Harmonization of Private Law and the destiny of overriding mandatory provisions: The Example of Consumer Protection under The Common European Sales Law

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1 Introduction

The Interrelatedness of Private Law and Private International Law

The development of Private law on a European level showcases a focus on social aims, arguably much more than this is the case on a national level. This becomes apparent in the field of consumer law. Private law issues within the EU therefore revolve around interests of the parties (the citizens), the (internal) market and the state. These 3 interest groups have been the stakeholders in projects on private law and private international law alike. Where consumer protection was initially to be achieved by way of private international law on a European scale (Rome I and Brussels I Regime), recent plans initiated by the Commission, take a more aggressive approach to achieving consumer protection and the further development of the internal market. A Common European Sales law[1] (hitherto CESL) has been proposed as a substantive law alternative towards the creation of consumer law. Where the Proposal for a Common European Sales Law (CESL) and the Regulation on the law applicable to contractual obligations[2] (hitherto Rome I Regulation) serve the primary aim to enhance cross border trade, there is a related aim of (in particular) Article 6 of the Rome I Regulation as well as in the CESL in general to protect consumers.[3]

The CESL is the product of a long on going debate on the need for harmonized contract law in the Union, or even private law in general. As such it has been the subject of discussion on the subsidiarity and proportionality of such an instrument. In total, 4 governments have issued subsidiarity complaints in accordance with the Protocol

1 COM (2011) 635 (final).

2 Regulation No. 593/2008 OJ L 177, 4.7.2008, p.6-16.

3 Bisping 2012, p. 11 et sec.

on Proportionality and Subsidiarity.[4] The CESL has been created thus as an optional instrument which seeks to achieve a high level of consumer protection. As an optional instrument it remains subject to the autonomous conflict of law rules with regards to issues: (1) the mechanism according to which it can be chosen by the parties and (2) the determination of the applicable law to fill the gaps that have been left (Recital 27).

The CESL is not quite as "complete" a sales law as its name suggests. It cannot, in the opinion of this author, be considered "hard core" contract law as it has substantial gaps, which need to be filled by the national laws of the member states.[5] As the objectives of the CESL are consumer protection and also the removing of obstacles in the internal market, it is needless to say that a balance had to be struck. Therefore, the CESL does not contain the highest degree of consumer protection possible, albeit the allegations of the European Commission that it does achieve a level of protection that is on average higher than that which the member states' laws have to offer.[6] Member states have on top of that lost the power to impose their own mandatory provisions, which protect the consumer, as the CESL imposes its own mandatory rules, when chosen by the parties.

The relationship of the CESL and the Regulation on the law applicable to contractual obligations will be the subject of this paper. Special attention will be paid to the application mechanism, which, as the drafters argue will make Article 6 Rome I superfluous where parties have chosen the CESL to govern their contract, which will however not make the application of all other PIL rules applicable to the contract. This will be the subject of Part II.A. Mandatory provisions are allegedly neutralized as a consequence of choosing the CESL. In the first part of this paper it will be explained what mandatory provisions are and diverging opinions on the matter will be identified. It will be argued that this is in fact the case. In the second part, it will be discussed whether member states have another possibility to impose more protective laws on the contract via the *Ordre Public* exception provided for under Article 21 Rome I or the Overriding Mandatory Provisions of Article 9. A conclusion will be drawn on the basis of the following observations on whether and if so, why the influence of PIL and that of overriding mandatory provisions in particular is impaired by the on going European harmonization in the field of private law. Consumer protection is in this context but an example, whereas the general principle of this mechanism can be transferred to other areas. The examination of member states' ability to impose laws via these alternative mechanism must therefore be seen to serve

4 See for instance the Subsidiarity Complaint issued by the German Bundestag 16.12.2011.

5 See Recital 27 of the Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final.

6 Busch 2012, p. 52.

the search for an answer to the research question: Does the on going harmonization in the field of consumer protection law lead to the redundancy of national (overriding) mandatory rules? Especially the Overriding mandatory provisions will be observed as the "last hope" of nation states to impose their diverging views on an issue.

2 The nature and application mechanism of CESL and the Rome I Regulation

At the heart of the development of the European Union lies its internal market with its freedoms for citizens and obligations for member states. Over the years this internal market has developed to an extent that it gave birth to a European Economic constitution. Inherent to this Economic Constitution is, in line with the notion constitution that defines the basic values of a nation state, the creation of consumer protection laws and a European definition of "consumer".[7] This European Economic constitution defined the consumer as a special group of subjects/market actors. Evidently, an evolutionary development of the constitution takes place to make its objectives converge more and more with a "real" constitution.[8] At the heart of this economic constitution is naturally private law. In line with the principles of subsidiarity and conferral, soft harmonization has been preferred over unification, harmonization of conflict rules and consumer protection rules have been preferred over the approximation of hard core contract law. Consumer Protection has suitably been recognized as early as in the *Cassis de Dijon* judgment.[9]

An ever-growing internal market raises the stakes for consumers and businesses, to which end it has been recognized that there is the need for reaching a balance between business and consumer interests. Therefore Consumer protection has increasingly become an objective of Union institutions, and the European legal sphere has seen the implementation of numerous consumer protection instruments. Examples include the Doorstep Selling Directive, Unfair Contract Terms Directive and, above all, the Consumer Rights Directive. Competence has been conferred on the Union level, whilst the objective has since been harmonization instead of unification, which can be proven by the vast

7 See inter alia Reich 2000, p. 482, Mak 2011, p. 29.

8 Reich 2000, p. 482.

9 Craig & De Burca 2011, p. 601; Howells & Weatherill 2005, p. 110.

number of times a directive has been chosen as legal form.[10]

Consumer protection has also been one of the objectives of the harmonization of European conflict rules in the area of private international law (hitherto PIL), whereas it was seen as a "softer" alternative to private law harmonization. It has seen in particular the creation of half-mandatory rules (*halbzwingendes Recht*), which can be deviated from for the advantage of the weaker party (the consumer), however not to its disadvantage.[11] Article 6 of Regulation 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations reflects this approach. Private international law thus restricts private autonomy for the sake of the protection of a public interest. This is necessary to prevent parties from being able to choose the law that is least advantageous to the consumer and circumvent mandatory rules of any country that has a sufficiently close link to the contract, such as that of the place of performance or the forum. PIL has thus served to set a minimum standard of consumer protection by preventing fraud/ forum shopping and exploitation of an inexperienced (passive) consumer.[12] This is where the Common European Sales law steps in to serve as a more aggressive/harmonizing instrument by introducing common mandatory rules.

2.1 Application mechanism

The interaction between the Common European Sales law and the Rome I Regulation is a result of the complicated application mechanism that was chosen by the commission. The commission had the choice between an optional instrument as a 28th regime (now a 29th regime) or a 2nd regime of national law.[13] As the CESL is not a mandatory law, as oppose to for example the UNCITRAL Convention on the International Sale of Goods (CISG), its application has to be determined by the autonomous conflict rules, which within the European Union will be the Rome I Regulation.[14]

A 28th Regime denotes that the CESL would have existed alongside the 27 (now 28) national legal systems. Parties could then have chosen the CESL instead of a law of a

10 See for example Council Directive 85/577/ EEC to protect the Consumer in respect of contracts negotiated away from business premises (Doorstep Selling Directive) or Directive 2011/83/EU of the European Parliament and the Council on Consumer RIghts (Consumer Rights Directive) among others.

11 Martinek 2000, p. 532.

12 Rosset 2010, p. 2.

13 Note that the Articles consulted were published before the accession of Croatia to the EU on 1st July 2013. It would now be called a 29th Regime respectively, as now 28 national member state laws coexist.

14 Behar-Touchais 2012, p. 3.

member state.[15] This approach was however not deemed the most advantageous by the Commission. If it had been opted for a 28th regime, the choice of CESL would have amounted to a choice of law under Article 3 Rome I. The difficulty in this would have been that Article 3 (1) would have needed a reform as it, in its momentary formulation excludes the choice of a supra-national or non-state law.[16] Also, consequently Art. 6 would have been applicable to its full extent.[17] This would have greatly endangered the objective of the drafters to come up with a harmonized set of consumer protection rules.[18] Article 6 Rome I requires that a consumer be protected under the law that awards him the most extensive protection.

Instead it was opted for what is referred to as a 2nd regime of national law. This went hand in hand with a more complicated application process. The Rome I regulation as autonomous set of conflict rules remains applicable also where CESL is a 2nd regime.[19] This is due to the fact that choosing the CESL will have to be done via a two-step approach: Firstly, the parties will have to choose the law of a member state as applicable law in accordance with Article 3 Rome I. Then, within this national law, parties have the choice between the sales law under the ordinary law of the member state and the CESL as 2nd regime of national law. These co-exist within the national legal order.

The first reason for introducing CESL as a 2nd regime rather than a 28th regime is due to its interaction with the Rome I Regulation and in particular Article 3, which stipulates that "the contract shall be governed by the law chosen by the parties". There was uncertainty as to whether parties could choose a non-state law under Article 3, and an amendment of Rome I was deemed undesirable.[20] Related to this was the fear that Article 6 on consumer contracts would apply with its full force to a 28th regime.

Secondly, Reasons for choosing the application of the CESL as a 2nd regime have been identified with regards to the applicable legal basis. As Article 352 of the Treaty on the Functioning of the European Union (TFEU) requires unanimity voting within the Council of the European Union, basing the proposal on Article 114 TFEU was seen as a more successful arrangement.[21] To that end, CESL has been introduced as an instrument of approximation

15 Behar-Touchais 2012, p. 10.

16 Rühl 2012, p. 3 et sec.

17 Behar-Touchais 2012, p. 11.

18 Low 2012, p. 14 ; Hesselink 2012, p. 199.

19 Behar-Touchais 2012, p. 13.

20 Behar-Touchais 2012, p. 3.

21 Eidenmüller et. al 2012, p. 316 et sec.

of national laws. However, academics have argued that this is only a disguise and not really the case. Eidenmüller *et al* argue that the optional instrument is not harmonizing at all but instead creating 27 (after Croatia's accession 28) new regimes due to the different interpretation of the CESL by the national courts.[22] Accordingly, the CESL is being introduced as *part of* the national laws instead of *in addition* to them to give the illusion of approximation. They argue that due to the preference of Article 114, the commission has chosen for an overly complicated system with a complex application mechanism.[23] It will however still need to be seen whether the CJEU will approve of such disguise.

Doctrinal Reservations

Almost the entire range of articles consulted has voiced criticism of the commission approach as it stands. Criticism revolves around the classification of the CESL as national law and the envisaged application of the Rome I regulation.

Firstly, with regard to the very nature of the CESL, scholars have voiced reservations on several aspects with regards to the definition of the CESL according to the European Parliament legal department: "a regime of domestic contract law, but enacted by the European legislator".[24] They deny that CESL, even though chosen as a 2nd regime of national law can in fact be a national law. Scholars like Bergé and Hesselink argue that the CESL has been enacted by the European institutions and not by the national legislators. It can therefore, with regards to constitutional law principles, not be national law.[25] This is supported by Chantal Mak's assessment of nationalism in private law, according to which she claims that the EU is not enough of a state entity in order to be able to enact private law yet.[26] However, Hesselink acknowledges that it could be regarded as national in the light of conflict rules.[27] The deciding argument in this respect must be that the CESL is in the annex of the regulation but it cannot be characterized as the regulation itself. It is national law introduced by a regulation would probably be the most fitting perception.[28] The issue remains debatable, however, especially with regards to Recital 8 of the CESL, in which the Commission puts forward that a national interpretation of the CESL is "neither desired nor appropriate" as it must have the same meaning and interpretation in all member states.

22 Eidenmüller et. al 2012, p 317.

23 Eidenmüller et. al 2012, p. 318.

24 Behar-Touchais 2012, p. 13

25 Behar-Touchais 2012, p. 12.

26 Mak 2012, p. 2.

27 Hesselink 2012, p. 204-205, p. 203; Behar Touchais, p. 13.

28 Behar-Touchais 2012, p. 14.

Secondly, related to the hybrid nature of CESL as between European and national law instruments, criticism has arisen with regards to the application within the framework of the Rome I regulation. The Commission denies that a choice of CESL is equal to a choice of national law although scholars like, most prominently, Gisela Rühl, have argued that it must be seen as a choice of national law especially in light of the fact that the commission sees mandatory provisions of the forum replaced by the CESL.[29] She argues, that as the mandatory provisions are neutralized, the choice of CESL must be seen as a choice of national law if it imposes its own provisions. She further puts forward that the Overriding Mandatory Provisions of the national law need to be taken into account, as this would be the applicable law in the absence of choice applicable to consumer contracts in accordance with Article 6(1).[30] This leads up to the central point of discussion: the neutralization of PIL defence mechanisms.

2.2 Neutralization of Mandatory rules as envisaged by the commission (*Zwingende Bestimmungen/Zwingendes Recht* (D), *lois d'application immédiate* (F))[31]

The effectiveness of the mandatory rules of the forum was undesirable for the commission by way of 2 reasons, very much intertwined with the objectives to be achieved by the CESL.

Firstly, the effectiveness of the overriding mandatory provisions of the member states is not desirable as it endangers the achievement of the first objective of the CESL, the further development of the internal market. The application of the mandatory rules by the member states leads to 27 different versions of the CESL, which would undermine to a great extent the objective of the CESL.[32] Businesses trading with consumers would to a large extent still have to take into account the mandatory rules of the consumer's habitual residence.

Secondly, as the second objective of the CESL is the protection of consumers in order to facilitate the conclusion of consumer contracts within the internal market, a central point of argumentation has since been the level of consumer protection under the CESL. The objective was to design a full set of consumer protection rules, which safeguard a high level of protection. However, due to its optional nature, the regime has to be attractive to businesses in order to be chosen to govern the respective contract. Therefore, a balance was struck between the interest of businesses and consumers. It was therefore not aimed for the highest protection, albeit it is claimed that the consumer protection under CESL

29 Rühl 2012, p. 8.

30 Rühl 2012, p. 11.

31 Rauscher 2009, p. 264; Basedow et. al 2009, p. 1826.

32 Behar-Touchais 2012, p. 8.

exceeds on average the one available under the national laws of the member states.[33] This has not been taken affirmatively by a number of member states, which argue that the member state laws may provide for a higher level of protection, especially in specific cases, although this is clearly not the case in every situation that could arise. Bisping gives the example of a more favourable cancellation right under German law.[34] The main concern with the neutralization of mandatory rules is therefore the neutralization of those that constitute consumer protection rules.

We have seen that the choice of the CESL is subject first to a choice of national law in accordance with the Rome I regulation, and then another agreement between the parties to choose the CESL instead of the national law regime. The reason for taking a 2-step approach is a desired neutralization of Article 6. Article 6 (2) Rome I, which offers a special connecting factor for consumer contracts, stipulates that

> *"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 (emphasis added)."*

Article 6(2) Rome I regulates the applicability of provisions that cannot be derogated from by agreement. In this section, the paper will give a definition of what this notion comprises. In the following those rules will be referred to as "mandatory rules" (or mandatory provisions, MP), as this is the notion generally preferred by literature.[35] Mandatory rules encompass a very wide range of rules. Their content is not easy to grasp as it is subject to national interpretations, which also require an interpretation and demarcation of the notion of *ordre public*.[36] Generally, the description "rules which cannot be derogated from by agreement" is a fitting albeit vague explanation. Academia makes a distinction between internal and international mandatory rules.[37] International mandatory rules will be referred to as "Overriding mandatory provisions" (hitherto OMP), as this is done in literature consulted and fits the terminology chosen under the Rome I regulation. Art. 6(2) Rome I refers to internal mandatory rules. Internal mandatory rules are the rules prescribed

33 Busch 2012, p. 52.

34 Bisping 2012, p. 9 ; Rühl 2012, p. 8 ; Eidenmüller et al 2012, p. 304.

35 Pauknérová 2010, p. 30; Hesselink 2005, p. 46.

36 Pauknerova 2010, p. 30.

37 Pauknerova 2010, p. 30-31.

by a certain national contract law, which the parties cannot alter by agreement. These include the characteristic provisions of a private law regime, in which private autonomy is not infringed upon. Generally however, these provisions can be circumvented by the choice of a different national law. Then, the mandatory rules of the chosen law will be applied instead.[38]

It appears that Art. 6(2) makes all mandatory provisions of the consumer's habitual residence overriding ones, due to its formulation.[39] They are further *halbzwingendes Recht,* being mandatory in the sense that they can only not be derogated from to the disadvantage of the weaker party. Within the scope of the article, as soon as the weaker party (the consumer) is protected by the provision, it will not be possible to derogate from it, which attaches a higher importance for the protection of the weaker party to them, than that which is generally accorded to overriding mandatory provisions. However, the difference to "real" OMP is that here the party invoking the rule will not have to prove that the rule is crucial for the organization of society (any mandatory rule will qualify).[40] Under Article 6 a limitation has been imposed however, on this application mechanism. MP apply only if a business has directed its marketing towards the consumer's home country, therefore in a situation where the consumer does not leave his habitual residence and only when the transaction takes place in the consumers country.[41]

The commission argues that the respective article will be rendered ineffective if the CESL was chosen as applicable law. CESL is a uniform law, which will have the same content everywhere.[42] Therefore, the CESL as chosen under German law encompasses the same level of protection as the one under French law and the consumer will not have been deprived of protection under the law of another member state. This argumentation has been questioned, due to several reasons.

Firstly, it is questionable whether the CESL does indeed harmonize the contract law of the member states for B2C contracts. Recital 27 of the Proposal for the Regulation lays down the instances, in which gaps have been left, which will have to be filled by the national laws of the member states. Therefore, scholars have contested that the CESL constitutes a full set of consumer protection rules.[43] Indeed, the gap filling will have to be done by the

38 Kuipers 2012, p. 49.

39 Behar Touchais 2012, p. 6.

40 Bisping 2012, p. 4.

41 Bisping 2012, p. 5.

42 Behar Touchais 2012, p. 7.

43 Eidenmüller et. al, p. 313.

national laws of the member states. It is at this moment questionable whether the national applicable law will have to be determined again by the Rome I regulation or whether the choice of the national law by the parties under which they have chosen the CESL will be the applicable law for gap-filling. If not, the application of the CESL will run into even more problems as the applicable law in absence of choice will not necessarily be the same as the one chosen by the parties. Consider a situation where a consumer in Germany deals with a French business and where the consumer has agreed to an application of French law and the CESL. Will it now be the French law, which will fill the gaps or will the law be applied via Rome I, which is applicable in the absence of choice? This will then be the law of the place where the consumer has his habitual residence, in accordance with Article 6 (1) Rome I, in this case German law, as the consumer deals from Germany, given of course that German law accords a higher level of protection. Notwithstanding this, it must be noted that the legal department of the Parliament acknowledges the possibility that the "first" choice of national law "may be an indication of an implicit will to choose the law of that member state" to fill the gaps.[44]

We can see that as it stands now, the CESL does not create a uniform set of laws but rather that 28 different versions of the CESL are being created by application via Rome I, namely a CESL with gaps filled by French law, one with German law and so on. The question that this paper tries to answer is however more connected to the question whether or not there is another way to impose consumer protection rules and whether this will persist with further harmonization. The gap-filling could be a way of doing so, as gaps are left with regards to illegality/immorality.

Next, it is possible to question the reasoning of the Commission with regards to the comparison mechanism of consumer protection rules under Art. 6(2)Rome I. The comparison of consumer protection under this article, which aims at awarding the consumer the higher consumer protection, must be done between the law chosen and the domestic law of the consumer, which would be available in the *absence of choice*. It has been argued, that this will never be the CESL, as the parties must explicitly choose the CESL.[45] While the commission maintains its argumentation that this will also be the CESL, authors have doubted this approach.[46] There remains, as Eidenmüller puts it, "no reason why by virtue of CESL or the general principle of Community law only certain parts of the law should be compared".[47]

44 Behar-Touchais 2012, p. 20.

45 Rühl 2012, p. 8.

46 Rühl 2012, p. 8 et sec. , Eidenmüller et. al, p. 313.

47 Eidenmüller et. al, p . 314.

The legal department solves this problem by putting forward that the CESL will be the same regime under all national laws. Therefore the consumer protection afforded under the CESL subject to German law will be the same as that afforded under the CESL subject to French law, as the CESL offers a full set of consumer protection rules.[48]

The crucial point of argumentation here may be that mandatory provisions are *internal* mandatory rules.[49] The applicability under Art. 6(2) in an international setting (where the applicable law is the consumer's home law) is therefore a *constructed* one, where the article itself makes these rules overriding, whereas in reality and according to interpretation by the national courts not all of them are.[50] They cannot be contracted out of by the parties within the framework of the particular legal system, but may be excluded by a different choice of law. As such, they constitute typical provisions of contract law.[51] Generally, they are therefore only to be applied in internal situations. The application of mandatory rules in internal situations is provided for under Art. 3(3) Rome I.[52]

In light of the CESL, the mandatory provisions protecting the consumer are neutralized, according to the legal department's publication, as they determine their scope unilaterally.[53] This is due to the fact that the 1st (national law) and 2nd regime (CESL) co-exist in the national legal orders, where both are national in the sense that they are national private law. This is in line with Piers and Van Leenhove's argument that the choice of CESL does not amount to a choice of law but rather "incorporation by reference", and by way of this classification justify that Art. 6 (2) has no legal and practical importance.[54] Therefore the 2nd regime cannot be incompatible with the mandatory provisions of the 1st regime as they are also part of the national legal order. The 2nd regime is not inferior to the first one, when it is chosen. It rather supplants the corresponding rules of the 1st regime. This leads to a situation where there are, with regards to consumer protection 2 regimes of national mandatory rules that coexist. As both are deemed national law, one can never be incompatible with the other.

Due to the principle of party autonomy, the parties have excluded the applicability of the national law rules that deal with the *same subjects* and therefore also the mandatory rules.

48 Behar-Touchais 2012, p. 20.

49 Pauknerová 2010, p. 30.

50 Kuipers 2012, p. 102.

51 Pauknerova 2010, p.30.

52 Pauknerova 2010, p. 38.

53 Behar-Touchais 2012, p. 18.

54 Piers & Van Leenhove 2012, p. 14.

Therefore, a replacement of all mandatory rules, which are covered under the CESL as the Commission points out, is justified. However it must be noted, that naturally the only provisions that can be replaced by the CESL are those that are regulated in it.[55] This stands in direct connection to the gaps that are left in the CESL. It must now be examined whether Articles 9 and 21 Rome 1 will be a means of circumventing the neutralization of *the lex specialis* for consumers.

3 Application of Overriding Mandatory Provisions (ART. 9) and *Ordre Public* (ART.21)

The Rome I regulation provides for an extensive set of rules regulating the rules enforcing the member states' national interests, as is typical for private international law.

An important aspect to take into consideration is therefore jurisdiction as a dependence on the national laws is inherent to this category of provisions. The national judges are experts at applying their own contract laws. Therefore, the choice/allocation of the forum is of importance. However, the respective drafters adhered to the *Principle of Gleichlauf* of the Rome I and Brussels I regulation when they were transformed from Conventions to Regulations. This means that it was tried to reach connected conflict rules for jurisdiction and applicable law issues, much like in the case of consumer contracts.[56] So it happens that Article 6 Rome I corresponds with Article 15 Brussels I in that it favours the courts and the law of the consumer. Storme claims that as law will be applied by national and regional judges, there will never be a neutral assessment of *Ordre Public* and Overriding mandatory provisions. National judges will want to give effect to the national law.[57] Can they do so?

3.1 Ordre Public (Öffentliche Ordnung *(D)*)

First, we will examine the possibility to impose mandatory rules via the *ordre public* exception, which is regulated under Article 21 Rome I Regulation. It provides that

55 Behar-Touchais 2012, p. 21.

56 Kuipers 2012, p. 41.

57 Storme 2008, p. 179 et sec.

*"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** (emphasis added)."*

Ordre Public or Public Order is a means of last resort for Member states to enforce their interests. It enables a state to refuse the application of the law of any country, whether chosen by the parties or deemed applicable via the application of conflict rules.[58] However, this is only the case where the applied law would be manifestly incompatible with the public order provisions of the member state that is the forum.[59] It becomes clear that this can only be the case in a very limited amount of situations, as the public order exception responds to the most basic vital interests of a country in safeguarding its national policy. It corresponds with the basic notions of morality and justice that form the state's inherent value system. Von Bar calls *ordre public* the *conditio sine qua non* of the emancipation of conflict of law rules from substantive law, highlighting the importance of creating a safeguard against the objectively applicable law, without which the states would be unwilling to adhere to a system of conflict rules.[60]

Further the application mechanism can be described as a "negative" one.[61] The public order exception does not correspond to one specific provision, unlike the mandatory rules in Article 6, but rather to a general principle of justice and morality. Therefore, one cannot really say that public order is being "applied". It rather "imposes" itself, or as Pauknerova calls it "is invoked", after the application of the applicable law and consequently intervenes with regards to the rules that would otherwise be applicable as part of the applicable law. Public order is therefore of a defensive nature, only to be employed in the most limited occasions.[62] With regards to international interpretation, it does not seem to be the case that difficulties of interpretation arise. Even though Member states have to be the only ones to be able to appropriately define their own public policy, internationally, no real conflicts or disparities may be detected.[63] This may be due to the fact that especially within the European Union, the same values can be identified with regards to public policy, having in mind that the concept only refers to the most fundamental societal values. On top of

58 Pauknerova 2010, p. 31.

59 *Ibid*.

60 Von Bar 1987, p. 540.

61 Pauknerova 2010, p. 32.

62 Pauknerova 2010, p. 32.

63 Kessedjian 2007, p. 30.

that, the competence of the Court of Justice of the European Union (CJEU) to exercise its discretion with regards to the exercise of public policy by the member states may not be discarded. The Court has specified that the impact of the exercise of the exception is restricted where it will undermine the construction of the European Union.[64] It has since even decided that a common definition is required for the member states and that they have the obligation to exercise their right in line with the principle of sincere cooperation and that of proportionality.[65]

With regards to secondary EU legislation, it is commonly understood that member states may refer to their public order during the drafting process and negotiations. Once a particular legislation is adopted however, they will lose the right to invoke it.[66]

This proves to be especially helpful for determining there remains any possibility for the member states to apply their public policy exception in order to guard their interests when applying the CESL. It seems safe to say that this will not be the case. In theory, consumer protection can be invoked under Article 21 (Public Policy) as the Parliament's legal department points out. However, in practice this is not done.[67] Generally, there are not many recent cases in which the CJEU has accepted the application of public order by a member state and virtually no cases in which this was allowed where the public policy of the member state was different from EU public policy in this regard.[68] Therefore, this seems highly unlikely.

It is also unlikely with regards to a second reason, that is, that in fact member states' public orders will not derogate from each other at all. As the formulation "manifestly" prescribes, a high threshold applies. In the light of this, it is very much doubtable that any public order provision of a member state will be violated manifestly by way of application of another member state law.[69] This option of course remains open where 3rd states are involved.

64 *Ibid*.

65 Kessedjian 2007, p. 33.

66 *Ibid*.

67 Behar Touchais 2012, p. 30.

68 Kessedjian 2007, p. 34.

69 See for example Kessedjian 2007, p. 33.

3.2 Overriding Mandatory Provisions

3.2.1 Meaning and Functioning within the ambit of Rome 1

The Overriding mandatory provisions are regulated under Article 9 Rome I regulation. Article 9(1) reads:

> *"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 (emphasis added)."*

Article 9 gives a definition of OMP and makes it possible a general idea about their applicability. Inspired by the definition given in the Arblade judgment.[70] By way of it, two fundamental aspects for the application of the rule can be distinguished: (1) the purpose of the rule as a general interest and (2) the connection of the legal relationship to the forum.[71] It is generally criticized for being too broad a category, which could also include ordinary MP.[72] This point of criticism comes a bit as a surprise as the vagueness of OMP is necessary for their effectiveness, whereas it is only a matter of classification whether the rule also falls within the ambit of MP. In fact, in the opinion of this author, this will generally be the case. Naturally, for a rule to be of enough imperativeness to apply in an international situation, it comes as a prerequisite that it is imperative on a purely national level. In situations without an international element there is therefore no difference between MP and OMP.[73] OMP compromise the autonomy granted to the parties under the general principle of party autonomy (choice of law under Rome I). They have a regulatory function, which would be compromised to a great extent if their effect were made dependent on the applicable law.[74] Therefore, OMP "override" the applicable law, taking precedence over those provisions that the parties have chosen to govern their contract. This is justified with the fact that countries deem them necessary for safeguarding their vital interests.[75] They differ from MP in that where a situation is classified as "international", it is neither

70 Pauknerova 2010, p. 39.

71 Behlolavek 2010, p. 1478.

72 Pauknerova 2010, p. 39.

73 Behlolavek 2010, p. 1479.

74 Kuipers 2012, p. 54.

75 Bisping 2012, p. 5.

reasonable nor feasible that all involved states invoke all their MP. Then only those that are overriding due to a special protected interest may be applied.[76] It is a given that this is only possible where the contractual relation has a sufficient proximate relationship with a legal order. OMP mainly constitute mainly provisions of public law, which is where they derogate from MP, which include many private law provisions.[77] They constitute mandatory provisions that restrict party autonomy much like mandatory provisions under Article 6 Rome I. Their purpose and content is however much more connected to a public order conception and in that way has much in common with the *ordre public* exception. In that way, as Kuipers claims, they require a certain vagueness (much more than MP), which must not be confused with arbitrariness.[78] Whereas Public order, due to its negative application is often characterized as a "shield", OMP are "sword" function of a state to guard its vital interests.[79] It becomes clear that OMP require "positive" application, that is application even preceding the application of the conflict rules, as Pauknerova points out.[80] They constitute a somewhat hybrid construction out of the two. As they are not scrutinized as much as *ordre public* and no unified interpretation on the Union level exists, a clarification as to their content and their possible application in the light of the CESL must be attempted.[81] The reason they are of particular interest for this paper is that they are virtually the only spheres of PIL that are still based on the national conceptions instead of an EU conception.[82] Also, they seem to be the only possibility for a state to safeguard its interests due to the fact the *ordre public* is a very much-compromised doctrine. There are thus 2 main differences between *Ordre Public* and OMP: one with regards to applicability (sword and shield) and one with regards to their content.

Academia distinguishes between 3 instances of application of MP. Those characterised as "internal" and only enforceable in single country contracts. They are applicable under Art. 3(3) Rome I Regulation, and under the specific conflict rule for Consumers under Article 6.[83] OMP are at the same time wider and narrower than Art. 6. They are narrower as they are always internal mandatory rules (see above). They are wider in the sense that

76 Kuipers 2012, p. 122.

77 Bisping 2012, p. 5.

78 Kuipers 2012, p. 55.

79 Kuipers 2012, p. 58; Pauknerova 2010, p. 31.

80 Pauknerova 2010, p. 31.

81 Kuipers 2012, p. 35.

82 *Ibid*.

83 Pauknerova 2010, p. 35.

Article 9 is able to enforce applicability of a wider set of rules, not only those protecting the consumer.[84] Next, we can distinguish those MP that we consider the classical OMP. Those are referred to in literature as "International mandatory provisions".[85] Here, two instances arise, one in an EU cross-border setting, the other in a setting that involves a 3rd non-EU state. Since the Ingmar GB ruling, Community legislation is deemed to constitute a part of the international mandatory rules of the forum, that take effect in a contractual relation involving a 3rd non-EU member state.[86] Lastly, there is also the possibility to apply "international mandatory rules of a 3rd state" (neither the law of the forum nor the chosen law), however only where there is an imperative nature and close connection with the facts of the case.[87] This will be the case concerning above all the overriding mandatory rules of the place of performance (*lex loci solutionis*). It makes sense in cases where the application of a law is outside of the scope of the case but it will be necessary for enforcement of the decision in that country. One could think for example about OMP with regards to export restrictions.[88] Especially within the European Union, this might seem imperative, with regards to the principle of mutual recognition, however courts are generally not obliged to give effect.[89]

Under the Rome Regime, the applicability of the different types of OMP is further regulated in subsections 2 and 3 of Article 9 Rome I. Sub. 2 allows the application of OMP of the law of the forum (note the link to jurisdiction) and Sub. 3 refers to the application of the OMP of the place of performance, whereas here, restrictions on application exist. This will be further explained in the remainder of this paper. Generally, it is common understanding that the OMP of the proper law of contract must be applied as well, even if Article 9 does not expressly provide for this. However, they cannot really be classified as "overriding" as they do not override but form part of the governing law.[90]

Kuipers distinguishes further between a first and second generation of OMP. The first generation OMP are those protecting the interest of the state whereas the second generation rights are those protecting the rights of a weaker party, i.e. the consumer. Their coming into being coincides with the development of the concept of the welfare

84 Kuipers 2012, p. 104.

85 Pauknerova 2010, p. 35.

86 Judgment of the Court in case C-381/98 Ingmar GB vs. Eaton Leaonard Technologies Inc., para. 25.

87 Pauknerova 2010, p. 36.

88 Pauknerova 2010, p. 40.

89 Behlolavek 2010, p. 1506.

90 Pauknerova 2010, p. 39.

state, which compromised the classical system of Von Savigny.[91] The author acknowledges however, that a distinction between the two is not always feasible.[92] This is due to the fact that it is easy to interpret the one as an interest of the other and vice versa. The "public interest" required by Article 9 Rome I to be endangered does therefore not exclude the application of 2nd generation OMP by itself, as "public" is not synonym to "state".[93]

3.2.2 Different Interpretations in national law

Returning to the issue of jurisdiction, we can see that this is an important issue to take into account as the court's discretion is crucial with regards to the definition of what OMP constitute as well as what other OMP to apply (lex loci solutionis or even those of another law having a close connection with the case). The application of OMP is subject to the discretion of the judge who will make use of a practical approach to the application, taking into account the purpose of a certain rule and the effect that application or non-application will entail.[94] He may give effect to OMP, but does not have to. Clearly, he will most likely insist on the application of his "own" law. We can identify different perceptions of overriding mandatory provisions in the national legal cultures of the member states. Even if the rules for application have been harmonized with the Rome I Regulation, the definition of, in particular, OMP is still very much at the discretion of the national judge.[95] States may take into account the specific situation, the character and aim of the norm as well as the protected interest. This may result in a situation where a rule is mandatory in one instance but not in another.[96] As Kuipers points out, characteristics may become clear by way of comparison between French and German legal culture especially with regards to the protection of weaker parties.[97] French academia is willing to apply protective provisions via Art. 9, while German jurists will not be.[98] Two points of examination can be distinguished: On the one hand the content of OMP according to the national law, on the other hand, the willingness to apply OMP. The fact that France has implemented a whole Code for Consumer law and Germany to this date has not, is a first indicator for the national attitudes towards the OMP nature of consumer law.[99]

91 Kuipers 2012, p. 58.

92 Kuipers 2012, p. 94.

93 Kuipers 2012, p. 95.

94 Pauknerova 2010, p. 39.

95 Behlolavek 2010, p. 1465.

96 Behlolavek 2010, p. 1474.

97 Kuipers 2012, p. 56.

98 Kuipers & Migliorini 2011, p. 2.

99 Remien 2003, p. 122.

Germany – International Zwingendes Recht[100]

Article 9 Rome I Regulation is codified in Art. 34 EGBGB. In the German PIL culture, one can witness a functionalist approach to overriding mandatory provisions. Whether or not a rule is mandatory will depend on the interest of the national law "of applying it in a way that upsets the normal application of the conflict rule".[101] The OMP identified under German law are above all focused on public law statutes.[102] This may be due to a strict separation between public and private law, whereas OMP are die to the German definition rather focused on a public law interest than the interests of private actors.[103] It does not come as a surprise that German authors have contested the possibility to apply second generation OMP under Article 9.[104] It adheres to the definition of OMP as the "positive" application of *ordre public*. As such, there must therefore always be a state interest involved when OMP are applied. The BGH has refused to enforce the German consumer credit law (*VerbraucherkreditG*) as an OMP as it was aimed at consumer protection and not first and foremost at the interest of the state.[105] Generally German academia adheres to the special connection theory (*Theorie der Sonderanknüpfung*), according to which it is not enough for the German law to be the lex fori to justify the application of the German OMP.[106] One can deduce in general a reluctance to apply OMP.

The German legal culture acknowledges that Article 6 is lex specialis of Article 9.[107] Therefore, if the conditions of Article 6 are not fulfilled, that is, when none of the specific contractual situations arise, a MP cannot be enforced via Art. 9 as Article 6 already sets the conditions for when the situation is of enough proximity to enable the applicability of MP. Also, concerning the CESL Proposal, German scholars do not accept an applicability of OMP via Article 9, as they see the field of applicability covered by the CESL in general terms, and therefore a search for specific, more protective rules is not justified according to Leible.[108] German legal culture thus sees the role of OMP substantially limited where a situation falls within the ambit of a special connection factor. There is no reason to award the consumer a Double Protection Mechanism.[109]

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100 Kegel & Schurig 2004, 516.

101 Kuipers & Migliorini 2011, p. 4.

102 Rauscher 2009, p. 276.

103 Kuipers 2012, p.136.

104 Kuipers 2012, p. 94.

105 Kuipers 2012, p. 95; Behlolavek 2010, p. 1548; BGH 13 December 2005 XI ZR 82/05.

106 Kuipers 2012, p. 76.

107 Rauscher 2009, p. 264.

108 Leible 2012, p. 3.

109 Kuipers 2012, p. 56; Kuipers & Migliorini 2011, p. 192.

France – lois de police[110]

Article 3(1) Code Civil reads *"Les lois de police et de sureté obligent tous ceux qui habitent le territoire"*.[111] The *lois de police* are thus applied on the basis of territorial jurisdiction, which is why they also have been classified as „*lois d'application territoriale*".[112] It goes without saying that this definiton is so wide that it is incompatible with the one given under Article 9 Rome I.

OMP are referred to as „*lois d'application immédiate*" or „*lois de police*".[113] It is questionable whether the wide application exemplified by Article 3 CC is in line wit the definition given by Phonis Franceskakis, that is generally regarded as a prevailing definition.[114] It reads "*lois dont l'observation est necessaire pour la sauvegarde de l'organisation politique, sociale ou économique d'un pays*".[115] This definition seems to give a narrower definition, only making those MP overriding that are important for the organisation of the state.

French legal culture differentiates between *ordre public économique* and *ordre public classique* whereas the economic public order comprises all provisions protecting weaker parties to a transaction.[116] French scholars are generally of the opinion that a *loi* that protects a weaker party must definitely be applied via Article 9. Mirrored to the German judgment (see above) the French Court of Cassation passed a judgment on the corresponding French consumer credit law, however holding the opposite, namely that this law must in all cases find application via Article 9.[117] The protection available for the consumer under the Rome I regime has been deemed insufficient by French authors, compared to the French conception of OMP.[118]

French jurists approve of a general ability to apply their OMP. As soon as it "adequately regulates the situation" a social or economical goal is not of necessity.[119] This is due to the fact that even if the state has no particular interest, it is not necessarily against the

110 Kuipers 2012, p. 125.

111 Article 3(1) French Civil Code: "Statutes relating to public policy and safety are binding on all those living on the territory." ; see Translation of the French Civil Code at *www.legifrance.gouv.fr* .

112 Kuipers 2012, p. 128.

113 Kohler & Bucher 2004, p. 45; Kuipers 2012, p. 126.

114 Mayer & Heuzé 2007, p. 88; Kuipers 2012, p. 63.

115 Kuipers 2012, p. 63.

116 Wagner 2010, p. 50.

117 Kuipers 2012, p. 97.

118 Sinay- Cytermann 2005, p. 746.

119 Kuipers 2012, p. 77.

application of a certain rule, which claims territorial application.[120] Also, they have approved of the residual function of Article 9, approving of applying consumer protection laws via Article 9 albeit an existence of Article 6.

3.3.3 Applicability in the light of the CESL

The possibility of an application of Article 9 when the CESL has been chosen has been subject to debate. Generally, academia argues that Article 9 can only apply when the conditions of Articles 6 and 8 Rome I are not fulfilled. Article 9 cannot be applied then because Article 6 (the special law) is not applicable. Bisping argues that this is not the case when the conditions of Articles 6 and 8 are fulfilled due to the principle of "*lex specialis derogat lege generali*".[121] Article 6 can be seen as a special law to Article 9, due to the author as it makes the mandatory provisions of the national law, which protect the consumer, overriding.

Also, the mandatory provisions are not overriding in general as we have seen in the first part of this paper. They are rules of contract law and thus do not fit the definition of OMP that has been favoured by international literature. They are "made" overriding by reason of formulation in Article 6, by virtue of their ability to protect the consumer. Rome I therefore takes a very favourable approach towards consumers. One could argue in that way, as OMP are of a hybrid nature, which makes it possible that private law rules form part of OMP, which are classified as MP in an internal situation. The reason by which they are overriding then, is the international nature of the legal relationship and not the rule in itself, whereas the extent of the proximity is decisive for the extent to which the OMP regulating a specific interest will apply. OMP *are* in this respect, nothing else than MP.

It is questionable whether the overriding mandatory provisions protecting a specific weaker party – the consumer – can still be invoked under Article 9 when they cannot, as has been shown be invoked under Art. 6. Bisping discusses this problem with regards to the CESL in his seminal article. The difference to MP lies in the fact that they do not only preclude the choice of law but also the applicable law in the absence of choice.[122] They do not require a comparison but are imposed unilaterally. He argues however, that the CESL has not superseded the application of OMP, due to insufficient clarification.[123]

Paul Lagarde also discusses this issue. He estimates that it is impossible to invoke article 7 of the Convention (Art. 9 of the Regulation) without Article 5 (Article 6 Regulation)

120 Mayer & Heuzé 2007, p. 91.

121 Bisping 2012, p. 5 et sec.

122 Bisping 2012, p. 15.

123 Bisping 2012, p. 17

losing its significance.[124] However, this does not mean, that it cannot and will not be applied by national judges.

It must be said then, that Rome I did not sufficiently clarify the relationship between the special connecting factor for consumers under Article 6 and the protection of weaker parties under Article 9.[125] Kuipers sides with Bisping in stating that generally Article 9 should not be applied if the situation already falls within the ambit of the special connecting factor, however he accords Article 9 a residual role to counter "too harsh consequences".[126] This is also due to the fact that the application of Article 6 in itself is subject to conditions, which make sure it only protects the "passive" consumer. Therefore, until the CJEU renders a judgment on this matter, Article 9 application is still at the discretion of the member states, whereas diverging applications are to be expected, even if this lead to "cumulative" protection of the consumer.[127]

Even if in general, no gap is left for consumer protection norms by the CESL, a gap is left by illegality/immorality. This will enable a state to impose its consumer protection law not by virtue of its interest for the general public (as this general interest is covered by the CESL) but by virtue of a different consequence and value attached to it (illegality/immorality) in the legal sphere. These considerations lead us to consider what is to come for the OMP with further harmonization of private law.

4 The future of Overriding Mandatory Provisions

The study of the influence of the harmonization of consumer protection law on the applicability of *Ordre Public* and Mandatory Provisions has shown the tendency towards the superfluousness of these "classic" defence mechanisms of PIL. *Ordre public* and national mandatory rules are pushed aside by the ongoing harmonization of Private law on the European Union Level. The *Ordre Public* Exception is probably the most compromised one on the European Level. Considering case law and legal theory on the approximation of the European Legal order, the *ordre public* of the European Nation States has almost entirely lost its meaning due to scrutiny of European actors.[128] Regarding mandatory rules,

124 Sinay-Cytermann 2005, p. 745.

125 Kuipers 2012, p. 123.

126 *Ibid*.

127 Kuipers 2012, p. 124.

128 Kessedjian 2007, p. 33.

in light of the CESL, this only holds true of course for the rules that are supplanted by the Regulation and only when the parties have chosen the CESL accordingly and explicitly. However, an assessment of the CESL's impact on PIL has helped to deduce a tendency for the future of the national private laws if further harmonization is pursued.

It has been shown that the situation of OMP is a bit more in the open, due to the hybrid nature of these provisions and the fact that they pursue a state interest. There resists an ambiguity in their application. Private law and Public law cannot be separated strictly, due to the existence of public law rules with an aim for social justice. Nowhere does this become more clear than with the nature of OMP, which have as their inherent defining factor the public interest that they protect. This showcases the complicated nature of harmonization, as it is much more problematic with regards to the differing value systems of the MS, and much less about the approximation of hard core contract law.

Harmonization of Private law thus entails the harmonization of rules with a public interest at heart. With every step towards harmonization, the discretion left to the member states in defining their public interests is narrowed, by way of the CJEUs powers to interpret Union legislation (*Krombach case*) and the further development of the consumer *acquis*.[129] The *Krombach case* proves to be important, as in it, the CJEU ruled that the member states must determine themselves what they consider public policy, but it is nonetheless the task of the court to "review the limits within which the courts may have recourse to that right".[130] This is transposable to an interpretation of OMP as well. A level playing field is being created, one that arguably becomes more and more narrow.

In the area of conflict between harmonization and fragmentation, Europeanism and Nationalism, the CJEU has been criticized for favouring a consistent approach over the consequences a judgment has for private parties.[131] Martinek argues, much in line with this, that the EU legislator must not exaggerate regulation in consumer law, otherwise it is even possible that the consumer finds himself in a disadvantageous situation, could be a threat to the functioning of national private law.[132] Is it then more favourable to leave consumer protection in the hands of the member states?

To that end, academia argues that a Definition of Article 9 by CJEU is needed. It is questionable whether the CJEU sees consumer protection as a public interest within the ambit of Article 9. The judgment in *Ingmar GB* seems to suggest that the ECJ would

129 Judgment of 28th March 2000 in Case C- 7/98, Dieter Krombach v André Bamberski.

130 Belohlavek 2010, p. 1504, Krombach v Bamberski, para. 1.

131 See inter alia Reich 2000, p. 480.

132 Martinek 2000, p. 557.

be very much in favour of including 2nd generation rights to the definition of overriding mandatory provisions. In this judgment, the court ruled that the agency directive should apply between a European and an American party to a contract and the rights set forth under the directive constituted overriding mandatory provisions of the *ordre public communautaire*.[133] Even if this concerned a contract with a 3rd country, it is probable that the Court will include 2nd generation rights also on a Member state level. However, the fact that the member states are granted discretion when applying a law via Article 9 is crucial as they are not obliged to apply 2nd generation rights, though they may do so. A definition rendered by the CJEU does not render a differential application illegal therefore. It is likely that differing applications will resist. Therefore, no consensus about the content of OMP is likely to be reached in the near future.[134] Also with regards to the fact that the national judge will apply the latter in an ad hoc manner, it remains probable that national approaches will survive, even though this may lead to intransparencies in interpretation.[135] It is likely possible also to apply a law via Article 9, claiming a 1st generation interest, which has beneficial consequences as well for the consumer.[136] What is more interesting is what consequence this judgment will have on the meaning of OMP, where their purpose shifts from pursuing a state policy to correcting private autonomy.[137] The claim that PIL loses its importance with on going harmonization of consumer law cannot be supported to its full extent therefore.[138] An utilisation of Art. 6 does not have the objective of securing the state interest, it is a restraint on party autonomy, which is justified with protection of the weaker party. This must be seen as the main objective of this *lex specialis*. An impairment of private autonomy is only justified with the protection of the consumer.[139] If the CJEU acknowledges the interests of private parties as a public interest, their meaning within the European legal sphere will be strengthened.

Notwithstanding this, it is beyond questionable whether this will ever oust the possibility of invoking OMP as a functional defence in the name of national consumers. The fact that it is regarded as a "safety net" to avoid too harsh consequences combined with the very essence of the notion which seeks to secure the individual public interests of

133 Judgment of the Court (Fifth Chamber) of 9th November 2000 in Case 381/98, Ingmar GB v Eaton Leonard Technologies Inc., para. 25 et sec.

134 Kuipers 2012, p.71.

135 Kuipers 2012, p. 78; Storme 2008, p. 182.

136 Kuipers 2012, p.110.

137 Kuipers 2012, p. 99.

138 Schilling 2006, p. 48.

139 See also: Rosset 2010, p. 2.

states and the nature of their application makes it very much doubtable that this notion will become superfluous or much controlled on the European level in the near future, with or without an autonomous interpretation.

5 Conclusion

We have examined the mechanisms available for consumer protection purposes under European Union law. Special emphasis was put on answering the question how the "old" soft and the "new" hard law instruments interact to that end. A development towards harmonized hard core contract law has been taking place (CESL), which also has the objective of improving consumer protection. The CESL has not entered into force yet and it is questionable whether it will do so in the near future. It has only been used as an example, in order to deduce how the development of hard core law would influence the applicability of conflict of law rules (PIL) and whether it would render (overriding) mandatory provisions superfluous or whether those remain a safety net for the member states. Special emphasis has been put on Article 6 Rome I (special law for the consumer) as well as Overriding mandatory provisions and *ordre public*. It was concluded that a harmonized contract law makes Article 6 superfluous, as it requires a comparison between two sets of law. Naturally, where rules are harmonized, only on system exists. This is, of course, only the case where no gaps exist in the new supra-national legal regime. This cannot be said of the CESL: Most prominently, a gap has been left for illegality and immorality. These notions being themselves connected to the most basic ideas of morality and justice of a member state, it can be argued that the CESL is very much left to the discretion of the national legal systems nonetheless. However, as Article 6 is itself subject to conditions, this paper has examined the possibility of imposing consumer protection rules under Art. 9 and 21 Rome I Regulation. The main focus was put on OMP, due to the nature of their content and application. They have a somewhat peculiar position in the PIL regime as they, albeit being the mirror image of *ordre public*, are not scrutinized enough on a European level to exclude their application. It is true that the EU is more and more creating a level playing field within which the member states can exercise their right, however, it is getting more and more scrutinized. Therefore, the conclusion has been reached that an interpretative judgment of the CJEU is needed to clarify the application of OMP. As the application is done in an ad hoc manner and left to the discretion of the member states (otherwise the very purpose of OMP would be impaired) a uniform application will probably never be the case. This can also not be resolved by the CJEU rendering judgment. With regards to

the CESL, it has been shown that due to the various peculiarities in application of PIL, a uniform system for consumer protection cannot be achieved (despite the replacement of mandatory provisions of the national 1st regime), which has been affirmed as consistent with the application of the instruments. This is due to different interpretations and applications in national law, whereas these intransparencies cannot be resolved by a uniform interpretation by the CJEU. To conclude, the destiny of OMP on a European level is still very safe to survive for a longer period of time. Nevertheless, it could be that they will disappear with more and more harmonization of private law. For now, it can only be said that the EU defines a playing field through the *acquis*. Nothing more, but also nothing less.

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