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CESL, Cross-Border Transactions and Domestic Law: Why a Dual Approach Could Work (Although CESL Might Not)

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Abstract: This article explores the case for legislation that focuses specifically on cross-border *consumer* transactions in the internal market. It argues that the existence of two parallel regimes (domestic and cross-border) is a positive step because the cross-border environment gives rise to different problems than the domestic context. It develops a notion of 'cross-border' that is different from that in Common European Sales Law (CESL), before considering the arguments for and against this approach. The positive view of a regulation focusing on cross-border transactions is combined with the argument in that the substantive provisions of CESL would need to be redrafted so as to fully address all the specific issues that arise in the cross-border context. Moreover, a cross-border CESL should be automatically applicable, i.e., not optional. It concludes that the step taken towards a cross-border regulation is a positive one, but that further work on the substance of a CESL is needed.

Zusammenfassung: Dieser Aufsatz untersucht die Argumente für ein Instrument für grenzüberschreitende *Verbraucher*-Transaktionen im Binnenmarkt. Die Existenz von zwei Parallelregimen (für nationale bzw. grenzüberschreitende Verträge) ist ein positive Schritt, da im grenzüberschreitenden Kontext andere Probleme als im nationalen Kontext zu lösen sind. Dieser Aufsatz entwickelt ein Verständnis von 'grenzüberschreitend', der anders als die im GEK vorgesehene Definition ist, und befasst sich dann mit den Argumenten für und gegen diesen Ansatz. Die positive Einstellung zu einer Verordnung über grenzüberschreitende Transaktionen wird kombiniert mit dem Argument, das die Substanz des GEK überarbeitet werden muss, um auf die spezifischen grenzüberschreitenden Problem anwendbar zu sein. Überdies sollte ein grenzüberschreitendes GEK automatisch und nicht optionell anzuwenden sein. Die Schlussfolgerungen dieses Beitrages sind, dass der Schritt zu einer grenzüberschreitenden Verordnung richtig ist, aber dass mehr Arbeit am Inhalt eines GEKs notwendig ist.

Résumé: Cet article examine l'opportunité d'une législation concernant spécifiquement les transactions transfrontalières du *consommateur* dans le marché intérieur. Il estime que l'existence de deux régimes parallèles (interne et transfrontalier) constitue une étape positive dans la mesure où l'environnement transfrontalier suscite des problèmes différents de ceux relevant du contexte national. Il développe une notion du caractère 'transfrontalier' qui est différente de celle du Droit commun européen de la vente (DCEV), avant de considérer les arguments pour

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et contre de cette approche. La vision positive d'un Règlement se concentrant sur les transactions transfrontalières est combinée avec l'argument selon lequel les dispositions de fond du DCEV devraient être redéfinies afin de viser entièrement tous les aspects spécifiques qui se présentent dans un contexte transfrontalier. De plus, un DCEV transfrontalier serait automatiquement applicable, c'est-à-dire non optionnel. Il conclut que l'étape franchie en direction d'un règlement transfrontalier est une étape positive, mais qu'il est nécessaire de poursuivre le travail sur la substance d'un DCEV.

1. Introduction

The proposal for a Common European Sales Law (CESL)[1] is widely regarded as a milestone in the evolution of both EU Consumer and EU Contract Law. Inevitably, it has prompted intense academic discussion.[2] In this article, one particular feature of the proposed CESL is singled out for discussion: its limitation to cross-border transactions. This would leave Member States free to regulate domestic transactions as they see fit, subject, of course, to the limitations already imposed by the harmonization programme in the field of consumer law. The proposal marked a significant shift in the approach towards adopting legislation in the field of European (consumer) contract law in that it no longer pursues the harmonization of aspects of domestic laws by introducing common rules across all the Member States irrespective of the geographical dimension of the contract but rather concentrates on transactions that have a real internal market dimension. As originally proposed, the CESL would have applied to all transactions with a cross-border dimension, but following the amendments proposed by the European Parliament, it may now be limited to distance and online cross-border transactions.[3]

The limitation of CESL to cross-border distance transactions was given a mixed reception, something that is understandable if one bears in mind the long gestation period of the proposal – in particular the rather grand vision for European Contract Law, which was hotly debated during the first decade of this century.[4] The legislative process that resulted in the Consumer Rights Directive (2011/83/EU) made it apparent that there was a distinct lack of appetite on the part of the Member States for substantial full harmonization of key aspects of consumer contract law, and so it was inevitable that an alternative had to be found. Strangely, the alternative, which might seem counter-intuitive to some

1 COM (2011) 635 final, 11 Oct. 2011.

2 Early books on the proposal include M. Schmidt-Kessel (ed.), *Ein einheitliches europäisches Kaufrecht?* (Munich: Sellier, 2012); H. Schulte-Nölke, F. Zoll, N. Jansen & R. Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht,* (Munich: Sellier, 2012).

3 See T7-0159/2014. This is something the present author has argued for elsewhere: see C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions – A Fresh Approach to EU Consumer Law* (New York: Springer, 2012). This article is a further development of the notion of 'cross-border transaction' found in that publication.

4 See C. Twigg-Flesner, *The Europeanisation of Contract Law* (2nd ed. Routledge, 2013).

bearing in mind the objective of completing the internal market within the EU,[5] has got a long track record in the field of international commercial law, where a range of international conventions have been adopted which deal with various aspects of international commercial transactions – not least the UN Convention on the International Sale of Goods 1980 (CISG), widely ratified by many countries around the world, including the majority of the EU Member States. Although the context for the CISG is obviously a different one, it would nevertheless be instructive to take its approach into account.

This article will argue that the change of direction with a focus on cross-border transactions is to be welcomed and that the existence of two parallel regimes will not inevitably be problematic. It will first explore the notion of 'cross-border' but offer a different approach to the one taken in CESL. There will then be a consideration of the arguments in favour of this approach, as well as potential obstacles. The support for a cross-border CESL advocated in this article is twinned with an argument in favour of re-designing the substantive provisions of CESL so as to ensure that these fully address all the specific issues that arise in the cross-border context. It will further be argued that a cross-border CESL should be automatically applicable, i.e., not optional. The discussion that follows focuses exclusively on *consumer* contracts, and the arguments made should be understood as applying only to these. The treatment of contracts between SMEs raises different issues, which are not the focus of this article.

2. Defining 'Cross-Border'

As this article argues in favour of the cross-border-only focus of CESL, the starting point has to be a discussion of how one might define the notion of 'cross-border'. This is essential because if it is not possible to come up with a satisfactory definition, then that would defeat any further argument in favour of such a focus. One of the advantages of the harmonization approach is that there is no need to find a demarcation line between 'domestic' and 'cross-border' and the obvious potential for uncertainty in having a grey area of transactions, which could on various grounds be classified as either. However, if there is to be a measure specifically applicable to cross-border transactions, then there needs to be some sort of test for determining which contracts are domestic and which are cross-border, respectively.

This section will analyse a number of circumstances and suggest which of these should be treated as cross-border situations. For the purposes of this discussion, the rules of private international law on consumer contracts in Article

5 S. Weatherill, 'The Consumer Rights Directive: How and Why a Quest for Coherence Has (largely) Failed', 49. *Common Market Law Review* 2012, p (1279) 1308 ff.

15 of the Brussels-I Regulation[6] and Article 6 of the Rome-I Regulation[7] are initially left to one side but will become relevant later (see section 2.1 below).

The following are the most common situations that fall to be considered:

(1) Consumer and trader are based in the same jurisdiction, and the contract is concluded by whichever means (face-to-face, distance, online).
(2) Consumer and trader are based in separate jurisdictions, and the contract is concluded at a distance (online).
(3) Consumer and trader are based in separate jurisdictions (but perhaps in a border region), and the consumer travels into the neighbouring country to conclude a contract face-to-face.
(4) A variant on (3), but the consumer is on holiday in another country and concludes a contract face-to-face.
(5) Consumer and trader are based in separate jurisdictions, but the trader visits the consumer's jurisdiction and concludes a contract (e.g., door-step selling, markets, exhibitions).

With the exception of the first situation, all of these appear to have a cross-border element. However, this does not invariably lead to the conclusion that all of these should be treated as 'cross-border transactions'. If so, they would all be within the scope of a measure for cross-border transactions. However, it needs to be considered whether it is appropriate that all of these are treated as cross-border transactions, and in order to address this, a general test is needed.

This problem is not new, of course – the same challenge arose in the context of transnational commercial law, e.g., with regard to the scope of application of the CISG. In that Convention, a contract is treated as 'international' if the respective places of business of the parties are in different states (Article 1(1) CISG). 'Internationality' is therefore established on the basis of the location of the respective places of business of the parties, rather than the fact that goods cross borders. Would it be enough to adopt this approach for consumer transactions, or is something more refined required?

Obviously, consumers do not have a place of business, but the obvious alternative criterion would be the consumer's place of residence (i.e., his habitual residence). Using the CISG test would therefore mean that a contract concluded in a Member State where both the consumer has his place of residence and the trader his place of business (situation (1)) would be a domestic transaction.

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6 Regulation 44/2001/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) O.J. L 12/1.

7 Regulation 593/2008 on the law applicable to contractual obligations (2008) O.J. L 177/6.

Conversely, a contract concluded between a consumer with a place of residence in one Member State and the trader with his place of business in another would be a cross-border contract (situations (2)–(5) above).

This would clearly not be problematic in the case of situation 2, where the contract is concluded through distance means, which would generally mean via online shopping. The order is placed by a consumer with a place of residence in one jurisdiction and received by the trader with a place of business in another jurisdiction.

However, it seems somewhat counter-intuitive to regard situations 3–5 as cross-border transactions, too. In all of these, the consumer has his place of residence in one jurisdiction and the trader his place of business in another, but trader and consumer are both physically present in one jurisdiction, which is where the contract is concluded. Applying a test based on the CISG approach would mean that all of these situations should be regarded as cross-border transactions, but it may be questioned whether it would be appropriate to do so.

On the basis of applying the CISG test for establishing whether this is an international or cross-border transaction by analogy, these situations would clearly satisfy that test. However, it is necessary to pause and ask whether the fact that both consumer and trader are physically present in the same jurisdiction when and where the contract is concluded should be taken into account.

At this point, one might ask what trader and consumer would reasonably expect to be the answer if they were to ask themselves which law applied to this transaction. The trader might not know that that the consumer has a place of residence in another Member State (although in some instances, e.g., in a holiday resort, this would be fairly likely), so the question of there being a cross-border element might not even enter his mind. This would, perhaps, depend on the consumer's competence in the local language or the method of payment used by the consumer – both could offer a strong indication to the trader as to whether the consumer is from another jurisdiction. One might therefore be tempted to rely on all of these factors as an indication of whether something is or is not a cross-border transaction. However, whilst such a refined analysis of each situation might be the kind of intellectual tickle that would excite lawyers, it seems rather impractical at the coal face of daily consumer contracting, not least because of the degree of uncertainty it might create for trader and consumer alike. It seems likely that the trader would expect – reasonably so – that any transaction concluded in this type of situation would be subject to the domestic law of the jurisdiction where this happened. Looking at the same situation from a consumer's perspective, it would seem quite likely that a consumer buying something in another country would assume that the domestic law of that jurisdiction applied. If this is correct, then it would be appropriate to treat situations 3 and 4 as domestic rather than cross-border transactions.

Finally, in the converse situation in scenario 5, a transaction would to be subject to the consumer's domestic law if the trader was present in the

jurisdiction where the consumer has his place of residence and the transaction was entered into there.[8] So this situation should also not be regarded as a cross-border situation.

What this suggests is that, in the context of consumer transactions, it might be necessary to adopt a more refined approach than that offered by Article 1(1) of the CISG. The guiding criterion in developing this approach should be a consideration of which law consumer and trader would reasonably expect to be applicable to the transaction where it is entered into in face-to-face circumstances. If the analysis above is correct, then the conclusion that might be reached is that a face-to-face contract concluded in the jurisdiction of the trader's place of business should be subject to the law of that jurisdiction and not be treated as a cross-border transaction.

What this leads to is the conclusion that the kinds of transactions that should be regarded as cross-border transactions are those that are conducted online or at a distance, with consumer and trader based in different jurisdictions. However, whilst this conception of 'cross-border transaction' has a certain appeal due to its simplicity, there is one question that requires further elaboration: the one difficult case that would remain with this approach is the situation where the consumer travels to the trader's jurisdiction because the trader has directed his activities at the consumer's jurisdiction. The next two sections consider whether the basic definition therefore should and could be refined.

2.1. A Difficult Case: Trader's Actions Result in Consumer Travelling ('Directed Activity')

The suggested definition of 'cross-border' developed above is open to the criticism that it proceeds on the basis of clear 'either-or' situations. Whilst this has the advantage of creating a bright-line rule, it does raise the question how 'difficult' cases should be tackled, i.e., circumstances where there are additional features that make a particular situation more difficult to analyse.

For example, it was argued above that, in situations (3) and (4), the contract should be treated as domestic to the jurisdiction where it was concluded, rather than a cross-border situation. It might be suggested that a distinction should be drawn between instances where the consumer is in another jurisdiction and makes a spontaneous purchase (which would not be a cross-border transaction) and where the consumer has travelled to that jurisdiction because the trader issued some sort of specific invitation to the consumer. Although it might seem sensible to regard the latter situation as a domestic rather than a cross-border transaction, because the consumer will still be physically present in

8 This would be also the outcome under Art. 6(1) of the Rome-I Regulation (593/2008/EU) – which deals with the applicable law in consumer contracts (see below) – as the trader would be pursuing his activities in the country of the consumer's habitual residence.

the trader's jurisdiction, the additional element of the trader's actions might have to be taken into consideration. Indeed, at that point, it might further depend on whether the invitation was addressed personally to the consumer or whether the directed activity is more general (i.e., a general website) – but if it is a website and the contract is concluded online, then it would be a cross-border transaction anyway.

But if the consumer physically travels to the trader's jurisdiction having seen the website, there is an argument – admittedly one based on convenient simplicity –that this contract should be subject to the law of the trader's jurisdiction and consequently not a cross-border contract. From a practical perspective, it reduces the risk of confusion: a trader dealing with two separate consumers from another jurisdiction might not be able to identify whether one, both or neither received a specific invitation, and so would not necessarily know whether domestic law or the cross-border regulation would apply.[9]

At this point, it will be useful to examine this situation from the perspective of identifying the applicable law under Article 6(1) of the Rome-I Regulation, which deals with consumer contracts. Where Article 6(1) applies, the applicable law is the law of the country where the consumer has his habitual residence.[10] There are two alternative preconditions, one of which needs to be met for this provision to apply:

(i) the trader pursues his commercial or professional activities in the country where the consumer has his habitual residence; or
(ii) the trader by any means directs such activities to that country or to several countries including that country.

In addition, in either case the contract has to fall within the scope of the trader's commercial or professional activities. It can be assumed that an invitation by a trader to a consumer would be regarded as a 'directed activity' within the meaning of Article 6(1) and the resulting contract would therefore be subject to the law of the consumer's jurisdiction.

As a result, the suggestion above that this situation should not be regarded as a cross-border situation might run into difficulties here, because if Article 6 continued to apply with a measure for cross-border contracts in place, then the domestic law applicable would be the law of the consumer's jurisdiction and *not* the trader's. One possible response to this is to modify the definition of cross-border and include this particular situation.

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9 The difficult evidential burden was a factor in Case C-218/12 *Lokman Emrek v. Vlado Sabranovic* [2013] ECR-nyr, discussed below.

10 For a fuller analysis, see P. Cachia, 'Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations', 34. *European Law Review* 2009, pp 476–490.

There are a number of possible ways forward. The first would be to abandon Article 6 once a measure for cross-border transactions has been put into place. This would, in turn, necessitate refining the definition of 'cross-border' to incorporate this situation so as to produce a similar effect to the one of Article 6, which is to ensure consumers do not lose out on legal protection through the application of the trader's domestic law. The second would be to retain the simpler definition of 'cross-border' and to let Article 6 operate, but this would have the drawback for traders that they would still be faced with the application of multiple consumer laws (depending on the number of countries to which he directs his activities). The third would be to abandon Article 6 whilst adopting the simpler definition of 'cross-border', but that would have the effect of applying the law of the trader's jurisdiction. At the very least, this would be seen as a retrograde step with the potential risk of reducing consumer protection (although this argument surely has to be set against the fact that the EU's harmonization programme has done enough to make this much less of a real problem). So, on balance, the first option outlined here would be preferable.

2.2. Defining Cross-Border and Lessons from Case Law

At this juncture, it is helpful to consider whether the case law of the CJEU developed in the field of private international might shed any additional light on the question of how to define cross-border. It has already been noted that the steer given by Article 6(1) of the Rome-I Regulation offers a particular steer for some circumstances. There are a number of cases under Article 15(1) of the Brussels-I Regulation that offer some additional pointers. According to the provisions of the Brussels-I Regulation, in 'matters relating to contract', jurisdiction is given to 'the courts for the place of performance of the obligation in question' (Article 5(1)(a)). For consumer contracts (i.e., those between a trader[11] and a person acting for a purpose regarded as outside his trade or profession), there are separate provisions that apply primarily where a contract has been concluded with a trader pursuing his activities in the consumer's domicile or where the trader directs his activities to that Member State and the contract is within the scope of these activities (Article 15(1)(c)).[12] The consumer has the choice between the courts of his domicile or those of the trader's domicile (Article 16(1)), but he may only be sued in his domicile (Article 16(2)).

11 I.e., a 'person who pursues commercial or professional activities' (Art. 15(1)(c)).

12 The other situations in Art. 15 are (a) contracts for the sale of goods on instalment credit terms and (b) contracts for a loan repayable by instalments or any other form of credit that was made to finance the sale of goods.

In *Pammer* v. *Schlüter*,[13] the CJEU was asked to consider when websites would be regarded as a 'directed activity'. As websites are generally accessible throughout the EU and beyond, the mere accessibility of a website beyond the country where the trader is established did not mean that the trader actually directs his activities beyond the borders of this country.[14] The trader must have 'manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile'.[15] A number of criteria would be relevant: the mere provision of the trader's e-mail address or geographical address, or of his telephone number without the international dialling code, was irrelevant – whilst this information does enable the consumer to contact the trader electronically, this was insufficient.[16] However, a clear statement by the trader on the website that goods or services are offered in one or more Member States, and these states are mentioned by name, or the paid inclusion in search engines accessed from particular Member States would be relevant evidence (paragraph 81). Additionally, more specific factors might include 'the international nature of the activity at issue; … telephone numbers with the international dialling code; use of a top-level domain name other than that of the Member State in which the trade is established … or the use of neutral top-level domain names such as ".com" or ".eu";...mention of an international clientele composed of customers domiciled in various Member States …'.[17] In addition, if the website provides the option of using a language or currency different from that of the Member State where the trader is established, then this *can* be taken as evidence that the trader directs his activities to other jurisdictions.[18]

This decision certainly adds some clarification to the meaning of 'directed activity', and it could easily be transplanted into the context of the refined 'cross-border' criterion developed above. If traders directs their activity into the consumer's jurisdiction, this would then be treated as a cross-border situation (but would not result in the application of the law of the consumer's habitual residence).

It has been considered in two subsequent cases, the facts of which illustrate difficulties with the 'directed activity' criterion that would be relevant to the test of 'cross-border' developed above. The first is *Mühlleitner* v. *Ysufi*.[19] The Austrian claimant accessed a German search platform to look for a car. Her search results

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13 Joined Cases C-585/08 and 144/09 *Peter Pammer v. Rederei Karl Schlüter GmBH & Co KG; Hotel Alpenhof GesmbH v. Oliver Heller* [2010] ECR I-12527.

14 Paragraphs 68–69.

15 Paragraph 75.

16 Paragraphs 76–79.

17 Paragraph 83.

18 Paragraph 84.

19 Case C-190/11 Daniela *Mühlleitner v. Ahmad Yusufi, Wadat Yusufi* [2012] ECR I-xxx.

directed her to the website of the car dealership operated by the defendants. She contacted the defendants by telephone (the website included the telephone number with the international dialling code!), but the car she was interested in was no longer available. The defendants suggested another vehicle and emailed details to her. The claimant then travelled to Hamburg to conclude the contract and took delivery of the car. On returning to Austria, she discovered faults with the car, which the defendants refused to repair, so she commenced legal proceedings in the Austrian courts. The defendants argued that she should have brought her action in the German courts because the special jurisdiction rules in Articles 15/16 of the Brussels-I Regulation did not apply. The lower courts in Austria treated the defendant's website as a 'passive' website and therefore the defendants had not directed their activities towards Austria. The Austrian Supreme Court took a different view and held that the defendants did direct their activities to Austria, but in light of *Pammer* v. *Schlüter*, it referred a question to the CJEU as to whether it was necessary that a contract had to have been concluded at a distance for the special jurisdiction rules to apply. On the basis of both the legislative history to these provisions and by way of clarification of *Pammer* v. *Schlüter*, the CJEU held that it was not necessary that the contract was concluded at a distance and the special jurisdiction rules would apply if the criteria in Article 15(1)(c) are satisfied. This case is interesting because it is one example of the first 'difficult case' discussed above: a consumer had some contact with the trader at a distance and then travelled to the trader's jurisdiction to conclude the contract. As argued above, this should be treated as a domestic contract subject to the laws of the trader's jurisdiction (i.e., Germany), unless the trader was involved in a 'directed activity' towards Austria. Unfortunately, the question of whether this was so on the facts of the case was not open to consideration by the CJEU – the Austrian Supreme Court had already decided that the trader had directed his activities to Austria. This was confirmed in its final ruling.[20] The Austrian court came to this conclusion for two reasons: (i) the traders had included the international dialling code on their website[21] and (ii) when the claimant contacted them, they supplied information about an alternative vehicle to her, in the knowledge that she lived in Austria. This conclusion seems surprising – after all, the claimant had made the first step and sought out the trader, and it seems difficult to regard the trader's subsequent actions as constituting a 'directed activity'. This seems to fall short of actively seeking customers from Austria – indeed, their response to the initial enquiry is more

20 OGH 18 Oct. 2012, 4 Ob 172/12s.

21 The weight attached to including an international dialling code as a key criterion for establishing whether a trader is directing its activities at another Member State seems rather odd in view of the relative significance of this as a means of communication these days.

likely to have been focused on finding a suitable car for the claimant and therefore was an individual response, rather than a properly directed activity.

This approach should not be followed in the context of the refined definition of 'cross-border', because it would have the effect of blurring significantly the line between cross-border and domestic transactions. The decision whether a contract in circumstances as those in *Mühlleitner* should be regarded as cross-border should not depend on particular individualized responses by a trader to unsolicited enquiries from a consumer.

An even more difficult factual situation arose in *Emrek* v. *Sabranovic*.[22] In this case, the claimant consumer lived in Saarbrücken in Germany, and the defendant trader, a car dealer, was based in France. However, the French town was close to the border, and the story that follows will be very familiar to anyone who has grown up in a border region. The defendant had a website that include both French and German telephone numbers with their international dialling codes. The claimant wanted to buy a second-hand car, and friends of his mentioned the defendant's business. He then travelled to France and concluded a contract for a second-hand car at the defendant's premises. The claimant had not seen the defendant's website. A dispute arose, and the claimant brought an action before a German court. On appeal, the regional court concluded that the defendant had directed his activities to Germany (the telephone numbers being an indication that he was willing to deal with customers from Germany as well as France), but it also thought that there needs to be a causal link between the directed activity and the decision to conclude the contract, i.e., the special jurisdiction provisions should not apply where the consumer was not aware of the directed activity. The CJEU held that no such causal link could be read into Article 15(1)(c), not least because this would undermine consumer protection.[23] More significantly, there would be difficulties of proving whether a consumer had or had not consulted the trader's website in advance of deciding to conclude the contract,[24] and at best, the causal link argued for would be evidence to support the conclusion that the trader had indeed directed his activities at the consumer's country.

This, too, is a situation where it seems preferable to take a different stance on the meaning of 'directed activity' for the purpose of deciding whether a contract is a cross-border transaction or not. Following on from the observations made with regard to the *Mühlleitner* ruling, it is suggested that a criterion based on the notion of 'directed activity' should require clear pro-active steps by a trader to attract consumers from another Member State, so in a situation such as the one in *Emrek*, the contract should be regarded as a domestic contract (which

22 Case C-218/12 *Lokman Emrek v. Vlado Sabranovic* [2013] ECR-nyr.

23 Paragraph 24.

24 Paragraph 25.

it would not have been had the claimant concluded the contract entirely at a distance).

These cases illustrate that there will be difficult situations where it is not easy to determine whether a contract has crossed the line from domestic to 'cross-border'. Whilst the decisions can be accepted in their context (i.e., determining jurisdiction), it must be concluded that, as far as the insertion of a 'directed activity' criterion into the 'cross-border' test is concerned, a modified version requiring more active steps on the part of a trader is needed.

However, on a more positive note, the foregoing has demonstrated that it is far from impossible to develop a workable and meaningful definition of 'cross-border', and so the initial hurdle for the overall argument in this article can be overcome without great difficulty.

2.3. 'Cross-Border' in CESL

Having considered when a situation should be regarded as a 'cross-border' situation, it is now appropriate to consider how the discussion above relates to the definition in the proposed CESL. The solution adopted in the initial proposal is far from ideal. A distinction is made between contracts between traders only and those between a trader and a consumer. For contracts where both parties are traders, a contract will be a cross-border contract if the habitual residence of the parties is in different countries, of which at least one has to be a Member State (Article 4(2)). The habitual residence of a trader, which is a company, is the place of its central administration, and if the trader is a natural person, it is that person's principal place of business (Article 4(4)). The determining factor is therefore the location of the parties, rather than whether goods cross any borders.

For contracts between a consumer and a trader, the criterion is more complex. Article 4(3) of the proposal states that:

> 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 first element of this definition has two reference points: (i) the trader's habitual residence and (ii) the consumer's address, the delivery address or the billing address. These must be in difference countries. As initially drafted, this would have meant that the CESL could apply to face-to-face as well as distance/online contracts. However, the European Parliament has amended the opening sentence of Article 4 to make it clear that it applies only to distance and online transactions. The second element – the fact that one of the countries has to

be a Member State – presumably relates to the territorial extent of the regulation and the need for a connecting factor with the EU. It does seem rather complex a test though, not least because it is possible that a transaction would become a cross-border transaction if the consumer specifies a delivery address in a Member State different from that of the trader, even though both consumer and trader are in fact based in the same jurisdiction. This approach is also quite different from the suggested test developed in this article.

3. The Arguments for a Cross-Border Focus

The difficulties of coming up with an appropriate definition might raise the question why one should seek to distinguish between rules for domestic and cross-border transactions respectively. Leaving aside a possible argument based on the constitutional framework of the EU treaties,[25] there are a number of practical arguments that lend strong support to a focus for CESL on cross-border transactions.

The first is borne out of a criticism of the process that resulted in the proposal for CESL in October 2011. As anyone familiar with the background to CESL knows, the proposal has its origins in the work on a Draft Common Frame of Reference,[26] which was a huge project trying to provide a restatement of much of private law across Europe and form a blueprint for a potential EU level codification of private law. Following the creation of an Expert Group[27] and a *Green Paper*,[28] this became the much more modest proposal for CESL. But this does not change the fact that the origins of CESL are, essentially, found in the comparative law scholarship, which produce the DCFR – in other words, the substance of CESL is largely derived from this comparative law exercise and the underlying desire to produce a coherent set of rules. For most legal scholars, this is an entirely laudable exercise, but it does have one fundamental drawback – it does not necessarily mean that the rules provided in this way are fit for dealing with the specific problems that one might encounter in cross-border sales, particularly those conducted online. To give but one example: it is not uncommon

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25 I.e., issues of competence, subsidiarity and proportionality – on this, see, e.g., C. Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions – A Fresh Approach to EU Consumer Law* (New York: Springer, 2012), pp 37–44.

26 Study Group on a European Civil Code/Research Group on the Existing EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference,* (Munich: Sellier, 2009).

27 Commission Decision setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (2010) O.J. L105/109. Cf. K. Riesenhuber, 'A Competitive Approach to EU Contract Law', 7. *European Review of Contract Law* 2011, 115–133 for a critical view of this group.

28 *Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses* COM (2010) 348 final.

that a website might contain a pricing error and what would normally be rather expensive goods are advertise for sale at a very low price.[29] CESL does deal with this issue, but it does require a bit of a 'legal jigsaw' to find the relevant provisions and work out what the likely outcome would be.[30]

Instead, it would have been much more preferable if the starting point for CESL had been an identification of the problems that consumers encounter in cross-border transactions and to ensure that appropriate and clear rules were designed to address these. In more general terms, limiting CESL to cross-border transactions could have made it possible to develop a tailor-made framework that would recognize that domestic and cross-border transactions do not give rise to the same problems, as well as problems that require a different solution in the cross-border context.[31] For example, one commentator has observed that having the same remedies for faulty goods found in domestic law for cross-border transactions might not be appropriate and that an altogether different solution might be needed:

> My own problem here is that I am becoming increasingly doubtful whether either termination (with an obligation to return the goods) or repair or replacement are suitable remedies at all for cross-border consumer contracts. Maybe we need to start from scratch and ask what people on both sides actually want, and would actually find efficient and workable, bearing in mind that we should soon have good mechanisms for online or alternative dispute resolution.[32]

Moreover, in the cross-border context, introducing a system of direct producer liability for faulty goods, combined with a system of 'network liability'[33] involving traders selling branded goods in co-operation with the manufacturer/ brand owner might provide a better solution than limiting the consumer's right of action to a claim against the immediate contracting partner.

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29 Cf. *Chwee Kin Keong v. Digilandmall.com Pte Ltd* [2005] 1 SLR 502 (Court of Appeal, Singapore), where laser printers that would normally retail at S$3,800 were advertised on the website for S$66.

30 LAW COMMISSION, *An Optional Common European Sales Law: Advantages and Problems – Advice to the UK Government,* (London, Law Commission, November 2011).

31 Cf. R. GOODE, 'Rule, Practice and Pragmatism in Transnational Commercial Law', 54. *International and Comparative Law Quarterly* 2005, p (539) 554 ff.

32 UNNAMED, 'Public Hearing on Common European Sales Law' (20 Mar. 2013), online at http://www.epln.law.ed.ac.uk/2013/03/20/public-hearing-on-common-european-sales-law/ [last accessed 28 Oct. 2014].

33 See R. BRADGATE & C. TWIGG-FLESNER, 'Expanding the Boundaries of Liability for Quality Defects', 25. *Journal of Consumer Policy* 2002, pp 345–377.

Limiting CESL to a specific context would therefore be a great opportunity for re-thinking what sort of rules would be appropriate to support cross-border transactions and move away from the underlying assumption that, as long as there is one set of legal rules, consumers and traders would be sufficiently confident to take up the opportunities offered by the single market. Indeed, this 'consumer confidence' argument can be turned on its head: surely consumers (and traders) would be more confident if they knew that there were dedicated rules dealing with the various issues that arise in the cross-border context, which were clear and easy to apply, rather than merely a single set of (often complex) rules that have a high degree of internal consistency appealing to legal scholars but are difficult to apply in practice and without legal assistance. Space precludes a more detailed consideration of this issue, but the foregoing is sufficient to make the main point that CESL needs to be designed for its particular purpose.

A concurrent benefit is that limiting CESL to cross-border transactions leaves some room to individual Member States to respond to particular local challenges for consumer protection, at least to the extent that this is compatible with existing harmonizing directives and the EU treaties. It is inevitable that, in a union of twenty-eight countries, there will be issues affecting a particular country or region, which might necessitate a response at the local level.

Finally, one should not ignore a potentially much wider benefit of a strong CESL, which is tailor-made for cross-border consumer transactions: although CESL's geographical reach will be EU Member States, it is already the case that consumers might wish to buy goods/digital content from outside the EU's borders. Indeed, cross-border purchasing is something that will now happen in a lot of countries around the world, and so CESL could not only promote the operation of the EU's internal market but also create a blueprint for a possible global legal framework to support cross-border consumer transactions.

4. Challenges Associated with a Cross-Border Focus

Although there are clear advantages for pursuing the idea of a cross-border-only CESL, there are also challenges that would, as a minimum, be acknowledged, but in some instances require appropriate steps to be taken to manage them. In limiting the focus of CESL to cross-border transactions, there will obviously have to be a dividing line between cross-border and domestic transactions. As the discussion above has demonstrated, this is far from an easy task, and it will require careful elaboration. That said, there is a danger that situations falling into the 'grey area' between domestic and cross-border transactions end up dominating this debate when, in reality, the vast majority of transactions would clearly be either cross-border or domestic transactions. Nevertheless, a definition that is as clear as possible and therefore minimizes the number of situations falling into this grey area is essential. Of course, whichever definition is chosen will involve

consideration of the location of both parties (e.g., place of business or habitual residence, or some other factor), which is made more difficult in the online environment (de-localization).

In the UN Convention on Use of Electronic Communications in International Contracts 2005, this problem is covered in Article 6(1), which states that a person's place of business is the location indicated by that person (and, in the case of a natural person, its habitual residence[34]). The location of the technical equipment used by a party is not determinative[35] nor is the fact that the domain name or e-mail address used is linked to a particular country.[36] If this approach were followed, there would be the practical question of how the consumer's habitual residence could be identified by the trader. For example, a consumer might be required to indicate his country of residence when accessing a website. Alternatively, when the consumer provides his personal details before submitting his order, he could be required to confirm his country of habitual residence (particularly if this is neither the country where the billing or the delivery address is located). Traders will have a registered business address, which will be relevant, and traders are already required to disclose this under various provisions of EU law.[37] So overall, this also would not appear to be a significant obstacle.

Secondly, the consequence of limiting CESL to a cross-border-only focus is that there will be at least two separate legal regimes for consumer transactions and that brings with it obvious concerns over fragmentation (with different rules applicable to domestic and cross-border situations respectively). Taken in the abstract, this could potentially be quite a serious obstacle and one that might even be fatal to the idea of a CESL applicable to cross-border transactions only. However, the strength of this objection is lessened if the substantive rules of CESL were designed in such a way as to provide a distinct set of rules for issues that require different treatment in a cross-border situation than in a domestic context but maintain parallels with domestic law where this is not necessary. As far as the latter is concerned, there is already a good level of harmonization in place in any event, and variations that might continue to exist are unlikely to create such a high level of concern or confusion so as to make the existence of two regimes unworkable.

That said, it is important to concede as a *caveat* that there is, as yet, a lack of empirical research into how both consumers and traders might respond to the

34 Article 6(3).

35 Article 6(4).

36 Article 6(5).

37 Cf. Art. 6(1)(b) and (c) of the Consumer Rights Directive (2011/83/EU) and also Art. 7(4)(b) of the Unfair Commercial Practices Directive (2005/29/EU).

existence of two parallel regimes. It might be possible that two regimes are still problematic, although one would expect that the fact that only two, rather than potentially 28, different sets of rules could be applicable would be a positive step. Again, it needs to be emphasized that this optimism is based on the argument made above that a cross-border CESL should be designed in such a way as to reflect the distinct requirements of these two different contexts. If that were done, then surely the variation between these two is not a problem as long as consumers can be told clearly when the different rules apply and what main legal implications of either type of contracting situation would be.

So overall, whilst there might be *challenges* that would need to be identified and addressed carefully, there are no insurmountable obstacles in the way of a twin-track approach. Of course, there will always be situations where it is not quite as easy to apply this distinction neatly, and some provision might have to be made for these difficult cases – but to reject the idea of a measure that has only cross-border application because of this would be an unfortunate incidence of letting the tail wag the dog.

5. Against Optionality

Although the focus of this article is primarily on the cross-border scope of application of CESL, there is a further feature of CESL that seems to complicate matters rather than simplify the legal framework for cross-border consumer transactions: the element of optionality. It might be that optionality is important for non-consumer transactions, where the ability to choose a particular domestic law over something like CESL and the potential implications for the performance of that contract (including remedies, etc.) is a factor in assessing the overall financial risk and consequently the value of the deal. However, this is unlikely to be an issue for consumer transactions.

Moreover, the optionality ostensibly created with CESL is really only apparent rather than real anyway – in practice, the choice as to whether to conclude a contract on the basis of CESL would, if at all, be for the trader rather than the consumer. As proposed, CESL contains a complex provision with the objective of ensuring a consumer is able to make an informed choice about whether to agree to the CESL (see Article 8). Assuming a trader is prepared to conclude a contract on the basis of CESL, then the consumer would have to consent explicitly to this. Giving his consent would have to be a separate step from the consumer's decision to conclude the contract. In order to help a consumer to give his consent, a Standard Information Notice is provided in Annex II of the proposed Regulation, and this has to be given to a consumer before a contract on the basis of the CESL is concluded. This process seems so long-winded and artificial that it may be doubted whether this would mean that

consumers are able to make a fully informed decision – rather, it would seem to be putting another hurdle in the way of concluding the contract itself.[38]

Consequently, the decision the trader will make is not really whether or not to contract under CESL, but rather whether to deal with consumers from outside the trader's jurisdiction. Once that decision has been made, it seems very likely that the trader would only offer the CESL so as to avoid bringing Article 6 of the Rome-I Regulation into play. That being the case, it would seem much better to accept this and to make CESL automatically applicable for cross-border transactions.

6. Concluding Observations

This article has argued in favour of a CESL that is limited to cross-border consumer contracts, with a definition of 'cross-border' that is essentially limited to cross-border distance sales, with some modification to allow for circumstances when a trader has actively attracted consumers from another jurisdiction to consider concluding a contract with him. As Hugh Beale has observed, there are good reasons for supporting cross-border trade, because if more traders sell across borders as a result of CESL, then the resulting increase in choice and competition would be good for consumers and might lead to reduction in prices.[39]

Although it looks as if the version of CESL currently proceeding through the EU's legislative stages will have a scope of application that focuses on the dominant types of cross-border contracts, there are still significant problems that would necessitate further work. That work could well mean undoing a significant amount of what has already done: if it is accepted that CESL should be an instrument that is 'purpose-built' for cross-border consumer transactions, then that would entail that its substantive rules need to reflect the issues that arise in that context. That, in turn, will mean re-evaluating many of the substantive provisions in the CESL and considering which can be retained and which require modification or replacement. Some might object that this would not only undo all the work that has already been undertaken to get to this stage but also risk creating legislation that is less coherent. However, ultimately, the reason for having a cross-border CESL should be to put into place a set of legal rules that will genuinely facilitate consumer utilization of the opportunities created by the internal market, and in this regard, it is not enough just to have a coherent set of

38 See also M. Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation', 20. *European Review of Private Law* 2012, pp 195-212.

39 H. Beale, 'A Common European Sales Law (CESL) for Business-To-Business Contracts: Pros and Cons' (online: http://www.ajk.elte.hu/file/annales_2012_08_Hugh.pdf) [last accessed: 28 Oct. 2014].

harmonized/uniform rules in place – these rules must meet the additional qualitative requirement of being suitable for cross-border transactions.

Overall, therefore, focusing on the cross-border context is to be welcomed – although CESL as considered by the EU's legislative bodies thus far might not provide the substantive rules that are really needed.