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Ending the Commercial Siesta: The Shortcomings of European Union Directive 2011/7 on Combating Late Payments in Commercial Transactions

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ENDING THE COMMERCIAL SIESTA: THE SHORTCOMINGS OF EUROPEAN UNION DIRECTIVE 2011/7 ON COMBATING LATE PAYMENTS IN COMMERCIAL TRANSACTIONS

De hecho tambien, cuando hablamos con [los países nórdicos] en Europa, no entienden que hay que crear una ley para pagar. Para ellos, pagar es una cosa normal. Se hace la factura, se paga, termina del problema.[1]

Rafeal Barón, Presidente, Plataforma Multisectorial contra la Morosidad

INTRODUCTION

On February 16, 2011, The European Union issued Directive 2011/7/EU ("Directive 2011/7"), which is meant to combat late payment in commercial transactions.[2] The objective of Directive 2011/7 is straightforward: to encourage enterprises and public authorities to pay their invoices on time.[3] While simplistic, the import of the objective and the severity of the problem it seeks to address cannot be overstated. At present, the average time for payment of invoices for goods and services in the EU is fifty-six days for the private sector and sixty-five days for the public sector.[4] This EU average, however, is skewed by the abysmal average payment periods in many

1. *Hablamos Con . . . Rafael Barón* [*Talking to . . . Rafael Barón*], (SurMadrid Television broadcast July 13, 2011), http://blip.tv/surmadridtv. "In fact, also, when we speak with the Nordic countries in Europe, they do not understand why a law must be created so that invoices are paid. For them, paying is something normal. The bill is sent, the bill is paid, end of problem." Rafael Barón, President, Platform against Late Payments. *Id*. The Platform Against Late Payments is an organization of over thirty business sectors in Spain dedicated to the reduction of payment periods through regulatory reform and enforcement. *See* PLATAFORMA MULTISECTORIAL CONTRA LA MOROSIDAD, http://www.pmcm.es (last visited Jan. 20, 2013).

2. Directive 2011/7, of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions (Recast), 2011 O.J. (L 48) 1 (EU) [hereinafter Directive 2011/7].

3. *See id.* art.1, at 5.

4. INTRUM JUSTITIA, EUROPEAN PAYMENT INDEX 2011 4 (2011).

south European countries.[5] Greece and Italy are the slowest with regard to settling invoices.[6] The average payment period in Greece is 110 days for the private sector and 168 days for the public sector,[7] while in Italy the average payment periods are 103 days and 180 days for the private and public sectors, respectively.[8] Spain is in a similar situation, with an average payment period of 99 days for Spanish businesses and 153 days for the government.[9]

The consequences of late payment can be dramatic. Late payments cause approximately one in four bankruptcies in the EU, leading to the loss of nearly 450,000 jobs every year.[10] For businesses that manage to stay afloat, late payment can generate substantial additional costs, such as essential external financing or lost investment opportunities.[11] Furthermore, on a regional level, the fear and uncertainty surrounding payment of bills impedes trade among EU Member States.[12] Recognizing the negative impact late payment has on the European economy, the European Parliament and Council passed Directive 2011/7, which, among other things, sets maximum payment periods for commercial transactions in an effort to reform the payment culture in Europe.[13]

But one has to question whether Directive 2011/7 complements or cripples prior global efforts to harmonize commercial sales law. The United Nations Vienna Convention on the International Sale of Goods ("CISG") already sets standards, directly and indirectly, for many of the matters covered in Directive 2011/7, such as when payment becomes due and liability for interest.[14] Given that twenty-three of the twenty-seven

5. *Id.* at 6.
6. *Id.*
7. *Id.* at 24.
8. *Id.* at 28.
9. *Id.* at 36.
10. *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on Combating Late Payment in Commercial Transactions (Recast)—Implementing the Small Business Act,'* 2010 O.J. (C 255) 42, 43.
11. *Id.*
12. *Id.*
13. Directive 2011/7, *supra* note 2, arts. 1–15, at 5–8.
14. United Nations Convention on Contracts for the International Sale of Goods arts. 58–59, 79, *opened for signature* Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

EU Member States are contracting parties to the CISG,[15] whether and how it interacts with Directive 2011/7 could influence which regime buyers prefer. Specifically, this Note will argue that the EU should have embraced the principles of the CISG in Directive 2011/7 because they provide more stringent payment standards and are in line with common principles of contract law already in force in the EU.

Part I of this Note will provide an overview of the problem of late payment in business transactions in the European Union, focusing specifically on how the practice hinders the growth of national and regional markets. Part II will discuss the legislative history and main components of Directive 2011/7, highlighting the substantive changes it made to its predecessor, Directive 2000/35/EC. Part III will analyze how portions of Directive 2011/7 conflict with the CISG. Finally, Part IV will provide a critique of Directive 2011/7 through an analysis of the EU's legislative powers and the common core of contract principles in the EU.

I. BACKGROUND AND THE EFFECTS OF LATE PAYMENT

The title of Directive 2011/7, "On Combating Late Payment in Commercial Transactions," is somewhat misleading. In addition to discouraging late payment of invoices (i.e., payment made after a contractual or statutory period of payment), Directive 2011/7 also seeks to reduce contractual payment periods in the first instance.[16] Thus, its overall thrust is to create a "culture of prompt payment" across Europe to encourage cross-border transactions.[17]

How did the European Union arrive at a need for this legislation? As will be discussed in Part II, Directive 2011/7 is not the first EU effort directed toward the subject of late payment, but

15. Ireland, Malta, Portugal, and the United Kingdom are the only EU Member States that are not Contracting States to the U.N. Vienna Convention on International Sale of Goods ("CISG"). *Compare Status: International Sale of Goods (CISG)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Nov. 4, 2012) (listing Contracting States to the CISG), *with* European Commission, *Countries*, EUROPA.EU, http://europa.eu/about-eu/countries/index_en.htm (last visited Nov. 4, 2012) (listing EU Member States).

16. *See* 2010 O.J. (C 255), *supra* note 10, at 44.

17. *See* Directive 2011/7, *supra* note 2, preamble, para. 12, at 2.

it is the most ambitious.[18] In the wake of the current financial and economic crisis, the EU has recognized that small- and medium-sized enterprises ("SMEs") are vital components of job creation and recovery capacity.[19] However, SMEs are particularly vulnerable to excessive payment periods[20] for two reasons. First, SMEs are more likely to accept unjustifiably long payment periods due to their often inferior bargaining power in negotiations with larger entities.[21] Second, because of their limited liquidity, SMEs are more sensitive to the consequences of late payment than their larger counterparts.[22] Indeed, for an SME, the administrative and financial burdens that result from long payment periods or late payments can be devastating.[23] Late payment often forces the SME to delay payment to

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18. *See infra* Part II.

19. *Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions –'Think Small First': A 'Small Business Act for Europe,'* 2009 O.J. (C 182) 30, 31.

20. *See* The Parker School of Foreign and Comparative Law, Columbia Univ., *Directive 2000/35/EC on Combating Late Payment in Commercial Transactions*, 7 COLUM. J. EUR. L. 293, 293 (2001).

21. *See* 2010 O.J. (C 255), *supra* note 10, at 43.

22. *See* The Parker School, *supra* note 20, at 293.

23. *See id.* With regard to the financial burden long payment periods impose, the Commission provides an excellent hypothetical to illustrate how the speed of payment periods can substantially deteriorate a firm's cash position:

> Take an example of a medium-sized enterprise with a turnover of ECU [European Currency Unit, (precursor to the Euro)] 12 million a year. Assuming an even spread of orders throughout the year and that invoices will be paid after 30 days, this company will have ECU 1 million in outstanding invoices each time. Assuming all trade debts are fully financed by bank loans, with an interest level of 10% this amounts to ECU 100 000 a year in financial costs on outstanding debt. If the enterprise has an average margin of 5% (ECU 6000 000), the interest on outstanding debt equals 16,7% of the profit. Assume now a different situation where invoices on average will be paid after 90 days. The outstanding invoices then amount to ECU 3 million and the financial costs on outstanding debt are 300 000. This equals 50% of profits. In other words, an increase in the payment time from 30 to 90 days takes away one third of the margin.

Communication from the Commission—Report on Late Payments in Commercial Transactions, 1997 O.J. (C 216) 10, 16. With regard to the administrative burden long payment periods impose, the Commission comments, its "suppliers and employees, as well as taxes, duties and State and social security contributions."[24] In order to meet its own obligations, the SME may have to obtain external financing, generating substantial additional costs.[25] Increased dependence on external financing or the inability to secure external financing may then lead to the worst-case scenario for an SME—bankruptcy.[26] As noted earlier, late payment causes nearly one in every four bankruptcies in the EU.[27]

Recognizing the importance of SMEs to the recovery of the EU economy, and their need for prompt payment, the European Commission (the "Commission") recommended that the European Parliament (the "Parliament") and the Council of the European Union (the "Council") take action to combat late payment and reduce payment periods.[28] The result was Directive 2011/7.[29]

> Time and manpower have to be spent collecting financial information on the solvency of potential customers and on managing outstanding claims. Legal action may also have to be taken to settle disputes. These costs are disproportionately high for SMEs, as they do not have specialised staff for debt recovery and the owners often have to intervene personally to chase debts. The problems are compounded when the late payer is in another country, and the creditor firm has to deal with different legal procedures in the other country.

Id.

24. 2010 O.J. (C 255), *supra* note 10, at 44. On December 16, 2012, the *New York Times* featured an article pointing out that Spanish employees often go weeks or months without receiving a paycheck, or even knowing whether they will receive a paycheck. Many employers said they wanted to pay their employees, but lamented "that their customers frequently pay late, or not at all." Suzanne Daley, *For Spaniards, Having a Job No Longer Guarantees a Paycheck*, N.Y. TIMES (Dec. 16, 2012), http://www.nytimes.com/2012/12/17/world/europe/in-spain-having-a-job-no-longer-guarantees-a-paycheck.html?pagewanted=1&_r=0&smid=fb-share.

25. *See* 2010 O.J. (C 255), *supra* note 10, at 43.

26. *See id.*

27. *See id.*

28. *See id.* at 44.

29. *See* Directive 2011/7, *supra* note 2, preamble, para. 3, at 1.

II. LEGISLATIVE HISTORY OF DIRECTIVE 2011/7

The first efforts to enact legislation at the EU level on the subject of late payments began in 1993.[30] In April of that year, Parliament adopted a resolution on SME participation in public procurement contracts, in which it requested that the Commission submit proposals to deal with the problem of late payment.[31] In November of 1994, Parliament repeated its request to the Commission in a resolution on an integrated program to favor SMEs.[32] In 1995, the Commission responded to Parliament's requests by adopting a recommendation on payment periods in commercial transactions.[33] Recommendations suggest action but are not legally binding on EU Member States.[34] In its recommendation, the Commission requested that Member States take appropriate measures in accordance with their own legal systems to encourage greater transparency of, and adherence to, contractual payment periods in commercial transactions in both the private and the public sectors.[35]

This recommendation, however, was ineffective.[36] A Commission report published on July 17, 1997, showed that the recommendation had done little in the way of reducing late payments.[37] The Commission found that "[i]n most countries . . . little or no action ha[d] been taken [to improve the payments situation between firms]."[38] In fact, the Commission concluded, "[a] prudent assessment of the available statistics on payment periods for the period 1994-1996 shows that the situation now is stable or slightly worse compared to the situation described in the recommendation."[39] Foreshadowing this result, Parlia-

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30. *See Commission Recommendation of 12 May 1995 on Payment Periods in Commercial Transactions*, 1995 O.J. (L 127) 19 (tracing the legislative history leading up to the recommendation).

31. *See id.*

32. *Resolution on the Commission Communication on the Implementation of an Integrated Programme in Favour of SMEs and the Craft Sector*, 1994 O.J. (C 323) 19, 21.

33. *See* 1995 O.J. (L 127), *supra* note 30, at 19.

34. *See* ERIKA SZYSZCZAK & ADAM CYGAN, UNDERSTANDING EU LAW 23 (2d ed. 2008).

35. *See* 1995 O.J. (L 127), *supra* note 30, at 19.

36. *See* The Parker School, *supra* note 20, at 293.

37. 1997 O.J. (C 216), *supra* note 23, at 10.

38. *Id.* at 11.

39. *Id.* at 15. Interestingly, the Commission went on to note, "This is all the more worrying as payment periods tend to get shorter in times of econom-

ment had in 1996 expressed doubt as to the appropriateness of a non-binding recommendation to ensure reasonable payment periods and called on the Commission to transform it into a directive.[40] After the dismal 1997 results, the Commission heeded Parliament's suggestion and announced its intention to make a proposal for minimum requirements to be incorporated into national legislation.[41]

On March 25, 1998, the Commission adopted a proposal for a joint Parliament and Council directive combating late payment in commercial transactions,[42] which eventually led to the adoption of Directive 2000/35/EC ("Directive 2000/35").[43] Directive 2000/35 is comprised of eight articles, wherein Articles 3 to 5 lay out the core provisions targeted toward combating late payments.[44] In sum, these articles give a creditor a statutory right to interest on late payment, retention of title, and accelerated recovery procedures for undisputed debts.

First, with regard to the creditor's right to interest on late payment, interest generally "become[s] payable" thirty days after the debtor receives "the invoice or an equivalent request for payment."[45] The creditor becomes entitled to such interest

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ic growth, and get longer in times of recession. This indicates an underlying structural problem which is not linked to business cycles." *Id.*

40. *Id.* at 11.

41. *Id.* at 18.

42. *See Commission Proposal for a European Parliament and Council Directive Combating Late Payment in Commercial Transactions*, at 11–17, COM (1998) 126 final (Mar. 25, 1998).

43. Directive 2000/35, of the European Parliament and of the Council of 29 June 2000 on Combating Late Payments in Commercial Transactions, 2000 O.J. (L 200) 35 (EC) [hereinafter Directive 2000/35].

44. *Id.* Article 1 outlines the scope; Article 2 defines terms; and Articles 6, 7, and 8 deal with procedural formalities—transposition into national law, entry into force, and addressees respectively. *Id.*; *see also* The Parker School, *supra* note 20, at 294.

45. Directive 2000/35, *supra* note 43, art. 3, at 37. Article 3 also provides when interest shall become payable in the following scenarios:

> (ii) if the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 days after the date of the receipt of the goods or services; or (iii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services; or (iv) if a procedure of acceptance or verification, by which the conformity of the goods or services with the contract is to be ascertained, is provided for by statute or in the contract and if the debtor receives the in-

provided: "(i) he has fulfilled his contractual and legal obligations; and (ii) he has not received the amount due on time, unless the debtor is not responsible for the delay."[46] Directive 2000/35 also sets a minimum rate for the statutory right to interest.[47] In its proposal for a directive, the Commission explained the need for a minimum statutory interest rate:

> If the statutory right to interest is to have a deterrent effect and is to provide adequate compensation for being paid late, the rate of interest needs to be set at a sufficiently high level. In other words, it should be at least as expensive to borrow money by paying late than to borrow from banks or other lenders at commercial interest rates.[48]

Heeding the Commission's proposal, Directive 2000/35 sets the level of interest for late payment at "the sum of the interest rate applied by the European Central Bank . . . plus at least seven percentage points . . . unless otherwise specified in the contract."[49] In addition to interest, the creditor is also entitled to compensation for all relevant recovery costs incurred through pursuing payment from the debtor, "unless the debtor is not responsible for the delay."[50] Finally, Directive 2000/35 provides that Member States "may fix the period after which interest becomes payable to a maximum of 60 days" for "certain categories of contracts to be defined by national law."[51]

Second, concerning retention of title, Directive 2000/35 provides that

> Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed

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> voice or the equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 days after this latter date.

Id.

46. *Id.*
47. *Id.*
48. COM (1998) 126, *supra* note 42, at 7.
49. Directive 2000/35, *supra* note 43, art. 3(1)(d), at 37.
50. *Id.* art. 3(1)(e), at 37.
51. *Id.* art. 3(2), at 37.

> between the buyer and the seller before the delivery of the goods.[52]

However, given that Member States differ with regard to the legal requirements relating to retention of title, sellers still have to use different clauses to ensure the effectiveness of those clauses in different Member States.[53] In this respect, Directive 2000/35 does not substantially affect the administrative burden the seller bears in becoming familiar with another Member State's legal procedures.[54] Nevertheless, as one scholar notes, "the incorporation of an important proprietary element in a European regulation is in itself a revolutionary development."[55]

Finally, Directive 2000/35 requires Member States to develop accelerated recovery procedures for unchallenged claims.[56] The Commission estimated that about 90 percent of cases seeking debt recovery in commercial transaction are undisputed.[57] Provided that the debt is not disputed, Directive 2000/35 requires Member States to "ensure that an enforceable title can be obtained, irrespective of the amount of debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority."[58] Accelerated recovery procedures benefit creditors in that "they are rapid, do not involve the intervention of a judge . . . and involve few formalities and little cost."[59] The Commission hoped that such procedures would give the creditor confidence to pursue the debtor in the debtor's Member State, where a writ of execution can be enforced almost instantaneously, as opposed to attempting to sue the debtor in the creditor's country of residence, which can lead to long delays in execution of judgment.[60]

These three provisions of Directive 2000/35—entitlement to interest, the retention of title, and rapid recovery procedures—are the "pillars" of the legal regime designed to combat late

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52. *Id*. art. 4(1), at 37.
53. *See* J. Michael Milo, *Retention of Title in European Business Transactions*, 43 WASHBURN L. J. 121, 138 (2003).
54. *See id.*
55. *Id.*
56. Directive 2000/35, *supra* note 43, art. 5, at 38.
57. COM (1998) 126 final, *supra* note 42, at 8.
58. Directive 2000/35, *supra* note 43, art. 5(1), at 38.
59. COM (1998) 126 final, *supra* note 42, at 8.
60. *Id.* at 9.

payment in commercial transactions.[61] Directive 2000/35 required Member States to transpose these provisions into their national laws and regulations by August 8, 2002.[62] However, its shortcomings became apparent in the wake of the 2008 economic crisis.[63] In a proposal to recast[64] Directive 2000/35, the Commission noted:

> [D]espite Directive 2000/35/EC, many businesses, in particular SMEs, do not charge interest when entitled to do so, which in turn decreases the motivation of debtors to pay on time . . . In addition, several key provisions of the Directive are unclear or difficult to implement in practice.[65]

The Commission found that late payment in commercial transactions continued to be a general problem in the EU, in part due to the deficiencies of Directive 2000/35.[66] The Commission commented that the problem was especially pronounced among public administrations in a number of Member States and criticized them as "displaying particularly bad payment behaviour."[67] The Commission was particularly concerned about the failure of Directive 2000/35 in the aftermath of the 2008 crisis because the risk of bankruptcies resulting from late payment of invoices "strongly increases in periods of economic downturn when access to financing is particularly difficult," and "[t]here were signs that [that] ha[d] started to happen as the current

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61. *Commission Proposal for a Directive of the European Parliament and of the Council on Combating Late Payment in Commercial Transactions (Recast) - Implementing the Small Business Act*, at 4, COM (2009) 126 final (Apr. 8, 2009).

62. Directive 2000/35, *supra* note 43, art. 6, at 38.

63. *See* COM (2009) 126 final, *supra* note 61, at 2, 4.

64. The Commission explains,

> Recasting is like codification in that is [*sic*] brings together in a single new act a legislative act and all the amendments made to it. The new act passes through the full legislative process and repeals all the acts being recast. But unlike codification, recasting involves new substantive changes, as amendments are made to the original act during preparation of the recast text.

Recasting, EUROPA, http://ec.europa.eu/dgs/legal_service/recasting_en.htm (last visited Nov. 4, 2012).

65. COM (2009) 126 final, *supra* note 61, at 4.

66. *See id.* at 3–4.

67. *Id.* at 4.

economic crisis unfold[ed]."[68] Because of these concerns, the Commission sought to recast Directive 2000/35 to introduce additional tools for combating late payments.[69]

The result was Directive 2011/7. In the recast, the three main pillars of Directive 2000/35 persist more or less unaltered.[70] The substantive changes to the directive relate primarily to shortening payment periods for public administrations, expanding entitlement to compensation for recovery costs, and strengthening unfair contractual terms.[71] For example, in business-to-government transactions, Directive 2011/7 imposes a maximum statutory period for payment. Where the debtor is a public authority, Member States must ensure that the period for payment does not exceed thirty days, with limited exceptions.[72] The preamble comments that this payment period is appropriate given that public authorities have more secure revenue streams and can obtain financing at more attractive conditions than a private enterprise.[73] While the preamble generally advises that Member States should ensure that "as a matter of principle, invoices, including to SMEs, for supplies and services are paid within one month to ease liquidity constraints," Directive 2011/7 does not require a comparable maximum thirty-day payment period for business-to-business transactions.[74]

With regard to recovery costs, Directive 2011/7 ensures that where interest for late payment becomes payable in accordance with its provisions, the creditor is entitled to obtain from the debtor a fixed sum of forty euros.[75] The creditor is also entitled to any recovery costs in excess of forty euros that were incurred as a consequence of the debtor's late payment, including, but

68. *Id.* at 2.

69. *Id.* at 4.

70. Directive 2011/7, *supra* note 2, arts. 3, 4, 9, 10, at 5–8; *see also* COM (2009) 126 final, *supra* note 61, at 8.

71. *See* Directive 2011/7, *supra* note 2, arts. 4(3), 6, 7, at 6–7.

72. *See id.* art. 4(3)(a), at 6. For transactions involving a public authority that carries out economic activities of an industrial or commercial nature by offering goods or services on the market as a public undertaking or a public entity that provides healthcare, Member States may extend the period for payment by the public authority to the creditor up to a maximum of sixty calendar days. *See id.* art. 4(4), at 6.

73. *See id.* preamble, para. 23, at 3.

74. *See id.* preamble, para. 7, at 2.

75. *See id.* art. 6, at 7.

not limited to, hiring a lawyer or a debt collection agency.[76] The goal of this provision is not only to enable the creditor to recover administrative costs related to late payment, but also to act as a further deterrent to debtors, since they will be liable for recovery costs in addition to interest.[77] Finally, Directive 2011/7 strengthens provisions about grossly unfair contractual clauses.[78] For example, a contractual term or practice which excludes interest for late payment,[79] or which excludes compensation for recovery costs, is presumed to be grossly unfair.[80] Grossly unfair contractual terms or practices are unenforceable or give rise to a claim for damages.[81]

Member States are required to bring into force the national laws necessary to comply with Directive 2011/7 by March 16, 2013.[82]

III. THE RELATIONSHIP BETWEEN DIRECTIVE 2011/7 AND THE CISG

A. Intra-EU Transactions for the Sale of Goods: Which Law Governs?

Within the EU, a cross-border transaction for the sale of goods may be subject to the provisions of two separate legal regimes, Directive 2011/7 and the CISG.[83] The CISG regulates international transactions for the sale of goods[84] and applies when a contract for a sale of goods exists between parties whose places of business are in different countries that are signatories to the CISG (the "Contracting States"),[85] or when the

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76. *See id.*

77. *See id.* preamble, para. 19, at 3; COM (2009) 126 final, *supra* note 61, at 8–9.

78. Directive 2011/7, *supra* note 2, preamble, para. 12, art. 7, at 2, 7.

79. *Id.* art. 7(2), at 7.

80. *Id.* art. 7(3), at 7.

81. *Id.* art. 7(1), at 7.

82. *Id.* art. 12, at 8.

83. CISG, *supra* note 14, art. 1.

84. *Id.* preamble, art. 1; *see also* JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG 1 (3d ed. 2008).

85. CISG, *supra* note 14, art. 1(1)(a). For example, imagine seller (*S*) does business in Country A, and buyer (*B*) does business in Country B. Both Country A and B are Contracting States to the CISG. If *S* and *B* enter into a contract for a sale of goods, by default the sale will be governed by the CISG. *See*

rules of private international law result in the application of the law of a Contracting State.[86]

To be clear, neither the CISG nor Directive 2011/7 intends to address all contractual issues associated with international sales.[87] Additionally, some matters may be covered by Directive 2011/7 but not the CISG,[88] and vice versa.[89] There are, however, provisions of Directive 2011/7 and the CISG that do overlap, namely those governing when payment by a buyer becomes due and when or whether a buyer becomes liable for interest.[90] The questions this Note seeks to address are how those overlapping provisions interact, and how the outcome of their intersection may incentivize buyers to prefer one law over the other.

A threshold issue in attempting to answer how these overlapping provisions interact concerns the status of directives adopted by Parliament and the Council. Some scholars argue that EU directives are "international agreements" within the

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LOOKOFSKY, *supra* note 84, at 3. As of November of 2012, 78 States have adopted the CISG. *See Status*, *supra* note 15.

86. CISG, *supra* note 14, at art. 1(1)(b). Private international law governs which law will apply when parties to a private transaction are from different countries, and the domestic laws of those countries conflict. To illustrate, imagine seller (*S*) does business in Country A, and buyer (*B*) does business in Country B. Country A is a Contracting State to the CISG; Country B is not. If *S* and *B* enter into a contract for a sale of goods, and the rules of private international law dictate that the law of Country A applies, then the CISG will govern. If, however, the rules of private international law dictate that the law of Country B applies, then the contract will be governed by the domestic sales law of Country B. *See* LOOKOFSKY, *supra* note 84, at 3.

87. *See* LOOKOFSKY, *supra* note 84, at 22.

88. For example, Directive 2011/7 covers transactions for the provision of services, as well as the delivery of goods. Directive 2011/7, *supra* note 2, arts. 1(2), 2(1), at 5. The CISG, however, covers only contracts for the sale of goods. CISG, *supra* note 14, art. 1. Other examples are questions concerning contract validity and title to property in the goods sold. Generally, the CISG is not concerned with "the validity of the contract or any of its provisions," nor "the effect which the contract may have on the property in the goods sold." CISG, *supra* note 14, art. 4. Directive 2011/7, on the other hand, contains provisions dealing with the retention of title, *see* Directive 2011/7, *supra* note 2, art. 9, at 8, and the validity of certain contractual terms, such as terms that exclude interest for late payment, *id.* art. 7, at 7.

89. For example, the CISG, but not Directive 2011/7, contains provisions governing the contract formation process, e.g., whether there has been an offer and an acceptance. CISG, *supra* note 14, arts. 4, 14–29; *see also* LOOKOFSKY, *supra* note 84, at 6.

90. *See infra* Parts III.B.1–3.

meaning of CISG Article 90,[91] which provides that the CISG "does not prevail over any international agreement which . . . may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement."[92] Consequently, these scholars conclude that directives prevail over the CISG.[93] Other scholars contend, however, that directives do not qualify as "international agreements," but rather "result in EU Member States having the same or closely related legal rules on matters governed" by the CISG, as provided for in Article 94.[94] This latter view is the predominate one.[95] According to this predominate view, in order for rules harmonized at the EU level by operation of a directive to apply by default over the CISG, EU Member States must make a formal declaration to the Secretary General of the United Nations.[96] No such declaration has ever been made.[97] Therefore, given that all but four EU Member States are Contracting States to the CISG,[98] the CISG applies by default to most intra-EU trade in goods.[99]

Nevertheless, many of the rules laid out in Directive 2011/7 will apply to intra-EU trade in goods, despite the CISG's preemptive authority. First, there are some matters addressed in Directive 2011/7 that are simply outside of the scope of the CISG, such as the retention of title and the validity of certain

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91. *See* Pilar Perales Viscasillas, *Late Payment Directive 2000/35 and the CISG*, 19 PACE INT'L L. REV. 125, 128 n.18 (2007).

92. CISG, *supra* note 14, art. 90.

93. Viscasillas, *supra* note 91, at 128 n.18.

94. *See* Ulrich G. Schroeter, *Global Uniform Sales Law—With a European Twist? CISG Interaction with EU Law*, 13 VINDOBONA J. INT'L COM. L. & ARB. 179, 190 (2009). Article 94(1) states, "Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States." CISG, *supra* note 14, art. 94(1).

95. Schroeter, *supra* note 94, at 190.

96. *Id.* at 190–91.

97. *Id.* at 190; *Status, supra* note 15.

98. Ireland, Malta, Portugal, and the United Kingdom are the only EU Member States that are not also Contracting States to the CISG. *See supra* text accompanying note 15.

99. The CISG applies unless parties affirmatively agree to opt out of the CISG regime. CISG, *supra* note 14, art. 6; LOOKOFSKY, *supra* note 84, at 27 n.113.

contractual terms.[100] When an issue is not governed by the CISG, courts and arbitrators must resort to domestic rules of law,[101] which in the cases of EU Member States include transposed provisions of directives. Therefore, sellers can rely on the protection afforded by those provisions regardless of which regime governs their transaction with a buyer.

Second, Directive 2011/7 also addresses some matters that are "governed" but not "expressly settled" in the CISG, most notably the matter of interest rates. In a "governed-but-not-settled" situation, a court or arbitral tribunal must first determine whether the matter can be resolved in conformity with a "general principle" on which the CISG is based.[102] If the matter cannot be settled by CISG general principles, courts and arbitrators must rely on supplementary domestic rules.[103] One persistent governed-but-not-settled problem arising under the CISG is determining the appropriate rate of interest in cases where payment of interest is due.[104] Because judges must resort to domestic law on this matter, the transposed provisions of Directive 2011/7 requiring Member States to fix the level of interest for late payment will govern. Consequently, creditors with a claim against a buyer for late payment are guaranteed to recover at the statutory interest rate provided by Directive 2011/7, irrespective of whether the transaction is governed by domestic law or the CISG.

Sellers of goods in the EU, then, can assume that certain safeguards of Directive 2011/7 will always be available to them. A seller may retain title to goods until those goods are paid for, defend against unfair contractual terms, and receive a fixed rate of interest for payment past due. All of these provisions are designed to insulate sellers from, and thus allay their fears of, late payment. A question remains, however, as to how these provisions impact a buyer's payment behavior. Certainly the prospect of paying a high interest rate discourages late payment by buyers. Prior to Directive 2000/35, the applicable rate of interest for late payment varied among EU Member States and was often lower than the commercial rates charged to bor-

100. *See supra* text accompanying note 88.
101. LOOKOFSKY, *supra* note 84, at 22.
102. CISG, *supra* note 14, art. 7; LOOKOFSKY, *supra* note 84, at 39.
103. *See* LOOKOFSKY, *supra* note 84, at 38.
104. *See id.* at 41.

row money from banks or other lenders.[105] By making late payment more expensive than a commercial loan, Directive 2011/7 should impact the behavior of those buyers who view late payment as a means of cheap financing.

However, the interest rate is only one factor impacting the cost of paying late. Other considerations include: (1) when payment is deemed past due, (2) when interest begins to accrue, and (3) the likelihood of being found liable for that interest. Both the CISG and Directive 2011/7 have provisions concerning these matters. In this situation, where a matter is governed by both the CISG and domestic law, even if that domestic law is implemented per the instruction of a directive, the CISG prevails.[106] Furthermore, since EU Member States have not made a CISG Article 94 declaration that the CISG should not apply to terms addressed by directives, the preemptive authority of the CISG on these subjects seems guaranteed. Yet there is an important caveat. In accordance with the principle of freedom of contract, CISG Article 6 provides parties whose transaction would normally be within the scope of the CISG with the power to partially or wholly contract out of its provisions.[107] Thus, in determining whether to opt out of the CISG, a buyer contracting with a seller in another EU Member State who is also a Contracting State may consider how each regime impacts the cost of late payment. Since late payment has plagued the EU despite the presence of the CISG, one might expect that Directive 2011/7 would impose standards stricter than, or at least as strict as, the CISG on these points so as not to incentivize buyers to opt out of the CISG in order to obtain more favorable treatment. However, this is not the case.[108]

B. Directive 2011/7 Versus the CISG

1. When Payment Becomes Due

The first point of comparison between Directive 2011/7 and the CISG is the default payment period established under each regime. That is, in the absence of an agreement between the parties, when does payment become due under Directive

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105. 1997 O.J. (C 216), *supra* note 23, at 10, 12.
106. *See supra* notes 94–99 and accompanying text.
107. CISG, *supra* note 14, art. 6; *see also* LOOKOFSKY, *supra* note 84, at 27.
108. *See infra* Part III.B.

2011/7, and how does that compare to the CISG? Unfortunately, Directive 2011/7 tacitly condones a longer default payment period than would be permissible under the CISG.

Directive 2011/7 does not explicitly establish a default payment period. Rather, it implicitly creates one through its provisions governing when a seller becomes entitled to interest. Under Directive 2011/7, when parties do not fix a date or period for payment in the contract, "the creditor *is entitled to interest* for late payment . . . 30 calendar days following the date" on which the debtor receives the invoice, or where that date is uncertain, "30 calendar days after" the buyer receives the goods.[109] As one scholar noted, because a breach of contract cannot constructively occur until interest becomes payable, Directive 2011/7 in effect grants the buyer a default payment period of thirty days.[110] The Court of Justice of the European Union ("ECJ") in *Telecom GmbH v. Deutsche Telekom* confirmed this reading, concluding that the directive "la[id] down . . . a period for payment of 30 days to be applicable in the absence of any contractual agreement . . . ."[111]

This default thirty-day delay in payment that Directive 2011/7 grants to a buyer lays in stark contrast to a buyer's payment obligations under the CISG. Under the CISG, where a contract is silent as to the date or period for payment, "[the

109. Directive 2011/7, *supra* note 2, art. 3(3)(b)(i)–(ii), at 5–6 (emphasis added).

110. Viscasillas, *supra* note 91, at 132, 134. In his article, Viscasillas analyzes the language of Article 3 of Directive 2000/35, *see id.*, the predecessor to Directive 2011/7, which provides that where the parties do not fix a date or period for payment in the contract, "interest shall become payable" after the expiry of the same time limits provided in Directive 2011/7. *Compare* Directive 2000/35, *supra* note 43, art. 3(1)(b)(i)–(iv), at 37, *with* Directive 2011/7, *supra* note 2, art. 3(3)(b)(i)–(iv), at 5–6 (stating instead that the "creditor is entitled to interest" after the expiry of one of the specified time limits). Presumably, a creditor is entitled to interest when such interest becomes payable. Thus, the change in language from Directive 2000/35 to Directive 2011/7 should not alter the substantive meaning of the provision, and an analysis applied to Article 3(3)(b) of Directive 2000/35 should apply equally to its correlative provision in Directive 2011/7.

111. Case C-306/06, Telecom GmbH v. Deutsche Telekom AG, 2008 E.C.R. I-01923, para. 22. In *Telecom*, the ECJ was interpreting Article 3(1)(b)(i) of Directive 2000/35. This interpretation should equally apply to the related provision in Directive 2011/7 because, although different language has been employed, the substance of the regulation remains the same. *See supra* note 110.

buyer] must pay [the price] when the seller places . . . the goods . . . at the buyer's disposal in accordance with the contract and this Convention."[112] Thus, in a sale governed by the CISG, payment becomes due as soon as the buyer receives the goods, not thirty days later.[113] This rule reflects a general principle of synallagmatic contracts in civil law or bilateral contracts in common law[114] that, "[u]nless otherwise agreed, the parties are to exchange their performance obligations at the same point in time."[115] The CISG then gives the seller a right to demand immediate payment from the buyer.[116] Directive 2011/7, however, does not give the seller that right; rather, it obliges the seller to grant the buyer at least thirty days of credit.[117]

Even more disquieting is that Directive 2011/7 appears to allow Member States to create a default payment period of up to sixty days for business-to-business transactions.[118] Article 3(5) provides, "Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor within the meaning of Article 7."[119] The plain meaning of this provision is not readily

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112. CISG, *supra* note 14, art. 58; *see also* LOOKOFSKY, *supra* note 84, at 95.

113. *See id.*

114. LOOKOFSKY, *supra* note 84, at 95.

115. *Id.* A synallagmatic contract is "[a] contract in which the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other . . . . The term *synallagmatic contract* is essentially the civil-law equivalent of the common law's *bilateral contract*." BLACK'S LAW DICTIONARY 374 (9th ed. 2010) (emphasis added). For examples of this principle in common law, see U.C.C. § 2-310(a) (2012) ("[P]ayment is due at the time and place at which the buyer is to receive the goods") or the Sale of Goods Act, 1979, c. 54, § 28 (U.K.):

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Id.

116. *See* LOOKOFSKY, *supra* note 84, at 95.

117. *See* Directive 2011/7, *supra* note 2, art. 3(3)(b), at 5–6; *Telecom*, Case C-306/06 at para. 22; Viscasillas, *supra* note 91, at 132. Although Viscasillas analyzed the language of Directive 2000/35, his analysis should apply to Directive 2011/7. *See supra* note 110.

118. *See* Directive 2011/7, *supra* note 2, art. 3(5), at 5–6.

119. *Id.*

discernible. At first glance, Article 3(5) seems to establish a ceiling, placing a limit on the duration of a payment period to which parties may agree. If this was the case, Directive 2011/7 would be more rigid than the CISG in this regard, as the CISG places no comparable limit on the parties' freedom to contract for longer payment periods. However, this most likely is not the case. After seemingly imposing a limit on maximum contractual payment periods, Article 3(5) of Directive 2011/7 goes on to say, "*unless* otherwise expressly agreed in the contract."[120] If parties can agree to payment periods longer than sixty days, albeit conditioned upon the terms not being grossly unfair to the creditor,[121] then the first clause of Article 3(5) cannot be interpreted to establish a maximum contractual payment period. Instead, it appears to grant Member States the discretion to implement a default payment period of sixty days for business-to-business transactions. This is precisely how Spain has interpreted this provision.[122] On July 5, 2010, in anticipation of Directive 2011/7, Spain passed *Ley* 15/2010, which incrementally decreases the default statutory payment periods in transactions between businesses as follows: eighty-five days until the close of 2011; seventy-five days during 2012; and sixty days beginning in 2013.[123]

If EU Member States interpret Article 3(5) as authority to implement default payment periods of sixty days, at what point does a creditor become entitled to interest for late payment? As previously discussed, Directive 2011/7 provides that, where the

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120. *Id.* (emphasis added).

121. *See id.* In determining whether a contracted payment period is grossly unfair to the creditor, a court should consider all circumstances, including "(a) any gross deviation from good commercial practice, contrary to good faith and fair dealing; (b) the nature of the product or service; and (c) whether the debtor has any objective reason to deviate from . . . the payment period as referred to in Article 3(5) . . . ." *Id.* art. 7(1), at 7.

122. *See* B.O.E. 2010, 163 art. 1 (Spain).

123. *See id.* art. 1 (Spain). ("El plazo de pago que debe cumplir el deudor será . . . [s]esenta días después de la fecha de recepción de las mercancías o prestacíon de los servicios.") ("The period for payment that the debtor must comply with shall be . . . sixty days after the date of receipt of the goods or provision of services."). Notably, although permitted by Article 3(3)(b)(b) of Directive 2011/7, Spain prohibits the possibility of parties agreeing to a payment period longer than 60 days. *Id.* ("Este plazo de pago no podrá ser ampliado por acuerdo entre las partes.") ("This period for payment cannot be extended by agreement between the parties.").

date or period for payment is not fixed in the contract, the creditor becomes entitled to interest thirty days after the buyer receives an invoice or the goods.[124] But if domestic law dictates a default payment period of sixty days, it would be illogical to answer that a creditor still becomes entitled to interest for *late* payment thirty days after the buyer receives the invoice or the goods if payment is not even considered late until after sixty days. Thus, Article 3(5) allows for a scenario whereby, under domestic law, the seller not only has no right to claim interest for late payment until sixty days after he delivers the invoice or goods, but also has no right to even expect payment in the first place until after the expiry of that period. This potential for a default payment period of sixty days is a drastic departure from the seller's right to demand immediate payment under the CISG, and is quite remarkable for a measure that purports to combat late payments.

2. When Interest Begins to Accrue

It should come as no surprise that the question of when payment becomes due and the question of when interest for late payment begins to accrue are closely related. On the latter question, similar to what has been shown for the former, Directive 2011/7 puts the creditor in a less favorable position than that which he would be in under the CISG.

The date from which interest begins to accrue under Directive 2011/7 is ambiguous. Although Article (3)(3)(b) clearly states that, when a contract is silent on the date or period for payment, "a creditor is entitled to interest for late payment" thirty days after the buyer receives the invoice or the goods,[125] that the creditor has a claim to interest as of that date does not necessarily mean that interest begins to accrue as of that date. It is plausible that interest begins accruing as of some earlier date, but a claim to the interest does not ripen until thirty days after the indicated events occur. Provided, however, that Article 3(3)(b) refers to the creditor being entitled to interest for "late" payment,[126] and that the ECJ has relied on this provision to conclude that payment is not considered late until thirty

124. Directive 2011/7, *supra* note 2, art. 3(3)(b), at 5–6.
125. *Id.*
126. *Id.*

days after the buyer receives the invoice,[127] the reasonable conclusion is that this is also the date as of which interest begins to accrue. Under Directive 2011/7, the default rate at which interest for late payment accrues for business-to-business transactions is at least as high as the rate charged by commercial lenders.[128] But the threat of a high interest rate will only affect a buyer's payment behavior insofar as he believes he will become liable for paying it. If a buyer's potential liability for interest does not begin until at least thirty days after the seller performs, it is impractical to believe that the threat of a high interest rate will persuade buyers who are intent on paying late to consider paying before then.[129]

The CISG, on the other hand, is clearer about when interest begins to accrue. Under the CISG, interest begins to accrue as of the date payment was due.[130] Because, provided the contract does not specify otherwise, the buyer must pay the price when the seller places the goods at his disposal,[131] interest for late payment begins to accrue from the day on which this event occurs.[132] As explained previously, since the rate of interest is a matter governed-but-not-settled under the CISG, courts and arbitrators will resort to domestic law to determine the applicable rate.[133] Because all EU Member States must transpose the provisions of Directive 2011/7, the domestic rules of each Member State will dictate that the applicable rate of interest for late payment in business-to-business transactions is the rate applied by the European Central Bank plus at least eight

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127. *See supra* text accompanying note 111.

128. *See* Directive 2011/7, *supra* note 2, arts. 2(5)–(7), 3(3)(a)–(b), at 5.

129. According to the 2011 European Payment Index, compiled by Intrum Justitia, 63% of European businesses believe late payment is intentional. INTRUM JUSTITIA, *supra* note 4, at 4.

130. *See* CISG, *supra* note 14, arts. 58, 78; LOOKOFSKY, *supra* note 84, at 138. Article 78 provides, "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74." CISG, *supra* note 14, art. 78. The term "sum that is in arrears" implies "that interest accrues as of the date the payment of the 'sum' in question is due." LOOKOFSKY, *supra* note 84, at 138. Although a U.S. Federal Court has interpreted Article 78 in this manner, other national courts may adopt a more narrow interpretation. *Id.* However, as Lookofsky points out, a narrower reading of Article 78 is not supported by CISG or policy reasons. *Id.*

131. *See* CISG, *supra* note 14, art. 58; LOOKOFSKY, *supra* note 84, at 95.

132. LOOKOFSKY, *supra* note 84, at 138.

133. *See* discussion *supra* Part III.A.

percentage points.[134] As a result, a seller will be awarded the same rate of interest for late payment under the CISG as under Directive 2011/7. Given that a seller's entitlement to the interest would ripen at least thirty days faster under the CISG than under Directive 2011/7, the directive seems to sell creditors short on the issue of interest as well.

3. Liability for Interest

The question of when interest for late payment begins to accrue, however, only has relevance insofar as a buyer is liable for that interest. Here, again, Directive 2011/7 is substantially weaker than the CISG. Under Directive 2011/7, a creditor has a claim to interest for late payment when, "(a) the creditor has fulfilled its contractual and legal obligations; and (b) the creditor has not received the amount due on time, *unless the debtor is not responsible for the delay*."[135] This final proviso may be troubling to a seller, as Directive 2011/7 provides no guidance as to how to determine whether a debtor is responsible for the delay in payment.[136] What if a debtor delayed payment because he was unsuccessful in obtaining external financing, or because he was insolvent? Would either of these scenarios result in a debtor being deemed "not responsible for the delay"? Directive 2011/7 does not provide a clear answer.

The CISG, on the other hand, provides a simple answer to the questions above: "no." Under the CISG, a buyer is strictly liable for interest for late payment.[137] Even if the buyer qualified for the narrow *force majeure* exemption provided for in CISG Article 79, he would only be exempt with regard to a claim for damages; he would *not* be exempt from a claim to interest.[138] Thus, on the issue of liability for interest for late payment, debtors would likely receive more favorable treatment under

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134. *See* Directive 2011/7, *supra* note 2, arts. 2(5)–(7), 3(3)(a)–(b), at 5.

135. Directive 2011/7, *supra* note 2, art. 3(1), at 5 (emphasis added).

136. *See id.*

137. *See* CISG, *supra* note 14, arts. 61, 78–79; LOOKOFSKY, *supra* note 84, at 150, 154–56.

138. *See* CISG, *supra* note 14, art. 79(5); LOOKOFSKY, *supra* note 84, at 150, 154–56. Force majeure is "[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)." BLACK'S LAW DICTIONARY 718 (9th ed. 2010).

the provisions of Directive 2011/7, with its potential escape valve, than under the strict liability standard of the CISG.

C. Intra-EU Transactions for the Sale of Goods: Which Law is More Favorable to Buyers?

In summary, Directive 2011/7 provides buyers with more leniency in matters concerning payment and interest than the CISG. To be sure, Directive 2011/7 has many laudable aspects that aid in alleviating the problems of late payment: the seller has the power to retain title in the goods until they are paid for in full;[139] clauses excluding interest for late payment or compensation for recovery costs are presumed to be grossly unfair;[140] and when found liable, the buyer must pay the seller at a default interest at least as high as that charged by commercial lenders.[141] Collectively, these provisions aid in bolstering the seller's confidence in a cross-border transaction for a sale of goods and dissuading the buyer from attempting to negotiate long payment periods or paying late. Nonetheless, as evidenced by its comparison to the CISG, Directive 2011/7 falls short on pivotal matters influencing a buyer's decision to pay, namely when payment becomes due, when interest begins to accrue, and liability for interest.[142] Consequently, instead of imposing strict sanctions on buyers of goods who choose to pay late, Directive 2011/7, in several regards, provides buyers with a more favorable environment in which to conduct their intra-EU transactions than the current default law, the CISG. Since most EU Member States are also Contracting States to the CISG,[143] one might question why Parliament and the Council shied away from adopting a directive that would require Member States to implement equally, if not more, stringent standards than those they have already agreed to under the CISG. As discussed below, this is the path the EU could have and should have taken in recasting Directive 2000/35.

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139. Directive 2011/7, *supra* note 2, art. 9, at 8.
140. *Id.* art. 7, at 7.
141. *See supra* text accompanying note 128.
142. *See* discussion *supra* Parts III.B.1–3.
143. *See supra* text accompanying note 15.

IV. A CRITIQUE OF DIRECTIVE 2011/7

A. Limits on the EU's Legislative Powers

Before critiquing the manner in which the EU addressed the transition from Directive 2000/35 to Directive 2011/7, it is important to understand when the EU can act. There are three principles that limit the legislative powers of EU institutions. First is the principle of conferral. Similar to the enumerated powers in the U.S. Constitution, the principle of conferral, found in Article 5 of the Treaty on European Union ("TEU"), gives the EU power to "act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein."[144] The Treaty on the Functioning of the European Union ("TFEU") clarifies these competences, distinguishing between areas in which the EU has exclusive competence and competences that the EU shares with Member States.[145]

The second and third principles are subsidiarity and proportionality, also found in TEU Article 5. In essence, the premise behind subsidiarity is that, when exercising a shared competence, the EU should only act if the Member States acting on their own cannot sufficiently achieve the objectives of the proposed action.[146] The principle of proportionality then requires that when acting the EU "not exceed what is necessary" to

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144. Consolidated Version of the Treaty on European Union art. 5, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU]. If the Treaties do confer a competence upon the Union, it remains with the Member States. *Id.*

145. Consolidated Version of the Treaty on the Functioning of the European Union art. 2, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TFEU]. In areas of exclusive competence, only the EU may act. In areas of shared competence, Member States may act to the extent that the EU has not done so. *Id.* Only five areas fall within exclusive EU competence: the customs union, competition rules, monetary policy for Member States using the euro, the conservation of marine biological resources, and common commercial policy. *Id.* art. 3.

146. TEU, *supra* note 144, art. 5. The second paragraph of TEU Article 5 reads, "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." TEU art. 5; *see also* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 117 (3d ed. 2011).

achieve the objectives.[147] The ECJ uses all three of these principles when reviewing legislative actions of the EU.

B. The Power to Harmonize National Laws to Ensure the Functioning of the Internal Market

1. The Breadth of the Power to Harmonize

Turning to the legal basis for Directive 2011/7, Parliament and Council use TFEU Article 114, which gives them the power to adopt measures for the harmonization of national legislation that "have as their object the establishment and functioning of the internal market."[148] The internal market of the EU is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[149] Without more, TFEU Article 114 appears to give the EU broad power to act to harmonize Member State laws in the name of achieving the internal market. After all, the very existence of more than twenty different national legal systems operates as a barrier to cross-border transactions.[150] However, in 2000, the ECJ in Case C–376/98 ("*Tobacco Advertising I*") delineated the extent of this power.[151] The ECJ held:

> "[A] measure adopted on the basis of Article 100a [now TFEU Article 114] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or distortions of competition liable to result there from were sufficient to justify the choice of Article 100a [now TFEU Article 114] as a legal

147. TEU, *supra* note 144, art. 5.
148. Directive 2011/7, *supra* note 2, preamble, at 1; TFEU, *supra* note 145, art. 114.
149. *See* TFEU, *supra* note 145, art. 26.
150. *See* Christian v. Bar, *From Principles to Codification: Prospects for European Private Law*, 8. COLUM. J. EUR. L. 379, 385 (2002); Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe*, 22 PACE INT'L L. REV. 145, 171 (2010).
151. Case C–376/98, Germany v. European Parliament and Council, 2000 E.C.R. I–8419 (commonly referred to as *Tobacco Advertising I*).

> basis, judicial review of compliance with the proper legal basis might be rendered nugatory."[152]

In other words, the EU does not have a general power to regulate the internal market; instead, it must show that diverging legal rules create a specific obstacle to the functioning of the internal market and that its harmonization action aims to eliminate it.[153]

2. Harmonization and Contract Law

The *Tobacco Advertising I* decision seems to make clear that the EU cannot adopt a wholesale harmonization of contract law. However, that does not mean that the EU cannot act selectively where differences in contract law are shown to impede the internal market. Indeed, the EU has issued at least twelve directives, including Directive 2011/7, in the field of contracts, all with Article 114 (ex Article 95 TEC) as their legal basis.[154]

Furthermore, limits on comprehensive harmonization have not stopped the EU from investigating its possibility. In 2003, the Commission issued an "Action Plan" on "A More Coherent European Contract Law."[155] In the Action Plan, the Commission announced its intention to finance extensive research in order to develop a "Common Frame of Reference" ("CFR").[156] The CFR was to be based on existing national legislation, the case law of national courts, the existing EC *acquis*,[157] and relevant binding international instruments, most notably the CISG.[158] The pronounced goal of the CFR was to serve as guide to European legislators in drafting and revising law, and to potentially serve as an optional instrument by which parties may

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152. *Id.* at I–8524.

153. A FACTUAL ASSESSMENT OF THE DRAFT COMMON FRAME OF REFERENCE–DRAFT 24 (Luisa Antoniolli & Francesca Fiorentini eds., 2009); Jan M. Smits, *Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures*, 67. LA. L. REV. 1181, 1190 (2007).

154. *See* Smits, *supra* note 153, at 1184.

155. *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law, An Action Plan*, COM (2003) 68 final (Feb. 12, 2003).

156. *See id.* at 16–17.

157. *Acquis communautaire*, or EC *acquis*, "includes all the EU's treaties and laws, declarations and resolutions, international agreements on EU affairs and the judgments given by the Court of Justice." *Eurojargon*, EUROPA, http://europa.eu/abc/eurojargon/index_en.htm (last visited Jan. 20, 2013).

158. *See* COM (2003) 68, *supra* note 155, at 16–17.

choose to govern their contractual relations.[159] In 2009, a Draft Common Frame of Reference ("DCFR") was published by a large international network of legal scholars.[160] The DCFR contains "principles, definitions and model rules" of European private law.[161] To date, however, the DCFR remains solely an academic text; neither the Parliament nor the Council has adopted a "political" CFR.[162] Nevertheless, the DCFR has been regarded as a restatement of the common core of the national private laws in Europe and of the EC *acquis*.[163]

3. Common Core of Contractual Payment Obligations

Relevant to Directive 2000/35, the DCFR speaks directly to the contractual obligations of time of payment and liability for interest. On time of payment, the DCFR adheres to the synallagmatic principle, stating, "If the order of performance of reciprocal obligations cannot be otherwise determined from the terms regulating the obligations then, to the extent that the obligations can be performed simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise."[164] On liability for interest, the DCFR recommends strict liability, providing, "If a payment of a sum of money is delayed, *whether or not the performance is excused*, the creditor is entitled to interest on that sum from the time when payment was due to the time of payment . . . ."[165] Thus, the DCFR closely mirrors the principles embodied in the CISG on these two questions.

C. The EU Should Have Used the DCFR to Enact More Stringent Payment Standards

When Parliament and the Council were recasting Directive 2000/35, they had the DCFR at their disposal. In fact, the DCFR states that it "is intended to help . . . in drafting any fu-

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159. *See id.* at 16; Hofmann, *supra* note 150, at 173.

160. STUDY GROUP ON A EUROPEAN CIVIL CODE & RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), DRAFT COMMON FRAME OF REFERENCE (DCFR) 3–4 (Christian von Bar et al. eds., outline ed. 2009) [hereinafter DCFR].

161. *See id.* at 9.

162. *See id.* 6–7; Martijn W. Hesselink, *The Common Frame of Reference as a Source of European Private Law*, 83 TUL. L. REV, 919, 920–21 (2009).

163. *See* Hesselink, *supra* note 162, at 925.

164. DCFR, *supra* note 160, at 234.

165. *Id.* at 251 (emphasis added).

ture EU legislation in the field of private law. By teasing out and stating clearly the principles that underlie the *acquis*, the DCFR can show how the existing Directives can be made more consistent."[166] Yet Parliament and the Council chose not to embrace the model rules contained in the DCFR or the similar principles embodied in the CISG when recasting Directive 2000/35. While the principles of subsidiarity and proportionality place a limit on EU action, these principles would not have acted as a barrier to the EU imposing more exacting standards for payment behavior, such as those embodied in the DCFR or the CISG, on buyers involved in intra-EU trade in goods.

With regard to the principle of subsidiarity, neither Directive 2000/35 nor the previous Commission recommendation resulted in improved payment behavior or shortened contractual payment periods. These dual failures strongly suggest that Member States could not sufficiently achieve these goals acting on their own. Indeed, the Commission relied on this reasoning to justify the need for further EU-level action in its proposal for a recast of Directive 2000/35.[167] In taking additional action, the EU incorporated provisions on unfair contractual terms and compensation for recovery costs into Directive 2011/7. Given the scale of the previous failures, however, the EU would have been warranted in going even further and strengthening provisions on when payment becomes due and when and whether interest for late payment accrues, especially since these considerations influence when a buyer decides to pay. Therefore, the principle of subsidiarity likely would not have acted as a barrier to these actions.

Finally, in keeping with the principle of proportionality, requiring Member States to bring their default contract law in line with the DCFR and CISG principles via a directive would not have exceeded what was necessary to combat late payment. Both a recommendation and a less stringent directive had failed to combat late payment; thus, a more exacting directive would have been a simple and rational next step.

CONCLUSION

There is no question that late payment is imposing substantial costs on European businesses, particularly on SMEs, a sec-

166. *Id.* at 38.
167. COM (2009) 126 final, *supra* note 61, at 6.

tor of the economy that the Commission has identified as crucial to Europe's economic recovery.[168] While Directive 2011/7 attempted to address some of the deficiencies of its predecessor Directive 2000/35, it left lax provisions addressing some of the pivotal factors that buyers will consider in determining when they should pay invoices. The EU should have and could have embraced the contractual principles governing payment obligations found in the CISG when recasting Directive 2000/35. The CISG sets more stringent standards for payment behavior and, as shown by the DCFR, represents the common framework within which most Member States already operate.

It is important to remember, however, that these standards represent default rules. This Note does not suggest that the EU should infringe on parties' freedom to contract. The freedom to contract, however, does not obviate the need for a stronger default regime, not simply because a default regime is important in the regulation of payment behavior, but also because, to some extent, it represents normative values. In many regards, what is required to change payment behavior in the EU is a culture shift,[169] and that shift should begin with more exacting default payment standards at the EU level.

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168. *See* discussion *supra* Introduction and Part I.

169. *See id.* at 3; Directive 2011/7, *supra* note 2, preamble, para. 12, at 2.

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