The Common European Sales Law: Aiming for the stars, but hitting the ground with reality?

Mine Ekim (Class of 2012-2013 Master of Laws (LL.M.) in Cross-Cultural Business Practice, University of Fribourg; Attorney-at-law admitted to Istanbul Bar Association and Union of Turkish Bar Associations)(*)

Can a Common European Sales Law be based on Art. 114 TFEU? While the proposal for a Common European Sales Law is making its way through the EU's legislative process, the author criticizes the weakness of its chosen legal basis and demonstrates the risk associated with relying on the wrong basis.

Abstract provided by the Editorial Board

In the context of a discussion on certainty, the goal of this paper is to be a sound in law[1] for attention to the European Commission's (Commission) "Proposal for a Regulation of the European Parliament (EP) and of the Council on a Common European Sales Law" (the proposed CESL)[2]. This paper questions whether the Commission's choice to base its proposal on Art. 114 of the Treaty on the Functioning of the European Union (TFEU) is appropriate.

The proposal is in the form of a regulation rather than a directive. Preceded by a short Explanatory Memorandum of about a dozen pages, the proposal has two main parts: firstly, the actual Regulation intended to give effect to the CESL, i.e. 37 Recitals and 16 Articles drafted by Commission officials (sometimes termed "le chapeau"), and concerning the scope of the application of the instrument, its optional character, its relationship to existing private international law instruments and the mechanisms to make it applicable and secondly, the actual "CESL" as an Annex to the Regulation, comprising 186 Articles and two appendices. It is a long and complex document, encompassing provisions governing much of contract law as well as specific provisions for the three types of contracts, which it would govern. The Commission claims that this proposal creates an optional, autonomous second national (sales) law regime, to be used initially in cross-border business-to-consumer contracts and business-to-business contracts involving at least one small and medium-sized enterprise.

Legal Basis: Questionable?

As a legislative act under Art. 288/1 TFEU, a directive or regulation requires a legal basis under the principle of conferral enshrined in Art. 5 Treaty of EU. As there is no specific legal basis endowing the Union with competence to legislate generally across the field of contract law, the Treaties governing the Union provide no specific competence to create optional contract law legal rules.[3] The choice of legal basis is of great importance, among others, for the following reasons: it determines the procedure for adopting legislative instruments in the EU (whether a qualified majority of votes[4] or unanimity in the Council is required, as well as what the role of the EP is in shaping the measure) and also, if the wrong legal basis is chosen, the measure is in danger of being challenged before the Court of Justice of the European Union (CJEU) and annulled by it.

As opposed to the initial proposals set out in the Green Paper of July 2010, the proposed CESL is devised as an optional instrument that no longer aims to harmonize the national sales laws of the Member States by "requiring amendments to the pre-existing national sales law", but by "creating within each Member State's national law a second sales law regime for contracts covered by its scope that is identical throughout the EU" and that "will exist alongside the pre-existing rules of national contract law"[5]– so, seemingly leaving Member States' laws intact or unaffected. Bearing this in mind, the appropriateness of the Commission's

(*) This paper is wholeheartedly dedicated to my beloved father, Halit Ekim, without whom I would not be who and where I am today.

1 WERRO, F. et al., "The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies of European Tort Law", King's Law Journal, V.20, 2009-ssrn.com/abstract=1452658, p. 255.

2 COM (2011) 635 final, 11.10.2011.

3 DALHUISEN, J., "Some Realism about a Common European Sales Law", EBLR, V.24/3, 2013-ssrn.com/abstract=2157397, p. 314.

4 This would mean that no single Member State can effectively veto.

5 DANNEMANN, G. & VOGENAUER, S. (eds.), *The Common European Sales Law in Context – Interactions with English and German Law,* Oxford, Oxford University Press, 2013, pp. 21-81.

choice[6] of Article 114 TFEU as the legal basis for an optional instrument like the proposed CESL is worth questioning. Can the proposed CESL be characterized as a measure for the "approximation of the measures laid down by law […] in Member States" within the meaning of Art. 114 TFEU?[7]

The proposed CESL purports to be based on Art. 114 TFEU.[8] The question of appropriate legal basis was widely debated already before the Commission's proposal was presented and several other treaty bases (notably Articles 81, 169 and 352 TFEU) were speculated upon prior to its publication. Previous studies[9] have meticulously considered and eliminated the appropriateness of Articles 81 and 169 TFEU, covering procedural rules and consumer protection respectively. The potential remaining legal bases are Articles 114 and 352 TFEU. Within the meaning of Art. 114 TFEU,[10] the term "approximate" suggests some manner of harmonization or replacement of Member State laws.[11] In accordance with this Article, the Union may adopt "measures for the approximation of the provisions […] in Member States which have as their object the establishment and functioning of the internal market" and accordingly, it empowers the Union to harmonize national legal provisions by way of a directive, or even to replace national law by way of a regulation. In contrast, Art. 114 TFEU does not empower the Union to introduce a legal regime of Union law that supplements national law *without* harmonizing or replacing it. Therefore, a legislative act, which does not aim to achieve approximation of the existing national laws but instead leaves existing national laws untouched, cannot be done under Art. 114 TFEU. Paragraph 3 of the same article lays down that the Commission should base its proposals concerning, inter alia, consumer protection on a "high level of protection".

There is well-established European Court case law,[12] which holds that creating a new legal form to exist alongside existing legal forms under national law rights, does not amount to approximating national law and cannot be based on Art. 114 TFEU. In the Opinion 1/94 paragraph 59, the CJEU drew a distinction between the harmonization of national intellectual property law, which can be based on now Art. 114 and creating "new rights superimposed on national rights" cannot be based on now Art. 114. This distinction has been applied in subsequent case law on patents and the unavailability of Art. 114 TFEU as a legal basis for creating European law forms of intellectual property and was recognized by the Member States when they introduced, through the Treaty of Lisbon, a new legal basis for measures creating European intellectual property rights in Art. 118 TFEU.[13] In a different context, the same distinction was applied in the creation of the European Cooperative Society (SCE).[14] The CJEU held that Council Regulation 1435/2003 established the Statute for SCE, an optional pan-Union corporate entity that, while obviating the need for incorporation in any single Member State, did not per se harmonize or replace the latter's company laws. Therefore, creating a European form of cooperative society to exist alongside national cooperative societies was correctly adopted on the basis of the residual power in what is now Art. 352 TFEU and could not have been based on Art. 114 TFEU. Implicit in the judgment is the Court's rejection of the application for annulment

6 EP has been a constant supporter of the proposed CESL whereas the Council and a number of Member States' parliaments (e.g. Austrian and German parliaments) have questioned the merit of Union intervention beyond reform of the consumer *acquis* and into the area of facilitative contract law. LOW, G., "*Unitas via Diversitas*: Can the Common European Sales Law Harmonize Through Diversity?", Maastricht Journal of European and Comparative Law, V.1, 2012-ssrn.com/abstract=1991070, p. 133.

7 This paper leaves aside whether the other requirements of Art. 114 TFEU are met. For this, see the reasoned opinions of the Belgian, Swedish and UK Parliaments, ipex.eu/IPEXL-WEB/dossier/document/COM20110635FIN.do.

8 LOW, G., *supra note 6*, p. 132; KUIPERS, J. J., "The Legal Basis For a European Optional Instrument", ERPL, V.19/5, 2011, pp. 545-564.

9 Particularly KUIPERS, J. J., *supra note 8*, pp. 549-560.

10 Since Art. 114/1 TFEU refers to "measures", in principle, any form of EU measure can be adopted provided that the measure is for the approximation of national law or administrative practice and with the aim of establishing or ensuring the functioning of the internal market.

11 LOW, G., *supra note 6*, p. 136.

12 BCEW, 01.2012, barcouncil.org.uk/media/112927/bar_council_of_e_w_preliminary_views_on_cesl_legal_basis_-_january_2012.pdf and 05.2012, barcouncil.org.uk/media/159762/barcouncilof_england___wales__response_to_moj__bis_call_on_cesl__may2012final.pdf.

13 BCEW, *supra note 12*, 01.2012, p. 3; position also shared by the Austrian Federal Council European Affairs Committee, 2011, parlament.gv.at/PAKT/VHG/BR/I-BR/I-BR_08609/fname_237038.pdf and by the German Bundestag Committee on Legal Affairs, 2011, dipbt.bundestag.de/dip21/btd/17/080/1708000.pdf.

14 Case 436/03, EP v. Council, ERC I-3733, 2.5.2006. BASEDOW, J. et al., "Policy Options for Progress Towards a European Contract Law: Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final", RabelsZ, V.75/2, 2011-ssrn.com/abstract=1752985, p. 388 vs. MICKLITZ, H. W. & REICH, N., "The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' - Too Broad or Not Broad Enough?", EUI Working Papers LAW N.2012/04, 2012, pp. 1-87-ssrn.com/abstract=2013183.

that any measure seeking to *merely* overcome the problems of legal diversity to the internal market is sufficient to trigger the use of Art. 114 TFEU. To reason otherwise is to render the term "approximate" otiose.[15] The Court found that the SCE was a new legal form; it existed alongside cooperative societies formed under national law; which was left "unchanged"; it had its own specific characteristics; it left certain matters to be governed by local national law, but these matters were of "subsidiary nature" and subsidiary national law was not harmonized by the contested regulation.[16]

The proposed CESL claims to be a "single uniform set of contract law rules" which "should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union law" and "should cover the matters of contract law that are of practical relevance during the life cycle of the types of contracts falling within the material and personal scope". Where the parties have validly agreed to use the proposed CESL for a contract, "only the CESL shall govern the matters addressed in its rules" and "all the matters of a contractual and non-contractual nature not addressed in the CESL are governed by the pre-existing rules of the national law". Just like the European intellectual property rights and the SCE, the proposed CESL will exist alongside national contract law, which will be *unchanged*: neither be harmonized nor replaced. It cannot turn itself into a regulation that harmonizes (or, in the language of Art. 114 TFEU "approximates") national law simply by claiming in its preamble that that is what it does.[17] The Commission argues that the proposed CESL approximates[18] national law by "creating within each Member State's national law a second sales law regime", however this argument does not displace the conclusion that it is a new legal form in addition to[19] the national systems of contract law. Notwithstanding any convergence due to regulatory competition, the very co-existence of these two sets of rules militates against the conclusion that the purely national law is *itself* changed.[20] If the proposed CESL were to be adopted under Art. 114 TFEU, it would clearly be a measure of EU law having no impact upon national law as it leaves the national systems of contract law intact or unaffected – meaning that this measure could not be regarded as one that approximates the national contract laws. Consequently, the appropriateness of Art. 114 TFEU, as the legal basis of the proposed CESL, can give rise to doubts.[21]

To this date, the Union's legislative practice proves that any legal instrument or legal form of Community law,[22] which exists in parallel to corresponding national laws without changing or replacing them, have not been based on Art. 114 TFEU, but on Art. 352 TFEU. Art. 352 TFEU provides for a different legislative procedure[23] which requires unanimity in the Council "after obtaining the consent of the EP" whereas the ordinary legislative procedure of Art. 114 TFEU allows majority voting with the full participation of the EP. If it turns out that Art. 114 is not the correct legal basis and given that there is no specific Union competence in the area of contract law, then it may be concluded that the Treaties have not provided the necessary powers to adopt an optional instrument and that Art. 352 TFEU remains the sole legitimate basis for the proposed CESL.[24] However, if the EU now decides to base an optional contract law on Art. 114 TFEU, then the rationale for the use of Art. 352 in all other past (and future) optional regimes might be called into question[25] and potentially challenged as being based on the wrong competence. In the near future, this issue will be a topic of discussion,[26] if not dissent, and thus it will undermine the credibility of the proposed CESL unless and until the CJEU has given judgment on the issue.

15 LOW, G., *supra note 6*, p. 137.
16 Case 436/03, *supra note 14*, paras 40-46.
17 BCEW, *supra note 12*, 01.2012, p. 5.
18 MICKLITZ, H. W. & REICH, N., *supra note 14*, p. 5 vs. BASEDOW, J., "Fakultatives Unionsprivatrecht oder: Grundlagen des 28. Modells", Festschrift für Dr. Dres. Franz Jürgen Säcker, Munich, C.H. Beck, 2012, p. 38.
19 Comparatively, Case 436/03, *supra note 14*, para 40: "the contested regulation that it aims to introduce a new legal form *in addition to* the national forms of cooperative societies".
20 LOW, G., *supra note 6*, p. 146.
21 BCEW, *supra note 12*, 01.2012, p. 8.
22 E.g. Council Regulation (EEC) N.2137/85, 25.7.1985, OJ L 199/1-1985; Council Regulation (EC) N.40/94, 20.12.1993, OJ L 11/1-1994; Council Regulation (EC) N.2157/2001, 8.10.2001, OJ L 294/1-2001; Council Regulation (EC) N.1435/200, 22.7.2003, OJ L 207/1-2003.
23 HESSELINK, M., "The Case for a Common European Sales Law in an Age of Rising Nationalism", ERCL, V.8/3, 2012, pp. 342-366-ssrn.com/abstract=1998174 vs. GRUNDMANN, S., "CESL, Legal Nationalism or a Plea for Appropriate Governance?" ERCL, V.8/3, 2012, pp. 241-244.
24 LOW, G., *supra note* 6, p. 136; BASEDOW, J. et al., *supra note 14*, pp. 388-389; ROTH, W-H., "Der 'Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht'-KOM (2011) 635 endg'", EWS, V.1, 2012, pp. 16-19.
25 Ibid., *supra note 6*, p. 147.
26 E.g. Council of the EU, 7-8.6.2012, http://europa.eu/rapid/press-release_PRES-12-241_en.htm?locale=en, p. 20.