Tobias Pinkel, Christoph Schmid and Fosef Falke (eds.), Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts, Nomos 2014

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I.

Sales contracts in the European Union are governed by national contract laws. It is argued that cross-border sales transactions are consequently more costly than domestic ones, since divergence among these national legal systems requires businesses to learn and to adapt to one or several foreign legal systems. Thus, merchants−especially micro, small and medium-sized enterprises (SMEs)[1]−might be discouraged from expanding into other European markets or from simply engaging in cross-border transactions if costs would exceed return. The result affects consumers, who are left with a narrower selection of goods than could be possible within the internal market. As a solution, the European Commission has proposed a Common European Sales Law (CESL).[2] The proposal offers a uniform set of contract law rules−as an alternative to the Member States' national contract laws−for merchants to sell goods in other Member States. By express agreement, contracting parties could select CESL to govern their cross-border sales contract.

The proposal for CESL has sparked much discussion about the functionality and legitimacy of a uniform European sales law, and the book presently under review, "Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts", exemplifies the dynamic nature of this discussion. The book, edited by *Tobias Pinkel*, *Christoph Schmid* and *Josef Falke*, is divided into three sections, each containing three or four contributions. The first section deals with the legitimacy of a uniform European sales law instrument, which is followed in the second section by contributions concerning the functionality as well as the potential for success of such an instrument. The book concludes by considering specific subjects that could have a significant impact on the functionality of CESL and consequently its legitimacy in the sense of a practical readiness of European lawyers to adopt it.

II.

The book begins with an exceptional introduction by the editors, presenting the development, scope and substance of CESL. Additionally, their discussion of legitimacy and functionality fittingly sets the stage for subsequent chapters. Legitimacy can be seen as the result of legitimization, that is, a process of justification, or described as a state. The partic-

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[1] The Commission has defined micro, small, and medium enterprises in its Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, pp. 36-41.

[2] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011, COM(2011) 635 final.

ulars are treated from the perspective of different variables, concepts and standards of legitimacy. Legitimacy variables are differentiated according to input factors (the law-making process in a wider sense) and output factors (the results). In addition to the different variables, three concepts of legitimacy are differentiated, which can play a role at the level of both variables considered here and are examined to varying extent in particular contributions. The first legitimacy concept presented is legality, that is, the legal positivist consideration of whether a legislative instrument comes into existence according to the correct legal form. The second legitimacy concept follows the sociological definition of legitimacy, which focuses on readiness to adhere to a law. This focuses not on actual adherence but instead on effective approval, that is, the subjective perception that an instrument should be valid. In the process, legitimacy is conferred as a belief in legitimacy, which leads to a readiness to adhere to a law and therefore to a certain stability of a political system or, as here, to fundamental adherence to a law. The third concept of legitimacy dealt with in the book is normative justification. In this concept, considerations are borrowed from other social sciences, such as compatibility with democratic principles, the guaranteeing of substantive rights, and the principle of efficiency taken from economics. This democratic legitimacy is given special attention in the present book.

Legitimacy standards are laid down here not through comparison with contra-factual, idealized national systems or international organizations, but instead, an experience-based, overall assessment is performed for all legitimacy factors, which taken as a whole could give rise *sui generis* to a European Union legitimacy standard. Since legitimacy in this sense depends on many factors that can alternatively strengthen or weaken in a fluid system, legitimacy can also be seen as present overall even when individual aspects suggest the illegitimacy of the institution, regime or, as in this case, a legal norm. By considering representative questions of legitimacy, the first part of this book gives an effective overall impression of the subject.

The first chapter by *Christoph U. Schmid*, "Von der Gesellschaftsverfassung zum privatrechtlichen Bastelforum? Zur Legitimität des Kommissionentwurfs für ein Europäisches Kaufrecht", generally elaborates central questions of input as well as output legitimacy. In the context of input legitimacy, that is, legitimization in the creation of the legislative instrument, the author focuses first on formal questions of the foundations of competence and thereafter on the legislative process. While he does not challenge the formal input legitimacy, that is, the legitimization concept of legality, *Schmid* considers legitimization in the sense of the democratic-normative legitimization concept to be questionable. To that extent, the chapter is based primarily on deliberative elements of normative input legitimization. Here, the author outlines several weaknesses in the academic drafting process toward the Draft Common Frame of Reference as well as in the hasty promulgation of the political DCESL. In contrast, improvement can be seen in the deliberate inclusion of an emerging class of European lawyers as a result of the discourse on the new uniform sales law, which is now also conducted on the level of the newly founded European Law Institute (ELI) that has already had a perceivable impact on legislative development through consultations in Parliament. For the still ongoing process of input legitimization, *Schmid* thus outlines a mixed picture of two legitimization concepts. Regarding the output legitimacy of the DCESL, the author's position is even more critical. Here, the normative legitimization concept is predominantly considered. A basic socio-normative concept of private law, based on a socially enriched perception of justice, is used as the normative basis for evalua-

tion for the quality of a uniform sales law. *Schmid* reveals in several examples from the DCESL that this concept had not been factored in.

A more positive picture of the legitimacy of the DCESL is painted by *Björn Hoops* in his contribution, "Notwendigkeit and Legitimation einer EU-Kaufrechtskodifikation für den grenzüberschreitenden Handel". In his chapter, the meaningfulness of an optional EU uniform sales law is laid out against the backdrop of the historical debate on codification in continental Europe. First, the author elaborates that, due to the complexity of private law in the multi-level system of the EU, a practical need exists for a harmonized sale law in intra-European trade. He also discusses relevant parallels to the situation in European nations before the national unification of private law systems through the great national codifications of the Nineteenth Century. As is postulated by the author, if a need for a uniform sales law exists, it can be presumed that this fact would contribute to the belief in legitimacy and the accompanying readiness to adhere. Furthermore, the postulated gain in efficiency could also provide economic-normative support for endowing legitimacy. Also, from the perspective of democracy, *Hoops* sees in CESL a victory for the *status quo* and, consequently, a contribution to legitimacy in the sense of democratic-normative legitimization. Thus, it is argued that a legislative instrument of European nature−despite democratic weaknesses in the EU−possesses a distinctly greater quantum of democratic legitimacy for EU citizens than does foreign law. However, in current intra-European international trade, it is mandatory that at least one contractual party is subjected to foreign law, and this situation could be solved through a uniform sales law. Therefore, so the reasoning goes, the concept of a uniform sales law promulgated by the EU on the basis of a Regulation could be considered legitimate. It is not possible, however, to make any further-reaching conclusions about the concrete legitimacy of the DCESL.

Legitimacy in the conceptualization of legality also describes the legal-formalistic consideration of a set of facts or, here concretely, of a legislative instrument in the form of a regulation. The relevant question here is whether the process by which a legislative instrument comes into being is constitutional. To answer this, compliance with procedural requirements must be laid out to determine whether it lies at all within the competence of the legislator to enact the instrument in question. In the case of the EU, which is based on the principle of limited conferral of authority, the relevant consideration is whether a permissible conferral of authority can be found, upon which basis a CESL could be concluded.. Following this legal-formalistic definition of legitimacy, *Anna-Carina Hilscher* concentrates thoroughly on the basis for competence of the EU for CESL in her contribution, "Artikel 114 AEUV als Rechtsgrundlage der Verordnung über ein Gemeinsames Europäisches Kaufrecht". The author leaves no serious doubt that the chosen basis for competence of Article 114 TFEU permits the conclusion of an optional European uniform sales law. This is a further aspect that would support the legitimacy of CESL, should it come into force.

III.

The second section of the book focuses on the functionality of the DCESL. Functionality consists primarily of three elements, two of which are normative and one descriptive. The functioning of CESL is descriptively presented without necessarily performing an evaluation. From a normative perspective, functionality requires effectiveness and a certain amount of efficiency. A prerequisite of determining the effectiveness and efficiency of a legislative instrument is a clearly defined purpose. Functionality is measured in light of the

goal to be achieved, which in the present context is shaped primarily by the Commission. With the DCESL, these goals are generally to promote the internal market and particularly to increase supply in smaller Member States as well as to strengthen the position of SMEs in international commerce. However, the functionality and suitability of the DCESL as a sales law instrument particularly for transnational Internet commerce and thereby the material quality of the legal instrument should also be examined. The characteristics of functionality in this sense first require a normative definition of purpose which simultaneously increases the normative output legitimacy. In contrast, if the goals are not achieved or if the CESL even works against desirable functions of the law, this can lead to output illegitimacy. Further, functionality is closely connected to the prospect of success of a CESL, as success in the application would increase the sense of readiness to adhere.

In the first chapter of the section, "Regelungsinnovation in Europäischen Vertragsrecht: Entwicklungsdynamik eines optionalen Instruments und seiner Alternativen", *Florian Möslein* pursues the question of how much potential for innovation exists in the current draft of CESL and what effect CESL would have on the ability of innovation in European sale law. Here, it is argued that DCESL contains mostly familiar concepts and could restrict the ability of Union private law to innovate. However, the author views the ability of innovation of private law in the multi-level system as not entirely in danger, since European private law as the sum of the private law of the EU Member States principally maintains its flexibility.

Bernd Seifert devotes his contribution, "Das Gemeinsame Europäische Kaufrecht – Cui bono?", to controversies that arose during the hearing of experts before the Committee on Internal Market and Consumer Protection (IMCO). After the author first confirms the need for harmonization of sales law at the European level and establishes the potential value of an optional sales law instrument, he takes up the requirements of the functionality of *the* CESL. Here, *Seifert* sets as criteria for the effective and efficient functioning of CESL the following considerations: the sufficiently exclusive scope of regulation that would nearly eliminate recourse to conflict of laws and other legal systems, the comprehensibility of the instrument text, the balance between consumer protection and merchants' freedom of contract. In particular, the author considers that merchants are disproportionately disadvantaged in the current DCESL, which presents a challenge to the functionality of CESL. In contrast, he considers the exclusive scope of regulation as adequate. Against the background of the highlighted opposing interests, *Seifert* raises the question of whether the Commission and Parliament could at all succeed in finding compromise solutions. It remains to be seen whether any such solutions would comply with the functionality criteria.

An entirely different perspective is taken by *Norbert Reich* in his chapter, "Reflexive Contract Governance in der EU – Privatrechtsvereinheitlichung oder Koordination durch Soft Law?". *Reich* first presents an overview of the context of EU private law as well as the development of the DCESL and then submits the thesis that an optional sales law instrument is not needed in the EU. He argues that, in the area of B2B, sales contracts can already be uniformly concluded across the EU through the exercise of private autonomy within the framework of conflicts of law. In the area of B2C, he suggests that an optional instrument would lead to a reduction of consumer protection standards, which would not be politically desirable, and that comparable results could be achieved through soft-law measures such as an EU-wide Code of Conduct. According to this view, not only are the legality and the normative legitimacy of any optional sales law instrument doubtful, the resulting function of the Commission draft would be an entirely different one, which the author proceeds to

outline. In the form of a Commission proposal, the Commission draft could influence jurisprudence, as well as inspire merchant and consumer organizations to develop guidelines for better business practices as a code of conduct on the basis of the draft text and to assist the Commission in the promulgation of new directives. Moreover, the author sees therein the possibility to ensure the flexibility and adaptability of the text based on regular reporting. Compared to the current Commission draft, this would amount to a completely different function for a CESL.

Olaf Meyer turns to an entirely different issue in his contribution, "Maßnahmen zur Förderung des GEKR: Im Fahrwasser des UN-Kaufrechts zum Erfolg?". This chapter considers the question of which institutional framework and infrastructures could help CESL to also become practically successful. Here, he deals with the preparation of case law through online databases, a digest and the significance of the ECJ as the highest instance of interpretation, the reworking of the area of law (particularly through textbooks and commentaries but also through an Advisory Council), the possibility to choose the optional legal instrument through boilerplate terms, and finally with student competitions. *Meyer* closes with the conclusion that the journey to success for a CESL is destined to be a rocky one, but the experience of the CISG could cautiously be consulted as a point of reference about how this journey could ultimately be mastered.

IV.

The final three contributions in the book thoroughly discuss and assess particular aspects which would have a significant influence on the functionality and thus ultimately the legitimacy of a uniform sales law.

In his chapter, "Die Rücknahme von Angeboten im Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht", *Jens Richter* considers the issue of revocation of offers. Here, the author not only evaluates a central contract law norm, but he also reveals two primary difficulties for the DCESL. First, a uniform European law will be faced with the constant challenge of finding substantively good compromises between varying legal traditions. Second, the CESL also has the problem that its predecessor, the DCFR, encompassed a wider scope of application, which may have been sensible.

Daniela Schmidt, in her contribution entitled "Vorvertragliche Informationspflichten bei Verbraucherverträgen im Gemeinsamen Europäischen Kaufrecht", focuses on the contractual duty to disclose, a central instrument of EU consumer law that is expanded in the DCESL. Here, *Schmidt* is critical of the *acquis* as being overloaded. In the process, a further problem of the DCESL also becomes clear: Variation from the consumer law *acquis* is hardly politically viable, and a parallel reform of the *acquis* would clearly be an excessive burden on the EU institutions.

The book concludes with a contribution by *Tobias Pinkel*, "Die Wahl des Gemeinsamen Europäischen Kaufrechts. Eine kritische Betrachtung der Anwendungsvoraussetzungen und Rechtswahlvorschriften im Kommissionsentwurf", which looks at the requirements and the functioning of the choice of law of the optional instrument. While the author argues that the current regulation would not strongly inhibit the practical success of the instrument, he indeed demonstrates monumental weaknesses in particular aspects of the instrument.

V.

This book could perhaps be best characterized as balanced and well rounded. Several arguments are posed in the first part of the book which support the legitimacy of *an* optional European uniform sales law, but other aspects are presented that currently place the legitimacy of *the* DCESL in doubt. A clear, uniform perspective cannot be drawn from this, but the first puzzle pieces are present for developing an overall impression of the subject. Additionally, the chapters in the second section of the book offer interesting and sometimes unexpected perspectives on functionality, some which are particularly likely to resonate with the reader–the contribution by *Norbert Reich* comes to mind here. Altogether, these contributions expose that there is still room for improvement in the legislative process. However, the functionality and legitimacy of the DCESL are not entirely discredited.

While most of the chapters in this book could be enjoyed by a wide spectrum of students and professionals, some more specialized contributions would perhaps be best appreciated by jurists with some pre-existing general knowledge of the subject matter. In any case, the book as a whole exhibits excellent scholarship and significantly enriches the material available on the subject of a uniform European sales law. Finally, despite the sophistication of the themes and often exquisite use of language, the text was nevertheless easily accessible for this author, for whom German is a second language.

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