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**FOR THE PURPOSES OF  
THIS REGULATION . . . :  
DENYING PROTECTION TO THE SMALL  
BUSINESS THROUGH THE APPLICATION OF  
THE CESL**

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## I. INTRODUCTION

At the request of the European Commission, the Gallup Organization surveyed businesses throughout the European Union to determine if companies are deterred from engaging in cross-border transactions due to the varying contract laws of the Member States.<sup>1</sup> The survey found that companies not engaged in cross-border transactions consider different contract laws to be a significant obstacle.<sup>2</sup> Of the companies surveyed, microenterprises (companies of nine or fewer employees) are more likely to be deterred from cross-border trading than larger companies by the complexities of navigating different contract laws.<sup>3</sup> The companies surveyed responded favorably to the proposal of a common European sales law, and over seventy percent of those surveyed indicated they would likely apply the proposed common law to facilitate cross-

1. See *European Contract Law in Business-to-Business Transactions: Analytical Report*, EUROPEAN COMM'N 4–6 (2011), [http://ec.europa.eu/public\\_opinion/flash/fl\\_320\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf) [hereinafter *Analytical Report 2011*] (noting that businesses considered there to be several obstacles to cross-border trade, such as taxes and licensing, but narrowing the study to obstacles created by contract law).

2. See *id.* at 6 (explaining that about forty-nine percent of the companies surveyed thought that contract law created barriers in at least one of four ways: “(1) difficulty in agreeing on the applicable foreign contract law; (2) difficulty in finding out about the provisions of a foreign contract law; (3) problems in resolving cross-border conflicts, including costs of litigation abroad; and (4) obtaining legal advice on foreign contract law”).

3. See *id.* at 4, 8, 25 (explaining that many businesses surveyed did not then participate in cross-border transactions and reported that a reason for not engaging in cross-border transactions was due to contract law variations). *But see Response of Allen & Overy LLP, London to the Call for Evidence Issued Jointly by the Ministry of Justice and the Department for Business Innovation and Skills in Relation to “A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission”*, ALLEN & OVERLY LLP (May 21, 2012), [http://www.allenoverly.com/SiteCollectionDocuments/AO\\_Response\\_to\\_MoJ\\_CESL\\_Call\\_for\\_Evidence\\_10853.pdf](http://www.allenoverly.com/SiteCollectionDocuments/AO_Response_to_MoJ_CESL_Call_for_Evidence_10853.pdf) [hereinafter *Allen & Overy's Response*] (taking issue with the study conducted and questioning whether the CESL is actually needed, in part because of the external factors exerted by national law, negating the efficacy of the CESL, and in part because cross-border approaches in the Vienna Convention have been under-utilized).

border transactions.<sup>4</sup>

Concerned about the internal market and based on the Gallup survey and others, the European Commission (the “Commission”) published the Proposal for a Regulation on the Common European Sales Law (the “CESL”) in October 2011.<sup>5</sup> The Commission drafted the CESL to alleviate the complex decision-making process that businesses must undergo to conduct business in multiple jurisdictions,<sup>6</sup> which the Commission believes is particularly cumbersome for small and medium enterprises (“SMEs”).<sup>7</sup> SMEs often have the weaker bargaining position when engaging in trade with larger companies, and the expense of navigating different contract laws is significant for SMEs with limited resources.<sup>8</sup> Thus, SMEs generally must use the preferred law of the larger company when engaging in cross-border trade.<sup>9</sup>

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4. *Analytical Report 2011*, *supra* note 1, at 29 (noting that while some countries’ businesses indicated stronger levels of support than others, overall, in twenty-two EU Member States, six in ten businesses were likely to utilize a common contract scheme).

5. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, 2011/0284 (COD) at 5 (2011) 635 final (Nov. 10, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> [hereinafter *The Proposal*] (noting that as a response to the surveys and Green Paper on policy options for progress towards a European contract law for consumers and businesses, the European Parliament issued a Resolution on June 8, 2011 supporting the drafting of a common European sales law).

6. See *id.* at 2 (explaining that an objective of the CESL is to improve the internal market by decreasing the complexity that businesses currently face in navigating the contract law of different jurisdictions). *But see Allen & Overy’s Response*, *supra* note 3, at 2 (noting that the surveys the Commission relied on are not accurate and that there is no need for a “28th” contract regime).

7. See *The Proposal*, *supra* note 5, at 3 (indicating that, when businesses, particularly SMEs, choose not to engage in cross-border trade due to contract variations, this results in the loss of tens of billions of Euros for the internal market).

8. See *id.* (explaining that SMEs are faced with the additional burden of learning the foreign jurisdiction’s contract law, a burden that requires expenditure of valuable and limited resources); see also HUGO BEALE ET AL., *IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE: CASES, MATERIALS AND TEXT ON CONTRACT LAW 793* (Walter van Gerven ed. 2010) (emphasizing that SMEs are often in positions similar to those of consumers when dealing with large and sophisticated parties and may need the same protections as those extended to consumers).

9. BEALE, *supra* note 8, at 793; Marco B.M. Loos, *Standard Contract Terms*

The Commission explained that existing efforts to harmonize or create an international legal contract regime, such as through the Draft Common Frame of Reference (“DCFR”), do not serve to ease the complexity of cross-border transactions.<sup>10</sup> To address the difficulty and cost of cross-border transactions and improve the economy, the Commission—with the backing of the European Parliament—drafted the CESL as an optional instrument.<sup>11</sup> As explained below, once adopted, the CESL will apply to cross-border transactions in either a business-to-business (“B2B”) transaction or a business-to-consumer (“B2C”) transaction.<sup>12</sup> The CESL will serve as a second contract regime in each Member State, and if one contracting party is from a Member State and either a SME or a consumer, the parties can agree to use the CESL as the governing law of the contract.<sup>13</sup> As a second contract regime for contracting parties, the CESL is designed to fulfill the Commission’s goal of promoting cross-border transactions by reducing the complexity of navigating twenty-seven disjointed contract laws.<sup>14</sup>

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*Regulation in the Proposal for a Common European Sales Law* (Univ. of Amsterdam Cent. for the Study of European Contract Law, Working Paper Series, Paper No. 2012-04, 2012), available at <http://ssrn.com/abstract=2081857>.

10. See *The Proposal*, *supra* note 5, at 5 (noting that because of gaps in the scope of contract terms like “defect in consent,” current minimum harmonization standards and the Vienna Convention differ in various jurisdictions, thus leading to greater complexity and confusion in cross-border transactions).

11. See Policy Option for Progress Towards a European Contract Law for Consumers and Businesses, Eur. Par. Doc. P7\_TA(2011)0262 (2011), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0262+0+DOC+PDF+V0//EN> (“[The European Parliament] [a]cknowledges the need for further progress in the area of contract law and favours . . . setting up an optional instrument (OI) by means of a regulation.”).

12. See discussion *infra* Part II(B) (explaining how parties can choose the CESL as the governing law of their agreement).

13. See *The Proposal*, *supra* note 5, at 4 (indicating that the purpose of the CESL regime is to improve cross-border trade for both businesses and consumers by providing parties with a viable alternative contract regime to national law).

14. See *id.* (stating that using one contract law throughout the European Union will reduce both the complexity and cost of cross-border transactions). *But see* Eric A. Posner, *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition* 6 (Chi. Inst. For Law and Econ., Working Paper No. 597, 2012), available at <http://www.law.uchicago.edu/Lawecon/wp551-600> (arguing that although one uniform contract law reduces legal costs, businesses must still weigh the potential benefits of using national law in a given transaction, and therefore offering the CESL as an option would add a level of complexity).

The CESL was proposed in the wake of the economic crisis, and after over two decades of debate about harmonizing European contract law.<sup>15</sup> The debate continues with the introduction of the CESL, and scholars question the form and structure of the CESL. Some scholars believe that the opt-in provision of the CESL defeats the purpose of harmonizing the laws, and it only results in the twenty-eighth contract law that businesses have to consider in cross-border trading.<sup>16</sup> Other scholars focus on provisions enhancing consumer protection in B2C transactions,<sup>17</sup> the uncertainty the CESL may create,<sup>18</sup> or how the CESL compares to other contract law

15. See LUCINDA MILLER, THE EMERGENCE OF EU CONTRACT LAW: EXPLORING EUROPEANIZATION 31–32 (Paul Craig & Gráinne de Búrca, eds., 2011) (explaining that European law originally focused more on public rather than private law and that many questioned whether the EU was competent and authorized to address issues in private law); see also Martijn W. Hesselink, *The Case for a Common European Sales Law in an Age of Rising Nationalism* 8 (Univ. of Amsterdam Cent. for the Study of European Contract Law Working Paper No. 2012-01, 2012), available at <http://ssrn.com/abstract=1998174> [hereinafter Hesselink, *The Case for a CESL*] (questioning the Commission's motivation in proposing the CESL as Europeans increasingly resist nationalism in the wake of the economic crisis).

16. See Posner, *supra* note 14, at 6 (noting that businesses must analyze the strategic benefits under both national and EU contract regimes); see also Norbert Reich, *U.S. Traders Take Note: From "Hard" to "Optional Soft Law" in Business to Consumer Transactions in the European Union*, 44 UCC L.J. 189, 5–6 (2012) (explaining that the optional nature of the CESL creates concerns about whether the instrument will be attractive enough for parties to choose it over national laws); Jan M. Smits, *Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market* 17 (Maastricht European Private Law Inst., Paper No. 2012/13, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2060017](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060017) (arguing that the CESL needs to be more attractive for businesses to apply it to their transactions by: (1) making sure the CESL significantly differs from other contract law; (2) marketing the CESL to businesses and consumers separately to improve recognition of the benefits; and (3) lowering the costs of applying the CESL).

17. See Bettina Heiderhoff, *CESL – A Chance for True Freedom of Contract for the Consumer*, in PRIVATE AUTONOMY IN GERMANY AND IN THE COMMON EUROPEAN SALES TAX 77, 89–90 (Tim Drygala et al. eds., 2012) (noting that the CESL provides higher protection for consumers than may be desired because the transaction cost for sellers may lead to a higher cost in goods for buyers, and claiming that the CESL fails to protect poorer consumers who cannot understand the difference between choosing the CESL or national law); see also Posner, *supra* note 14, at 7 (indicating that the consumer protections extended by the CESL are “extensive and are probably more extreme than the rules of many, if not most, of the EU member states”).

18. See, e.g., Smits, *supra* note 16, at 17 (predicting that the costs of the

regimes.<sup>19</sup> Despite criticism, many scholars believe that the CESL has great potential to serve as a cross-border contract regime.<sup>20</sup> What have not been thoroughly addressed, however, are the provisions governing B2B transactions and the protection, or lack thereof, of SMEs in transactions governed by the CESL.

As written,<sup>21</sup> the CESL deregulates the protections offered in B2B transactions. The narrow definition of “consumer” provided in the CESL effectively eliminates national regulations that are in place to protect SMEs dealing as consumers.<sup>22</sup> This deregulation of protection offered to SMEs may lead to larger companies preferring and selecting the CESL as the governing law to the detriment of the SMEs.<sup>23</sup> This comment argues that the limited definition of “consumer” and the lack of protection for SMEs in B2B transactions under the CESL results in deregulation, which is shown through the application of the CESL to the facts presented in *R & B Customs*

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uncertain application of the CESL, without further improvement, heavily outweigh any benefits that it would provide to contracting parties); Posner, *supra* note 14, at 6–7 (arguing that the CESL introduces significant costs to businesses because of the uncertainty of how it will be applied and that these costs will lead to businesses not applying the CESL).

19. See generally Loos, *supra* note 9 (comparing the CESL with the Draft Common Frame of Reference (“DCFR”) and the Vienna Sales Convention (“CISG”)); see also Nicole Kornet, *The Common European Sales Law and the CISG Complicating or Simplifying the Legal Environment?* 14 (Maastricht European Private Law Inst., Paper No. 2012/4, 2012), available at <http://ssrn.com/abstract=2012310> (addressing whether the CESL has added value compared to the use of the CISG in cross-border transactions); Hesselink, *The Case for a CESL*, *supra* note 15, at 7 (explaining that the CESL was adopted to promote economic growth while attempting to maintain national identities).

20. See Hesselink, *The Case for a CESL*, *supra* note 15, at 12 (“[T]he regime for opting into the CESL, as proposed by the European Commission, is innovative and generally convincing, although there is still room for improvement.”); see also Loos, *supra* note 9 (noting that the CESL makes significant improvements from previous attempts to harmonize European contract law).

21. This article is based on the October 2011 draft of the CESL.

22. See Loos, *supra* note 9 (indicating that the narrow definition of consumers ignores the possibility that some purchasers have a dual purpose for purchasing, which necessarily limits the applicability of the law).

23. See Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law 22–23* (N.Y. Univ. Law and Econ. Working Papers, Paper No. 298, 2013), available at [http://lsr.nellco.org/nyu\\_lewp](http://lsr.nellco.org/nyu_lewp) (noting that sellers will elect the CESL when they find Member State contract law to be more restrictive on the particular transaction).

*Brokers Co. v. United Dominions Trust Ltd.*<sup>24</sup>

Part II of this comment addresses the background of the CESL and how it is intended to regulate cross-border transactions. Subsection A of Part II explains the fundamental case in English law, *R & B Customs*, in which the definition of “consumer” is not limited to a natural person, but is expansive and applies unfair contract term protection to all persons (legal or natural) dealing as consumers. Subsection B focuses on how the CESL can be applied by contracting parties. Subsection C will discuss relevant provisions in addressing the exclusion of an implied warranty of merchantability under the CESL in a B2B transaction. In Part III, the CESL, as written, is applied to the facts of *R & B Customs*. Subsection A of Part III shows that the parties can elect the CESL as the governing law. Subsection B demonstrates how the definition of “consumer” limits the protections offered under the CESL to the advantage of the larger company. Subsection C of Part III shows that by applying the CESL, the outcome of the dispute changes and results in deregulation to the detriment of the SME. Lastly, Part IV offers recommendations for altering the language provided in the CESL to maintain domestic protections of SMEs when acting as consumers.

## II. BACKGROUND

The CESL was proposed in October 2011 and has yet to be adopted by the European Parliament.<sup>25</sup> Despite a general willingness to adopt the CESL,<sup>26</sup> some practitioners fear that businesses will not apply the CESL due to the lack of legal certainty in dealing with a new instrument.<sup>27</sup> There are many questions yet to be answered about

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24. *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 321 (EWCA (Civ) 1988) (U.K.) (extending the Unfair Contract Terms Act of 1977 to a business dealing as a consumer).

25. See Press Release, European Lawyers Welcome Common European Sales Law Proposal and Suggest Wider Scope, Council of Bars and Law Soc’y of Eur. (Oct. 11, 2012), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_pr\\_0912pdf1\\_1349937593.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_pr_0912pdf1_1349937593.pdf) (citing broad support for the CESL in the European legal community, and urging the European Parliament to adopt the regulation).

26. See *id.* (noting that many lawyers not only support the CESL but believe that the scope of the CESL should be expanded beyond what is currently proposed).

27. See Posner, *supra* note 14, at 6 (describing that a major cost to the

the CESL, but the European Commission's Proposal lays out the general application.<sup>28</sup> The language used by the drafters of the CESL makes a clear distinction between B2B transactions and B2C transactions.

#### A. SMES UNDER BRITISH LAW

The United Kingdom passed the Unfair Contract Terms Act ("UCTA") in 1977.<sup>29</sup> British case law interprets the UCTA to cover businesses when dealing as a consumer.<sup>30</sup> Under the UCTA, a business selling to a "person dealing as a consumer" cannot include listed contract provisions deemed unfair that may otherwise be included in a transaction with a person not dealing as a consumer.<sup>31</sup>

In *R & B Customs*, the court extended consumer protection to a small business.<sup>32</sup> *R & B Customs Brokers* ("R & B") was a private company owned by Mr. and Mrs. Roy Bell.<sup>33</sup> R & B was in the business of shipping and freight forwarding and was conducting business for five to six years before the transaction in dispute arose.<sup>34</sup>

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application of the CESL, and potentially a deterrent for many businesses, is the uncertainty of how the CESL will be applied). *But see* Smits, *supra* note 16, at 18 (explaining that the uncertainty caused by the newness of the CESL is only a short-term cost, which will diminish with time).

28. *See generally* *The Proposal*, *supra* note 5 (detailing how the CESL will apply in both B2B and B2C cross-border transactions).

29. Unfair Contract Terms Act, 1977, c.50 (U.K.).

30. *See id.*; *see also* PAOLISA NEBBIA, UNFAIR CONTRACT TERMS IN EUROPEAN LAW: A STUDY IN COMPARATIVE AND EC LAW 93 (2007) (noting that if an English business does not act within its ordinary course of business, it may receive consumer protection under the UCTA).

31. *See, e.g.*, *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 321–22 (EWCA (Civ) 1988) (U.K.) (expanding the protection of the UCTA to an SME dealing as a consumer); *see also* Unfair Contract Terms Act § 6(2) (distinguishing between a person dealing as a consumer and a person not dealing as a consumer, and noting that if a person is not dealing as a consumer, the parties may exclude an implied warranty of merchantability).

32. *See R & B Customs Brokers Co.*, 1 W.L.R. at 331 (noting that the SME was dealing outside its ordinary course of its business, and thus was acting as a consumer under the UCTA); *see also* NEBBIA, *supra* note 30, at 93 (explaining that the court in *R & B Customs* wanted to extend the protection of the UCTA as far as possible).

33. *See R & B Customs Brokers Co.*, 1 W.L.R. at 323–24 (noting that Mr. Bell and his wife were the only directors and owners of the company).

34. *See id.* (discussing the background for the dispute, the court noted that the vehicle purchased was not part of the ordinary course of business, but rather was

In 1984, R & B purchased a vehicle from Saunders Abbott Ltd., financed by defendant United Dominions Trust Ltd. (collectively “United Dominions”).<sup>35</sup> United Dominions often engaged in this type of triangular transaction with buyers.<sup>36</sup> Before signing, United Dominions brought Mr. Bell’s attention to a provision in the standard form contract that excluded an implied warranty of merchantability.<sup>37</sup> The standard form contract noted that the provision excluding the implied warranty of merchantability only applied when the buyer was not a consumer.<sup>38</sup> Mr. and Mrs. Bell had the opportunity to reject the term, but they did not alter its terms and signed the contract as drafted by United Dominions.<sup>39</sup>

Shortly after acquiring the vehicle, Mr. Bell realized that the car roof leaked.<sup>40</sup> Mr. Bell brought the defect to United Dominions’ attention and gave United Dominions several opportunities to cure the defect.<sup>41</sup> Unfortunately, United Dominions was unable to cure the defect and, in attempting to cure it, made the problem worse.<sup>42</sup> Mr. Bell rejected the vehicle and demanded his money back, but United Dominions refused, pointing to the provision that excluded an implied warranty of merchantability when the buyer was not a consumer.<sup>43</sup>

The court of appeal found that the definition of consumer that United Dominions relied upon was not in accordance with the

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for both personal and business needs of the directors).

35. *See id.* at 324 (noting that this sort of “triangular relationship” is typical and that the defendants engaged in the transaction frequently with both legal and natural persons).

36. *See id.* (explaining that the defendants used standard form contracts for both legal and natural persons with whom they conducted business).

37. *See id.* at 325–27 (describing that Mr. and Mrs. Bell purchased the vehicle in the company’s name for ordinary use on English roads).

38. *See id.* at 328 (“The seller . . . does not let the goods subject to any warranty or condition whether express or implied as to condition description quality or merchantability for any particular purpose or at all.”); *cf.* Unfair Contract Terms Act § 6(2) (mandating that in a contract with a person dealing as a consumer, an implied warranty of merchantability cannot be excluded).

39. *See R & B Customs Brokers Co.*, 1 W.L.R. at 327 (noting that Mr. Bell admitted to not reading the provision despite United Dominions drawing his attention to the term).

40. *See id.* at 325.

41. *Id.*

42. *Id.*

43. *Id.*

UCTA.<sup>44</sup> The UCTA does not limit consumer protection of unfair contract terms to natural persons; rather, the UCTA uses the phrase “a person dealing as a consumer.”<sup>45</sup> The court determined that where a business is acting outside its ordinary course of business, by acting outside its regular practice that is not an integral part of the business, it is dealing as a consumer.<sup>46</sup> By acting as a consumer, the consumer protection of the UCTA extends to the business.<sup>47</sup> Thus, the court held that R & B was dealing as a consumer when purchasing the vehicle and that United Dominions was subject to an implied warranty of merchantability.<sup>48</sup>

### B. ELECTING TO APPLY THE CESL

If the CESL is adopted by the European Parliament, contracting parties will have the option to apply the CESL as the governing law of their agreement.<sup>49</sup> The drafters intend for the CESL to serve as a

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44. See *id.* at 331 (explaining that although Mr. Bell had made two vehicle purchases previously this did not meet the requisite degree of regularity for the transaction to be considered part of R & B's ordinary course of business, thus R & B was dealing not as a business but as a consumer).

45. Unfair Contract Terms Act § 6(3)–(4) (providing protection to both legal and natural persons dealing as a consumer); see also Hans-W. Micklitz & Norbert Reich, *The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or not Broad Enough?* 14 (EUI Working Papers, Paper No. Law 2012/04) (comparing English, German, and French contract laws that use a broader approach to the definition of consumer in regulations protecting consumers).

46. See *R & B Customs Brokers Co.*, 1 W.L.R. at 329–31 (defining the term “ordinary course of business” to mean an integral part of carrying on that business by meeting a requisite degree of regularity, rather than any transaction an entity may perform); see also NEBBIA, *supra* note 30, at 93 (arguing that the holding in *R & B Customs* suggests that any transaction that is “merely incidental” to the business does not meet the requirement of regularity to be considered part of the ordinary course of business).

47. See, e.g., *R & B Customs Brokers Co.*, 1 W.L.R. at 328, 331 (holding that where a business does not act within its ordinary course of business, it is dealing as a consumer and receives the protection of the UCTA, which does not allow a seller to exclude or restrict any “implied undertakings as to conformity of goods . . . as to their quality or merchantability for a particular purpose”).

48. See *id.* at 331 (affirming the decision below, but also noting that in a transaction between two businesses an exclusion of an implied warranty of merchantability is not per se unreasonable).

49. See *The Proposal*, *supra* note 5, at 25 (leaving the decision to apply the CESL as the governing law to the individual parties); see also *id.* at 6 (“Where the parties have agreed to use the Common European Sales Law, its rules will be the

second national contract law,<sup>50</sup> and, if the parties choose the CESL as the governing law, its law trumps domestic contract law.<sup>51</sup> When a dispute arises, a national court addressing a transaction governed by the CESL cannot defer to its own law if the provision is covered by the CESL: the CESL is to stand alone and to be interpreted according to its purpose and objective.<sup>52</sup> Unlike other EU private law directives, the CESL is not applied as a base line that Member States cannot go below but can modify by increasing regulation; rather, the CESL applies as an autonomous contract regime and cannot be modified to increase regulation.<sup>53</sup>

To apply the CESL, contracting parties must be engaged in either a B2C or B2B cross-border transaction.<sup>54</sup> One party to the agreement must be from a Member State,<sup>55</sup> and the transaction must involve the

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only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules.”); Micklitz & Reich, *supra* note 45 (discussing the difficulties parties will face in applying the CESL).

50. See Hesselink, *The Case for a CESL*, *supra* note 15, at 7–9 (noting that throughout the debates in drafting the CESL, parties referred to the CESL as a twenty-eighth contract regime; however, in its current proposal, the CESL is presented as a second national regime). *But see* Smits, *supra* note 16, at 2–3 (questioning the need and demand for a “twenty-eighth” contract regime).

51. See *The Proposal*, *supra* note 5, at 27 (explaining in Article 11 of the CESL that by selecting the CESL, its law governs any dispute or circumstance that falls within its scope without recourse to national law). *But see* Hesselink, *The Case for a CESL*, *supra* note 15, at 16 (explaining that contract disputes that are not covered by the CESL fall outside of its scope, and noting that it is uncertain which national law will apply when the CESL is chosen to govern).

52. See *The Proposal*, *supra* note 5, at 27 (explaining that a “consequence” of choosing the CESL is that it governs without regard to domestic law); *see also* *The Proposal*, *supra* note 5, at 33–34 (mandating that the CESL “be interpreted autonomously and in accordance with its objectives and the principles underlying it”).

53. See *The Proposal*, *supra* note 5, at 4 (indicating that the CESL is to serve as a second national contract regime); *see also* Micklitz & Reich, *supra* note 45, at 14.

54. See *The Proposal*, *supra* note 5, at 26 (mandating that one party must be a seller of goods or supplier of digital content and that one party must be a consumer or an SME, defining an SME as a business that employs fewer than 250 people and does not exceed fifty million Euro for annual turnover or forty-three million Euro on its annual balance sheet, and implying that the SME can be either the seller or buyer).

55. See *id.* at 25 (noting that, for a B2B transaction, one of the businesses must have its principal place of business in a Member State, or, for a B2C transaction, the consumer or the delivery address of the consumer must be located within a

sale of goods, supply of digital content, or a service.<sup>56</sup> Lastly, the parties must expressly agree to apply the CESL.<sup>57</sup>

### C. ASSESSING A PROVISION EXCLUDING AN IMPLIED WARRANTY OF MERCHANTABILITY UNDER THE CESL

The CESL offers extensive protection to consumers,<sup>58</sup> but this protection is limited by the definition of consumer provided in Article 2(f).<sup>59</sup> The CESL is divided throughout its provisions into either B2C or B2B transactions.<sup>60</sup> If a person in a transaction does not qualify as a consumer and all other requirements are met,<sup>61</sup> the transaction is treated as a B2B transaction and the extensive consumer protections do not apply.<sup>62</sup> Unlike Member State contract

Member State).

56. *See id.* (limiting the application of the CESL certain sales transactions). *But see id.* at 26 (prohibiting the use of the CESL in transactions that mix both sale of goods and services or any other form of mixed contract).

57. *See The Proposal, supra* note 5, at 26. *Contra* Hesselink, *The Case for a CESL, supra* note 15, at 9 (arguing that the express mention that the CESL must apply in its entirety to B2C transactions implies that parties to a B2B transaction can choose which provisions of the CESL govern and claiming that the CESL need not be expressly agreed upon in a B2B transaction).

58. *See, e.g., The Proposal, supra* note 5, at 68 (creating a lengthy list of contract terms that are *always* unfair in B2C transactions in Article 84); *see also* Heiderhoff, *supra* note 17, at 90 (explaining the extensive protection offered to consumers, but noting that this may not be desirable for consumers because sellers may increase the price of goods and services due to the sellers' increased risk under the CESL).

59. *See The Proposal, supra* note 5, at 22 (defining a consumer as a natural person and not a legal entity under Article 2(f)); *see also* Micklitz & Reich, *supra* note 45, at 10, 12 (explaining that the narrow definition of consumer in the CESL leads to decreased protection for those who may have qualified as consumers under domestic contract law).

60. *See, e.g., The Proposal, supra* note 5, at 81 (mandating that the parties in a B2C transaction abide by the provisions in Chapter 11 of the CESL addressing the buyer's remedies, but neglecting to mandate the provisions for B2B transactions). *Compare id.* at 67–71 (heightening the protection of consumers from unfair contract terms by including black and grey lists in Articles 82–85 regarding unfair contract terms, thus creating a low threshold for proving that a contract term is unfair in a B2C transaction), *with id.* at 71 (constructing a heightened standard in Article 86 to prove a contract term is unfair in a B2B transaction).

61. *See* discussion *infra* Part II(B) (explaining that for a B2B transaction, the CESL can only apply if one party to the transaction is an SME and if the parties are located in different jurisdictions, one of which is a Member State).

62. *See* Loos, *supra* note 9 (expressing that in a B2B transaction where the SME is a single individual and using the purchased object for both business and

law,<sup>63</sup> any legal person acting or dealing as a consumer is prohibited from receiving consumer status.<sup>64</sup>

The definition of “consumer” in the CESL is drawn from the Draft Common Frame of Reference (“DCFR”) and the Unfair Contract Terms Directive;<sup>65</sup> however, the drafters of the CESL narrow the definition of “consumer” provided in the DCFR.<sup>66</sup> The definition of “consumer” provided in Article 2(f) limits consumer status to “any *natural* person who is acting for purposes which are outside that person’s trade, business, craft, or profession.”<sup>67</sup> The term “natural person” excludes any SMEs, including sole proprietorships, from consumer status.<sup>68</sup> The deliberate narrowing of the definition of “consumer” and the use of the CESL as a second contract regime limits the Member States from extending consumer protections within the CESL to SMEs acting outside their ordinary course of business.<sup>69</sup> SMEs will receive less protection than they would under their domestic law due to this narrow definition.<sup>70</sup>

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personal use, the individual will not be protected).

63. See Micklitz & Reich, *supra* note 45, at 12–13 (listing Germany, France, and England as jurisdictions, among others, that extend consumer protection to persons other than natural persons).

64. See *id.* at 6–12.

65. See Draft Common Frame of Reference of 2009 (DCFR), available at [http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf) (defining consumer as a *natural* person *primarily* acting outside his trade, business, or profession); see also Martijn W. Hesselink & Marco B.M. Loos, *Unfair Contract Terms in B2C Contracts* 11 (Centre for the Study of Eur. Contract Law, Working Paper No. 07, 2012), available at <http://www.europarl.europa.eu/studies> (noting that the definition of consumer in the CESL comes from both the Unfair Contract Terms Directive and the Draft Common Frame of Reference).

66. See *The Proposal*, *supra* note 5, at 22 (providing in Article 2(f) that even a natural person acting within his or her business or trade is not included in the definition of consumer).

67. *Id.* (emphasis added).

68. See *generally* Loos, *supra* note 9 (noting that the limited definition of consumer does not take into account that businesses come in all shapes and sizes and that goods purchased by businesses can have dual purposes: business and personal).

69. See Micklitz & Reich, *supra* note 45, at 12 (asserting that the CESL contains a “fully harmonized definition” of consumer that does not allow Member States to include persons that are excluded by the definition).

70. See *id.* at 13 (“By opting-in the CESL, consumers would ‘voluntarily’ abandon their protection in situations where Member State law contains a broader definition of consumer.”). *But see Allen & Overy’s Response*, *supra* note 3, at 16 (emphasizing that the protective provisions provided by the CESL for both B2C

Depending on how the transaction is classified (either a B2B or a B2C), there are different mandatory and default rules for each transaction governed by the CESL.<sup>71</sup> Chapter 11 of the CESL addresses a buyer's remedies in a transaction.<sup>72</sup> The provisions within Chapter 11 are mandatory pursuant to Article 108, but the mandatory nature is only expressly provided for in B2C transactions.<sup>73</sup> The express mention of B2C transactions (and the omission of B2B transactions in Article 108) provides that the parties in a B2B transaction can derogate from Chapter 11 remedies.<sup>74</sup> Thus, in a B2C transaction, the CESL specifically prohibits excluding an implied warranty of merchantability to the detriment of the consumer,<sup>75</sup> but parties engaged in B2B transactions can contract around a buyer's liability for lack of conformity of goods.<sup>76</sup>

Unlike Chapter 11, the parties in a contract, whether B2B or B2C, cannot derogate from any provision within Chapter 8, which addresses unfair contract terms.<sup>77</sup> Chapter 8 of the CESL addresses unfair contract terms for both B2C and B2B transactions, but, while

and B2B are unwarranted).

71. See *The Proposal*, *supra* note 5, at 33 (highlighting that the first principle of the CESL is the freedom to contract, but that freedom is subject to mandatory provisions provided in the CESL).

72. See *id.* at 80–86 (outlining the remedies of a buyer in seven sections, including the seller's ability to cure and the right of the buyer to demand specific performance).

73. See *id.* at 81 (“[T]he parties may not to the detriment of the consumer, exclude the application of this chapter, or derogate from or vary [Chapter 11’s] effect.”).

74. Cf. Martijn W. Hesselink, *How to Opt Into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation 8–9* (Centre for the Study of Eur. Contract Law, Working Paper No. 15, 2011) [hereinafter Hesselink, *How to Opt Into the CESL*] (reasoning that the express language of Article 8, mandating that the CESL be adopted in its entirety in B2C transactions “e contrario,” provides that the CESL can be “cherry picked” in B2B transactions).

75. See *The Proposal*, *supra* note 5, at 81 (stating that a lack of conformity of a good cannot be excluded by agreement if it is to the detriment of the consumer).

76. See *id.* (permitting parties in a B2B transaction to contract around provisions listed in Chapter 11 of the CESL). Compare *id.* (distinguishing between B2C transactions and B2B transactions in Article 108), with *id.* at 67 (making no distinction in Article 81 between B2C and B2B transactions, but requiring that Chapter 8 governing Unfair Contract Terms apply in its entirety to all transactions).

77. See *The Proposal*, *supra* note 5, at 67 (addressing unfair contract terms for both B2B and B2C transactions, but noting that the section does not cover terms that are addressed in other areas of the instrument).

B2C transactions are covered extensively in four articles and thirty-six subsections, B2B contract terms are governed by a single article with two subsections.<sup>78</sup>

Article 86 is the single provision addressing unfair contract terms in a B2B transaction, and it provides a two-prong test in determining whether a contract term is unfair.<sup>79</sup> Article 86 states,

In a contract between *traders*, a contract term is unfair for the purposes of this Section only if: (a) it forms part of not individually negotiated terms within the meaning of Article 7; and (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.<sup>80</sup>

First, the term within the contract must not be individually negotiated as determined by Article 7.<sup>81</sup> A contract term is not individually negotiated if it is supplied by one party and the other party is not able to influence its content.<sup>82</sup> Where one party supplies a selection of contract terms to the other party, a term is not to be regarded as individually negotiated merely because the other party chooses that term from the selection.<sup>83</sup> Typically, standard form

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78. Compare *id.* at 67–71 (detailing and thoroughly listing transparency requirements, contract terms that are always unfair, and contract terms that are presumed to be unfair), with *id.* at 71 (explaining briefly that the nature of the term cannot “grossly deviate . . . from good commercial practice, contrary to good faith and fair dealing” and taking into account the nature of what is provided under the contract, the circumstances at the signing of the contract, other contract terms, and other contracts on which the contract at issue depends).

79. See *The Proposal*, *supra* note 5, at 71 (providing that a contract term is unfair if it is not individually negotiated and it grossly deviates from good commercial practice).

80. *Id.* (emphasis added); see also *id.* at 67 (noting in Articles 80 and 81 that Section 3 of Chapter 8 cannot be derogated and that Chapter 8 applies when no other provision within the CESL governs the term that is in dispute).

81. See *The Proposal*, *supra* note 5, at 71 (providing that a contract term is unfair for the purposes of Section 3 only if “it forms part of not individually negotiated terms within the meaning of Article 7”).

82. See *id.* at 34 (outlining that a contract term is not individually negotiated when a party chooses one term from a selection of terms, and noting that the party claiming that the term was individually negotiated bears the burden of proof); cf. NEBBIA, *supra* note 30, at 118–20 (discussing the provision requiring that terms found to be unfair under EU Directive 93/13 (regarding unfair contract terms in B2C transactions) not be individually negotiated).

83. See *The Proposal*, *supra* note 5, at 34.

contracts are not individually negotiated,<sup>84</sup> and a party who claims that a contract provision, which is part of a standard form contract, was individually negotiated bears the burden of proof.<sup>85</sup> The language of Article 7 suggests that a contract term can be considered individually negotiated if a party has the opportunity to change the standard language but does not.<sup>86</sup>

If a term is determined to not be individually negotiated, a court must address whether the term in dispute “grossly deviates from good commercial practice, contrary to good faith and fair dealing.”<sup>87</sup> In determining whether there is a gross deviation from good faith and fair dealing in a B2B transaction, the court must consider: (1) what is provided under the contract; (2) the circumstances at the conclusion of the contract; (3) the other contract terms; and (4) the terms of any other contract that the contract in dispute depends upon.<sup>88</sup> As shown by the application of other EU laws that attempt to harmonize EU private law, Member States interpret EU laws autonomously; thus, good faith is interpreted by referencing concepts under the governing EU law and not domestic law.<sup>89</sup> Under the CESL, good faith and fair

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84. See Aristides N. Hatzis, *An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts*, in *STANDARD CONTRACT TERMS IN EUROPE: A BASIS FOR AND A CHALLENGE TO EUROPEAN CONTRACT LAW* 43, 45, 49 (Hugh Collins ed. 2008) (explaining that standard form contracts are appropriately referred to as “contracts of adhesion” in some countries because the terms are not individually negotiated).

85. See *The Proposal*, *supra* note 5, at 34 (applying the burden of proof to a party claiming that the term was not individually negotiated in both B2C and B2B transactions); see also *id.* at 22 (defining a “standard contract term” as one that is drafted in advance for more than one transaction with different parties that is not individually negotiated as set out in Article 7 of the CESL).

86. See *The Proposal*, *supra* note 5, at 34; NEBBIA, *supra* note 30, at 116–18 (noting that whether a term is determined to be individually negotiated is not always clear and depends on the facts and circumstances).

87. See *The Proposal*, *supra* note 5, at 71 (applying a heightened standard for finding that a term in a B2B transaction is an unfair contract term).

88. Compare *id.* (providing that in determining whether a factor grossly deviates from good commercial practice, a court must give regard to the four factors listed in B2B transactions), with *id.* at 68 (listing the same factors required for a B2B transaction while adding a duty of transparency). The B2C transaction also requires an assessment of the factors to find if there is a significant imbalance between the rights and obligations of the parties to the contract. *Id.*

89. See generally Simon Whittaker, *Assessing the Fairness of Contract Terms: The Parties' Essential Bargain, Its Regulatory Context and the Significance of the Requirement of Good Faith*, 12 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 75

dealing is to be applied as an objective standard that relies on open and honest conduct.<sup>90</sup> Gross deviation from good faith and fair dealing is a higher standard than that used for B2C transactions.<sup>91</sup> With no black and grey lists for B2B transactions, enumerating the contract terms that are prohibited or are likely prohibited, and the high standard of gross deviation, parties can freely contract and implement terms that would otherwise be unfair under domestic law.<sup>92</sup>

### III. ANALYSIS

Given the prevalence of transactions like that seen in *R & B Customs*, it is likely the CESL will apply in a similar transaction where the parties to the contract are located in different jurisdictions.<sup>93</sup> Assuming the same facts as those presented in *R & B Customs*, with the exception that R & B is located in a different jurisdiction (not the UK),<sup>94</sup> the following analysis demonstrates how the application of the CESL, as written in October 2011, will yield a different result than that found under English law, a result that is detrimental to R & B. The application of the CESL reduces the

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(2004) (emphasizing that member states interpret “good faith” differently, however, it should be interpreted within the meaning of the Directive or other autonomous law that uses this language).

90. Cf. Hesselink & Loos, *supra* note 65, at 11 (noting that the language used in the CESL regarding good faith and fair dealing in a B2C transaction connotes a standard of conduct that is transparent and honest in consideration of the other party and is drawn from the DCFR and the Unfair Contract Terms Directive).

91. See Loos, *supra* note 9 (noting that even having a standard for finding a contract term unfair in a B2B transaction is controversial).

92. See *id.* (observing that domestic laws have started to protect against unfair terms in B2B dealings).

93. See *The Proposal*, *supra* note 5, at 25 (explaining that the CESL is to be applied in cross-border transactions where the parties habitually live in different countries, at least one of which is a Member State). *But see id.* at 18, 28 (emphasizing the hope of the Commission that individual Member States will alter their domestic laws to mirror the CESL for other transactions to harmonize cross-border and internal transactions).

94. Cf. *Flash Eurobarometer 320: European Contract Law in Business-to-Business Transactions*, GALLUP ORG. 29 (2011), [http://ec.europa.eu/public\\_opinion/flash/fl\\_320\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf) [hereinafter *Flash Eurobarometer 320*] (noting that SMEs interested in cross-border trade are deterred from engaging in trade in part due to varying contract laws, but emphasizing that SMEs showed a greater willingness to enter into cross-border transactions with the implementation of a common European sales law).

protection provided to R & B under domestic law,<sup>95</sup> and R & B, unlike a consumer, is not shielded from contract terms that would otherwise constitute unfair terms under domestic law.<sup>96</sup>

This analysis is broken down into several subsections to demonstrate how R & B will receive less protection in a transaction governed by the CESL. The first subsection will describe how the parties are able to apply the CESL as the governing law of the contract. The second subsection will address the dispute as it arose in *R & B Customs* and how the application of the CESL alters the analysis to the disadvantage of R & B. Lastly, because the transaction is a B2B transaction under the CESL, the contract term excluding an implied warranty of merchantability will be assessed for unfairness based on the two-prong test provided in Article 86, thus yielding a different result than that found in *R & B Customs*.

#### A. R & B AND UNITED DOMINIONS CAN BE GOVERNED BY THE CESL

The parties can select the CESL as the governing law of their cross-border transaction if three requirements are met: (1) at least one of the parties has a habitual residence in a Member State;<sup>97</sup> (2) one of the businesses is an SME or a consumer;<sup>98</sup> and (3) the parties are contracting for the sale of goods.<sup>99</sup> Here, United Dominions operates its business in the United Kingdom, a Member State of the

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95. See Loos, *supra* note 9 (highlighting that protection provided to an SME in domestic law is reduced in some areas of contract law by the CESL).

96. Compare *The Proposal*, *supra* note 5, at 68–70 (creating comprehensive black and grey lists that apply in B2C transactions), with *id.* at 67, 71 (denying the extensive protections listed for B2C transactions for use in B2B transactions).

97. See *The Proposal*, *supra* note 5, at 25 (mandating that at least one party must be from a Member State, whether a habitual residence for a consumer or a principle place of business for a trader, and implying that the other party does not have to also be part of a Member State).

98. See *id.* at 26 (describing qualified parties to a transaction governed by the CESL and defining SMEs as traders that “employ . . . fewer than 250 persons; and ha[ve] an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country”).

99. See *id.* at 25–26 (applying the CESL in transactions for the sale of goods, digital content, or services).

European Union, and R & B is not located in the United Kingdom.<sup>100</sup> Secondly, R & B is a business that is owned by a husband and wife and does not employ more than 250 people or exceed EUR 50 million in annual turnover, thus meeting the requirement to qualify as an SME under the CESL.<sup>101</sup> Lastly, the parties are contracting for the sale of a vehicle.<sup>102</sup> The requirements for the parties to apply the CESL exist in this cross-border transaction.<sup>103</sup>

#### B. UNDER THE CESL, R & B IS NOT A CONSUMER

The CESL permits United Dominions to create a standard form contract, as United Dominions did in *R & B Customs*, which can be used in multiple jurisdictions without conforming to the individual Member State contract laws.<sup>104</sup> The ability to use this uniform standard contract with SMEs in other jurisdictions will ease the expense and complexity of cross-border transactions for United Dominions and the contracting SMEs.<sup>105</sup> However, by agreeing to choose the CESL over British law to govern the transaction, R & B loses the protection it would otherwise receive from domestic regulation.<sup>106</sup>

There is a trend for SMEs to use the contract law preferred by the

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100. See *id.* at 25 (requiring that in a transaction between two traders at least one of the traders has its principal place of business in a Member State, whether or not that trader is the SME).

101. See *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 323–24 (EWCA (Civ) 1988) (U.K.); see also *The Proposal*, *supra* note 5, at 26 (mandating that where both parties to a transaction are traders, one must be an SME as defined in the CESL, and noting that the SME need not be from a Member State if the other trader is from a Member State).

102. *R & B Customs Brokers Co.*, 1 W.L.R. at 324.

103. See generally Hesselink, *How to Opt Into the CESL*, *supra* note 74 (describing how the CESL is an optional agreement and that the parties must meet certain requirements and agree to apply the CESL as the governing law).

104. See *EU to Simplify Cross-Border Trade Rules*, EURONEWS (Sept. 19, 2012), <http://www.euronews.com/2012/09/17/eu-to-simplify-cross-border-trade-rules> (explaining that the CESL was drafted to boost “cross border trade, cut costs, and give customers greater choice”).

105. See, e.g., *Flash Eurobarometer 320*, *supra* note 94 (explaining that many businesses forego cross-border transactions because of the legal costs of interpreting and complying with different contract laws).

106. See Hesselink & Loos, *supra* note 65, at 10 (electing to use the CESL means that parties to B2C transactions cannot modify the provisions on unfair contract terms).

larger company when engaging in cross-border transactions.<sup>107</sup> R & B, a two-person business that engaged in only two other similar transactions, had a weaker bargaining position than United Dominions, a company that engages in this type of transaction as its ordinary course of business.<sup>108</sup> Following the trend of SMEs yielding to the contract law preferred by the larger company, R & B will likely agree to the contract being governed by the law preferred by United Dominions. As for United Dominions, it is likely that it will prefer the CESL as the governing law of its contract for legal certainty and the ability to exclude an implied warranty of merchantability in a B2B transaction.

The CESL creates a more certain outcome for both parties, but at the expense of R & B and to the benefit of United Dominions.<sup>109</sup> When dealing with R & B (or any other SME), United Dominions wants to exclude any implied warranty of merchantability.<sup>110</sup> An SME can remain protected under its own governing law or that of its trading partner if acting as a consumer,<sup>111</sup> but, by using the CESL as the governing law, United Dominions can avoid the domestic regulations that benefit R & B when acting as a consumer because R

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107. See Loos, *supra* note 9 (stating that in contracts between an SME and larger company, the SME is typically forced to use the law that is preferred by the larger company because the term “consumer is so restricted that buyers in the case of a dual purpose contract fall short of . . . consumer protection rules”).

108. See Martijn W. Hesselink, *Unfair Terms in Contracts Between Businesses* 2–4 (Centre for the Study of Eur. Contract Law, Working Paper No. 07, 2011) (discussing that where an SME is not as familiar with the transaction as a larger company, the SME is in a similar situation to that of a consumer and, therefore, has less bargaining power than the larger company). See generally GINTAUTAS ŠULIJA, *STANDARD CONTRACT TERMS IN CROSS-BORDER BUSINESS TRANSACTIONS: A COMPARATIVE STUDY FROM THE PERSPECTIVE OF EUROPEAN UNION LAW* (2011) (explaining that courts notice and mention weaker bargaining, but that this inequality does not render a contract to be unfair where there are disparate bargaining powers between businesses).

109. Compare *The Proposal*, *supra* note 5, at 4 (noting that a goal of the CESL is to reduce transaction costs and create more certainty in cross-border transactions), with Hesselink & Loos, *supra* note 65 (stating that SMEs will have to give up protective domestic regulations when contracting under the CESL).

110. *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 328 (EWCA (Civ) 1988) (U.K.).

111. See discussion *infra* Part II(A) (explaining the holding of the court in *R & B Customs* extending the protection of the UCTA to a business dealing as a consumer).

& B is never a consumer under the CESL.<sup>112</sup>

The definition of “consumer” in the CESL is clear.<sup>113</sup> It provides that a “‘consumer’ means any natural person.”<sup>114</sup> The CESL extends extensive protections in B2C transactions, but the protections are limited to natural persons acting outside the scope of their trade or business.<sup>115</sup> Mr. and Mrs. Bell signed the contract with United Dominions in the company’s name acting outside its ordinary course of business.<sup>116</sup> Although R & B was acting outside the ordinary course of its business, the CESL automatically excludes R & B from consumer status since it is not a legal person.<sup>117</sup> A court determining a CESL-governed dispute would classify the transaction as a B2B transaction, thus allowing United Dominions to exclude an implied warranty of merchantability.<sup>118</sup>

In a B2C transaction governed by the CESL, a seller cannot exclude an implied warranty of merchantability;<sup>119</sup> however, this protection is provided to consumers,<sup>120</sup> and R & B is not a consumer

112. See *The Proposal*, *supra* note 5, at 27 (mandating that, where the parties elect to use the CESL, the CESL governs over any other law); cf. Oren Bar-Gill and Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 28 (N.Y.U. L. & Econ. Working Papers, Paper No. 298, 2012), available at [http://lsr.nellco.org/nyu\\_lewp/298](http://lsr.nellco.org/nyu_lewp/298) (discussing B2C transactions and how sellers will use the CESL to avoid jurisdictions that have more regulated contract law).

113. See Loos, *supra* note 9 (comparing the definition of consumer in the Draft Frame of Reference and the CESL and finding no intent by the drafters to expand the definition to apply to legal persons despite the proposals made when drafting the Draft Frame of Reference).

114. *The Proposal*, *supra* note 5, at 22.

115. Compare *id.* at 67–71 (creating black and grey lists of unfair contract terms that apply in B2C transactions), with *id.* at 22 (limiting the definition of consumer to natural persons and excluding legal persons).

116. See *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 324 (EWCA (Civ) 1988) (U.K.).

117. See Hesselink & Loos, *supra* note 65 (describing the limited definition of consumer in the CESL, thus forcing SMEs to give up domestic protections).

118. See *The Proposal*, *supra* note 5, at 81 (providing that in a B2B transaction, the parties can derogate from the provisions governing an implied warranty of merchantability under Chapter 11 of the CESL).

119. See *id.* (mandating that the seller not exclude a “lack-of-conformity” provision to the detriment of the buyer in a B2C transaction).

120. See Bettina Heiderhoff, *CESL – A Chance for True Freedom of Contract for the Consumer*, in *PRIVATE AUTONOMY IN GERMANY AND POLAND AND IN THE COMMON EUROPEAN SALES LAW* 77, 90 (Tim Drygala et al. eds., 2012) (noting that under the CESL “the consumer is put in paradise”).

under the CESL.<sup>121</sup> United Dominions benefits from the deregulation created by the CESL.<sup>122</sup> Knowing that the CESL does not regulate unfair contract terms in B2B transactions as domestic contract law does, United Dominions will prefer the CESL as its governing law in B2B transactions.<sup>123</sup>

Acting as a consumer and in a weaker bargaining position than United Dominions, if R & B wants to engage in cross-border trade, it will likely agree to the terms provided by United Dominions.<sup>124</sup> United Dominions, with greater bargaining power, will push for the CESL over domestic law to govern the transaction to avoid a regulation that would favor R & B.<sup>125</sup> R & B will relinquish the protection offered under domestic regulation (both in the United Kingdom and its own jurisdiction) in exchange for the transaction.<sup>126</sup>

By preferring and electing the CESL, United Dominions is able to avoid a regulation that is in favor of R & B.<sup>127</sup> Where the transaction in *R & B Customs* was considered closer to a B2C transaction because R & B was determined to be “dealing as a consumer,”<sup>128</sup>

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121. See *The Proposal*, *supra* note 5, at 22 (providing that a consumer is a natural person only); see also Loos, *supra* note 9 (explaining that the drafters of the CESL narrowed the definition of consumer even further than in the DCFR).

122. See Loos, *supra* note 9 (explaining that the limited definition of the consumer will serve as a detriment to SMEs, which, in this case, must accept the terms favorable to United Dominions).

123. See Posner, *supra* note 14; cf. *Allen & Overy's Response*, *supra* note 3, at 11 (emphasizing that their clients (businesses) “typically prefer clear rules over general principles since they want to know in a given circumstance that their contract will be binding”).

124. See Loos, *supra* note 9.

125. Cf. Oren Bar-Gill and Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 124–25 (N.Y.U. L. & Econ. Working Papers, Paper No. 298, 2012), available at [http://lsr.nellco.org/nyu\\_lewp/298](http://lsr.nellco.org/nyu_lewp/298) (mentioning that a business may use the CESL to its advantage to avoid more restrictive domestic regulations).

126. See Hesselink & Loos, *supra* note 65 (noting that the scope of the CESL and the limited definition of consumer could serve as an invitation for companies to apply the CESL to avoid domestic regulations).

127. See *The Proposal*, *supra* note 5, at 27 (mandating that where the parties select the CESL as the governing law, that law trumps national law).

128. See *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 328 (EWCA (Civ) 1988) (U.K.) (outlining three conditions to be considered “dealing as a consumer”: (1) the party that deals as a consumer does not present himself as dealing as a business; (2) the other party makes the contract in the ordinary course of his business; (3) in the case for a sale of goods, the good sold is

under the CESL, the transaction between United Dominions and R & B will receive B2B transaction status.<sup>129</sup> Although R & B made a purchase that was “merely incidental” to its business activities, it is a legal person and will not receive consumer status under the CESL.<sup>130</sup> By opting into the CESL, United Dominions is able to avoid protections offered by British law to its trading partners.<sup>131</sup>

### C. EXCLUSION OF AN IMPLIED WARRANTY OF MERCHANTABILITY UNDER THE CESL

Suppose now that the parties are aware that R & B is not a consumer under the CESL, and United Dominions and R & B expressly agree that the CESL will govern their contract.<sup>132</sup> Choosing the CESL as the governing law alleviates uncertainty about the status of R & B as a consumer, and, when a dispute arises regarding the exclusion of an implied warranty of merchantability,<sup>133</sup> the court hearing the complaint will apply the CESL.<sup>134</sup> By applying the CESL, the court will come to a different conclusion than the decision reached under British contract law.

The court will first establish that the transaction is between two

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that normally sold for private use or consumption).

129. See *The Proposal*, *supra* note 5, at 22 (limiting the provisions within the CESL that govern B2C transactions to traders dealing with natural persons acting outside the scope of their trade or business).

130. See NEBBIA, *supra* note 30, at 76 (describing the holding of *R & B Customs* and noting that a transaction that is not an integral part of the ordinary course of business can give rise to consumer protection).

131. See Oren Bar-Gill and Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law* 124 (N.Y.U. L. & Econ. Working Papers, Paper No. 298, 2012), available at [http://lsr.nellco.org/nyu\\_lewp/298](http://lsr.nellco.org/nyu_lewp/298).

132. See *The Proposal*, *supra* note 5, at 26. *But see* Hesselink, *How to Opt Into the CESL*, *supra* note 74, at 8–9 (arguing that the combination of Article 30 and Article 58 of the CESL allow for the interpretation that the parties could imply without expressly agreeing that the CESL govern the contract).

133. See *R & B Customs Brokers Co.*, 1 W.L.R. at 328 (dividing the provision excluding an implied warranty of merchantability into two sections: consumer and non-consumer).

134. See *The Proposal*, *supra* note 5, at 27 (explaining that when the CESL governs, it trumps national law when a provision in the CESL directly addresses the issue in dispute); see also *id.* at 33 (instructing that the CESL is to be interpreted “autonomously and in accordance with its objectives and the principles underlying it”).

traders.<sup>135</sup> Once the court establishes that the transaction is between two traders (one of which is an SME), the dispute between United Dominions and R & B will be assessed under provisions governing B2B transactions.<sup>136</sup> In a B2B transaction, contract terms that are claimed to be unfair, and not expressly addressed in a different Chapter of the CESL, are governed by Article 86, which sets a high standard requiring a gross deviation from good commercial practice, contrary to good faith and fair dealing.<sup>137</sup> To the disadvantage of R & B, the dispute between United Dominions and R & B yields a different result under the CESL: the CESL effectively deregulates protections set in place by Member States' contract law.<sup>138</sup> The contract term excluding the implied warranty of merchantability does not qualify as an unfair contract term under the CESL.

The implied warranty of merchantability that United Dominions and R & B agreed to exclude in the contract would not be stricken from the contract as an unfair term under the CESL.<sup>139</sup> As described above, R & B is a legal person, and although acting as a consumer, it does not qualify as a consumer.<sup>140</sup> Because R & B does not qualify as a consumer, it does not receive the advanced protection of Section 2 of Chapter 8 nor does Article 108 apply.<sup>141</sup> The parties contracted

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135. See generally *The Proposal*, *supra* note 5 (dividing the provisions within the CESL into provisions that govern B2C transactions and B2B transactions).

136. See generally *Allen & Overy's Response*, *supra* note 3 (questioning how the Commission proposes to handle close calls of when a business is or is not an SME).

137. See *The Proposal*, *supra* note 5, at 71 (requiring that the court take into account four factors when deciding whether a term grossly deviates from good faith and fair dealing: the nature of what is to be provided in the contract; the circumstances surrounding the signing of the contract; other contract terms; and any other contract that the contract in dispute depends upon). See generally NEBBIA, *supra* note 30 (assessing unfair contract term interpretation in Europe with a focus on England and Italy).

138. Cf. Loos, *supra* note 9 (noting that using the CESL renders national rules on sales contracts concerning unfair contract terms inapplicable).

139. See *The Proposal*, *supra* note 5, at 67 ("Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.").

140. See discussion *infra* Part III(B) (applying the definition of consumer to R & B when it acted as a consumer).

141. See *The Proposal*, *supra* note 5, at 67–71 (creating black and grey lists of unfair contract terms to protect consumers in B2C transactions); *id.* at 81 (mandating that an implied warranty of merchantability not be excluded in B2C transactions to the detriment of the consumer); see also Hesselink & Loos, *supra*

around Chapter 11 of the CESL, which is permitted under Article 108 of the CESL.<sup>142</sup> R & B would have to argue that the contract term meets the requirements set out in Article 86 deeming the exclusion to be an unfair contract provision.<sup>143</sup> Under Article 86, a contract term is deemed unfair if it meets two requirements: (1) the contract term is not an individually negotiated term, and (2) the nature of the term “grossly deviates from good commercial practice, contrary to good faith and fair dealing.”<sup>144</sup> These requirements will be addressed in turn.

*1. Individual Negotiation of the Implied Warranty of Merchantability  
Contract Term between R & B and United Dominion Is Irrelevant  
Under the CESL*

An unfair contract term in a B2B transaction is only unfair if it meets the first criterion that the term was not individually negotiated.<sup>145</sup> The standard set out in Article 7, referenced by Article 86, mandates that the party presented with the standard form have the ability to “influence” the provision.<sup>146</sup> Because the contract between United Dominions and R & B was a standard form contract, United Dominions bears the burden of showing that the term was individually negotiated.<sup>147</sup> The facts presented in *R & B Customs* are unclear as to whether the parties individually negotiated the

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note 65 at 9 (“Chapter 8 . . . consists of 8 articles: section 1 (art. 79–81) applies to all contracts which are governed by the Common European Sales Law, section 2 (art. 82–85) applies only to contracts between a trader and consumer . . . section 3 (art. 86) applies only to contract where both parties are traders . . .”); Loos, *supra* note 9.

142. See *The Proposal*, *supra* note 5, at 80–86 (addressing the buyer’s remedies for non-performance and lack of conformity, but failing to include an express provision that parties in B2B transactions cannot contract around the provisions, which, when read with the inclusion of the provision for B2C transactions, results in the ability to contract around the provisions regarding lack of conformity of goods in a B2B transaction governed by the CESL).

143. See *id.* at 67 (explaining that contract terms deemed to be unfair are not binding on the parties and that Chapter 8 of the CESL only applies if another Chapter of the CESL does not govern the status of the term included in the contract).

144. *Id.* at 71.

145. See *id.* at 34, 71.

146. See *id.*

147. See *id.* at 34 (placing the burden of proof on the party that supplied the standard form contract to show that the term at issue was individually negotiated).

provision.<sup>148</sup> However, whether or not the terms were individually negotiated does not alter the outcome of the decision under the CESL in favor of United Dominions.

For example, if United Dominions is able to show that the terms of the contract were individually negotiated because R & B's attention was brought to the provision and it arguably had the ability to alter the provision, then the term does not qualify as an unfair contract term.<sup>149</sup> By not meeting this initial threshold, R & B would be bound by the terms of the agreement and not be able to strike the provision.<sup>150</sup> On the other hand, because the parties used a standard contract, United Dominions bears the burden of proof to show that the term was individually negotiated.<sup>151</sup> Arguably United Dominions would not meet this burden because R & B did not "influence" the terms of the provision.<sup>152</sup> If United Dominions is unable to convince the court that drawing a party's attention to a provision in its standard form contract constitutes an individually negotiated term,<sup>153</sup> then the analysis would continue to the second prong that requires

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148. See *R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 327 (EWCA (Civ) 1988) (U.K.) (noting that the parties do not question the manner in which R & B was made aware of the provision excluding the implied warranty of merchantability, but also mentioning that Mr. Bell emphasized that he did not read the provision despite it being brought to his attention).

149. See *Loos*, *supra* note 9 (noting that the CESL regarding individually negotiated terms follows the provisions within the Unfair Terms Directive, and that if the term is found to be individually negotiated the unfairness analysis does not apply).

150. See *The Proposal*, *supra* note 5, at 27 (outlining that the consequence of electing the CESL is that its terms govern over national contract law). *But see* *Hesselink & Loos*, *supra* note 65 (noting that when a term is not deemed to be unfair a court may use the national law addressing immorality to strike a provision).

151. See *The Proposal*, *supra* note 5, at 34 (outlining in Article 7(3) that the party claiming a term in a standard form contract was individually negotiated bears the burden of proof); *see also* *Loos*, *supra* note 9 (noting that Article 7 places the burden of proof on the party claiming that a term is individually negotiated, and emphasizing that this requirement is not met when one party describes the provision to the other party).

152. *Cf. The Proposal*, *supra* note 5, at 34 (explaining that a term in a contract is not individually negotiated if the provision is provided by one party and the other party does not have the ability to alter its content).

153. See *NEBBIA*, *supra* note 30 (noting that this questioning by the court regarding the ability to negotiate over standard form contracts is often a concern that touches on the unequal bargaining power between the parties).

the term to be a gross deviation from good commercial practice, contrary to good faith and fair dealing.<sup>154</sup>

*2. The Contract Provision Does Not Grossly Deviate From Standards of Good Commercial Practice, Contrary to Good Faith and Fair Dealing*

The high standard applied to B2B transactions under Article 86(1)(b) of the CESL would not be met in the transaction between R & B and United Dominions, and the decision by the court would result in United Dominions effectively avoiding national regulation. For a court to find a provision in a B2B transaction unfair, the contract provision must “grossly deviate from good commercial practice, contrary to good faith and fair dealing,” a heightened standard compared to that provided for B2C contract terms under the CESL.<sup>155</sup> Good faith and fair dealing is a defined term within the CESL: “a standard of conduct characterized by honesty, openness and consideration for the interests of the other party.”<sup>156</sup> Courts interpreting a dispute may not settle an issue by referring to their national law, and Article 86 requires courts to address four areas regarding the contractual relationship.<sup>157</sup> Following the “objectives

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154. See *The Proposal*, *supra* note 5, at 71 (requiring that the courts address both whether the term was individually negotiated and if it was in line with good faith and fair dealing in a B2B transaction).

155. Compare *id.* at 67–71 (providing extensive, comprehensive protection to consumers in B2B transactions), with *id.* at 71 (requiring courts to exclude the guidance offered in B2C transactions regarding unfair contracts and look at the contract through a different lens that mandates a heightened standard).

156. *The Proposal*, *supra* note 5, at 22. Compare BEALE, *supra* note 8, at 812 (noting that the standard of good faith in accordance with unfair contract terms was traditionally interpreted according to the law of the nation state), with *The Proposal*, *supra* note 5, at 27 (mandating that, where the parties opt into the CESL, the CESL trumps national law when the provision is expressly addressed in the CESL). See generally Simon Whittaker & Reinhard Zimmerman, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in GOOD FAITH IN EUROPEAN CONTRACT LAW 7 (Reinhard Zimmerman & Simon Whittaker eds., 2000) (explaining that the consumer protection directive has implemented good faith in Member States and the Member States have developed their own jurisprudence on how to interpret the term).

157. See *The Proposal*, *supra* note 5, at 33–34 (“Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other

and principles” of the CESL, such as its emphasis on freedom to contract and the express exclusion of SMEs from consumer status,<sup>158</sup> a court assessing the required factors laid out in the CESL would find that the exclusion of an implied warranty of merchantability in the transaction between R & B and United Dominions is not unfair.

After establishing that the transaction is a B2B transaction and that the term is not individually negotiated, the court would address four factors: (1) “the nature of what is to be provided under the contract”; (2) “the circumstances prevailing during the conclusion of the contract”; (3) “the other contract terms”; and (4) “the terms of any other contract on which the contract depends.”<sup>159</sup> Applying the same logic as applied in *R & B Customs* to assess the transaction here, R & B is purchasing a car from Saunders Abbott, which is financed by United Dominions.<sup>160</sup> The nature of what is provided under the contract is a vehicle and financing, a typical contractual relationship.<sup>161</sup> To the second factor, during the conclusion of the contract R & B was made aware of the contract provision excluding the implied warranty of merchantability and was arguably allowed the opportunity to object to the provision.<sup>162</sup> What is more, R & B made similar purchases in the past on credit terms, thus it was not a new transaction to the business.<sup>163</sup> Thirdly, the other contract terms

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*law.”*) (emphasis added).

158. *See id.* at 33 (emphasizing that the first general principle of the CESL is that parties are free to contract and determine their relationship, and providing that any provision not mandated within the CESL may be contracted around); *see also id.* at 22 (limiting the definition of consumer to natural persons operating outside their trade or business). *But see* CHANTAL MAK, FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW: A COMPARISON OF THE IMPACT OF FUNDAMENTAL RIGHTS ON CONTRACTUAL RELATIONSHIPS IN GERMANY, THE NETHERLANDS, ITALY AND ENGLAND 5–6 (2008) (noting that jurisdictions throughout Europe emphasize the freedom to contract but set limits to that freedom on moral, social, and good faith grounds).

159. *The Proposal*, *supra* note 5, at 71.

160. *See R & B Customs Brokers Co. v. United Dominions Trust*, 1 W.L.R. 321, 324 (EWCA (Civ) 1988) (U.K.) (noting that the transaction at issue was not the first transaction that R & B had done).

161. *See id.* (identifying that this was a common and long-standing relationship between the defendants and the third party dealership).

162. *See id.* at 325 (remarking that there was no deceit on the part of United Dominions regarding the provision excluding an implied warranty of merchantability).

163. *See id.* (indicating that R & B was familiar with this sort of transaction but not explaining if the transaction had occurred between the same parties in the past).

are not in dispute and are part of the standard form contract to finance the purchase of a vehicle.<sup>164</sup> Lastly, the contractual relationship was set out in one document.<sup>165</sup>

The factors considered and the objective of the CESL to keep B2B transactions separate from B2C transactions will result in the court having to hold in favor of United Dominions.<sup>166</sup> The factors do not include a question about unequal bargaining power, and, no matter its size or sophistication, R & B is on its own and cannot rely on national law regulation that would serve to protect it.<sup>167</sup> There was no egregious behavior in the transaction that would qualify the provision as grossly deviating from “conduct characterized by honesty, openness and consideration for the interests of the other party.”<sup>168</sup> R & B was made aware of the provision, and United Dominions made several attempts to cure the defect.<sup>169</sup> However, here, United Dominions protected itself by excluding the implied warranty of merchantability, which it showed to R & B before the conclusion of the contract.<sup>170</sup> R & B, as a legal person, does not receive the protection that is offered to consumers under the CESL, and its relationship with United Dominions is governed by the terms

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164. *See id.* at 324, 328 (explaining that the company purchased the vehicle in its name for business purposes).

165. *See id.* (noting that the only other document that R & B completed was a credit application form, which bears little to no determinative value for assessing if the contract provision is against good commercial practice).

166. *See The Proposal, supra* note 5, at 33 (mandating that the CESL be interpreted according to its objectives and principles without recourse to domestic law).

167. *See id.* at 71 (excluding bargaining power as a factor to consider when addressing unfair contract terms in B2B transaction); *see also Allen & Overy's Response, supra* note 3, at 11 (“[B]ecause CESL is autonomous . . . , even in Member States where the concept of good faith is refined, the case law will presumably be of little assistance.”).

168. *Compare The Proposal, supra* note 5, at 22 (defining good faith and fair dealing as open and honest conduct that considers the interest of the other party), with *R & B Customs Brokers Co.*, 1 W.L.R. at 331 (noting that an exclusion of an implied warranty of merchantability in a different transaction would not be necessarily per se unreasonable).

169. *See R & B Customs Brokers Co.*, 1 W.L.R. at 327 (remarking that United Dominions drew Mr. and Mrs. Bell's attention to the provision excluding a warranty of merchantability).

170. *See id.* (explaining that Mr. Bell admitted to being made aware of the provision, but not reading the provision before signing the agreement).

for which it freely contracted.<sup>171</sup> British contract law cannot protect R & B when the transaction is governed by the CESL,<sup>172</sup> and the outcome of *R & B Customs* changes. What would be an unfair contract term under domestic law becomes an acceptable term when the contracting parties opt into the CESL, thus resulting in deregulation.

#### IV. THE CESL LANGUAGE SHOULD BE ALTERED TO PROTECT SMES

The goal of the Commission in drafting the CESL was to create a stronger internal market by removing complexities that hinder SMEs from engaging in cross-border transactions.<sup>173</sup> However, as written, the CESL will deprive SMEs of protection that their jurisdictions offer.<sup>174</sup> For fear of losing the protection offered to them, SMEs may continue to forego cross-border transactions.<sup>175</sup> Losing the protection offered under domestic law can be as costly for the SME as not engaging in cross-border transactions, and, for fear of losing domestic protection, businesses may refrain from cross-border transactions as they have in the past.<sup>176</sup> To avoid this result, the language of the CESL should be altered.<sup>177</sup>

171. See *The Proposal*, *supra* note 5, at 33 (providing that parties are free to contract in the first article of the CESL).

172. See *id.* at 33–34 (stating that when the CESL is chosen as governing law, domestic law does not apply).

173. See *id.* at 2–4 (listing the objectives of the Commission, including making cross-border transactions easier on SMEs which in turn will improve the internal market).

174. See Loos, *supra* note 9 (noting that the restrictive definition of consumer will force SMEs or a natural person acting outside his or her trade or business to give up the protections offered by domestic contract law).

175. Cf. *Flash Eurobarometer 320*, *supra* note 94 (explaining that micro-enterprises were the most deterred from entering into cross-border transactions due to costs of navigating different contract laws).

176. See *id.* (indicating that many businesses currently refrain from cross-border transactions due to the expense of dealing with foreign jurisdiction contract regimes).

177. See Bettina Heiderhoff, *CESL – A Chance for Truer Freedom of Contract for the Consumer*, in *PRIVATE AUTONOMY IN GERMANY AND POLAND AND IN THE COMMON EUROPEAN SALES LAW 77*, 94 (Tim Drygala et al. eds., 2012) (“[T]he chance should be taken to make the CESL something special. It has the opportunity to become a truly innovative project which might be attractive to . . . market players.”).

The language of the CESL could be changed in three different ways to avoid the deregulation of protection for SMEs. First, the definition of consumer could be expanded to match that of the UCTA.<sup>178</sup> By broadening the definition to include “any persons dealing as a consumer,” the CESL would extend the protections that it offers to consumers to SMEs dealing as consumers. Thus SMEs would be less hesitant to engage in cross-border transactions, larger businesses would still be able to save costs by using a uniform contract law, and the Commission would be better able to pursue its goals of improving the internal market.<sup>179</sup>

However, if expanding the definition raises concerns about certainty and protection as being too broad for SMEs, the CESL could include black and grey lists of what are unfair contract terms and what are presumed to be unfair contract terms.<sup>180</sup> By listing what provisions are unfair and likely considered to be unfair, businesses (both large and small) would have more certainty of the outcome if a dispute arose under the contract.<sup>181</sup> Businesses could create standard form contracts that avoided these terms and, if they did not avoid the presumptively unfair terms, take the appropriate steps to prepare for any dispute that may arise to justify the use of the term.

Thirdly, in particular for the exclusion of an implied warranty of merchantability, the Commission could extend the mandatory nature of Chapter 11 of the CESL for B2C transactions to B2B transactions.<sup>182</sup> By doing so, parties in B2B transactions would still have the freedom to contract, but the parties would not be able to exclude an implied warranty of merchantability.<sup>183</sup> This solution is

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178. See Unfair Contract Terms Act §12 (defining consumer as *any* person dealing as a consumer) (emphasis added).

179. See *The Proposal*, *supra* note 5, at 3–4 (acknowledging that SMEs are often forced to agree to the terms provided by a larger company and emphasizing its goal that the CESL ease costs for SMEs and improve the internal market).

180. See *id.* at 68–70 (providing lists of terms that are always unfair and terms that are presumptively unfair).

181. See Posner, *supra* note 14, at 6 (noting that a primary obstacle for businesses and consumers in applying the CESL is the uncertainty of how disputes will be resolved under its provisions).

182. See *The Proposal*, *supra* note 5, at 81 (mandating that the parties in a B2C transaction not derogate from the provisions in Chapter 11, but permitting parties in B2B transactions to contract around these provisions).

183. See *id.* (prohibiting a party from excluding an implied warranty of merchantability to the detriment of the consumer).

particular to the results of *R & B Customs*, and there may be other concerns regarding unfair contract terms that would arise and again result in deregulation.

Two other mechanisms that scholars suggest are for (1) domestic courts to apply a standard of immorality to contracts, and (2) the Commission to change the structure of the CESL from an optional instrument to a directive for minimum harmonization.<sup>184</sup> These suggestions would potentially avoid the deregulation of consumer protection for SMEs, but they would frustrate the Commission's goal of creating a uniform contract law that can be applied at low cost and high certainty.<sup>185</sup>

## V. CONCLUSION

The decision in *R & B Customs* held that an SME could receive consumer protection when dealing as a consumer, but if the CESL is applied to the same circumstances in *R & B Customs*, the outcome changes to the detriment of the SME. The application of the CESL in B2B transactions results in deregulation of Member State law. Larger businesses may insist upon the CESL when dealing with SMEs to avoid the domestic law that has a broader definition of "consumer." The heightened standard for an SME to prove that a contract term is unfair in a B2B transaction under the CESL does not protect the SME when dealing as a consumer. SMEs may continue to forego cross-border trading as a result of this aspect of deregulation, and the Commission's goals will be frustrated.

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184. See Loos, *supra* note 9 (noting that the normal instrument for the Commission to apply is a minimum harmonization directive that the Member States can augment as they see fit); see also Hesselink, *The Case for a CESL*, *supra* note 15, at 16 (expressing that the immorality standards of jurisdictions could be applied since the CESL does not address moral standards).

185. See *The Proposal*, *supra* note 5, at 3 (explaining that transaction costs due to different contract laws of the Member States create barriers to cross-border transactions that cost the internal market tens of billions of Euros).

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