime or 1st regime*; on the same subject in German: Matteo FORNASIER, '*28 versus 2. regime-Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts*' http://ssrn.com/abstract=1881510; vgl. ferner Matthias Lehmann, *Europäisches Vertragsrecht – 28th oder 2nd Regime?*: GPR 2010, 261.
[17] Accord, Dr Eva Lein, British Intitute of International and Comparative law, 'Issues of Private International law, Jurisdiction, and enforcement of judgments linked with the adoption of an optional EU contract law' http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Lein%20EN.pdf

Regime applied through designation by the conflict rule, the Rome I Regulation would have priority over the CESL conceived as a 28th Regime. Accordingly, **the optional instrument conceived as a 28th Regime would also have had to comply with Article 6 of the Rome I Regulation and the expected result would not have been achieved.**

1.2.1.2 A uniform law, applicable before any conflict rule

Another option would have been to make the optional instrument a uniform law ([18]). Some authors consider that this would have had the advantage that the parties could have chosen this uniform law, without first needing to apply the conflict-of-law rule.

Professor Gisèle Rühl deduces from this that the uniform law is the best means of making all contracts concluded with EU consumers subject to the same regime ([19]). She writes:

> *'The European Commission should, therefore, rethink its position and consider application of the '1st regime-model' instead of the '2nd regime-model'.*
> *Technically, implementation of the '1st regime-model' would require nothing more than a statement by the European Commission, for example in the Explanatory Memorandum or in the recitals, that the CESL shall be classified as a uniform law that takes precedence over the rules of private international law.*
> *Ideally, however, the European legislator would insert an express provision that makes clear that the CESL applies if the requirements set out in the CESL itself are met and that the rules of private international law do not apply.'*

The European Commission had envisaged this possibility:

> ***'The first suggestion would be to adopt the optional instrument as international uniform law**. (...) **Within that approach, the optional instrument would contain a provision relating to its scope [19] and Rome I would not then apply to matters regulated by the optional instrument**. (...) The second approach would be through Article 20 of the Rome Convention [20]. In this case, the optional instrument would again contain a clause relating to its scope and Rome I would not then apply to matters regulated by the optional instrument. An adaptation of Article 20 could be envisaged. Finally, the third possibility (...) would be to adopt the*

[18] What Professor Giséla Rühl, (*The Common European Sales Law: 28th regime, 2nd regime or 1st regime*) calls a 1st Regime:
according to the '28th regime-model' the optional instrument will be integrated into the system of private international law. It will be a contract law that parties may choose in accordance with the rules of private international law just like any other national contract law. According to the '2nd regime-model', in contrast, the envisioned optional instrument will not be integrated into the system of private international law. It will not amount to an additional contract law that parties may choose in accordance with the rules of private international law. Rather, it will be a second contract law regime that will exist alongside each Member State's contract law and that parties may choose if the law of a Member State applies. Under the '2nd regime-model' the rules of private international law will, thus, take precedence over the optional European contract law. (…).

Under the '1st regime-model' the CESL will be classified as a uniform law. It will define its own scope of application and apply if the requirements for its application as set out in the instrument itself are met. Under the '1st regime model' the CESL will, hence, take precedence over the rules of private international law. (See pp. 1 and 2).
[19] Art. above.

> *optional instrument as a Community instrument, which would not benefit from any priority over Rome I and that the parties could choose as applicable law to their contract on the base of Article 3[21] of the Rome Convention. In this case, the optional instrument would not contain any scope clause but only provisions of substantive law.'* ([20]).

However, would making the optional instrument a uniform law have been the best solution? The European Commission did not think so and indicated in its Green Paper that *'existing optional regimes, such as the Vienna Convention … cannot restrict the application of national mandatory rules'* ([21]). It should nevertheless be noted that this is due to the fact that the Vienna Convention has not standardised the rules on validity for the international sale of goods. These must therefore be determined in the national laws.

But it is unclear whether the basis of the application of the CESL as uniform law could not have been found in the Rome I Regulation itself, more precisely in its Recital 14 which states:

> *Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions,* ***such an instrument may provide that the parties may choose to apply those rules****.*

Accordingly, if the CESL had been a uniform European law, the priority of the CESL over the Regulation on the conflict of laws provided for by the Rome I Regulation could have been recognised, and that would have helped supplant Articles 6 and 9 of the Rome I Regulation. **However, Recital 14 above is only a recital, and its inaccuracy makes this explanation uncertain.**

There thus remained one last possible definition, that of 2nd Regime of domestic law.

1.2.1.3. A 2nd Regime of domestic law

In fact, a third possibility remained: to make the optional instrument **a second Regime of domestic law** ([22]).

That is very clever because, as will be shown, it lets the Rome I Regulation apply without cross-border trade being inhibited as a result.

It is the choice made by the European Commission.

[20] Communication from the Commission to the European Parliament and the Council - European Contract Law and the revision of the *acquis* : the way forward /* COM/2004/0651 final */.
[21] Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses/* COM/2010/0348 final */ Point 4.1(4); **In this respect also Cass. Com 20 February 2007 appeal No 04-17752,** Sté Mimusa CA (Compania anonyma) c/ Sté Yves Saint-Laurent Parfums (YSLP).
[22] We use this expression although it would be preferable to say a second regime as it is possible that there may be a third. For example, in France, in a B2B cross-border contract of sale, there will be a choice between French law, the Vienna Convention, or the CESL.

1.2.2. The European Commission's choice

The Commission has chosen to make the European Sales Law a second Regime of national law. That is evident in more than one place in the Explanatory Memorandum ([23]) and recitals of the proposal for a Regulation. In Recital 9, the Commission thus notes that:

> *This Regulation establishes a Common European Sales Law. It 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.* ***This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law****.*

The repetition of the reference to the second Regime, in particular in the Explanatory Memorandum, shows how important this definition is for the Commission.

This also corresponds to what the Economic and Social Committee had proposed in its opinion of 21 January 2011:

> *Therefore, it appears to be more appropriate to talk about a '2nd Regime'* (*24*) *of private law in all Member States. This term makes clear that a European Optional Instrument would penetrate the domestic laws of the Member States like any other source of European Law. In short: a '2nd Regime' would provide parties with an option between two regimes of domestic contract law, one enacted by the national legislator, the other by the European legislator.* (*25*)

However, some authors now express reservations about this definition.

1.2.3. Doctrinal reservations

Some authors have expressed reservations regarding this definition and opt for the hybrid nature of the CESL ([26]).

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[23] See, for example, Explanatory Memorandum, p. 4, p. 6, p. 9, p. 12.

[24] As to the perception of an Optional Instrument as a '2nd Regime' see Heiss, Introduction, in: Basedow/Birds/Clarke/Cousy/Heiss (eds.), Principles of European Insurance Contract Law (2009) I 45.

[25] Opinion of the European Economic and Social Committee on 'The 28th regime — an alternative allowing less lawmaking at Community level', OJEU No C 21 of 21 January 2011 pp. 0026–0032.

[26] One author is more critical and denies the character of domestic law of the CESL (J.S. Bergé, *Le droit national des contrats, nouveau complexe du droit européen des contrats*, RDC 2012 Vol. 2 p. 569 and in particular p. 571). However, perhaps we should not confuse the European notion of the instrument and the power that is attributed to it. In its response to the Commission's Green Paper (Green Paper on European Contract Law: Responses from the Trans Europe Experts (TEE) network, under the direction of M. Behar-touchais and M. Chagny, Société de législation comparée, collection TEE, Volume 1, 2011, *Réponse du groupe D*, p. 137 onwards. Group D of the TEE was made up of Pascal de VAREILLES-SOMMIERES, Sabine CORNELOUP, Jérémy HEYMANN, Laurence USUNIER, and Chloé ADELBRECHT-VIGNES), had underlined for comparative purposes the fact that *'the uniform regime of the international sale of goods developed within UNCITRAL is characterised by its* ***international approach****, but its power within party States where the Convention is in force is only that of domestic law so that two sales regimes coexist in the domestic law of the party States : that of internal sales and that of international sales, both applicable* ***as domestic law****'*. (loc.cit.188). Thes authors concluded: *'the treatment of the optional instrument is (not) the same, (…) depending on whether it formally constitutes EU law, or* ***whether it is simply carried by a European Regulation, without having the formal status of Union law in national legislations****'*.
This is why the content of the CESL is not included in the Regulation, but is simply an annex.

They include, in particular, Professor Martijn W.Hesselink ([27]) who poses the following question:

> ***It is not entirely clear how a European law can become a (second) national regime****. Can a set of rules ever become applicable as national law unless it is enacted by the national legislator?*

Professor Hesselink questions finally **whether this law would be national within the meaning of private international law or European within the meaning of EU institutional law**, which would for example imply that the CESL can be interpreted by the Court of Justice of the European Union. Hence the **hybrid law** definition adopted by the author. The CESL would be a *sui generis* law as the European Union's legal order is *sui generis.*

It is true that to assert without some qualification that the CESL is a second Regime of national law could be problematic in light of certain rules:

- Firstly, **with regard to the interpretation of the CESL**, does that not risk leading to national interpretation of the CESL?

This is neither desired nor appropriate. Recital 8 of the proposal for a Regulation provides for ***'the same meaning and interpretation in all Member States'***, and Recital 29 of the proposal for a Regulation adds that the rules of the CESL ***'should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation'***. Finally, Recital 34 concerns *'the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law'.* It is therefore a question of interpreting the CESL autonomously, under the control of the Court of Justice of the European Union.

Is this compatible with the domestic law nature of the CESL?

- Then, **with regard to the application of existing directives**, to say that the CESL is a second Regime of national law should imply that this regime cannot offer the consumer any more protection than a maximum harmonisation directive or cannot do less than the existing directives.

Thus Professor Whittaker notes that the CESL does not sufficiently safeguard the quality of the decision made by the consumer to comply with it, which, according to him/her, is not in compliance with the 2005 Unfair Commercial Practices Directive which defines an unfair commercial practice in part as distorting substantially a consumer's economic behaviour, which is the case when a practice appreciably impairs *'the consumer's ability to make an informed decision'* ([28]).

In any case, based on this precise reasoning, would the nature of the second Regime of the CESL not imply that the latter must respect the existing directives, and can be interpreted as such in order to be in line with the Directive?

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[27] How to opt into the Common European Sales Law? Brief comments on the Commission's Proposal for a regulation, 26 October 2011, European Review of Private Law, Vol.1, pp 195–212, 2012, Amsterdam law school Legal Studies Research paper No 2011-43, Centre for the Study of European Contract Law Working Paper Series No 2011-15, Electronic copy available at: http://ssrn.com/abstract=1950107.

[28] Art. above RDC 2012 No 5

In truth, **a distinction must be made between the contents and the container**.

The CESL is contained in a European regulation, and therefore in a European act of secondary legislation, of which it is an annex. This justifies the fact that it can be subject to autonomous European interpretation, under the control of the Court of Justice. This could also justify the fact that this special European text can offer the consumer greater protection than an existing maximum harmonisation directive, under the rule that the special derogates from the general.

However, **this Regulation obliges the Member States to offer a second Regime of domestic law to sellers and buyers who conclude a cross-border contract.** This Regulation also directly influences the Member States' legal order, **without necessitating a transposition measure ([29]).** The domestic law nature of the CESL implies that it cannot protect consumers less than European directives do. However, contrary to what Professor Whittaker writes, we believe that the CESL respects this requirement, as regards the 2005 Unfair Commercial Practices Directive. Thus, the fact that the consumer's choice must be made expressly and after the receipt of an information notice, shows that the requirement for loyalty in the commercial practice stemming from the 2005 Directive has already been taken into account by the CESL. Similarly, the fact that the CESL contains a high level of consumer protection also implies that a choice of CESL clause does not entail a significant imbalance and must not be considered as an unfair term.

The CESL does then have a hybrid nature: the container (the Regulation) is institutionally European secondary legislation, but the content (the system of sales to which the parties can choose to submit) is a second Regime of domestic law imposed by the Regulation.

In any event, this analysis of the CESL as a second Regime of domestic law will facilitate the normal application of the Rome I Regulation.

1.3. ON THE NORMAL OPERATION OF THE ROME I REGULATION

Before explaining this normal operation, it should already be noted that it is not necessarily understood in the Member States.

Thus, as an example, the Committee of European Affairs of the French National Assembly decided to reject the CESL, following an information report by Ms Marietta Karamanli of 7 December 2011 (Doc. No 4061) ([30]), in which the Member states that:

'*This is firstly the case as regards the two named Regulations on the law*

[29] The regulation is directly applicable in the Member States. It takes precedence in the legal order of the Member States and automatically changes existing legal situations. It impedes the application of any national provision to the contrary, whatever the ranking of the rule involved, whether it is legislative or regulatory within the meaning of national law. The direct applicability opposes any national formality for inclusion or transposition into the domestic order. There is therefore no need for a national act, which would aim to introduce the Regulation in question into the domestic order and which would condition its entry into force. Such an act would be illegal as contrary to European law. This is a fundamental difference with the Directive, which cannot be understood without national transposition measures (except in exceptional circumstances where the legal situation in a Member State satisfies the Directive's requirements).

[30] http://www.assemblee-nationale.fr/13/europe/rap-info/i4061.asp.

> *applicable to contractual obligations (Rome I) and that applicable to non-contractual obligations (Rome II).*
> *It could be considered a priori that the solution adopted is clear with:* ***the exclusion of redress available to them for all the matters covered by the CESL;*** (…)'

It is mistaken to think that the Rome I Regulation is excluded ([31]). In fact, it has to be shown that the Rome I Regulation is not superseded (1.3.1), but that the State's overriding mandatory provisions of the 1st Regime are neutralised (1.3.2), even if it does not concern them all (1.3.3).

1.3.1 No dismissal of the Rome I Regulation

In the Explanatory Memorandum, the European Commission concludes from the fact that the optional instrument creates a second Regime of domestic law that in particular the Rome I Regulation will dovetail normally with the CESL ([32]):

> *The Rome I Regulation and Rome II Regulation* ***will continue to apply*** *and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts. This will be done by the normal operation of the Rome I Regulation (…). The Common European Sales Law will be a second contract law regime within the national law of each Member State.* ***Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules*** *([33]). This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules* (Explanatory Memorandum p. 6–7).

1.3.2 The neutralisation of the overriding mandatory provisions of the 1st domestic Regime ([34])

Several times it has been explained, both in the Explanatory Memorandum and in the recitals of the proposal for a Regulation, how the effects of Article 6 of the Rome I Regulation which protects the consumer may be neutralised. Only non-European foreign overriding mandatory provisions should therefore be applied to the international situations involved, assuming that they are entitled to apply. The matter could for example arise for a consumer resident in Switzerland, who has concluded a contract over the Internet with a

[31] Likewise it is mistaken to believe that Rome I would intervene for capacity while it excludes it from its scope (subject to the question of apparent capacity: see Article 13).
[32] Accord also Geert Van Calster, To Unity and Beyond? The Boundaries of European Private International Law and the European Ius Commune, Forthcoming in Alain-Laurent Verbeke et al (eds.), *Liber Amicorum Walter Pintens,* 2012, n°3 p. 11: 'The proposal for a Common European Sales Law, if adopted, will have no direct impact on the Rome I or Rome II Regulations. Parties will effectively employ Rome II's principle of party autonomy to opt into the CESL.'
[33] bold and underlined characters added.
[34] If the domestic law already consisted of two regimes, the overriding mandatory provisions of these two regimes would be counteracted.

professional established in the European Union, by opting for the CESL, and who would apply to a court in the European Union. The latter should apply the Swiss overriding mandatory provisions of the consumer's place of residence, if they provide more far-reaching protection than the CESL, on the basis of Article 6 (which does not limit its application to consumers resident in the European Union) ([35]).

Since the optional regime is a domestic 2nd Regime in each Member State, by nature it cannot be supplanted by the overriding mandatory provisions of the other State domestic regime, because it replaces it completely when the parties choose it ([36]). It becomes the domestic regime chosen by the parties. ***Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules*** ([37]).

Recital 12 of the Regulation also moves towards the neutralisation of the State overriding mandatory provisions of the Member States of the European Union, stating that '*since the Common European Sales Law contains a complete set of fully harmonised 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 Common European Sales Law. Consequently, Article 6(2) of Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law'* ([38]). Therefore, once the CESL has been chosen it will apply, to the exclusion of other national rules that may ultimately provide more protection.

It should rightly be noted that regrettably such an important point is **set out in the recitals or in the Regulation's Explanatory Memorandum.** Indeed, once the text has been adopted, the risk is that the national judges who apply the CESL forget the proposal's Explanatory Memorandum, or do not attach enough value to its recitals. They risk being slower than the Commission to rule out straight away the mechanisms provided for by Articles 6 and 9 of the Rome I Regulation. They could also persist in wanting to apply Article 9 of the Rome I Regulation under which the overriding mandatory provisions of the forum would be applied, notwithstanding the choice of the optional regime, that they would analyse in turn as a classic choice of *lex contractus*.

The proposal for a Regulation should therefore establish this point more clearly, given that it is a key element in the operation of the optional instrument. This can be done by, for example, adding **an article to the Regulation establishing the CESL or by fleshing out the existing Article 11.**

Article 11 currently reads: *'Where the parties have validly agreed to use the Common European Sales Law for a contract only the Common European Sales Law shall govern the matters addressed in its rules'.*

It should be reworded as follows: *'Where the parties have validly agreed to use the Common European Sales Law for a contract only the Common European Sales Law shall govern the*

[35] The restriction of cases where foreign overriding mandatory provisions can be applied (Article 963) only seems to concern Article 9 of the Regulation, not Article 6.
[36] See, by analogy, our briefing paper 'Interplay between an optional instrument and national laws', 2010.
[37] Explanatory Memorandum of the proposal for a Regulation COM(2011) 635 final of 11 October 2011.
[38] Recital 12 of the proposal for a Regulation COM(2011) 635 final of 11 October 2011.

matters addressed in its rules, to the exclusion of all other national rules, including those offering greater protection'.

Some authors, however, dispute that the overriding mandatory provisions of the 1st regime are really neutralised in this way.

Jean-Sylvestre Bergé seems to consider that even if there are two regimes of domestic law, the optional instrument should always be compared with the 1st national regime, which could provide a higher level of protection than the CESL ([39]).

To us this note seems unfounded.

It should be recalled that an overriding mandatory provision or a law that is immediately applicable determines its scope unilaterally. In other words, it determines the situations to which it 'wants' to apply. However, since a first and a second regime coexist in a legal order, at the parties' discretion, it necessarily follows that the overriding mandatory provisions of the 1st regime cannot be interpreted as wishing to apply to situations where the 2nd regime is chosen, since the legal order containing these two regimes itself provides that it is possible to choose between these two regimes.

In our opinion, the said proposal by Jean-Sylvestre Bergé amounts to depriving the parties of the opportunity to choose between the 1st national regime and the CESL.

In any case, this opportunity to choose finds its source in the Regulation establishing the optional instrument.

Ms Giséla Rühl considers, in turn, that the 2nd regime does not result in the opportunity to trade throughout the European Union under a single regime:

> *the European Commission wants to apply the CESL only if the rules of private international law, notably the rules of the Rome I-Regulation, call for application of the law of a Member State*

Her line of argument is based on the following reasoning:

> *'a choice of the CESL amounts to* ***a choice of law at the level of private international law*** *because the CESL is meant to replace both the default and mandatory provisions of the otherwise applicable law.*
> *A choice of the CESL is, therefore, subject to the restrictions of Article 6(2) of Rome I-Regulation.*
> *As a result, the provisions of the CESL will only apply to the extent that the consumer protection standard it offers goes beyond the mandatory consumer protection standard offered by the law at the consumer's habitual residence. To the extent that it provides less protection, a law mix consisting of the CESL and this law will apply.'*

Since, according to her, choosing the CESL is a choice of applicable law within the meaning of private international law, it is therefore subject to Article 6. It cannot deprive the consumer of the overriding mandatory provisions of his/her residence.

She considers that it is irrelevant that the CESL is already a 2nd regime in all the EU

[39] loc.cit. RDC 2012 p. 573 al. 1.

Member States, because she stresses the wording of Article 6(2), which states that the consumer cannot be deprived of the overriding mandatory provisions **which would be applied in the absence of choice.**

However, there is cause to disagree with this argument for the following reasons:

First reason: choosing the CESL is not a choice of applicable law within the meaning of private international law

Ms Rühl's analysis proceeds on the false premise that choosing the CESL is a choice of private international law, an international choice of law. Choosing the CESL is not a choice of law within the meaning of private international law.

The proposed Rome I Regulation had initially provided that the future optional instrument could be a law chosen under Article 3 of the Regulation, and that has been abandoned, which shows that the choice of the CESL is not a choice of law within the meaning of private international law ([40]).

In fact the choice comprises two phases:

-on the one hand there is the choice of the law of a Member State as the applicable law (this is a choice of applicable law within the meaning of private international law). Otherwise, there is objective localisation of the contract (Article 6 of the Rome I Regulation).

-on the other hand, there is the choice of the CESL (2nd regime) in the national law. The latter choice is a choice of pure domestic law.

It is a little like two spouses, who choose at first French law to govern their matrimonial regime (choice of private international law), and who then within this domestic law, choose to be subject to one of the regimes offered by French law: the regime of separation as to property, regime of community of acquisitions (choice of pure domestic law).
With the exception of the rules of the primary regime (applicable to all matrimonial regimes), each regime has its own public policy rules. Thus spouses subject to the community regime will not be subject to the public policy rules of the regime of separation as to property, and vice versa.

As the Explanatory Memorandum of the proposal for a Regulation notes:

> *'This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law;* ***and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules'*** **([41]).**

[40] See above; provided that Recital 14 is not interpreted as a uniform choice of law, of substantive law.
[41] Explanatory Memorandum of the proposal pp. 6–7.

In the response of the TEE to the Green Paper ([42]), Group D of the TEE, which addressed in particular aspects of private international law, ([43]) however, found this reasoning too complicated and indicates that there is a risk of frustrating the expectations of parties that have chosen the CESL without checking in advance the law applicable to the contract ([44]).

However, **the choice of the CESL (without an express choice of applicable law) will be an indication of the implicit will to choose the law of an EU Member State as the applicable law ([45]).**

Second reason: Saying that the consumer cannot be deprived of the overriding mandatory provisions which would apply in the absence of choice does not require taking into account the overriding mandatory provisions of the 1st national regime.

The argument put forward by Ms Rühl, whose conclusions we do not share in this respect, consists in saying that Article 6(2) of the Rome I Regulation, to the effect that it indicates that the consumer cannot be deprived of the overriding mandatory provisions which would be applied in the absence of choice, requires that the overriding mandatory provisions of the 1st regime be taken into account.

It should be recalled that this text provides that:

> *'Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*

Assuming that a consumer is resident in Italy and chooses French law, *'the law which, in the absence of choice, would have been applicable on the basis of paragraph 1'* is Italian law. The text therefore implies that the choice of French law cannot, however, have the result of depriving the consumer of the protection afforded to him/her by Italian law.

However, in this scenario, Italian law comprises two regimes: a 1st regime and a 2nd regime (the CESL).

Since in all Member States there is a 1st regime, with the CESL as a 2nd regime, the choice of one law must not violate one or the other; and the choice of the CESL will never violate the CESL applicable in a State.

The definition of the CESL as a 2nd regime of domestic law thus effectively enables the overriding mandatory provisions of the 1st regime of the consumer's place of residence to be neutralised without harm to the consumer who is protected by the overriding mandatory provisions of the 2nd regime. However, not all of the overriding mandatory provisions are affected.

[42] Green Paper on European Contract Law. Responses from the Trans Europe Experts (TEE) network, under the direction of M. Behar-touchais and M. Chagny, Société de législation comparée, collection TEE, Volume 1, 2011.
[43] ibid p. 133 onwards ; Group D of the TEE was made up of de Pascal de VAREILLES-SOMMIERES, Sabine CORNELOUP, Jérémy HEYMANN, Laurence USUNIER, and Chloé ADELBRECHT-VIGNES.
[44] p. 159.
[45] On which law is chosen in this case: see below proposal by Professeur Cuniberti.

1.3.3. The overriding mandatory provisions affected by Article 6(2) of the Rome I Regulation

It can be considered that **the only overriding mandatory provisions supplanted are those of the 1st regime which fall within the scope of the 2nd regime (CESL)**

For example, the 2nd regime does not address consumer safety. If a Member State prohibits the sale of a product in its territory because it considers it dangerous, the choice of the CESL should not permit circumvention of this prohibition.

Similarly, for example, in B2B relations, the invoicing requirements provided for by Article L 441-3 of the French Commercial Code, are not covered a priori by the CESL, even if they are not among the areas explicitly excluded. They could therefore apply as overriding mandatory provisions if the sale takes place in France.

On the other hand, the reasoning relating to the neutralisation of the overriding mandatory provisions of the 1st regime appears to be **compromised by Recital 27 of the proposal for a Regulation**. Said Recital 27 provides for the exclusion of immorality and illegality from the scope of the CESL. If its aim is that the CESL should not, for instance, take a position on the sale of human gametes, that would seem to be justified. In this case the object of the sale is unlawful because the 'thing' sold is outside legal trade. However, as the exclusion is written in too broad a manner it risks allowing the overriding mandatory provisions to step into this category. Thus, in French law, for example, everything that is contrary to a mandatory law is illegal. Therefore **a national court could be tempted to say that any invalidity because of a clash with an overriding mandatory provision of the 1st regime is an invalidity because of illegality and is therefore excluded from the scope of the CESL**, which would give effect to the overriding mandatory provisions of the 1st regime ([46]). The concept of invalidity for 'illegality' must therefore be restricted, to avoid becoming the Trojan horse that State overriding mandatory provisions use in order to apply to the CESL. In our opinion, the exclusion of invalidity due to 'illegality or immorality' should be replaced by the exclusion of 'invalidity of the sale of goods which are outside legal trade' ([47]).

In any event, since the Rome I Regulation is not supplanted, the precise conditions of its application now need to be specified.

[46] Addmittedly, by giving a strict autonomous interpretation of the concept, the Court of Justice could address this issue. But that might compromise the proper implementation of the CESL in the Member States for several years.
[47] See J.C. Galloux, *Réflexions sur la catégorie des choses hors du commerce : l'exemple des éléments et des produits du corps humain en droit français*, *Les cahiers du Droit*, Vol. 30, No 4, 1989, pp. 1011–1032, http://id.erudit.org/iderudit/042991ar

1.4. ON THE PRECISE APPLICATION OF THE INTERACTION BETWEEN THE ROME I REGULATION AND THE CESL

The problems likely to arise will be examined in turn.

1.4.1. International character of relations: Interaction between Article 1(1) of the Rome I Regulation and the CESL

Article 1(1) of the Rome I Regulation states that it applies *'in **situations involving a conflict of laws**, to non-contractual obligations in civil and commercial matters'*.

The CESL, for its part, applies to **cross-border contracts**, as defined by Article 4 of the proposal for a Regulation:
2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.
3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if:
(a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and
(b) at least one of these countries is a Member State.

The cross-border contract as thus defined is a situation which involves a conflict of laws within the meaning of the Rome I Regulation. There is therefore no difficulty dovetailing these two texts.

Nor would there be any difficulty if a State decided to extend the CESL to domestic contracts. In this case the Rome I Regulation would not apply, since the situation would not involve a conflict of laws.

1.4.2. Choice of law and instrument: Interaction between Article 3 of the Rome I Regulation and the CESL

Whether it is a question of choosing the applicable law on the basis of the Rome I Regulation or choosing the CESL, similar questions arise as regards the manner of choice.

1.4.2.1. Timing of the option

The Rome I Regulation allows the applicable law to be chosen after the conclusion of the contract ([48]). Article 3(2) of the Regulation in fact states *'that the parties may **at any time** agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights*

[48] This reflects the predominant jurisprudence from Member States: see Tomaszewski, M., *La désignation, postérieure à la conclusion du contrat, de la loi qui le régit*, Rev. Crit. Dr. Int. Pr. 1972. 567.

of third parties'.

The proposal for a Regulation on the CESL does not state expressly whether the CESL can or cannot be chosen later.

At most, it seems that it is possible in a case referred to in Article 9(1) as follows: *Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8(2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law.'*

In this situation, at the moment when the sale is concluded, the consumer is not bound by the CESL since he/she has not received the information notice. The sale is therefore subject to the 1st regime of the applicable law. Only if, after having received the notice, the consumer consents to the application of the CESL, will the sale be subject to the CESL.

This subparagraph may suggest that it is possible to choose the CESL after the conclusion of the sale ([49]).

Conversely, it could be argued that choosing the CESL after a contract would be 'temporal' dépeçage, which would be prohibited in B2C relations. We do not, however, believe that this reasoning should apply, in so far as Article 9(1) of the proposal for a Regulation on the CESL itself provides for a case where the CESL is chosen after a contract in B2C relations ([50]).

One might nevertheless wonder whether, in such cases, there would be difficulty dovetailing the two texts, if the timing of the choice does not correspond.
Several situations must be identified:

***__**1st scenario: choosing the CESL at the time of the contract, in the absence of an express choice of an applicable law; change of the applicable law after the formation of the contract**__

A contract can only be subject to the CESL if the law applicable to the contract is the law of an EU Member State([51]). In the scenario envisaged where no law has been expressly chosen at the time of the sale, **__choosing the CESL is therefore necessarily an implicit choice of the applicable law of a Member State.__**

This law may apply to certain issues which are outside the scope of the CESL ([52]).

[49] See also: Policy Options for Progress Towards a European Contract Law, Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final, Max Planck Institute for Comparative and International Private Law, p. 24.
[50] Some authors consider that choosing the CESL at the time of the trial would be equivalent to a kind of '*dépecage'* (see Martijn W Hesselink art. above p. 9).
[51] Otherwise the CESL could only be incorporated in contractual clauses, but this would not be submission to CESL : On the difference between submission and incorporation, see Footnote 14 above.
[52] See Recital 27.

But which law has been chosen?

In order to avoid legal uncertainty, Professor Cuniberti recommends expressly stipulating this in the Regulation on the optional instrument (after Article 11). The professor proposes the following text:

> *'(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.*
> *(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member State.*
> *(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation or any other applicable choice of law rule.*
> *(b) If the law referred to in (a) is not the law of a Member State, this law shall be the law of the habitual residence of the buyer or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.' ([53])*

Professor Cuniberti also puts forward an alternative version of (b) which applies the proximity principle ([54]): *'If the law referred to in (a) is not the law of a Member State, this law shall be the law of the Member State which is the most closely connected with the contract'.*

While we would agree that it is important to ensure that the introduction of the CESL is not hampered by any unnecessary debates, the effect that would be achieved by the wording *'Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member State'* has in fact already been achieved by Article 3 of the Rome I Regulation and Article 6(2) of that regulation, which refers back to Article 3. Those provisions establish that the choice of law does not necessarily need to be made expressly, but may also be *'clearly demonstrated by the terms of the contract or the circumstances of the case'.* When the parties to a contract opt for the CESL, the fact that it was their intention to choose the law of a Member State is clearly demonstrated by the terms of the contract or the circumstances of the case.

Accordingly, it may suffice to include in the CESL Regulation an article stating that *'in accordance with Article 3 of the Rome I Regulation and Article 6(2) of that regulation, which refers back to Article 3, opting for the CESL without expressly choosing the applicable law clearly reflects an implicit intention to choose the law of a Member State'*.

Do we need to go one step further and indicate precisely which law would be applicable? It would appear relevant to do so only in connection with matters that are outside the scope of the CESL. Recital 27 of the regulation establishing the CESL reads: *'All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common*

[53] See Common European Sales Law and Third State Sellers, http://conflictoflaws.net/2012/common-european-sales-law-and-third-state-sellers/; and Common European Sales Law, Third States and Consumers, http://conflictoflaws.net/2012/common-european-sales-law-third-states-and-consumers/.
[54] On this principle, Paul Lagarde, *Le principe de proximité en droit international privé,* RCADI, 1986, p. 196.

European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule'. Accordingly, there does not appear to be a great amount to be gained by including in the CESL Regulation the wording recommended by Professor Cuniberti, in particular since doing so could further complicate the debate on the legal basis to be used for the adoption of the CESL.

Anyway, if, following the contract, the parties expressly choose the applicable law of a State outside the EU, **this may render the choice of the CESL ineffective** (and, where appropriate, make the overriding mandatory provisions of the 1st regime of the consumer's place of residence applicable).

***2nd scenario: express choice of the applicable law of an EU Member State, at the time of sale; subsequent choice of the CESL.**

In this case there is no real problem with dovetailing. The only question which could arise would be knowing whether the choice of the CESL implies the retroactive application of the CESL from the date of sale, or whether the 1st regime should apply for the period before the CESL was chosen, and the 2nd regime after it was chosen. That will be up to case law. In any event, if it can be assumed that the change may be voluntarily retroactive, it must not under any circumstances affect the rights of third parties.

***3rd scenario: No express choice at the time of the sale; subsequent choice of the CESL**

The law applicable to the contract at the time the contract is entered into will be determined objectively under Article 6 of the Rome I Regulation. This will be the law of the consumer's habitual residence.

The CESL can be chosen afterwards, and therefore this choice of the CESL after the conclusion of the contract can be analysed as an implicit choice to submit to the law of an EU Member State.

But then, this means one of two things:

-either the law of the consumer's habitual residence was already the law of an EU Member State; in this case, the subsequent choice of the CESL will not change the law applicable to the contract within the meaning of private international law;

-or the law of the consumer's habitual residence was the law of a State outside the EU; in this case, the choice of the CESL will bring with it an implicit change in the law applicable to the contract within the meaning of private international law, in order to render the law of an EU Member State competent. In this respect, it should be borne in mind that Article 3(2) of the Rome I Regulation stipulates that *'any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties'*.

1.4.2.2. Form of the option

The Rome I Regulation allows an express or tacit choice of applicable law. Article 3 of the said Regulation in fact stipulates that: *1. A contract shall be governed by the law chosen by*

the parties. The choice shall be made expressly or ***clearly demonstrated by the terms of the contract or the circumstances of the case.***

As shown, choosing the CESL neutralises the overriding mandatory provisions of the 1st regime. It is probably because of this effect **that the proposal for a Regulation demands an express choice**. Article 8(2) of the proposal for a Regulation in fact stipulates that: *'In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an* ***explicit statement which is separate*** *from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.'*

It is noted that the explicit statement must be separate from the agreement to conclude a contract, but the text does not demand that it be separate from the agreement on the law applicable to the contract. This is what infers that the choice of the CESL is the implicit choice of the law of an EU Member State.

1.4.2.3 Conditions of the validity of choice

In private international law, the '*contrat de choix*' is given validity by the Rome I Regulation ([55]). But this Regulation also adds, in Article 3(5), that *'the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Article 10, 11 and 13'*. These texts refer to the law of the contract (Article 10) in respect of consent and the fundamental validity of the '*contrat de choix*', and to the law of the contract or the law of the place in which the contract was concluded (Article 11) in respect of its formal validity.

In particular that implies **that a lack of consent to the choice of applicable law will be assessed on the basis of the domestic law designated by the conflict-of-laws rule of the Rome I Regulation.**

However, the choice of the CESL is subject to the Regulation establishing the CESL.

Article 8 of the proposal for a Regulation on a CESL in fact stipulates that:
1. The use of the Common European Sales Law requires an agreement of the parties to that effect. ***The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article and Article 9, as well as the relevant provisions in the Common European Sales Law.***

Furthermore, Article 9 of the proposal for a Regulation provides for the delivery of the Standard Information Notice in Annex II in contracts between traders and consumers.

[55] See Paul Lagarde, Répertoire Dalloz de Droit Communautaire, V° Convention de Rome (contractual obligations) No 44 who states that *''It should, however, be stressed that it is in the Rome Convention itself that the principle of the validity of the 'contrat de choix' is established. This principle cannot be challenged using one of the laws mentioned in Article 3(4),which are only applicable to the limited issue assigned to them'*.
Furthermore, insofar as capacity is excluded from the Rome I Regulation, Article 13 provides that, *'in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'*. This solution is based on the notion of appearances, as the party that contracted with the incapable party was legitimately able to trust that the law of the place where the contract was concluded would be applied: See Cass. Req. 16 January 1861, judgment from LIZARDI, D.P.61.1.193; S.61.1.305, Footnote by G. Massé; Jobard-Bachelier, M.-N., *L'apparence en droit international privé*, L.G.D.J. 1983.

-The question firstly arises of knowing **whether the validity of the choice of the CESL can be subject to other requirements**. It has already been indicated how some authors consider that the choice of the CESL should not be the product of an unfair commercial practice or result from an unfair term ([56]).

We question whether the choice of the CESL can be subject to other conditions of validity than those provided for in Articles 8 and 9 and in the CESL itself (with the exception of something relating to matters excluded, such as capacity). In fact the optional instrument, such as it was conceived, is designed to be as autonomous as possible, with the exception of matters expressly excluded. The instrument itself provides for the protection of the consent of the consumer when choosing the CESL.

Thus, the fact that the consumer's choice must be made expressly and after the receipt of an information notice, shows that the requirement for loyalty in the commercial practice has already been taken into account by the CESL. Similarly, the fact that the CESL contains a high level of consumer protection also implies that a choice clause in the CESL does not bring a significant imbalance and must not be considered as an unfair term.

The question then arises of knowing **whether the choice of the CESL depends on the validity of the choice of applicable law**.

As stated above, we must distinguish between the choice of applicable law under the Rome I Regulation and the choice of the CESL.

However, it is likely that in practice the two theoretical phases described above will take place over time. The trader will propose that the consumer accept the choice of the CESL, which will imply an implicit choice of the applicable law of an EU Member State.

The question could then arise of knowing whether the choice of the CESL could be invalidated due to the voidness of the choice of applicable law in private international law.

The question is firstly more theoretical than practical: in fact, in private international law, there is no case law on the invalidity of the choice of applicable law ([57]), as the issue has not arisen.

Then everything depends on the question of knowing whether the error ([58]), or fraud for example, are assessed very differently in the laws of the Member States (to which the choice of applicable law will be subject) and in the CESL. It is, however, likely that most often, if a lack of consent altered the consent given to choose the applicable law, it would also alter the consent given to the CESL.

In any event, if the lack of consent only altered the choice of applicable law, without altering the choice of the CESL, then the latter choice could be maintained, provided that the law

[56] See Simon WHITTAKER art. above RDC 2011 No 35.

[57] However, there will probably be a dispute over the validity of choosing the CESL, either when a consumer has not been informed, or when, in B2B relations, a major trader has imposed this choice on a small trader in order to circumvent national overriding mandatory provisions.

[58] This is the case for the error which is assessed very strictly in English law. A unilateral error is not a lack of consent, while an error made by both parties is only a reason for invalidity in exceptional circumstances. English law is concerned with legal certainty, while here French law is concerned with the quality of consent : see Simon WHITTAKER, The Optional Instrument of European Contract law and Freedom of Contract, RDC 2011, Vol. 2, p. 36 onwards, No 3.1.

objectively applicable is the law of an EU Member State, since this law would also allow the CESL to be chosen.

1.4.2.4. '*Dépeçage*'

The Rome I Regulation does not exclude '*dépeçage*' of the foreign law to which the parties submit ([59]). Indeed, Article 3(1) of this Regulation provides that *'the parties can select the law applicable to the whole or to part only of the contract'*. This may lead to '*dépeçage*'.

But authors have concluded that, in such cases, any '*dépeçage*' must be coherent.
For example, Professor Paul Lagarde explains that if *'the seller's claim for avoidance of the contract of sale for failure to pay the agreed price is met with an action by the buyer in respect of a latent defect, and the obligations of each of the parties are subject to different and contradictory laws, the 'dépeçage' performed by the parties should be considered as ineffective and the judge should determine which law is objectively applicable'* ([60]).

Article 8(3) of the proposal for a Regulation on a CESL excludes '*dépeçage*' in B2C relations: *3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.*

A number of situations may arise:
***If the parties have decided to apply '*dépeçage*' for the choice of applicable law and have chosen the law of a European country for one part of their contract, and the law of a third country for the other part, the CESL cannot be chosen in B2C relations, because it cannot be chosen in its entirety.
*** If the parties have decided to apply '*dépeçage*' by choosing two laws of EU Member States, it is still difficult to envisage that the CESL could be chosen. It is true that the existing 2nd regime in each law, in the choice of two laws of EU Member States, would allow to 'reconstitute the CESL'. But it is feared that the choice does not fully include the 2nd regime of any national law. This situation therefore remains completely uncertain.

In any case, to us '*dépeçage*', rarely used within the framework of the Rome I Regulation, is an unnecessary complexity, and it should be prohibited even in B2B relations, where it could also be dangerous for small traders.

1.4.3 Application of the CESL to a trader resident outside Europe; Interaction between Articles 6 or possibly 4(1) of the Rome I Regulation and the CESL

When the seller is resident outside Europe, in the absence of a choice of applicable law of an EU Member State, there are two scenarios:

- either he/she has directed his/her activities towards an EU consumer, and Article 6 gives competence to the law of the consumer's place of residence, which allows the choice of the CESL

[59] For more about '*dépeçage*', see Lagarde, P., '*Le dépeçage dans le droit international privé des contrats*', Rivista di diritto internazionale privato e processuale, 1975, p. 649; Ekelmans, V., '*Le dépeçage dans la convention de Rome*', Mélanges Vander Elst, Brussels, 1986, p. 243; C. NOURISSAT, *Le dépeçage*, in S. CORNELOUP, N.JOUBERT (dir) , *Le règlement communautaire Rome I et le choix de la loi dans les contrats internationaux*, Lexis nexis Litec 2011.
[60] Rep. Dalloz *Droit communautaire, V° Convention de Rome (obligations contractuelles)* No 34.

- or he/she has not directed his/her activities towards an EU consumer, in which case Article 4(1)(a) of the Rome I Regulation, which designates the law of the seller's residence, designates here the law of a third country. However, if the parties choose the CESL without giving any express indication as to the applicable law, this results in an implicit choice for the law of an EU Member State, which legitimises the application of the CESL.

1.4.4 Protection of the consumer by the law of his/her habitual residence in the absence of choice of applicable law Interaction between Article 6(1) of the Rome I Regulation and the CESL ([61])

Article 6(1) of the Rome I Regulation gives competence to the law of the consumer's place of residence to govern the contract, **when the parties have not chosen an applicable law.**

If the parties choose the CESL without otherwise making an express choice of applicable law, we have seen that this equals an implicit choice of the law of an EU Member State and that the only question is which law was chosen. This shows that in choosing the CESL, implying the choice of an applicable law, it is not Article 6(1) which applies but Article 6(2).

1.4.5 Protection of the consumer by the overriding mandatory provisions of his/her habitual place of residence in the case of a choice of applicable law offering less protection: Interaction between Article 6(2) and Article 9 of the Rome I Regulation and the CESL

Since the parties have chosen the CESL, this choice being the same as an implicit choice of applicable law, we find ourselves under Article 6(2) (or Article 9) of the Rome I Regulation. It will be Article 6(2) if we are in the area of this text (either the trade exercises his/her professional activities in the country where the consumer has his/her habitual residence, or directs his/her activities by any means to that country or to several countries, including that country). In other cases it will be Article 9 ([62]).

As shown, the choice of the CESL allows the neutralisation of the overriding mandatory provisions of the 1st regime of the law of the consumer's place of residence. The consumer remains protected by the 2nd regime (CESL) of his/her place of residence, the 2nd regime being the same in all EU countries. Accordingly, Article 6(2) and Article 9 of the Rome I Regulation are not supplanted but the possibly disruptive impact they may have on cross-border trade is eliminated.

And this protection of the consumer by the mandatory rules of the second regime is satisfactory since the CESL is a text offering a high level of consumer protection (see Part II). Furthermore, authors who have warned against the risk of social dumping linked to the optional instrument and consisting in only choosing it when it is less favourable to the

[61] This text is counteracted according to Martijn W. Hesselink, 'How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation', 26 October 2011, European Review of Private Law, Vol.1, pp. 195–212, 2012, Amsterdam law school Legal Studies Research paper No 2011-43, Centre for the Study of European Contract Law Working Paper Series?o 2011-15, Electronic copy available at: http://ssrn.com/abstract=1950107.

[62] On the relationship between these two texts: see above introduction.

applicable national law, recognise that this risk is more present in B2B relations than in B2C relations, insofar as the optional instrument has a high level of consumer protection ([63]).

1.4.6 The international public policy exception of the forum: Interaction between Article 21 of the Rome I Regulation and the CESL

Article 21 of the Rome I Regulation stipulates that: *'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.'*

The difference between the overriding mandatory provisions (Article 6(2) and Article 9) and the exception of international public policy (Article 21) is methodological. These are two procedures which have the common objective of protecting crucial values. Overriding mandatory provisions are *'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'* (Article 9(1) of the Rome I Regulation). Overriding mandatory provisions determine their scope unilaterally. Its application is not in principle subject to the content of the law applicable to the contract. In contrast, the public policy exception is a means which helps to disapply a foreign law that is normally applicable because its content clashes with the fundamental values of the forum.

If, in theory, the public policy exception can be applied in consumer law, in practice the matter is dominated instead by the method of the overriding mandatory provisions[64].

However, concerning the CESL, we have to ask ourselves whether the judge in a Member State wishing to supplant the optional instrument to apply his/her national mandatory rules could try to use the abovementioned Article 21.

The question could only arise if it is the 2nd regime of a law foreign to the forum which has been chosen. For example, the parties have chosen the CESL but they have also expressly chosen German law. The French court of the forum might question whether the German 2nd regime clashes with international public policy of the forum.

But it will have to conclude this not to be the case because the same 2nd regime will also exist in French law, which will prevent the foreign law chosen by the parties from being manifestly incompatible with the fundamental values of the forum ([65]).

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[63] Jacobien W.RUTGERS, An optional Instrument and Social Dumping Revisited, European review of Contract Law, (March 8, 2011). Available at SSRN: http://ssrn.com/abstract=1780950 or http://dx.doi.org/10.2139/ssrn.1780950

[64] However, learned opinion has in any case established a blurring between these two methods. Article 6(2) is an example, since it implies a comparison between the content of the protection of the consumer in the law chosen by the parties, and the protection to which he/she would have been entitled under the law of his/her residence. If the law chosen affords greater consumer protection, it will not be ousted by the overriding mandatory provisions of the consumer's place of residence. On the distinction between the public policy exception and the mechanism of overriding mandatory provisions : V. B. Rémy, *Exception d'ordre public et mécanisme des lois de police en droit international privé* : Typed thesis, Paris I, May 2006, National Library th., Dalloz, 2008. – N. Nord, *Ordre public et lois de police en droit international privé* : Typed thesis, Strasbourg III, 2003. – D. Archer, *Impérativité et ordre public en droit communautaire et droit international privé des contrats* : Typed thesis, Cergy-Pontoise, 2006.

[65] Accord Green Paper on European Contract Law. Responses from the Trans Europe Experts (TEE) network, under the direction of M. Behar-touchais and M. Chagny, Société de législation comparée, collection TEE, Volume 1, 2011, *Réponse du groupe D*, part drawn up by Pascal de Vareilles SOMMIERES No 76.

CONCLUSIONS

We see that there are no insurmountable difficulties dovetailing the Rome I Regulation and the CESL. In order to improve matters further, it would be desirable to:

- transfer into an article of the Regulation establishing the optional instrument details on the interaction between the Regulation and the national overriding mandatory provisions which are currently included in the recitals or in the explanatory memorandum, without normative value; in our opinion, this is necessary because this is a decisive factor of the regime of the CESL;
- restrict in Recital 27 of the proposal the exclusion of 'illegality' from the scope of the CESL in such as way that all the national overriding mandatory provisions sanctioned by invalidity are not deemed excluded from the scope of the CESL and therefore applicable to a sale subject to the CESL; this exclusion should be replaced by the exclusion of 'invalidity of the sale of goods which are outside legal trade';
- stipulate that submission to the CESL, without an express choice of applicable international law, constitutes an implicit choice of the law of an EU Member State.

The mechanism established must be approved from the moment the consumer is protected by the mandatory rules of the 2nd regime, and provided that the level of protection of this second regime is a high level of protection. This is indeed the case, as we will show by comparing the CESL to the national laws of the EU Member States, which is the subject of the second part of this study.

2. COMPARISON OF NATIONAL CONSUMER LAW IN THE MEMBER STATES WITH THE PROVISIONS ON CONSUMER PROTECTION IN THE CESL

(to be completed)

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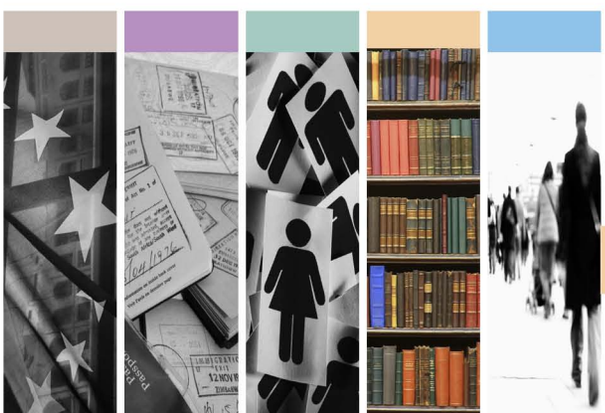

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