REPORT ON CONFERENCE: "EUROPEAN CONTRACT LAW- UNLOCKING THE INTERNAL MARKET POTENTIAL FOR GROWTH", WARSAW, NOVEMBER 2011

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Abstract in original language

The Polish Presidency of the Council of the EU in cooperation with the European Commission organised a major conference on European contract law. This conference should serve as a platform for a discussion on the forthcoming Commission's proposal for an instrument in European contract law. It comprised of a number of panels devoted to the economic, legal and political aspects of the forthcoming proposal. Author aims to inform about the results achieved by this conference.

Key words in original language

European contract law, the optional instrument

1. INTRODUCTION

The Polish Presidency of the EU Council and the European Commission organised a high-level conference on European contract law. Proceedings of the conference concentrated on *the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*.[1] This proposal could be regarded as the contemporary climax of the efforts of the European Commission in the field of European contract law. The EU has been working on European contract law for a decade. This process has been initiated mainly by the Communication from the Commission to the Council and the European Parliament on European contract law.[2] In the frames of these activities, academics organised in the joint network on European Private Law — EU Sixth Framework Programme "Network of Excellence"[3] , founded in May 2005, delivered in 2008 proposal for the "Common Frame of Reference" (CFR) for European contract law containing the "Common Principles of European Contract Law" (CoPECL) as described both in the Commission's Action Plan[4] and in the Commission's Communication on 'European Contract Law and the

[1] COM(2011), 635 final, 2011/0284 (COD), Brussels, 11.10.2011

[2] Com(2001) 398, 11.7.2001

[3] http://www.copecl.org/

[4] (COM [2003] 68 final)

Revision of the Acquis: The Way Forward'[5]. The key role in the Network of Excellence was played by The Study Group on a European Civil Code[6] and The Research Group on the Existing EC Private Law, or "Acquis Group". This material, published as Draft Common Frame of Reference[7], has been roughly and precisely commented and forced everybody to raise a question of its future application and usefulness. In July 2010, the European Commission put forward several possible policy options for public consultation in the *Green Paper on progress towards a European contract law for consumers and businesses (Green paper 2010)."* .[8] In April 2010, the Commission also established an Expert Group[9]. The group's task had been to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European contract law, including consumer and business contract law, and in particular in: (a) selecting those parts of the Draft Common Frame of Reference which are of direct or indirect relevance to contract law; and (b) restructuring, revising and supplementing the selected contents of the Draft Common Frame of Reference, taking also into consideration other research work conducted in this area as well as the Union acquis. In July 2010, the Commission established a Group of Key Stakeholder Experts ('Sounding Board') which represented different categories of persons affected by a possible European contract law instrument (businesses, consumers and legal practitioners). The stakeholder group met monthly, reviewed drafts of parts of the feasibility study prepared by the Expert Group and provided practical input on a regular basis, particularly on the level of consumer protection, legal certainty and clarity.[10] An expert group established by the European Commission delivered a *Feasibility study on a future initiative on European contract law* in May 2011.[11] This study has been the direct basis for the proposal for the regulation on the Common European Sales Law.

The conference in Warsaw discussed the proposal in the four panels. Report on this conference could enable to take in regard various views

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[5] COM (2004) 651 Final) of 11 October 2004

[6] www.sgecc.net

http://www.acquis-group.org/

[7] Principles, Definitions andModel Rules of European Private LawDraft Common Frame of Reference (DCFR).Outline Edition http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf

[8] COM (2010) 348 final

[9] 2010/233/EÚ

[10] http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf, p.3

[11] http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf

expressed by the different groups of persons, not only academics, but also politicians and stakeholders, that represented mainly consumers and small and medium enterprises.

Firstly, we would like to concentrate on the reasons *why among the various options presented in the Green Paper 2010 the Commission has preferred the regulation as the best solution for the future progress in the field of European contract law.* The optional instrument technique seems to be a better technique in comparison to directive. It is less invasive, more respectful of national laws. The recent harmonisation effort via the Consumer Rights Directive had been prolonged and difficult. Scottish academics commented this development as following *´Another interesting point that emerged from the Warsaw conference on European Contract Law was whether the familiar, if not always satisfactory, EU technique of harmonising the domestic laws of Member States by way of Directive was at an end, at least in the field of private law. The experience of the Consumer Rights Directive has obviously been a deeply scarring one for both the European Commission and the European Parliament. This is not just a matter of no more full or maximum harmonisation (as in the original CRD proposal), but of harmonisation of any kind as a technique of law reform for the EU as a whole.´* [12]

Moreover Consumer Rights Directive[13] has not been based on a full harmonisation, so it did not solve the problem lying in the fact that the differences between Member States´ laws remain substantial.

Another important point lies in the high level of consumer protection established in the cross- border transactions by the *Article 6 of Rome I Regulation.*[14] 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. Outcome of this rule has proved to be counter-productive on its impact to consumer cross-border contracts. Seeking and getting legal advice of foreign legal orders is very costly for businesses, so in many cases they simply decide not to sell abroad or they sell only to two or three selected countries.

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[12] MacQueen,H., Clive,E., Macgregor,L.: Will CESL be the end of harmonisation as we know it, maximum or otherwise? http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8783

[13] http://register.consilium.europa.eu/pdf/en/11/pe00/pe00026.en11.pdf

[14] 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)

2. BENEFITS OF THE PROPOSAL FOR CONSUMERS AND BUSINESSES - WHAT AN OPTIONAL REGIME COULD OFFER TO CONSUMERS AND BUSINESSES

First part of the conference dealt with possible benefits of proposal for consumers and businesses. Speakers represented Polish Consumer Federation, European Consumer Centre, Belgium, Federation of Small Businesses, UK, legal advisors from UNIZO-Studiedienst, Belgium. Professor Fernando Gomez and Mrs. Paraskevi Michou, Director, Directorate Civil Justice, European Commission were among the speakers of this panel, too.

Stakeholders raised the question, that the *differences between national law are not an obstacle No. 1,* other barriers are important and need to be addressed in the internal market of the EU. The response from the representative of the Commission to this reasonable point was, that parallel approaches were needed and were being pursued (e.g. alternative dispute resolution, taxes, enforcement), but that was not a reason for doing nothing on the contract law front.

´Content of Common European Sales Law has many gaps and vague terms´, this fear was common for many speakers in the contemplation about the proposal's future application. Interpretation by national judges, the interaction between national law and the CESL on the items that are not covered and reference to national law will remain necessary. Professor Anna Veneziano, member of Expert Group, answered in discussion that *´Gaps and open term are sometimes inevitable and would not greatly diminish the utility of the instrument, given that most matters of practical importance in normal cases would be covered.´* In this regard**,** a very important role will belong to the Court of Justice of the EU and to the planned communication of final judgments of national courts.

SMEs argued that CESL is not balanced because the level of consumer protection on many topics is too high. Contrary to this opinion, consumers expressed hesitation whether the level of consumer protection is sufficient.

Professor Gomez in his contribution mentioned the evidence that transaction costs due to legal diversity affect both sides of the transaction and bring about the uncertainty for firms and consumers. The costs are probably higher in e-commerce.

Mrs. Paraskevi Michou and other speakers advocated proposal of the CESL and pointed to its *pros*:

- regulation is not so expensive as directive ;

- CISG also established double regime and it is not controversial;

- CESL provides the highest level of consumer protection, same as Consumer Rights Directive;

- it could encourage SMEs to trade abroad;

- it improves competition and therefore it will have positive impact to prices of goods and related services;

- it should be time and cost saving;

- CESL will be available in all languages;

- proposal preserves freedom of contract, possibility of choice; and

- it does not effect national law directly.

3. LEGAL ELEMENTS OF THE PROPOSAL - CONTENT OF THE INSTRUMENT

The second panel dealing with legal elements of the proposal began by the presentations of Christiane Wendehorst, Hugh Beale, Anna Veneziano, professors of law. Subsequently, their contributions were followed by Graham Wynn, British Retail Consortium, UK, Prof. Dr. Friedrich Graf von Westphalen, President of the Commission on European contract law, CCBE, Alain Bazot, President, UFC-Que Choisir, France. The Commission was represented by Prof. Dr. Dirk Staudenmayer from the Directorate Civil Justice. High level of discussion was supported by Professor Marco Loos, University of Amsterdam as moderator.

Speakers analyzed mainly the scope of CESL, but also its terminology was asessed (Wendehorst).

Its *territorial scope* is given by Article 4 of the proposal. CESL may be used on cross-border contracts. In B2B (business to business relationships) it is a cross-border contract if the parties have their habitual residence in different countries, in B2C relations (business to consumer contract) it is a cross-border contract if 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 at least one of these countries is a Member State. Pursuant to Article 13 of the proposal, Member States may decide to broaden its application also to domestic contracts.

The Common European Sales Law can be used for:

(a) sales contracts;

(b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and

re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.

(c) related service contracts, irrespective of whether a separate price was agreed for the related service (art. 5, *material scope*)

Personal scope of the proposal is according to Article 7 (Parties to contract) restricted not only to B2C contracts, but where all the parties to a contract are traders, CESL may also be used if at least one of those parties is a small or medium-sized enterprise ('SME')- (B2B). There is a possibility for Member States to allow its application also to large businesses without participation of SME as a contract party.

In connection to the proposed application to B2B contracts in cases where small and medium enterprises are involved, professor Hugh Beale speculated *´What do SMEs want?´* He argued that in dealing with large business they would like to have consumer-like protection. In order to obtain it, they will probably be willing to pay higher prices when buying or to sell for lower prices. This would be comparable to buying some sort of insurance and the CESL will be able to give them these warranties. On the other hand, using the CESL in B2C contracts may be regarded by consumers as ´the mark of honesty´.

Graham Wynn stressed that the legal certainty will be the first one to be tested in the case of a new instrument and *that the proposal should be subjected to rigorous scrutiny to ensure it works;, it works for businesses, it works for consumers; and it works in a legal structural sense.´* This speaker raised another important requirement for the proposal it had to meet*:´ It must be clear and accepted that it makes Rome I redundant for those who use it. It must be totally optional for the businesses with no attempt to suggest that a business that directs its offer to a Member State under this proposal may somehow be forced to accept any other the laws of the Member State within the scope. There must be" no right to buy".´*

4. HOW AN OPTIONAL REGIME SHOULD FUNCTION

Speakers at this panel were Kaisa Olkkonen, Nokia Corporation, Finland, Jutta Gurkmann, Federation of German Consumer Organisations, Martijn Hesselink, Jerzy Pisuliński, professors of law, Sir Nicholas Hamblen, Commercial Judge, High Court, the UK and Prof. Dr. Dirk Staudenmayer, EC.Moderator was professor Hans Schulte Nolke.

Before we start to speak about how to opt into the CESL, the structure of the proposal should be outlined. It consists of Introductory provisions, Articles (16) and two annexes; Annex 1 contains Common European Sales Law, Annex 2- Standard Information Notice on the CESL, that must be provided by the trader to the consumer before an agreement on use of the CESL is made.

There was significant change in the legal mechanism on how to opt into the CESL. Previously, in the political debate on the optional

instrument, the optional instrument was referred to as the 28th regime in EU. Present proposal introduces the CESL as the second national regime.

If the CESL had been the 28th regime, opting into the CESL would have amounted to a choice of law under Art. 3 of the Rome I Regulation. In contrast, according to the present proposal, the CESL as the second contract law regime within national law of MS will become applicable once the national law has already been indicated as the law governing the contract.

´The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007)20, or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules´[15] .

Hesselink pointed out to the fact that *the categorisation of the CESL as the second national law neutralises the operation of Article 6 of the Rome I Regulation in B2C transactions.*

Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.16

In connection to this part of proposal which relates to B2B contracts *Hesselink stressed that whether and to what extent the parties have opted - out (certain or all rules) of is determined by the CISG itself, as the law applicable to the contract. Therefore it seems advisable for prudent parties in B2B relationship who are opting into the CESL to indicate explicitly that they are opting out of the CISG, and to be very precise about their intentions in the case of partial choice.*[17]

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[15] Recital 10, of COM(2011), 635 final, 2011/0284 (COD), Brussels, 11.10.2011

[16] Recital 25, of COM(2011), 635 final, 2011/0284 (COD), Brussels, 11.10.2011

[17] Hesselink, M. How to opt into the CESL. Brief comments on the Commission´s proposal for a regulation. Paper was presented at the conference in Warsaw.

At last we would like to draw attention to the fact that *in practical life, the trader will be the contract party to choose the CESL*, and this will be *an* opportunity for the consumer to decide whether he is willing to make an agreement *o*n the use of the CESL as the law governing the contract. If the consumer agrees, the second step will be the conclusion of the sales contract itself.

If the regulation is adopted, it will be very important for the Commission to promote this new optional instrument. The key role will also belong to the consumer organizations and their attitude to this regulation, They will be subjects often addressed by the inquiries of consumers whether using the CESL may be recommendable for them.

5. THE INTERPLAY BETWEEN AN OPTIONAL REGIME AND NATIONAL LAWS - IMPACT OF THE OPTIONAL INSTRUMENT ON NATIONAL LAWS AND EUROPEAN LEGAL AREA

The last panel had a prevailingly political character and it's content was concentrated on various topics.

First speaker, professor Ewa Łętowska from Poland pointed out that the idea of inserting, by Regulation, a second set of sales law rules into the national laws was an innovative and useful idea but there was a *plea for clarity and certainty on the question of the Treaty basis – currently article 114*. Secondly, she stressed the *need for proper preparation of the implementation campaign, otherwise the Optional instrument would not be successful in the area of its practical use .* Thirdly, same as her predecessors, she expressed *fear of not clearly defined and blank terms in the CESL.*

Diana Wallis, Vice-President of the European Parliament and Paraskevi Michou, Director, Directorate Civil Justice, advocated proposal.

Mrs Wallis said *´ I am firmly committed to maintain this high level of protection during the forthcoming negotiations, as it is a core part of the overall equation. Consumers need to have the confidence that their core rights are guaranteed and that they do not take risks when shopping abroad under the Common European Sales Law. And the more consumers use the Common European Sales Law, the better knowledge they will have of their rights. This is also the best way to make sure that the Common European Sales Law will develop into a mark of quality in our internal market and the use of it will become a competitive advantage for traders´* [18]

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http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/742&format=HTML&aged=0&language=EN&guiLanguage=en

6. CONCLUSION

The Common European Sales law seems to be a very promising instrument in the European Contract Law. The rather sceptical approach of some stakeholders and national experts may be needed in comparison to very supportive attitude of academics. The creating of a common European legal culture could be, by its adoption again one step forward. A very important role in this process will belong to legal education. The European Commission supports this idea[19] and the participation in this process may create a real challenge for the European lawyers, at the first stage for the academics.

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[19] Commission Communication on Building Trust in EU-wide Justice: a New Dimension to European Judicial Training, COM (2011) 551 final, 13.9.2011.