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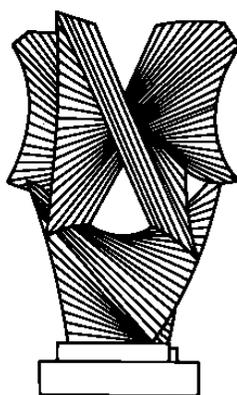
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Another Look at the Eurobarometer Surveys

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ANOTHER LOOK AT THE EUROBAROMETER SURVEYS

WILLIAM H. J. HUBBARD*

The current proposal for a Common European Sales Law (CESL) makes a number of empirical claims in support of its argument that differences in contract law among Member States are stifling trade, and that CESL will address these barriers to cross-border trade. These empirical claims rest largely on citations to a number of Flash Eurobarometer surveys and other surveys of businesses and consumers. A closer look at these surveys reveals that the cited statistics do not support the claims that contract-law-related obstacles present special barriers to cross-border trade for small- and medium-sized enterprises and consumers. Instead, a more ambiguous picture emerges – one that may cast doubt on several of the design features of CESL. I conclude that a more careful assessment of the empirical foundations for CESL (whether in its current or a revised form) is necessary.

1. Introduction

Last year, the European Commission published its *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (“Proposal”).¹ The Proposal is the product of extensive study and the latest manifestation of the momentum in many quarters toward harmonization of European contract law. The proposed Common European Sales Law (CESL) has engendered a spirited debate about its costs and benefits.² Notable features of CESL include: its optional character as an opt-in regime of sales law applicable to cross-border contracts; its applicability only to business-to-business (B2B) contracts involving small- or medium-sized enterprises (SMEs) and business-to-consumer (B2C) contracts; its reliance on custom and usage in the B2B context; and its extensive, mandatory consumer protection provisions in the B2C context. As evidenced by the other papers in this volume, abler contracts scholars than myself have offered both criticism and defense of these features.

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¹ COM 635(2011) final.

² The papers presented at *European Contract Law: A Law-and-Economics Perspective* and collected in this volume provide a small sampling of this debate.

Given this heated debate, one is tempted to ask if CESL is worth the considerable effort and controversy attending it. To this question the Proposal offers a clear answer. The Proposal opens with these words:

Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.³

In other words, whatever the strengths or weaknesses of its particular details, CESL or something like it is needed. Current disuniformity in contract law across Europe is stifling trade, especially by SMEs.

This is an empirical claim. More precisely, the Proposal's language quoted above contains a bundle of *four* empirical claims:

Claim 1: There are a significant number of traders in the EU, and in particular SMEs, who want engage in cross-border trade or increase their cross-border trade, but do not.

Claim 2: Obstacles created by differences in contract law are an impediment to cross-border trade, especially for SMEs.

Claim 3: There are a significant number of consumers in the EU who want to make cross-border purchases, but cannot.

Claim 4: Obstacles created by differences in contract law are an impediment to cross-border purchases by consumers.

These empirical claims are the central justification for CESL.⁴ With respect to SMEs, if the first claim is not true, then there is no problem to solve; and if the second claim is not true, then CESL will not solve the problem. Likewise, for consumers, if the third claim is not true, then there is no problem to solve; and if the fourth claim is not true, then CESL will not solve the problem.

³ Proposal, 2.

⁴ There are other important justifications as well, such as fostering a common European legal identity and establishing shared values throughout Europe. See, Mak, "In Defense of CESL," this volume.

The Proposal does not make these claims without offering evidence to support them. The European Commission sponsored studies to address aspects of these claims, and the Proposal expressly cites this empirical data. In particular, the Proposal cites two surveys, Flash Eurobarometer 320 and 321, to point out that “traders ranked contract-law-related obstacles among the top barriers to cross-border trade.”⁵ (Flash EB 320 surveyed enterprises engaged in B2B transactions, and Flash 321 surveyed enterprises engaged in B2C transactions.) This suggests that contract law is a major impediment to cross-border trade, and it raises the possibility that a large number of traders are dissuaded from cross-border trade.

The Proposal’s companion document, *A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market* (“Companion Document”),⁶ cites Flash Eurobarometer 299 as evidence of the small number of European consumers currently purchasing online from other countries.⁷ The Companion Document also cites the *Third Edition of the Consumer Markets Scoreboard* (“Scoreboard”),⁸ for the claim that “attempts to purchase products online more often fail than succeed in a cross-border context.”⁹ This suggests that contract law may be a major obstacle to cross-border activity by consumers as well.

⁵ Proposal, 2. Flash Eurobarometer 320, “European contract law in business-to-business transactions” (Flash EB 320) was a survey conducted by the Gallup Organization in January 2011 of 6,475 managers at enterprises in the 27 EU member states. See *Summary*, Flash EB 320 (2011) and *Analytical Report*, Flash EB 320 (2011). Flash Eurobarometer 321, “European contract law in consumer transactions” (Flash EB 321) was a survey conducted by the Gallup Organization in January 2011 of 6,465 managers at enterprises in the 27 EU member states. See *Summary*, Flash EB 320 (2011) and *Analytical Report*, Flash EB 320 (2011). All *Summaries* and *Analytical Reports* for the cited Flash EB surveys are available at ec.europa.eu/public_opinion/archives/flash_arch_en.htm (last visited 12 Sept. 2012).

⁶ COM 636(2011) final.

⁷ Companion Document, 3. Flash Eurobarometer 299, “Consumer attitudes towards cross-border trade and consumer protection” (Flash EB 299), was a survey conducted by the Gallup Organization in September 2010 of 25,139 individuals in the 27 EU member states. See *Summary*, Flash EB 299 (March 2011). Components of this survey were reported as Flash Eurobarometer 299a, “Attitudes towards cross-border trade and consumer protection” (Flash EB 299a). See *Analytical Report*, Flash EB 229a (2011).

⁸ SEC 385(2010), 9.

⁹ Companion Document, 3.

Given that this survey data provides the empirical foundation for the perceived need that motivates CESL, these studies deserve a closer look. In this paper, I undertake to do this.¹⁰ This paper assesses the degree to which the Flash EB surveys support the four central empirical claims in the Proposal. Section 2 focuses on claims about SMEs (claims 1 and 2). Section 3 focuses on claims about consumers (claims 3 and 4).

What I find is that the Flash EB and other surveys cited by the Proposal offer an ambiguous picture of the extent to which contract law may create obstacles to cross-border trade by businesses and consumers. These surveys do *not* suggest that there are large numbers of discouraged traders, or that contract law is in practice a major obstacle to cross-border trade. They are consistent, however, with the proposition that a small, but economically significant, number of traders and consumers are discouraged from cross-border trade by differences in European contract law. To prove this latter proposition will require further, and more careful, study.

2. Empirical Evidence on Cross-Border Trade, Contract Law, and SMEs

Claim 1 is that there are a significant number of traders, in particular SMEs, who want to (but do not) engage in cross-border trade or increase the number of Member States with which they trade. The Proposal itself provides a brief statement of the empirical basis for this fundamental claim: “Currently, only one in ten [EU] traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of member states.”¹¹ This statement can be broken down into two separate, component claims:

¹⁰ The survey micro-data, or “primary data,” for these surveys is publicly available through GESIS, <www.gesis.org> (last visited 12 Sept. 2012). All data from the Flash EB 320 and 321 surveys presented in this paper are based on this primary data; there may be slight discrepancies between the summary statistics generated by this data and those presented in the corresponding *Analytical Reports* or *Summaries* for the surveys. I rely solely on the *Summaries* and *Analytical Reports* for the Flash EB 299 and Flash EB 299a surveys.

¹¹ Proposal, 2.

(1) “currently, only one in 10 [EU] traders, involved in the sale of goods, exports within the Union.”¹²

(2) “the majority of those who do only export to a small number of member states.”

These two statements together capture the two crucial aspects in which barriers to trade, including contract-law-related barriers, may hinder cross-border trade. The first statement refers to the *extensive margin*. By “extensive margin,” I mean the extent to which new businesses may be willing to enter cross-border trade if barriers to trade are lowered. The second statement refers to the *intensive margin*. By “intensive margin,” I mean how intensively companies already engaged in cross-border trade can participate in trade with other countries; i.e., businesses already engaged in cross-border trade may be willing to trade with a greater number of Member States if barriers to trade fall.

I look at each margin in turn.

2.1 *The extensive margin*

The fact that only one in ten EU traders involved in the sale of goods exports within the EU suggests that there is a lot of room for increasing participation in cross-border trade. From this, one might conclude that the extensive margin is very large.

This conclusion, however, would be too hasty. The fact that 90 percent of traders do not export to other EU member states does not mean that 90 percent of traders would export other EU member states if the barriers to trade were lower. Some traders may have no interest in exporting and many traders are involved in the sale of goods for which there is essentially no international market – i.e., the market for such goods is entirely local. Recall that a neighborhood bakery or butcher shop is a “trader involved in the sale of goods.”

Instead, one should look for evidence on the number of companies who are not trading cross-border *but want to*. The Flash EB surveys cited by the Proposal are helpful here. These surveys asked each respondent whether they were (1) currently buying or selling cross-border, (2) not currently buying or selling cross-border, but

¹² The Proposal provides no citation for this figure, but it may come from Flash Eurobarometer 196, “Observatory of European SMEs” (Flash EB 196), which was a survey conducted by the Gallup Organization in November-December 2006 of 16,339 SMEs in the 27 EU member states. See *Summary*, Flash EB 196 (2007).

considering doing so, or (3) not interested in selling or buying cross-border. The third group was excluded from the sample, so the sample included only businesses that were interested in cross-border trade. Thus, the Flash EB 320 and 321 surveys allow us to see how large is the group of traders who are interested but not engaged in cross-border trade relative to the group of traders already engaged in cross-border trade.

The results of the two surveys were essentially identical: more than 91 percent of enterprises were currently buying or selling cross-border.¹³ We can now reconsider the earlier statistic that only one in 10 traders involved in the sale of goods exports within the EU. This does not mean that 9 in 10 traders would export cross-border if the barriers to trade were lower. Instead, the number is probably much smaller. If 91 percent of the traders who want to trade are already trading, this implies that the extensive margin is less than 1 in 100 traders.¹⁴

A caveat is in order here: this number is a rough cut of the Flash EB data and is not at all a precise estimate of the extensive margin.¹⁵ Rather, the point is that the Proposal rests on an empirical claim that there is a significant number of businesses out there, especially SMEs, that want to trade cross-border but do not because of barriers to trade. The Flash EB surveys cited by the Proposal indicate that the number of such traders are relatively small.

¹³ The shares already engaged in cross-border trade was 91.6 percent (B2B) and 91.5 percent (B2C).

¹⁴ If 1 out of 10 traders, or 10 percent of traders, are currently exporting, and traders currently exporting are 91.5 percent of traders interested in exporting, then traders interested in exporting make up $0.10/0.915 = 0.109 = 10.9$ percent of all traders. Traders interested in exporting but not already doing so make up $10.9 - 10.0 = 0.9$ percent of all traders.

¹⁵ One limitation of this estimate is that the Flash EB surveys asked traders about buying or selling cross-border, while the statistic cited by the Proposal referred only to traders exporting. Thus, these two sets of numbers are not, strictly speaking, comparable. Note, though, that in the B2C context, cross-border transactions with consumers are by definition exports only; and the B2C numbers were virtually identical to the B2B numbers.

TABLE 1: NUMBER OF ENTERPRISES, BY SIZE, FLASH EB SURVEYS

	B2B		B2C	
	Number	Percent	Number	Percent
Micro (1-9)	4,077	63.0	3,678	56.9
Small (10-49)	1,684	26.0	1,882	29.1
Medium (50-249)	553	8.5	695	10.8
Large (250+)	161	2.5	210	3.2
All Respondents	6,475	100.0	6,465	100.0

Note: Parentheses contain number of employees in enterprises of each category. Source: Flash EB 320 (B2B); Flash EB 321 (B2C).

Why might it make sense that the extensive margin would be small? Many SMEs, especially small and micro enterprises, are engaged in inherently local trade. While many SMEs may aspire to trade cross-border, it is likely that many more do not. And since the vast majority of all enterprises are small and micro enterprises (see Table 1), one might expect the extensive margin to be small: the few large companies are already trading cross-border, while a large fraction of the many small companies are not interested in it. Indeed, a strong predictor of SME participation in cross-border trade is the size of its home country (SMEs in small countries trade more),¹⁶ which suggest that geographical, rather than legal, barriers are the primary determinants of cross-border trade.

¹⁶ Flash EB 196, 5, 16.

TABLE 2: PERCENTAGE OF TOTAL EMPLOYMENT, BY ENTERPRISE SIZE, FLASH EB SURVEYS

	B2B	B2C
Micro (1-9)	4.1	4.2
Small (10-49)	9.2	10.6
Medium (50-249)	15.1	17.8
Large (250+)	71.6	67.4
All Respondents	100.0	100.0

Source: Flash EB 320 (B2B); Flash EB 321 (B2C).

The extensive margin looks even smaller when one considers not the number of companies on the extensive margin, but the share of employment on the extensive margin. Although small and micro enterprises account for nearly 90 percent of the companies in the sample, they account for only a little more than 10 percent of total employment.¹⁷ See Table 2. Because small and micro enterprises account for a small share of total employment, even a large rise in their participation in cross-border trade will have a modest effect on the volume of trade.

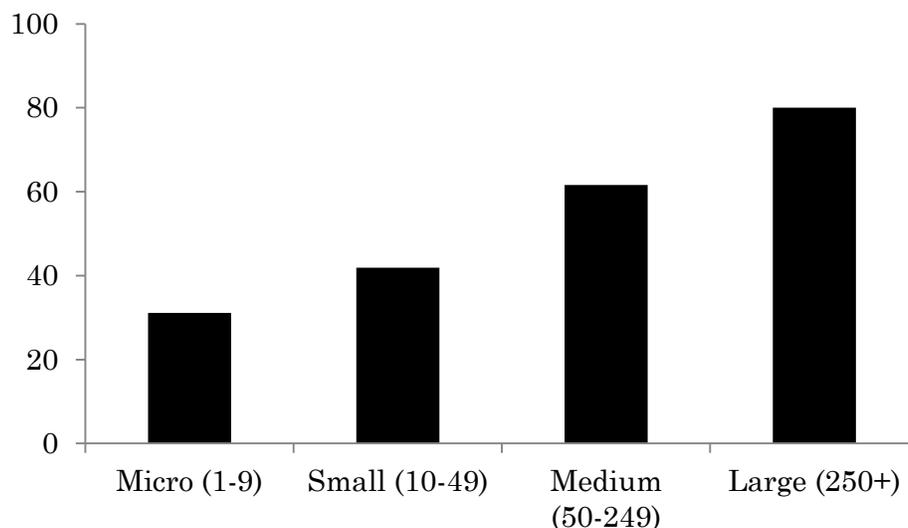
2.2 *The intensive margin*

The Proposal observes that “the majority of [traders] who do [export] only export to a small number of Member States.” This claim is validated by the Flash EB survey results, which indicate that among enterprises that trade cross-border, approximately 60 percent trade

¹⁷ These shares are calculated after removing the two largest employers from each of the Flash EB 320 and 321 samples. Out of over 6,000 enterprises, the two largest in each survey accounted for approximately half of all employment. Including these enterprises skews the numbers even more strongly in favor of large companies. I use the truncated sample in the remainder of this paper; for the remaining results, truncation has no effect.

with three other countries or fewer.¹⁸ This suggests that, while the extensive margin may be small, there may be room on the *intensive* margin for policies to increase participation in cross-border trade.

FIGURE 1: PERCENTAGE OF ENTERPRISES ENGAGED IN CROSS-BORDER TRADE WITH 4 OR MORE MEMBER STATES, BY ENTERPRISE SIZE, B2C



Note: Excludes traders not engaged in cross-border trade.
Source: Flash EB 321.

Once again, though, this statistic should be taken with care. A closer look at the data reveals that intensity of cross-border trade is strongly correlated with firm size. See Figure 1.¹⁹ Only among micro and small enterprises do the majority of enterprises trade with three or fewer other countries. Even among small enterprises nearly half of them are already trading with four or more other countries.

This pattern in the data is consistent with two stories: First, as noted above, it may simply be that the bulk of micro enterprises are not in a position to trade more broadly, even if contract-law-related barriers (or any other barriers) are reduced. If so, the intensive margin is small. Second, it may be that contract-law-related barriers to trade are greatest for micro enterprises, and this is why they

¹⁸ The shares are 59.9 percent (B2B) and 60.5 percent (B2C).

¹⁹ Figure 1 provides B2C data; B2B data yields the same pattern.

disproportionately fail to engage in cross-border trade. In this case, the intensive margin may be large. The Proposal accepts this view, saying that “dealings with various national laws are burdensome particularly for SME,”²⁰ and the Companion Document goes on to note that the burden falls especially on “micro and small enterprises.”²¹

If this latter account is true, then we should see evidence that micro enterprises are more concerned than large enterprises about the problems presented by contract law. If, however, the less intense cross-border trade by SMEs is because SMEs are less interested in cross-border trade than large companies, we should expect them to be *less* concerned than large companies about contract-law-related barriers to trade.

This brings us to Claim 2: that contract-law-related barriers to trade are an impediment to trade by SMEs in particular. As I describe below, SMEs are *less* concerned about contract-law-related barriers than large enterprises.

2.3 *Contract-Law-Related Barriers to Trade, Particularly for SMEs*

Before comparing the attitudes of SMEs and large enterprises about contract-law-related barriers, we must first review the evidence on contract-law-related barriers cited by the Proposal. The Proposal states:

“Surveys [citing Flash EB 320 and 321] show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.”²²

This is true. The Flash EB surveys identify four contract-related barriers, each of which easily falls in the top ten potential barriers to trade listed in the Flash EB surveys. But given the structure of the Flash EB surveys, this is an uninteresting result – the top ten potential barriers to trade were the *only* ten potential barriers to trade that the Flash EB survey described in its questionnaire.

²⁰ Proposal, 3.

²¹ COM 636(2011) final, 2.

²² Proposal, 2.

TABLE 3: PERCENTAGE OF ENTERPRISES IDENTIFYING A POTENTIAL BARRIER AS HAVING A LARGE OR SOME IMPACT, B2C SURVEY

Potential Barrier to Cross-Border Trade	“Large” or “Some” Impact
Tax regulations	24
<i>Learning about foreign contract law</i>	23
Administrative requirements, e.g., licensing	21
<i>Compliance with foreign consumer protection rules</i>	20
<i>Conflict resolution/cost of litigation abroad</i>	19
<i>Obtaining legal advice on foreign contract law</i>	19
Language	18
After-sales maintenance abroad	16
Cross-border delivery	15
Cultural Differences	11

Source: Flash EB 321.

Nonetheless, the contract-law-related barriers included in the Flash EB surveys were rated as about as significant as the other potential barriers, such as tax regulations and problems with cross-border delivery. Table 3 lists all ten potential barriers and the percentage of respondents identifying them as having “a large effect” or “some effect” on the company’s decision to buy or sell cross-border. The four contract-law-related barriers are placed in italics.²³ They are not all at the top, but they are not all at the bottom either. While the Proposal overstates the import of the Flash EB surveys, the empirical data do not foreclose the significance of contract law to cross-border trade.

²³ The list for the B2B survey is similar, although “Difficulty in agreeing on the foreign applicable law” replaces “The need to comply with different consumer protection rules in the foreign contract laws” – and ranks much lower. See *Summary*, Flash EB 320, 7.

TABLE 4: CONTRACT LAW IN CROSS-BORDER SALES, B2C SURVEY

	Unimportant Barrier	Small Barrier	Medium or Great Barrier
Micro (1-9)	47.7	16.8	35.5
Small (10-49)	42.1	18.8	39.2
Medium (50-249)	40.7	19.1	40.1
Large (250+)	38.9	18.3	42.8
All Respondents	45.0	17.7	37.3

*Note: Percentages may not add to 100 because of rounding.
Source: Flash EB 321.*

But what about SMEs, and small and micro enterprises in particular? How are they affected by contract law, relative to larger companies? The data from the Flash EB surveys indicate that SMEs are less concerned about contract-law-related barriers to trade than large companies. Table 4 reveals that micro enterprises are less likely to consider contract law to be a “medium” or “great” barrier to cross-border trade, and more likely to consider it an “unimportant” barrier, than large enterprises.²⁴ This evidence rejects the view that the low intensity of cross-border trade by SMEs is the product of contract-law-related barriers. Indeed, a survey not cited by the Proposal finds that 46 percent of exporting SMEs did identify any constraint on their cross-border trade, and only 8 percent identified a contract-law-related obstacle (“different regulations in other EU countries”) as their main constraint.²⁵

In sum, a closer look at the Flash EB data tends to undermine the hypothesis that there are large extensive and intensive margins along which policies can increase participation in cross-border trade by

²⁴ The B2B survey, Flash EB 320, yields the same pattern.

²⁵ *Summary*, Flash EB 196, 16.

SMEs. Further, while contract law is recognized by many traders as an obstacle to trade, contract-law-related barriers do not distinguish themselves from a number of other obstacles to trade considered in the Flash EB surveys.

Nonetheless, small extensive and intensive margins are different from no margins at all. Even a small increase in intra-EU trade would involve a huge amount of commerce. Intra-EU export trade easily exceeds €2 trillion (i.e., million million) per year.²⁶ A 0.1 percent increase in trade, for example, would amount to thousands of millions of Euros.

Thus, reducing the obstacles to trade created by contract law remains an project worth serious consideration, although we need to be realistic about the extent of its potential impact. This bring us to the ultimate question about CESL and cross-border trade by SMEs: Will CESL reduce the barriers to cross-border trade affecting those SMEs that *are* “on the margin” of increasing their cross-border trade?

2.4 *Empirical evidence on CESL and the needs of SMEs*

This is hard to answer empirically. As others have noted, one of the weaknesses of the Flash EB surveys is that they asked questions about contract law in the abstract, including asking for opinions about the benefits of a hypothetical European contract law without specifying its contents.²⁷ For this reason, theoretical analysis of its likely benefits and burdens is important, and many of the papers in this volume address this need.

It turns out, however, that the Flash EB surveys do provide a few results with respect to certain major features of CESL. Recall that CESL is an optional instrument, applicable to cross-border transactions. The Flash EB surveys specifically asked businesses about their views of the utility of a common European sales law, depending on whether it is an optional instrument, and depending on whether it is applicable only to cross-border transactions. The B2C survey asked, “If a European contract law was developed, what would you prefer for your business-to-consumer transactions?” and gave

²⁶ See *Europe in Figures – Eurostat Yearbook 2011*, ch. 9 “International Trade” (European Commission 2011) (citing Eurostat (tet00039) <<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=en&pcode=tet00039>>).

²⁷ This criticism was raised by Ackermann, “Das Gemeinsame Europäische Kaufrecht – eine sinnvolle Option für B2B-Geschäfte?” in Remien, Herrler and Limmer (Eds.), *Gemeinsames Europäisches Kaufrecht für die EU?* (C.H. Beck 2012), 49, at 53-54.

three options. (The B2B survey asked the corresponding question for B2B transactions.) The three choices were:

- (1) “A common EU contract law replacing 27 national contract laws.”
- (2) “A European contract law that you could choose as an alternative to the national laws for both your cross-border and domestic transactions.”
- (3) “A European contract law that you could choose as an alternative to the national laws for your cross-border transactions only.”

The latter two choices describe an optional instrument, and the third choice describes an optional instrument for cross-border transactions only, which is how CESL is structured.²⁸

The surveyed businesses resoundingly reject this third option. In both the B2B and B2C surveys, only 15.3 percent of the respondents who expressed a preference selected the third option.²⁹ The overwhelming preference was for the opposite choice: a single, mandatory European contract law regime that displaces all 27 national contract laws.³⁰

Even more illuminating are the results when broken down by size of enterprise. Given the focus of CESL on SMEs, one might hope that among traders, SMEs are more favorably disposed toward the third option – but the opposite is true. See Table 5.³¹

²⁸ For reasons that will become obvious shortly, it is important to note that Art. 13(a) of CESL provides for individual Member States to extend its coverage to domestic transactions. Proposal, 28.

²⁹ Not everyone expressed a preference. In the B2B survey, 12.9 percent of respondents did not select one of the choices; in the B2C survey, the non-response rate was 10.7 percent.

³⁰ This empirical result seems to confirm the theoretical prediction made by Ganuza and Gomez in this volume: “the rule that limits the choice of the CESL solely [to] cross-border transaction . . . does not seem a happy one.” Ganuza and Gomez, “Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law,” 8, 14-15.

³¹ Table 5 presents results for the B2C survey; the B2B results are similar.

TABLE 5: PREFERENCES FOR EUROPEAN CONTRACT LAW,
B2C SURVEY, BY ENTERPRISE SIZE (PERCENT)

	Replaces National Laws	Optional, Domestic and Cross-Border	Optional, Cross-Border Only
Micro (1-9)	53.8	32.4	13.8
Small (10-49)	53.3	30.6	16.2
Medium (50-249)	49.3	31.7	18.9
Large (250+)	53.7	25.4	20.9
All Respondents	53.2	31.6	15.3

Note: Percentages may not add to 100 because of rounding. Responses “Don’t know” or “NA” are excluded. Source: Flash EB 321.

Why the lack of enthusiasm for the third option? The Flash EB surveys did not ask businesses to explain their answers, but the patterns in the data we have seen so far suggest the following explanation:

Most small businesses, and especially micro enterprises, are likely to transact cross-border business, if at all, in one or two other Member States.³² Thus, while the need to account for multiple contract law regimes may be a source of significant transactions costs for SMEs, the economies of scale associated with moving to a uniform law for cross-border transactions are small. For many micro enterprises, the benefit of a uniform European law for cross-border contracts may be zero, because they are interested in trading with only one additional Member State – and whether a business has to learn about CESL or about that Member State’s law, it is one new legal regime either way.

Similarly, an SME that trades with, say, three other Member States could *at best* reduce the number of legal systems governing its contracts by 50 percent, from four to two (CESL plus its domestic contract law). I say “at best,” because this assumes that the SME

³² See Section 2, *supra*.

succeeds at making CESL the governing law in *every one* of its cross-border contracts. If not, there may be no savings at all.³³

On the other hand, a mandatory instrument that applies to all contracts domestically and cross-border will benefit an SME interested in trading with even one other Member State. It reduces by 50 percent the number of legal systems that SME must learn (from two to one). An SME that trades with three other Member States would be guaranteed a 75 reduction in legal regimes (from four to one). Thus, one can see why a mandatory regime would be so popular among SMEs.

There are obvious political and practical reasons why such a mandatory regime is infeasible. For this reason, it is worth noting that an optional regime that applies both domestically and cross-border has the potential, in a best-case scenario, to generate the same savings.³⁴

These results are summarized in Table 6 for various numbers of trading partner states and for the three choices of European contract law offered by the Flash EB survey. Table 6 also helps make sense of the fact that large businesses seem more tolerant of the possibility of an optional, cross-border instrument. (Note that the Flash EB surveys did not limit the optional instrument to transactions involving SMEs, as CESL does.) It is the largest companies – the companies who are most likely to do business in many Member States – who stand to gain the most from an optional cross-border contract law regime, given the economies of scale associated with the fixed costs of learning a new set of legal rules. And the differences in savings between a mandatory European contract law and an optional one are much smaller for a business trading with 27 countries than a business trading with one.³⁵

³³ It is possible in the B2B context, given that CESL is optional, that some businesses may experience a rise in the number of contract law systems with which they must contend, and thus a rise in costs.

³⁴ Again, by best-case scenario, I refer to a situation in which a business is able to conduct all of its transactions under the optional law.

³⁵ Hence, it is worth noting that Art. 13(b) of CESL provides for individual Member States to extend its coverage to B2B transactions not involving SMEs. Proposal, 28.

TABLE 6: REDUCTION IN NUMBER OF LEGAL REGIMES
REQUIRED TO LEARN, BY BREADTH OF CROSS-BORDER TRADE
AND NATURE OF EUROPEAN CONTRACT LAW

Number of Other Member States	Replaces National Laws	Optional: Domestic and Cross-Border	Optional: Cross-Border Only
1	50%	up to 50%	0%
3	75%	up to 75%	up to 50%
10	91%	up to 91%	up to 83%
27	96%	up to 96%	up to 93%

Note: Maximum number of trading partners is 27 when including Scotland as the 28th legal regime in the EU.

3. Contract-Law-Related Barriers for Consumers

So far, this paper has focused on the empirical claims related to CESL from the perspective of businesses, especially SMEs, interested in cross-border trade. In this section, I turn to the empirical claims motivating CESL's provisions governing consumer contracts. I begin by addressing Claim 3, and in particular the claim that more than half of all online, cross-border purchase attempts fail.³⁶ I then consider the evidence on whether contract law creates barriers to cross-border B2C transactions (Claim 4). Finally, I conclude by considering some empirical data relevant to one of the salient motivations for CESL's consumer-related provisions: the need for greater mandatory consumer protections.

3.1. *Do sellers reject half of all online, cross-border purchase attempts?*

The Companion Document states: "In practice, attempts to purchase products online more often fail than succeed in a cross-border context and often end-up with a disappointing message such as 'this product is

³⁶ See Companion Document, 3.

not available for your country of residence.”³⁷ This claim rests on a citation to the Scoreboard,³⁸ which in turn cites a 2009 YouGovPsychonomics study commissioned by the EC (“YouGov Study”),³⁹ which found that 61 percent of attempts at online, cross-border purchases failed, and that 50 out of that 61 percent failed because the seller refused to sell to the consumer’s country.⁴⁰

If this statistic is representative of the actual experiences of consumers, then there is indeed a serious problem with online B2C contracts in the European Union. And perhaps it is differences in contract law that lead to half of all online, cross-border purchase attempts being rejected because the seller refuses to sell to the buyer’s country. If so, there may be a real need to address B2C contracts at the European level. Still, this statistic is surprising; is it possible that *in practice* more than half of online purchase attempts are rejected by the seller?

A closer look at the data tells a less dramatic story. First, the YouGov Study points out that in 52 percent of all attempts at online, cross-border purchases the seller did not provide for shipping outside of the seller’s home country.⁴¹ Thus, the *entire* result – that half of all online, cross-border purchase attempts are rejected because the seller does not serve the buyer’s country – is explained by the fact that half of all online retailers do not ship internationally.⁴²

Second, the YouGov Study, by design, did not target online retailers that purport to serve more than one country; instead the goal of that study was to target any retailer that had any online presence at all. In this respect the study was successful: the study identified nearly 17,000 offers on 100 different consumer products from over

³⁷ Companion Document, 3.

³⁸ SEC 385(2010), 9.

³⁹ “Mystery shopping evaluation of cross-border e-commerce in the EU,” YouGovPsychonomics (2009), cited in Scoreboard, SEC 385(2010), 27 n. 12.

⁴⁰ YouGov Study, 24.

⁴¹ YouGov Study, 28.

⁴² This does not mean that contract law is not the problem: it could be that sellers are reluctant to ship cross-border because of concerns about contract law. Indeed, in the internet context, one might wonder what difference in costs to the seller, other than contract law, would deter a seller from trading cross-border; shipping costs may not differ much and may be borne by the purchaser anyway. But the fact that half of all sellers do not ship internationally could simply reflect the fact that many retailers target a more local audience, and are not interested in competing with larger, more internationally focused internet retailers. The data do not refute the hypothesis that contract law is causing the problems identified by the YouGov Study, but the data do not prove it, either.

4,000 online retailers.⁴³ Thus, if consumers randomly selected retailers with an online presence and attempted to make purchases, they would fail more than half the time – this is what the YouGov Study meticulously shows. It is not true, however, that *in practice* consumers cannot make purchases half the time. Instead, both the Flash EB 299 data and the Scoreboard data show that no more than 8 percent of consumers who shop online in a 12 month period are unable to complete an online, cross-border purchase at least once during that period.⁴⁴

3.2. *Do consumers perceive contract-law-related barriers to online shopping?*

The relatively low rate with which consumers experience problems with online, cross-border shopping suggests that differences in contract law may not be quite as large a problem as the Companion Document implies. Indeed, the Scoreboard data suggest that consumers do not perceive serious problems with contract law when shopping online. When consumers who make purchases online were asked why they shopped online, 49 percent said that “certainty about legal rights” was a “very important” reason, just behind “lower prices” (50 percent).⁴⁵ See Table 7. This bears repeating: about half of all consumers who shop online say they do so because it offers *certainty about legal rights*.

⁴³ YouGov Study, 19. The majority of retailers identified made offers on only *one* of the 100 products searched for.

⁴⁴ According to Flash EB 299a, of EU consumers who had engaged in distance purchases in the last 12 months, 8 percent encountered at least once a seller who had refused to sell or deliver to them. *Analytical Report*, Flash EB 299a, 9. According to Scoreboard, 11 percent of online shoppers reported a problem when buying or ordering goods, and most of these consumers reported problems other than a refusal to sell, such as delivery delays or technical failures with the website. *Scoreboard*, 24-25.

⁴⁵ When including both “very important” and “to some extent” responses, “certainty about legal rights” comes in first among the eight reasons offered. *Scoreboard*, 24.

TABLE 7: PERCENT OF ONLINE CONSUMERS DESCRIBING REASON FOR SHOPPING ONLINE AS “VERY IMPORTANT”

Reason	Very Important
Lower prices	50
Certainty about legal rights and guarantee	49
Convenience	48
User-friendliness of the website	45
Unavailability of the good in the area or region	45
Wider choice of goods and services	39
Certified quality of the website or availability of recognized trust mark	35
Ratings and feedbacks on the website from other users	31

Note: Percentages may not add to 100 because of rounding.

Source: Scoreboard, 24.

On the other hand, when consumers who had *not* shopped online were asked why they did not, the most common reasons given were “Prefer to shop in person” (20 percent) and “Have no need” (17 percent). The top-ranking reason that seems related to contract law, “trust concerns/receiving or returning goods, complaints or redress” (9 percent) came in a distant fifth place.⁴⁶

One limitation of this data is that these questions do not distinguish between domestic and cross-border online purchases. This is a weakness of the cited Flash EB surveys as well. In general, they do not ask companies or consumers to compare their experiences in domestic trade with their experiences in cross-border trade. As a

⁴⁶ Scoreboard, 25.

consequence, it is hard to tell whether these statistics apply equally to domestic and cross-border online shopping.

Fortunately, there was at least one question in the Flash EB 299 survey that made such a direct comparison. In this question consumers who had made at least one distance purchase – i.e., by internet, post, or phone – in the last 12 months whether they had experienced any problems with the delivery of the goods they had ordered. As Table 8 shows, consumers reported no more delivery problems with cross-border purchases from other Member States than from their home countries. (Indeed they reported slightly fewer.) This result suggests that cross-border transactions may involve fewer problems than we might otherwise assume.

TABLE 8: PERCENT OF CONSUMERS WHO EXPERIENCED DELAY OR NON-DELIVERY OF DISTANCE PURCHASES, BY SELLER LOCATION

	Delay in Delivery	No Delivery at All
Consumer's Own Country	18	6
Another Member State	16	5
Non-EU Country	19	6

Source: Summary, Flash EB 299, 20.

3.3. *Is there a need for higher, uniform consumer protection?*

One theme that runs throughout the European Commission's activities in the area of contract law is a strong commitment to consumer protection, often through the use of mandatory rules. CESL is no exception. It provides "a single set of mandatory rules which offer a high level of consumer protection."⁴⁷

To the extent that this replicates the degree of consumer protection already present in the law of most EU nations, this approach seems to jibe with the attitudes of most European consumers. The recent Flash EB survey of consumers indicates that

⁴⁷ Proposal, 4.

consumers are largely satisfied with existing consumer protections. See Table 9. By a 2-to-1 margin, consumers agreed with the statement that sellers in their countries respected their rights.⁴⁸ (The survey did not ask about sellers in *other* Member States.)

TABLE 9: CONSUMER ATTITUDES TOWARD EXISTING CONSUMER PROTECTIONS

	Agree/Tend to Agree	Disagree/Tend to Disagree
You are adequately protected by existing measures to protect consumers	57	35
In general, sellers in your country respect your rights as a consumer	65	28

Note: Percentages responding “Don’t Know/NA” are omitted.

Source: Summary, Flash EB 299, 23.

To the extent that CESL serves to increase, rather than preserve, the level of mandatory consumer protection, its merits are less clear. Because CESL is an optional instrument, it may offer advantages for those consumers who desire greater protections than currently available to them. On the other hand, mandatory consumer protections do not come for free. They raise the costs of sellers, and therefore raise the prices that all consumers must pay. Further, Bar-Gill and Ben-Shahar argue that mandatory consumer protections will subsidize sophisticated consumers, who know to invoke them, at the expense of the “poor, the elderly, the less educated.”⁴⁹

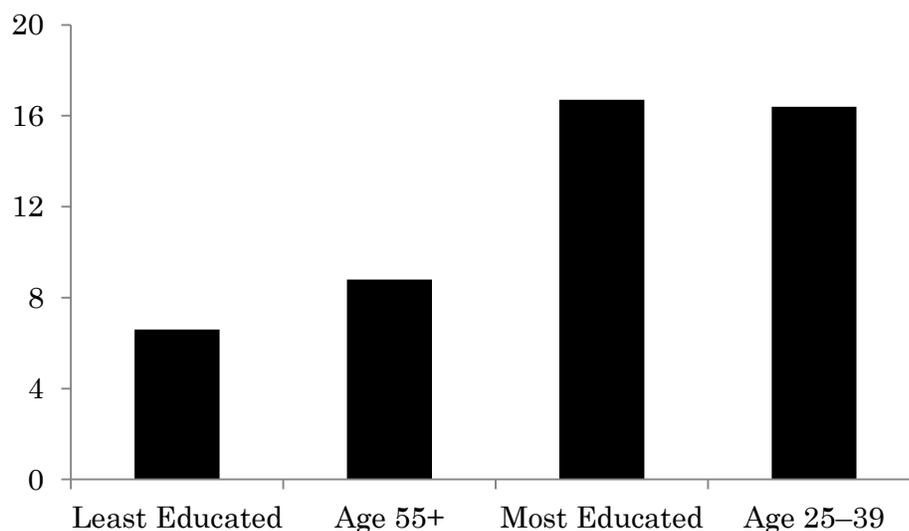
Here, the Flash EB surveys make a final contribution. The consumer attitudes survey examined which consumers were the most likely to identify a problem with their purchase and complain to the seller about it. And it finds that, as Bar-Gill and Ben-Shahar predict,

⁴⁸ Interestingly, trust in sellers to respect consumer’s rights was higher than trust in public authorities to protect the consumer’s rights. *Summary*, Flash EB 299, 23.

⁴⁹ Bar-Gill and Ben-Shahar, “Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law,” 9.

the elderly and least educated are far less likely to invoke their rights by complaining to a seller than the younger and more educated. See Figure 2. The concern that the most vulnerable groups will be cross-subsidizing the most advantaged may not be speculative.

FIGURE 2: PERCENTAGE OF CONSUMERS IDENTIFYING A PROBLEM AND COMPLAINING TO THE SELLER, BY EDUCATION AND AGE



Note: “Least Educated” left school before age 16; “Most educated” continued school past age 20. Source: Analytical Report, Flash EB 299, 132.

4. Conclusion

The Proposal and its Companion Document cite a number of surveys in support of their central empirical claims: that there are SMEs and consumers who want engage in cross-border transactions or increase their cross-border activity, but do not, and that obstacles created by differences in contract law are impediments to cross-border trade, especially for SMEs and consumers. A closer look at these surveys, especially the Flash Eurobarometer surveys on which the Proposal primary relies, reveals that the cited data only ambiguously supports these empirical claims. The cited surveys tend to cast doubt that the numbers of discouraged traders are large, and the surveys make a weak case that contract law is the primary obstacle to cross-

border trade. Nonetheless, it is plausible that contract law plays a role in discouraging a small but economically significant number of traders and consumers from cross-border trade.

Given the controversy surrounding CESL and the numerous concerns about the precise ways in which it implements its vision of a uniform European sales law, it is worth further study to determine whether the empirical claims justifying this project can be validated. Studies other than the surveys cited by the Proposal may help to support or refute the empirical claims in the Proposal. A better sense of the empirical foundations of the Proposal will inform the normative and policy-based arguments—many of which are articulated by other papers in this volume—that will ultimately determine the fate of CESL.

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