The Proposed Common European Sales Law – the Lawyers’ View
The Proposed Common European Sales Law – the Lawyers’ View

edited by
Guido Alpa
Foreword

For many years, the Italian Bar Council has focused on the harmonization of European private law. Since 2000 I have promoted several seminars with representatives from the legal profession and the University on issues concerning community law, fundamental rights, contract law, consumer law, civil liability, individual remedies and collective redress. We have kept track of each seminar in publications gathered in the Council’s book series (Consiglio Nazionale Forense, Seminari di diritto privato europeo, Giuffré, Milan).

Personally, I participated in the Study Group on the European Civil Code firstly on behalf of the University of Rome La Sapienza (since 1995), then as member of the Italian Bar Council, and later as President of this public body (since 2004). Moreover, as a member of the Study Group on European Private Law directed by Friedrich Graf von Westphalen, I collaborate in the initiatives of the CCBE together with the colleagues Ubaldo Perfetti, Vice-President of the Italian Bar Council, and Giuseppe Conte. With the latter, I also published an essay in which we reconstructed the process of text formation which offer a consistent discipline of the fundamental institutions of private law at European level (Riflessioni sul progetto di Common Frame of Reference e sulla revisione dell’acquis communautaire, in Rivista di diritto civile, 2008, I, p. 141 ff.) and with Mads Andenas I have written a book on this subject (Fondamenti di diritto privato europeo, Giuffré, Milan, 2005).

Not only the legal world but also the Italian academic world is particularly interested in these issues. The annual conferences of legal training organized by the Italian Bar Council always include a session dedicated to European Private Law. They are carried out with the support of the Association Civilisti Italiani, of which I am currently President succeeding Giovanni Iudica who, as a member of the Study Group, organized an important conference on the Draft Common Frame of Reference at the Bocconi University comparing the solutions of the fundamental problems of contracts and of civil responsibility applying the Italian Civil Code and the Draft CFR.

At the Faculty of Law of the University of Rome La Sapienza, together with Luca Di Donna and the other assistants Elizabeth Corapi, Rafi Korn and Nicolas Maione, we have reached the eleventh edition of the Master in European private law and cooperation.

These are all initiatives that evidence the interest expressed by the Italian legal culture for harmonization projects, as I had the opportunity to present in my speech at the conference on the Feasibility Text organized by Professors Reiner Schulze and Jules Stuyck in Leuven in July 2011 (Towards a European Contract Law, Sellier, Munich, 2011) and as Ubaldo Perfetti was able to confirm to the Vice President of the European Commission Vivian Reding at a meeting held last spring at the seat of the European Union offices in Rome.
Foreword

Last April a seminar organized by the Italian Bar Council in cooperation with the CCBE, the European Commission and the Master was held in Rome, under the direction of Friedrich Graf von Westphalen and Ubaldo Perfetti. That seminar’s reports are collected in this book. They represent further incentive for the implementation of those projects.

I am grateful to Sellier for accepting this volume in the series and publishing it in such a short time, and to Giuseppe Conte who took care of the scientific organization of that seminar together with of the editing of this book.

Rome, 5th November 2012

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Introduction
The Role of CCBE and of the legal practitioners in the process of harmonization of contract law

Marcella Prunbauer

1. Preliminary remarks

First of all, I would like to thank the Italian Bar Council (Consiglio Nationale Forense – CNF) for having co-arranged with the CCBE\(^1\) the very important conference on the Common European Sales Law (CESL), held in Rome last 11 of April 2012, in order to debate specific issues of the CESL Regulation-Proposal\(^2\) from the view point of legal practitioners. I was particularly honoured to address that distinguished audience in my capacity as President of the CCBE in 2012 at the opening of a conference which dealt with one of the most visionary, most interesting and in various aspects most challenging European law initiatives – challenging prospects for every lawyer in Europe and challenging equally for the lawyers’ clients, which are both consumers and businesses. I am equally honoured, now, to introduce this book which collects the reports of the conference.

For those, who are not yet familiar with the work of the CCBE please allow me a short introductory remark: the CCBE, Council of Bars and Law Societies of Europe, is the representative European organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries and 11 further associate and observer countries. During its now more than 50 years of existence the CCBE has worked hard to contribute towards a compact “corpus legalis” for European lawyers, to contribute to European draft legislation and European law developments, to intervene before European courts including the ECHR and to continuously promote the area of freedom, justice and the rule of law for the benefit of European citizens – the lawyers’ clients. This substantive work of the CCBE is being prepared in currently (17) committees and (11) working groups.

The developments towards a potential European contract law have been closely followed within the CCBE under the guidance of a specifically established “European Contract Law Working Group” which has been established at the very beginning since the Commission’s ambitions in this direction became visible.

I am rather proud to inform you that the first – in principle positive and welcoming CCBE resolution on European Contract law was passed already in

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\(^1\) Council of Bars and Law Societies of Europe, www.ccbe.eu.
\(^2\) COM 2011 (635) final.
The Role of CCBE and legal practitioners in the process of harmonization

Nov 2006. The CCBE resolved that it was in full support of the initiative to create a Common Frame of Reference in order to improve quality and coherence of the existing acquis and future legal instruments in the area of contract law. The CCBE European Contract Law working group has meanwhile been upgraded within the CCBE to a European Private Law Committee with broader scope.

I know that many conferences have taken place since the CESL Proposal first was promulgated by the European Commission on October 11, 2011. These conferences, however, were mainly involving academics and politicians, both as speakers and attendees, but as it seems, hardly any lawyers as practitioners. That was one of the main reasons why the CCBE decided to go on and co-organise with Italian Bar Council the conference on CESL held in Rome.

The “success” of any new European Law, but in particular one being an optional instrument, must in my view, first of all, be achieved among and through the legal practitioners. I.e., the new optional instrument and its consequences must be understood and accepted by the legal profession, who will “translate” and recommend it to its clients.

Lawyers are the first port of call for citizens in need of legal advice or representation. Only if practicing lawyers after due consideration of all circumstances can and will recommend the CESL in their day-to-day-work as an option of sales law being superior or at least comparable to the otherwise applicable national law, CESL will come to substantial real life and will be voluntarily chosen by parties as a basis for their cross-border transactions, be it a b2c or a b2b-sales contract.

At present, some Member States seem to be rather hesitant and critical to accept the proposed CESL as an optional instrument for a Common European Sales Law. One of the main reasons seems to be that there have been some doubts whether the legal basis of Art. 114 TFEU that has been chosen by the Commission, would be valid. Since I heard that equally the Legal Service of the Council has confirmed that Art. 114 provides a solid basis, that might no longer be a reason for legal uncertainy or confusion. Another reason for the opposition against this Proposal is that it is contested whether CESL would be not violating the principles of subsidiarity and proportionality (Art. 5 Sec. 3 and 4 TFEU). Further arguments go more into the substantive law details of provision itself and questions which arise and will practicably arise out of the fact that certain legal areas are excluded, i.e. missing, the proposal sufficiently certain and balanced in view of an over protection of consumers.

I do not want to go into details of what is rather complicated legal debate and I certainly do not want to pre-empt the contributions collected in this

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3 Art. 4 Draft of the Order (DO).
4 The österreichische Bundesrat, the deutsche Bundestag and the House of Commons have submitted Notices to the Commission holding that the Proposal violates the principle of subsidiarity pursuant to Art. 5 Sec. 3 TEUF and the principle of proportionality pursuant to Art. 5 Sec. 4 TEUF.

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2.1 The Underlying Idea of the CESL

As to the underlying idea of the CESL I am optimistic. Why? But first let me clarify again: I can and will certainly not prejudice the currently on-going substantive work and deliberations within the CCBE’s European Private Law Committee in charge, and, whilst today expressing my personal views about the CESL, I certainly do not want to pre-empt any decision of the CCBE Standing Committee about it. But a view on the many Position Papers\(^5\) that have already been adopted by the CCBE since 2006 in consideration of the principle idea of a possible European Contract and European Sales Law – all were supported by the vast majority of the delegations – speak a very distinct language.

The basic idea underlying behind all these CCBE Position Papers is simple: lawyers play and have to play a pro-active role in shaping any future legal act, be it a European Directive or a Regulation. This goal, however, can only be achieved by accepting that any such new optional CESL instrument will be and must be somewhat different than the respective national laws. Thus, a general impulsive “no” to new challenges and new developments has been rejected both by the members of the CCBE Committee in charge and by the national delegations. Truly speaking, not yet by all of them, but by the overwhelming majority.

The pro-active stance taken by the members of the CCBE European Private Law Committee could only be taken due to a considerable knowledge of lawyers in the field of comparative law. On that basis it was possible to find a common ground how to accept to shape general guidelines of European Contract Law, being a viable and accepted law for future generations.

\(^5\) These position papers are available at the following website: http://www.ccbe.eu/index.php?id=94&id_comite=59&L=0.

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As stated before this pro-active approach implies that the CCBE was and is of the opinion that lawyers have something to add and to contribute to the overall political debate. Lawyers know best what are the legal needs and demands of their clients, i.e. the ordinary citizen, as they day by day ask their lawyers to defend and represent their interests in the search for practicable, understandable, just and equitable solutions of conflicts that have arisen.

Finally, the CCBE believes that the approximation of the divergent private laws of the Member States should not necessarily be achieved by virtue of more and more new Directives and Regulations, as those will cut more and more – and very deeply – into the flesh of the national laws, thus creating inconsistencies and sometimes, as we have already witnessed, even systemic conflicts. Thus, to the view of the CCBE an optional instrument on an – and this is very important! – opt-in basis, could be more appropriate to overcome the complex issues of even more required harmonization of national laws and outbalance practical issues of potentially several applicable national laws for one transaction.

2.1.1 The Large Scale Approach

The next Position Paper taken by the CCBE in January 2008 represents the work on four major problems areas, namely: on freedom of contract, on Standard Terms of Contract, on the Notion of Consumer and Professional,6 and on Remedies and Damages.7 This Resolution was not supported by the UK delegation, but by all others.

I cannot repeat here in detail what has been said in this Position Paper. But I would, at least, try to outline some main aspects in order to demonstrate how they indeed fit into the scheme of the Proposal of CESL which you will debate today.

The CCBE held that the “principle of freedom of contract” must be considered to be a “fundamental principle of contract applying to contracts with both European citizens and enterprises.”8 I may remind you that this principle is now enshrined in Art. 1 of CESL.

With regard to Standard Terms of Contract the CCBE stressed that the “grey list” of Art. 3 of the Directive 93/13/EEC on Unfair Terms in Consumer Contracts should be fully respected by all Member States in order to “achieve a higher level of consumer protection”. There is hardly any doubt that this proposal has basically been taken care of in Art. 83-85 of CESL, containing a general provision and a “black” and a “grey list” of standard contract terms to be

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6 The CCBE hardly ever used the now common term „trader“  
8 Vide p. 3 ibid.

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either “always unfair” (Art. 84 CESL) or to be presumed to be unfair pursuant to Art. 85 CESL. However, the CCBE did not vote for a “black” list, but held that the Member States could do in order “to achieve a higher level of consumer protection, if so needed”.

Moreover, I would like to underline that the CCBE maintained the position that due competence to “apply any terms of the grey list” should no longer be vested solely into the national courts, but rather to the ECJ. This is exactly the consequence of the Proposal of CESL.

It seems to be very important that the CCBE in the same Position Paper has also addressed the issue whether Standard Terms of Contract should be controlled by the courts in b2b-transactions. The CCBE so agreed and maintained the position that “gross deviations from legal principles and good commercial practice” should be the benchmark for the unfairness test. Thus, it was held that Art. 3 Sec. 3 of the Late Payment Directive No. 2000/35/EC should be taken as the legal basis, as this provision seemed to be “appropriate to protect the “weaker” party, e.g. a non-consumer”.

If one now reads Art. 86 of CESL one will find a striking similarity. But the proposal of the CCBE goes one important step further. The benchmark is not only “good faith and fair dealing” in order to determine whether a clause “grossly deviates” therefrom. The stand taken by the CCBE requires a finding whether the respective Standard Contract Term contains a “gross deviation from the legal principle”, i.e. the respective provision of the applicable law.

I do not argue that this approach is better equipped than Art. 86 of CESL to adjudicate whether a specific Standard Term of Contract is unfair. But it must be stressed that the “legal principle” is a much more solid basis to adjudicate whether the deviation of the Standard Term is “gross” and thus unfair in comparison to the rather general test whether the rather unspecified principles of “good faith and fair dealing” have been violated.

I also admit that the definition of “good faith and fair dealing”, as contained in Art. 2 lit. b) of the CESL is rather rigid as it spells out that “good faith and fair dealing” must relate to a standard of conduct that respects the interests of the other party. This again is subject to on-going discussions.

Finally, I would like to draw your attention to the last proposal of the CCBE that has been made in the Position Paper of January 2008. The majority of the delegations held that it is inappropriate to spell out many, namely pre-contractual information duties to be observed by the professional towards the consumer, without at the same time addressing the remedy available to the consumer in

Vide p. 4 ibid.
EuGH 1.4.2004 – C-237/02 – Freiburger Kommunalbauten.
Vide p. 4 ibid.
Vide p. 4 ibid.
Ibid.

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case the professional has breached its information duty.\textsuperscript{14} The CCBE favoured a higher degree of consumer protection and a damage remedy in this respect, not leaving the remedy to the national laws. This by now is exactly the position taken by Art. 29 of the CESL.

2.1.2 \textit{Then: the Resolution Concerning the Common Frame of Reference}

Soon after the DCFR had been published in October 2009 the CCBE passed another Position Paper.\textsuperscript{15} There are two elements in this Position Paper that are worth mentioning: First, the CCBE proposed a Sales Law for b2c and b2b-transactions – not restricted to cross-border contracts – on the basis of the Sales Directive No. 99/44/EC, thus enlarging its scope to b2b-transactions also. Second, and even more important the CCBE resolved that the remedies to the buyer should encompass the remedy for damages on the basis of the proposals of the DCFR.\textsuperscript{16} Astonishingly, you will find almost the same wording in the Articles 159 sequ. of CESL. The claim for damages is not based on the negligence principle, but foreseeability shall be the decisive test. However, the measure of damages available to the damaged party, as suggested by the CCBE, does not go so far as to also cover damages for pain and suffering, as spelled out in the definition of loss in Art. 2 lit. c) of the CESL.

3. \textbf{The Way Forward}

Can CESL achieve what it sets out to do? Given the work of the CCBE so far, it seems very likely that the CCBE and its newly named “European Private Law Committee” will not deviate from the essence of the Position Papers that have been passed with hardly any objection in the past. As to possible caveats, I personally think that sufficient time to consult in depth with stakeholders must be given and ideas what to improve should be fairly taken up in the legislative process. Conferences and volumes like these are important to foster such exchange of views.

But, of course, I cannot and will not prejudge either the evaluation of the experts in the Committee nor the political decision which has then to be taken by the Standing Committee of the CCBE in the future in relation to the Proposal of CESL.

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Marcella Prunbauer
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\textsuperscript{14} Vide p. 5 ibid.
\textsuperscript{16} Sec. II – 3: 701 sequ.
I also could imagine that the Committee might refrain from going into the details of the Draft Proposal. For an organisation that represents more than one million lawyers in 31 full Countries such work on specific details could be an adventure that might lead to nowhere.

It should maybe be said how the CCBE works. To accept simple majority votes, provided that just more than fifty % have been met, never has been the way the CCBE has presented its views to the Commission or to the Parliament. Strong majorities are needed in order to make the voice of the lawyers to be heard in public. This is the general philosophy.

Thus, I believe that the Committee in charge and the CCBE will review the Position Papers taken so far in light of the respective principles now laid down in the Proposal of CESL.

I am almost certain that also in the future a pro-active stance will be taken. I do not doubt that the CCBE will come out in favour of the substance of the Proposal of CESL, as the Position Papers passed already are consonant with many provisions of CESL.

I am, the CCBE is convinced that CESL should have a vital future. But this hope is based on the promise that the CCBE will closely watch and contribute the future law-making process of CESL.
Some Preliminary Remarks

Friedrich Graf von Westphalen

When I took over the honour and the responsibility to chair a newly created committee of the CCBE dealing with „European Contract Law“1 in 2005 no one of us was expecting that we had to deal with a Draft of a Proposal of a Common European Sales Law2 only six years later. Some of the members of this committee, however, had a dream that one day the Member States of the European Union could promulgate a Directive or a Regulation for a European Contract Law in the foreseeable future. But there were more members who believed that the best Europe could achieve in this respect would be to agree upon a “toolbox”, proposing some rules and some general definitions of general contract matters mainly in order to harmonize some of the existing divergences that had been created by the acquis communautaire in a number of Member States.

But on October 11, 2011 – a historical date – the Commission issued its Proposal COM (2011) 635 (final). Of course, this proposal did not come out of the blue. Many academics, lawyers and politicians had worked in the past in order to promote this ambitious project. In 2010 three members of the CCBE committee on “European Contract Law” had been invited by the EU-Commission to participate as stake-holders in order to discuss with members of the EU-Commission and many academics the particulars and the best practical approach for a Common European Sales Law.

Two aspects were dominant: First, it was necessary to incorporate the entire acquis communautaire into such a new body of law, and, second, to not restrict the scope of such new law simply to contracts between traders and consumers, but to also include b2b-transactions. There was a common understanding, though by no means undisputed, that the best approach to achieve this very ambitious goal was to rely on the findings that had been incorporated into the “Draft Common Frame of Reference”.3 But more important, there was a common understanding amongst the three members of the CCBE that it would not be advisable to issue a new Directive or a new Regulation, as these instruments tend to cut very deep into the flesh of the national laws, hardly leaving the national law enough room to breathe on its own terms in the long run. Therefore,

1 This Committee has recently be renamend and reoganized and now is called „Committee on European Private Law“.
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it seemed advisable to try out a new instrument, proposed by the Commission, namely: an Optional Sales Law, based on the principles of freedom of contract and requiring both parties – be they traders or consumers – to agree on its applicability as a second regime of national sales law.

During the past years many debates took place within the “CCBE-Committee on European Contract Law”, pros and cons were exchanged. Lively debates were programmed. There hardly ever was unanimity. This could not be reasonably expected, as many members in that committee fought for the “survival” of their own law, at least, for the perseverance of the basic ideas and principles of their own laws. But right from the beginning a vast majority supported the idea to create a European Contract Law, being different from their own national laws. Creativity was at stake.

A number of Resolutions were passed during the last five years by the Standing Committee of the CCBE. They all are listed in the presentation of the President of the CCBBE in this book.4

It is worthwhile to mention and to underline that all these Resolutions were inspired by a pro-active attitude. No other profession is as conversant with day-to-day needs of the ordinary citizen. Thus, they are more interested in legal certainty and in establishing reasonable and equitable rules in any new instrument. Therefore, the majority of the national delegations were of the opinion that any new European law should be tested against this background and the know-how of the legal profession should be considered to be an important filter. After all, lawyers tend to be different from professors and academics. Dogmatic differences and incoherencies that might show up in very rare instances in practise regularly do not cause too many headaches to the legal profession, as they will be left to be decided by the courts.

The CCBE-Committee right from the beginning decided not to argue any details of any Proposal issued by the Commission, be it the “Green Paper” of the Commission or the Draft of the Consumer Directive.5 Rather, the Committee took the general position to articulate its ideas and propositions on basic legal principles, such as freedom of contract, protection of the consumer and the trader against unfair terms of contract, on remedies in case of delivering a non-conforming good, and the particulars of delivery etc. At the end, this “political” attitude proved to be very fruitful, as the debate on these issues was concentrated on the “big points” and progress was made in a rather short time. Moreover, on the basis of general principles proposed by the Committee to be voted on in the Standing Committee the national delegations of all 37 CCBE-Members were able to either agree or dissent without getting lost in the mass of details.

4 At p. •••
Consequently, also the topics dealt with in this book – they have been presented in a conference in Rome on April 11, 2012 – are designed to mainly address major points and problem areas of practical importance for the legal profession.
Part I
General Context, fundamental rights and objectives of the proposed regulation on the CESL
General context and objectives of the proposal for a Regulation on a Common European Sales Law

Dirk Staudenmayer

I would like to structure my introduction to the substantive discussion into two major parts.

Firstly I will explain why in the Commission’s view the Common European Sales Law is beneficial for your clients, and then I will go on to talk about a few more substantive issues before I conclude.

I. Benefits of the Common European Sales Law for lawyers’ clients

Why is the Common European Sales Law good for your clients? For those of your clients who trade to consumers, i.e. are in a business-to-consumer (B2C) relationship, the most important reason why this proposal on the Common European Sales Law is good for them is that those businesses will be able to export their products on the basis of one single law and one single IT (Information Technology) platform. This will save them a lot of transaction costs which arise because of the differences between different national contract law rules and the international private law situation that is in place due to the “Rome I Regulation”. Under Article 6 paragraph 2 of the Rome I Regulation, a business must check if the mandatory rules of the country of the consumer prescribe a higher level of consumer protection than the law of the business’ country, (which is in almost in all cases the law chosen by the trader’s standard terms and conditions). If this is the case the business has to apply those rules with a higher standard. This means, even if there are no rules with a higher standard of consumer protection, a business must still check and this causes costs.

1. Transaction costs of cross-border business

The Commission has calculated that it costs each business around ten thousand euros per each Member State into which a business wants to export to. On top of this, there is an additional cost of three thousand euros if a business needs to adapt its website.
This amount is not so much if you are a large company such as Siemens or Nokia, but it is a lot if you are a micro, small or medium sized enterprise.

In fact 98% of all European companies are such micro, small and medium sized enterprises and this is the main target audience we are aiming our proposal at. But even for big companies with their own legal department this is interesting. For instance, Nokia, a Finnish multinational company marketing their products in all countries of the European Union, told us that this proposal would save them an enormous amount of costs.

If this is interesting for B2C – for business-to-consumer transactions –, what about B2B – Business-to-business transactions? If you are in a B2B relationship you do not have the problem of having to respect mandatory laws of the country of the consumer. If you are the party with more bargaining power you would most likely use your own national law as the choice of the law applicable. Even if you are not the party with more bargaining power, you may be a big company and therefore have a legal department of your own which means that you can handle the costs of applying a foreign law.

So, in a relationship between two big businesses the added value is not so large, and that is why the Commission left those transactions out of the scope of the proposal.

It becomes more interesting if you are in a relationship between a big business and a small and medium sized enterprise. The party with less bargaining power (most often, but not necessarily this is the small or medium sized enterprise) is, in a way, in the same situation as a consumer because that party before concluding the contract will have to check what are its rights and obligations according to the law which applies to the contract because this influences for instance the price calculation. So here there is added value but admittedly the added value is not as big as in B2C transactions.

It becomes much more interesting if you want to enter into a contract in a situation between two parties which have the same level of bargaining power, like two SMEs.

For example, if a French SME, which is established in Alsace is selling cross border to a German SME which is established in the Black Forest, they would obviously both advocate their national law as the choice of law applicable to the contract. This is normal because it is their law, the law they know and is the one that they think is the best although, it could possibly not be the best for that contract. The Commission has done a survey where we have found that 55% of SMEs surveyed, said that the time and effort, i.e. the money they have to invest, in order to negotiate the applicable law in a contractual relationship where none of the parties has a considerably higher bargaining power than the other party, it is an obstacle for them. Here, in a B2B relationship between two SMEs the Common European Sales Law will have some added value, because SMEs can avoid the hassle of negotiating the applicable law and can refer to a neutral law which they can both choose in the confidence that neither of them will lose out.
Looking at the consumer side, consumers will have an economic advantage, because there will be a larger choice of products at more competitive prices: therefore consumers win by having a bigger choice of cheaper products, which at the moment they do not have.

The Commission launched a survey which took a basket of one hundred popular consumer goods and checked if these goods were available online in all national markets in the EU. We found that in Cyprus ninety eight of these one hundred products were not available online in the national market. One could argue that the low level of exports to Cyprus could be due to logistical disadvantages, however, there were also a further twelve countries, where more than fifty of the one hundred products were not available online on the national market. Another study looked at price discrepancies in EU countries. It found that in 50% or more of the cases, consumers in 13 Member States could have bought products at least 10% cheaper abroad than in their domestic market.

This means that at present consumers do not have a sufficiently large choice and they buy more expensive products. So if you had more cross-border exports, consumers would have a larger choice at a cheaper price.

This is the economic advantage. There is a legal advantage, too: as a consumer, one would not want to buy a product and be in a considerably worse situation with regards to consumer protection rights, compared to one’s national law.

2. Consumer protection aspects

Therefore we had to assure – and have assured – that the level of consumer protection at which consumers buy (if they choose the Common European Sales Law as the applicable law of the contract) is comparable or even higher than almost all national laws. This means the consumer not only has an economic advantage in the form of a larger choice and more competitive price but he also has at the very least an equal and possibly better legal protection under this law. For instance if an Italian consumer buys on the basis of the Common European Sales Law, as a consumer, he will in some instances be better protected than in national law.

For example, under the Common European Sales Law an Italian consumer who has bought a defective product has the free choice of remedies, while in Italy going back to the implementation of the Directive on the Sale of Consumer Goods there is a hierarchy of remedies starting with repair and replacement and as next step – only then – price reduction and rescission of the contract. In this case for Italian consumers, the Common European Sales Law consumer protection rules provide a free choice of remedies which is a higher level of consumer protection than in national law. Therefore Italian consumers cannot lose out.

But consumers still have a choice as to whether or not they want to use the Common European Sales Law – as do businesses. Even if the consumer says “I prefer to buy at the shop around the corner because I know and trust the guy”,

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this is fine, he can do that. But if he wants to buy a product on the internet and
is confident in the brand of the product and can also get a cheaper price, he can
choose to buy using the Common European Sales Law.

There is another aspect of choice in relation to this proposal, this time for
businesses. Stakeholders have said in discussions that this high or higher level
of consumer protection represents costs for businesses: This is true – a higher
level of consumer protection comes at a price. But we have intentionally set the
benchmark rather high and the answer we give to those business stakeholders
is to tell them that they also have a choice. If they think they save considerable
transaction costs by using the Common European Sales Law which outweigh
potential disadvantages (due to the high level of consumer protection), then
they may find it economically advantageous to choose to use it. And if they
do not have confidence in their products and they think they will face a lot of
consumer claims because of frequently defective products and those potential
risks outweigh the transaction cost savings, they will not choose it.

It is a simple commercial choice for businesses, but nevertheless a choice for
both parties where neither consumers nor businesses can lose out.

3. The situation in Italy in particular

Looking at the situation of Italy in particular:

Professor Perfetti has recently published an article in an Italian newspaper,
where he pointed out two major advantages for Italian lawyers with which we
fully agree.

Firstly, this instrument enables Italian lawyers to expand their professional
activities beyond borders.

Secondly it helps you, Italian lawyers, to help your business clients to export
more and to protect consumers which, as Professor Perfetti has pointed out, is
a constitutional mission of Italian lawyers.

So it is clearly a benefit for Italian lawyers and for Italian businesses. We
conducted surveys before we adopted the proposal and looking at the figures
for Italy was particularly revealing. For example, in response to the question:
“would you increase your exports if you could choose one single European
Contract Law?” 50% of Italian businesses said “yes”. This is higher than the
European average of 40% positive responses. That was for B2C but for B2B the
result was also higher than the EU average. 41% of Italian businesses said they
would increase their exports, while on average, at the EU level, 34% of busi-
nesses said the same.

It is interesting to see that the Italian figures for both B2C and B2B are
higher than the EU average. Why is that? Most probably because Italy is an
export-oriented country and you have a lot of companies who want to increase
their exports. There is also a strong interest for the Italian economy as a whole
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to do that. If, for example, one looks at the growth forecast for Italy, last year growth was forecast at 0.5%, this year it is forecasted to be 0.1%.

II. Substantive Questions

And now, in the second part of my intervention a few words about some substantive questions which have also been raised partially by many commentators.

1. The legal base – Article 114 TFEU (and not Article 352 TFEU)

I start with the legal base.

As you know the Commission has suggested Article 114 TFEU as the legal base. According to case law of the European Court of Justice, we had to demonstrate obstacles for the internal market and that was not difficult to demonstrate. Firstly in the B2C area we have legal obstacles in the form of different mandatory national rules and I have also already explained that in analysing these levels of mandatory protection businesses are presented with economic costs. In the business to business area you have also the same economic obstacles. These are the obstacles which led us to suggest Article 114 TFEU as the legal base.

There is some discussion about Article 352 TFEU as possible legal base. First of all I would like to stress that according to a constant case law of the European Court of Justice, Article 352 TFEU is only a subsidiary legal base. Only if there is no other legal base in the Treaty, can Article 352 TFEU be used.

I have just explained that in Article 114 TFEU the requirements according to the ECJ are fulfilled, in which case one could not even refer to Article 352 TFEU.

But let us nevertheless have a look at Article 352 of the Treaty because of the case law on the European Cooperative Society.

In this case and in two other cases dealing with intellectual property titles, the Court of Justice confirmed Article 352 TFEU as the legal base. When you look at the judgements you will see that in all three cases there are new legal forms or new legal entities which are created: the European Cooperative Society or two new intellectual property titles. These entities or these two new intellectual property titles have an effect *erga omnes*, i.e. for all parties, not only for the parties of the contract. If you look at your national law, these are legal institutes which cannot be created by the parties out of their private autonomy, they can only be created by the legislator.

However, in these cases it was necessary at the EU level to create such a European Cooperative Society in order to prevent – in the event that one wanted to transfer ones national cooperative society into another country – one having to dissolve it and to recreate it in order to register it as new in another country. With the European Cooperative Society one can just transfer it. It is a new legal institute and that is the major difference.
In our proposal, we are not creating a new “European Contract of Sale”, we are not creating a new legal institute with effect **erga omnes**. We are just taking the normal contract of sale as it already exists in all Member States and giving it a second set of rules which can be applied and which can be chosen by the parties out of their free private autonomy as the applicable law to their contract of sale.

That is why we have not chosen Article 352 TFEU and as Miss Prunbauer-Gloser has pointed out, the legal service of the Council have already endorsed this legal base.

I also wanted to mention the concern because of a possible lack of legal certainty. The criticism on this topic is mainly on the use of abstract legal terms and indeed there are a number of them. There is a dilemma here: on the one hand there is a need of legal certainty, on the other there is a need of justice in every case. The traditional tool a legislator uses in order to reconcile both objects is abstract legal terms, because this kind of terms allow a judge to find a fair solution for each case. However, these terms should not be too abstract, i.e. too vague so that nobody knows what is going to happen if a case goes to a court or if you have a dispute which does not need to go to court, but may be resolved earlier.

The Commission tried to achieve a balance in this dilemma. For example, when we received the feasibility study of the expert group, the word “reasonable” was used in the text more than seventy times. “Reasonable” for our friends in common law countries is a perfectly normal legal term, but not so for a continental lawyer.

So the Commission tried to restrict the use of abstract legal terms, for example by cutting down the use of the word “reasonable” to a around forty cases and by adding some precisions, for instance instead of saying “within a reasonable deadline” we added “at the latest by” followed by the indication of a specific deadline”.

Thereby we tried to make the text more precise, whilst maintaining some a certain number of abstract legal terms to allow a judge to find the fair solution for every case.

At present the Commission is working on a number of flanking measures in the pipeline aimed at alleviating concerns of stakeholders, among others on a possible lack of legal certainty.

Firstly, as already announced in the text of the Regulation itself we will have a database where all final judgements applying the Regulation will be encoded, summarised and translated. This data base shall be accessible to everybody, not only judges but also practitioners such as lawyers and the public at large.

The second tool which the expert group have begun preparing are comments on each Article – basically a short explanation stating first of all why the legislator has come forward with that proposal for that provision and a few examples and illustrations of how it is practically applied. This is so that those
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applying these provisions are given some guidelines and some explanation. Once they are fully developed, we will make these comments publicly available.

We will also do some training for lawyers as already announced last year in a Communication on the legal training.

One of the areas for this training for lawyers could be the Common European Sales Law.

But training could also be done for those who advise SMEs or consumers, so that they will know how this new law works and be able to advise their customers.

And lastly we will develop something which has been announced in the Commission Communication accompanying the proposal for use after the Regulation has been adopted, i.e. standard terms and conditions, for European model contracts. The idea is to have sector specific European model contracts which have the purpose of giving content to these abstract legal terms which I spoke to you about earlier. So to take my previous example: if the Common European Sales Law says you have to examine the goods delivered to you within a reasonable deadline, the European model contract terms and conditions – which are sector specific, i.e. adapted to the needs of the parties in the respective sectors – could specify “within a reasonable deadline” with saying for instance one week or two days. So the idea of such European model contracts is to give parties more flesh on the bones, more guidelines to apply concretely the Common European Sales Law. These European model contracts are not going to be drafted by the Commission, instead we want to assemble stakeholders around a table and ask those people who have the experience in that sector, be it now on the business side, be it the consumer representatives, be it legal practitioners, to draft such European model contracts. They will be made publicly available to everybody who wants to use the Common European Sales Law.

You will then know that, if you choose the Common European Sales Law as the applicable law, you can use these model contracts, which are in conformity with the Common European Sales Law and therefore give you more certainty. So this is a flanking measure which will give more legal certainty and practical help to those parties who will choose this Regulation as their applicable law.

2. The relationship of the CESL with the Rome I Regulation

I would also like to say a few words about the relationship of the Common European Sales Law with the Rome I Regulation and the Vienna Convention, the Convention of the International Sales of Goods.

Firstly, the Rome I Regulation remains intact and applies. The continued application of the Rome I is necessary. Although we are fairly confident we have covered the very large majority of all practically appearing cases in cross-border litigation, there is always something which is not regulated. Therefore one needs a kind of a background law which then makes available the rule for

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the particular case which may exceptionally appear. That is why you first come to the normal applicable law, be it by a choice of law clause or by Article 4 or Article 6 of the Rome I Regulation. By the normal rules of private international law you first determine the applicable law and then within that applicable law you choose a second regime which would be the Common European Sales Law.

That means that the comparison arising from Article 6(2) of the Rome I Regulation, which at the moment forces you in the case of Article 6 (1) of the Rome I Regulation to compare the level of consumer protection in the applicable law and the national law of the consumer is no longer needed. Let us take an example: a French business selling in the case of Article 6 (1) of the Rome I Regulation to a Belgium consumer cross-border. French law is chosen because there is the usual choice of law clause in favour of the seller’s law in the contract and then the second regime in French law, the Common European Sales Law, is also chosen.

If you compare the second regimes of both countries the result is: As the Common European Sales Law is a Regulation and therefore directly applicable, the rules in general and the mandatory consumer protection law rules in particular are identical. Therefore, no comparison is necessary anymore because the level of consumer protection is precisely the same. So while Article 6(2) is untouched, it is just no longer operational if the parties choose the Common European Sales Law.

3. The Vienna Convention

Very briefly one word on the Vienna Convention. The Vienna Convention is an opt-out instrument, while the Common European Sales Law is an opt-in instrument. There could be a conflict in the case of (mostly) B2B sales. In order to avoid that conflict, Recital 25 of the Regulation makes it clear that if you choose a Common European Sales Law you implicitly opt-out out of the Vienna Convention.

4. Common law concerns

Finally a word on some concerns of our common law colleagues, as there is widespread concern among common law firms that they will lose out on business to their Wall Street competitors because common law as the law of the choice for international transactions would not be chosen anymore. Instead, it would be the Common European Sales Law which would be chosen.

We do not think that is a justified concern, when one looks at the scope of the proposal: if for example Siemens sells a nuclear power plant to Saudi Arabia, common law could still be used as the law of the choice.

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The Common European Sales Law is not meant for these transactions. Common law however is fully equipped for them. Historically if you look at common law it is a law which comes from overseas transactions – large transactions at high risks. But we are not looking at such transactions, we are looking at mainly B2C transactions or B2B transactions where SME’s are concerned. If an English SME wants to sell to a French SME they can still choose the common law, they just have to convince the French counterpart that common law is a good choice as the applicable law. However, if a Finnish SME wants to sell to an Italian consumer they are not going to choose common law, for them it is of interest to have the Common European Sales Law.

What I am saying is the big City of London law firms advising large companies doing important international transactions will not lose out in business because first of all Common European Sales Law is not aiming at these transactions. Secondly if they really want to choose the Common European Sales Law they are obviously free to do so, but are not forced to do it. We are not taking away common law and replacing it with European Common Sales Law. What we have to put forward is an optional instrument which parties can choose and which is a tool to help to export for SMEs to other European countries.

In conclusion, the Commission has devised an instrument which is perfectly in conformity with the principle of subsidiarity because it does not replace national law. Italian sales law will continue to exist and continue to be applied as for instance French, English, German or Polish sales law.

It would have been totally different if the Commission had chosen the full harmonisation directive option. We would have achieved the same objective of reducing the transactions costs, but we would have obliged all those businesses who do not want to export at all or want to export on the basis of the present status quo to have the same costs to familiarize themselves with and apply the new law while not having the corresponding benefits in the form of transaction cost savings.

Instead, we choose an optional instrument to meet not only the principles of subsidiarity but also the principle of proportionality. In our impact assessment, we set out problems in the area of B2C and some problems in the area of B2B but mainly only where SMEs were concerned. We did not find problems in contracts between big businesses or for domestic contracts. That is why the latter two categories were left out of the scope of the Regulation and we focused only on those areas where we found problems.

5. Optional instrument

And finally we have here an optional instrument. This means that “choice” is the key word.

We have for consumers a situation where they cannot lose out because they have only advantages: economic advantages in form of more choice and cheaper

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prices and legal advantages in the form of consumer protection level which is comparable or higher than the level of the national consumer protection regime.

For businesses, it is simply a commercial choice. They will only choose to use the Common European Sales Law if it presents an economic advantage for them and if not, then they will not choose to use it. Therefore we have a win-win situation for both sides, based on their own choice.

I would like to try to explain why the Commission suggested an “optional” instrument. Three elements as an answer:

First of all I wanted to mention the experience with the Consumer Rights Directive. Here the Commission tried full harmonization on four modules: “pre-contractual information”, the “right of withdrawal” (where we had differences in the existing Directives), plus two other modules: the sales remedies from the Consumer Sales Directive and unfair contract terms from the Unfair contract Terms Directive. During negotiations, the Council deleted the last two, i.e. the two most important modules because they could not agree on full harmonised consumer protection standards.

That is the problem; if you go to the core of national sales law and fix a level of consumer protection which forces Member States to change the law, they cannot agree.

We tried full harmonization because it achieves the purpose as well as an optional instrument because it eliminates all differences and obstacles. However as we have seen, it cannot be agreed.

The second answer is what I said initially in my presentation. There is one major disadvantage – and this is at the same time the charm of the optional instrument: a full harmonization directive imposes costs on all businesses including those which do not want to export. So everybody would have to familiarise themselves with the new instrument even if those initial costs are not outweighed by transaction cost savings. So this is the advantage of this optional instrument: only those businesses who see they have an advantage will take up the costs of familiarising themselves with a new regime. So if you are purely marketing your products on a domestic contract law basis, you do not have to change anything.

If you are selling cross-border but you do not want to sell on the basis of a Common European Sales Law you have no costs. The Common European Sales Law is only for those who want to take advantage of its internal market potential and who see that they gain something which is more than the costs they face.

And the third point where you say “nobody will choose it”: obviously that has to be seen but I personally do not think this will be the case. It is clear that not every single trader will choose it, but there are some sectors which are likely to choose it. If you look at it economically the sector which has the biggest interest are businesses which sell in the area of e-commerce and distance-selling in general. But it is e-commerce which has the most growth potential at the moment and which is not yet fully exploited.

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Just a few weeks ago I met representatives of E-Bay in my office, they appreciate this instrument because, as they say, it will take away some of the problems we have with marketing their products. During our consultations, other businesses which also come from the e-commerce sector, were very much interested. For off-premises contracts it will be more interesting in cross-border regions.

6. Other problems

To respond to the first major issue: “Are there other problems”? The first answer is: yes, of course there are other problems, we have always recognised that there are other problems and one of the most important problems for instance for consumers and B2C is redress.

The Commission is dealing with the problems it can deal with, among others redress. For instance, the Commission has put forward a month after the proposal for the Common European Sales Law a proposal for a directive and a regulation on B2C ADR (Alternative Dispute Resolution) and in my unit we are working on examining the need for a B2B ADR instrument.

So yes, there are other problems and yes, we are dealing with those we can deal with.

The other obstacle which was mentioned was about languages. We did for both B2C and B2B a large Eurobarometer survey. Eurobarometers are representative surveys which means that the sample of companies surveyed is so large that it can be statistically extrapolated. So we asked businesses about ten obstacles in both B2C and B2B contracts and we also asked: are there any other problems which you see? And in this final category the responses were so small that we could confidently say that the ten problems that we identified were the major ones.

If you look at these ten problems there are two points which come into play; it is important to stress that the businesses we have surveyed are those businesses who are already trading cross-border and those who are interested in trading cross-border. For example, if a business says “despite all the problems we are still going abroad and exporting”, all the better! What we are concerned about is those businesses who say “we have a problem and therefore we do not trade cross border” or who say “we have a problem and it makes exporting more difficult and therefore we limit our exports to 1 or 2 countries”. These are the businesses we want to help.

The last point I wanted to make is on the different obstacles we asked about. You can basically group the ten different issues into three categories: there are legal obstacles related to contract law, there are other legal obstacles for instance tax or administrative requirements and then there are obstacles dealing with non-legal issues like language, culture or delivery – which is mainly distance or other practical delivery issues.

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If you look at the obstacles for B2C and B2B you will see that the number one obstacle in B2C is a contract law related issue because there was a difficulty in finding out about the provisions of a foreign contract law. If you look at the others you will see that in B2C, the contract law related obstacles rank as number one, number three, number six and number seven of the ten, while language and culture rank as number four and number nine. This clearly sets out that “yes, language is an issue, however we cannot do anything about it and do not want to do anything about it,” but there are other issues and these other issues are more important for businesses in B2C and B2B than language or distance.

7. Replacement or change of national laws?

The other two major issues I wanted to address are about whether the proposal would replace nor change national laws.

The Commission position is firstly that the proposal does neither replacenor change the pre-existing national sales law.

Secondly however, the Common European Sales Law changes the national law because all Member States have to make it possible to choose the Common European Sales Law and cannot maintain or introduce any provisions which do not allow the parties to choose it.

In addition, it introduces into national law a second set of national rules

Let us look at Article 114 of the Treaty which mentions the word “approximation”. Constant ECJ case law has given the EU legislator a wide margin of manoeuvre on how to interpret “approximation”, it is up to the legislator to choose the technique. So, “approximation” does not have to be done by Directives, it does not have to replace the whole of one body of law, it can also be done by a Regulation and many Regulations are adopted on the basis of Article 114.

8. Harmonization aspects

I come back to the important issue of harmonization. Of course the Consumer Rights Directive basically harmonises two and a half modules as I considered earlier: pre-contractual information and right of withdrawal and a little bit of passing of risk. These are the areas where existing minimum harmonization directives are replaced by the Consumer Rights Directive: the Doorstep selling Directive and the Distance Selling Directive.

As for those areas we have full harmonisation, there is no longer an internal market obstacle. But however– as I said earlier – there are other areas where you still have different mandatory national rules, part of them are already minimally harmonized in EU law. These are the Unfair Contract Terms Directive and the Consumer Sales Directive. They are both minimum harmonisation Directives and in both cases Member States went beyond minimum harmonisation in
their implementation but to different degrees. As all these national rules are mandatory there are in those two areas different national mandatory rules and these differences constitute obstacles: legal obstacles and economic obstacles because of the transaction costs. In addition there are areas which are not harmonised where there are different national mandatory rules and they pose legal and economic obstacles. Therefore the Consumer Rights Directive dealt with some obstacles but only a few.

9. Do the consumers have a real choice?

Do the consumers have a real choice? First of all, just to state the fact that the Regulation as it stands indeed allows the situation that it is only the seller who says in a cross-border transaction “you can buy this product but only if you accept the Common European Sales Law as the applicable law.” The Regulation allows this and actually that responds to a business request. If they had to offer the consumer’s law in addition to the Common European Sales Law there would be no business interest because they would be back in the same situation of Article 6 (2) Rome I Regulation as they are now.

The second point is: is there a real choice? You said very rightly so, the consumer does not know, yes, that is absolutely true, and the consumer does not even know that something like international private law exists.

I did a “personal field survey”, i.e. I asked friends of mine as well as my parents: if you go to Spain on holiday and buy a t-shirt on the beach, on the basis of which law do you buy this? They presumed it was German law. I do not think it is different with Italians or any other nationality: consumers simply do not know about private international law and the issue of applicable law.

In addition, in reality a non-lawyer does not know the whole of one’s national law. There is a limited perspective of one’s own law: consumers know roughly what their rights are, at maximum.

Thirdly we have evidence that consumers do not read standard terms and conditions and if they do, they do not understand them. So we have to make sure that a suggestion made to them to choose the Common European Sales Law does not make them lose out. That is precisely the case as they are as well protected under the Common European Sales Law or even better protected than in their national law. So if they do not know about their national law or about the Common European Sales Law, it not does not matter, as they cannot lose out. They can only win economically and legally.

10. Information requirements

About the excessive information requirements. We have no choice here. What you call ‘excessive pre-contractual information requirements’ comes from the
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Consumer Rights Directive. We have no choice other than taking the requirements over one for one. Otherwise one would make the optional instrument an instrument of circumvention of the law.

On the matter of the too high level of consumer protection and what Fergus said about the not finished products: this is not yet a finished product because the Commission is after all not the legislator. The Parliament and Council will decide and the level of consumer protection will be one of the keystones to be discussed and decided by the legislator. But on the other points, this discussion is extremely useful for us. We are currently having a number of detailed discussions with European umbrella organizations of stakeholders. You have mentioned that there will be a CCBE resolution on the broad issues and we are looking forward to it. These discussions are so important for us because we can take up what can be improved in the legislative process.

Somebody observed that nobody reads the Amazon standard terms and conditions. But I draw a different conclusion out of this. If the consumer who has to make a separate statement ticks the box without reading even the standardized information notice which is only one and a half pages long, I said already earlier: it does not harm! Because the consumer does not lose out and this is exactly the main point. I feel a little bit like Cato the Elder: my *ceterum censeo* is: the consumer cannot lose out.
1. The ambiguity of the term “principle”

A very interesting phenomenon has occurred in the last few decades: the increasingly more frequent (but less and less perceived) use of the term “principle”. Its use is to be found both in national and EU legislation as well as in the projects for the harmonisation of European law. In national legislation, a “permanent debate” can be noticed in which principles are confirmed by a long-standing tradition, as is the case with the legal culture that has established itself in Italy, Germany, and Austria. These countries have a long tradition of investigating and enforcing Roman Law, hence the *regulae iuris* (the rules of law listed in book I of Justinian’s Digest) – which are one of the first examples of principles of law written in the form of brocards (legal maxims) – as well as investigating natural law as opposed to positive law and the “logical” conception of the legal system according to rationality principles. Therefore, we can find rules concerning the interpretation of the law in statutes and civil codes, general principles in status and civil codices, general clauses and other devices to adapt the law to any kind of circumstances. Usually, general principles corresponded (and in some cases still correspond) to *analogia legis*.

With regard to the British legal culture, a “renewed interest” is to be noticed in our days: after Jeremy Bentham’s *Principles of Morals and Legislation*, this terminology migrated to critical studies on logic and philosophy. In the U.S. legal culture, the matter can be said to be more “complex” in that the issue has been recently examined mainly in Ronald Dworkin’s analytical philosophy of law. Dworkin explained that principles are to be taken seriously, maybe because of the debunking arguments held by the founders of legal realism. In the French

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1 For a historical review of the term “general principle” and its corresponding expressions, see Alpa, *I principi generali*, Milano, 1993 (2d ed. 2006); Guastini, *Le fonti del diritto e l’interpretazione*, Milano, 1993

2 From the wide palette of literature on the matter, see Alexy, *Theorie der juristischen Argumentation*, 1978, trad.it., Teoria dell’argomentazione giuridica, a cura di M. La Torre, Milano, 1998


4 Stein, *Regulae juris. From juristic rules to legal maxims*, Edimburgo, 1966

civil law, one may say that this terminology has been “discovered” only in recent years: with the exception of François Gény’s writings⁶ – which have always been viewed with mistrust by formalists, while being much appreciated in Italy –, the use of the terminology and its practical application has been more frequent in administrative rather than French civil law.⁷

In this panoply of references, the term “principle” has multiple meanings, which grow in number if one considers the contexts in which this word is used with reference to the attempts of harmonisation, unification, and codification of European private law.

Here are a couple of examples: in the “Principles” of European Contract Law (PECL) by Ole Lando and Hugh Beale, the expression refers to the “general rules of contract law” (art. 1:101(1) and the same holds true for the Unidroit Principles (Preamble, paragraph 1).

In the Draft Common Frame of Reference, the term may include rules that have not the force of law, definitions, and general rules.⁸ What is important, however, is the stance taken in the introduction: the underlying fundamental principles of rules are the expression of clashing values, are not in order of priority and are only quoted by way of example. In a first list, the following principles are mentioned:

“justice, freedom, protection of human rights, internal market development, solidarity and social responsibility, freedom, security and justice, protection of consumers and other weak parties, preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency, reasonable reliance, and appropriate risk accountability”.

Apart from the specific mention of human rights in some rules – which will be explained below –, even if the principles are not set in any hierarchical order, the authors of the DCFR cannot have thought of human rights as a group of rights clashing with other rights in a text aimed at systematically regulating contracts, without them having a significant role. On the contrary, pursuant to Article 1-1:102(2), the rules set in the DCFR “have to be read in the light of any

⁶ Gény, Méthode d’interprétation et sources de droit privé positif, Parigi, 1899

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applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws”.

In the *principes directeurs* drafted by the Association Henri Capitant and the Société de Législation comparée (in 2008), a distinction is made between guiding principles and other principles, which are considered as general rules shared by EU Member States. This collection of principles therefore rectifies the PECL and new rules are suggested as model contract rules to imitate, to draw on, or to be looked at as instruments for problem solving purposes. These are some of the guiding principles mentioned: (i) freedom of contract, (ii) certainty of transactions, and (iii) fairness. The latter term is translated in the commentary on the DCFR, which quotes the *Principes contractuels communs*, by using three distinct expressions: “good faith, fair dealing and cooperation”.

Fundamental rights are not mentioned.

Fundamental rights were lost also in later attempts to harmonise rules of contract law, which relied on simple, synthetic, and partial texts.

The text that marks the transition between the DCFR general rules on contracts (Book II) and the draft Regulation on a Common European Sales Law is called *Feasibility Study for a Future Instrument in European Contract Law* (July 2011). This text either does not mention fundamental rights, it sets only some general principles like reasonableness (Article 4), freedom of contract (Article 7), good faith and fair dealing (Article 8). The general or constitutional principles accepted in EU law or national Constitutions are not even referred to in the interpretation of the text, for which a *closed system* is suggested: “This instrument is to be interpreted and developed autonomously and in accordance with its objectives and the principles underlying it” (Article 1 (1)), without recourse to national laws (Article 1(2)).

Eventually, the draft Regulation introducing a Common European Sales Law (CESL) sets out some “general principles” in its introductory provisions, such as (i) freedom of contract, (ii) good faith and fair dealing, and (iii) cooperation. This text too is a closed system: it does not mention fundamental rights nor the general rules including the values of EU provided by the Charter of fundamental rights.

This varied culture – underlying the different linguistic, cultural, and technical backgrounds of the authors of the texts – is therefore reluctant to any strict use of the term “general principle”, although it does not reject it, but accepts it. The term is accepted not as a technical and scientific term to be used cautiously and knowingly, but as a versatile term with an indistinct conventional meaning, a sort of proposition phrased in general words, referring each time to a value, a

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10 *Principles*, cit., p. 14
11 To be found in *Towards a European Contract Law*, edited by Schulze and Stuyck, Munich, 2011
rule, a line of interpretation, and so on. Every jurist can understand the meaning of “principle” and feels that he/she can use it in the most different ways. Because language, fashion, and practice cannot be controlled, the meaning of the word “principle” must be checked each time in order to fully understand the meaning referred to by its author.

This term is appreciated differently depending on each jurist’s culture and background. For instance, I do not know whether the evolution of “general principles” in the Italian legal culture since the late XIXth century is known outside Italy. This evolution went beyond the mere investigation of the formal legal meaning of these principles, to gain an insight into their ideological and practical meaning.

Jurists who refer to a written text find it difficult to accept the idea that it is useful to draft general provisions with a very wide scope, that vaguely describe the case in point. Thus, they tend to make a distinction between specific detailed rules and general rules – i.e. the enunciation of a broad case in point. They also tend to distinguish between general rules and general principles, which result from logical inductive reasoning by drawing the general enunciation from a set of specific rules. Jurists who pay accurate attention to the letter and spirit of legal rules also make a distinction between the supreme principles of State legal systems and those that are derived from other contexts. They also ask themselves whether there is a difference in role between the general principles expressly laid down in legal provisions and those inductively drawn from those provisions without being explicitly mentioned.

This is due to the fact that in some legal systems, like the Italian one, the civil code, the Constitution, and other important legal texts (that may be qualified as the “Tables of the Law”) often use the term “principle” thus binding the interpreter much more closely than legal systems in which principles are seldom mentioned in legal texts, are derived from the interpretation of the majority of authors (logic, axiology, hermeneutics, etc.) or are considered by these authors as “guiding rules” for harmonising an area of a national or supranational legal system, or a system in its early stage of development like “European private law”. Jurists who are less closely bound by legal texts mentioning principles can thus afford a higher degree of freedom and latitude in devising, manipulating, listing, and classifying “principles”.

These are only some of the issues that Italian jurists have long debated for more than a century. This debate reached one of its peaks at the Academy of the Lincei, at a conference held in Rome from 27th to 29th May 1991, during which distinguished scholars in several branches of knowledge identified, classified, and discussed principles both from a philosophical and historical perspective and from a legal and practical point of view, with regard to the different branches of law.12

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2. General principles “in context”

During the twenty years from 1991 to this day – at a pace that is unusual in legal culture – there has been a tremendous amount of studies, lines of thought, legal texts, projects, jurisprudential trends that have deeply modified legal experience both at a national and European (not only geographically speaking) level. This experience cannot be ignored. In particular, I am referring to the experience that has served as the breeding ground for the new legal culture, thus becoming crucial for jurists and irreversible.

There are basically three cultural events or trends that have gradually established themselves and have changed the meaning and role of general principles: (i) the eventual collapse of the distinction between private law and public law; (ii) the introduction of the Charter of Fundamental Rights of the European Union; (iii) the use of the principles laid down in the European Convention on Human Rights by the European Court of Justice as well as by many constitutional and supreme courts – here, the term “principles” stands for the formulation of human rights that the European Union has complied with.

While legislative texts are accurate, the texts of judgments, decisions, rulings, and, often, legal literature are general or superficial, so that the terms “general principles”, “values”, “fundamental rights”, “human rights” are used interchangeably.

Thanks to these cultural events and trends, the universe of principles has grown richer and newer, showing an amount of vitality that was absolutely unimaginable in the late XIXth century, when the debate on principles in their modern sense was launched.

The new millennium marked a very significant turning point – which had an impact on the evolution of EU law and on the process of harmonisation of national legal systems – with the establishment of common values, the redefinition of the relationships between citizens and EU institutions, and the development of a body of common rules (acquis communautaire) in which the unifying principles of consumer contracts are set out.13

As a result of the underlying link between fundamental rights and general principles that has supported this process, the EU legislation cannot be enforced if it clashes with general principles (hence with fundamental rights) and national authorities, judges, or governments cannot enforce national rules

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derived from EU law without applying general principles and, as a consequence, fundamental rights.\textsuperscript{14}

3. Fundamental rights as general principles: the two distinct processes of the European Charter and European Convention

The Charter of Fundamental Rights of the European Union, the case-law of the European Court of Justice and the decisions of national constitutional courts form the basis of positive law upon which the argument that fundamental rights are general principles rests.

From a formal point of view, if one just considered the letter of the Charter, the controversial point could be whether fundamental human rights should be taken as “principles” of law as such. What might be inferred from the Preamble of the Charter is that fundamental rights are \textit{values} that are based on the principles of democracy and the rule of law.\textsuperscript{15} The Preamble states:

“All conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

In another passage of the Preamble, the values and principles quoted above seem to be referred to as fundamental rights:

“To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.”

The most relevant passage, though, concerns the nature of these values/principles/rights:

“Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations. The

\textsuperscript{14} This is the argument I held some years ago in \textit{L’applicabilità della Convenzione europea sui diritti dell’uomo ai rapporti tra privati}, in Eur.dir.priv., 1999, II, p. 873; Wade, Horizons and Horizontality (2000) 11 LQR 217

\textsuperscript{15} Rodotà, \textit{La Carta come atto politico e come atto giuridico}, in Riscrivere i diritti in Europa, Bologna, 2001
3. Fundamental rights as general principles

Union therefore recognises the rights, freedoms and principles set out hereafter.”

These are not emphatic statements merely aimed at depicting a perfect picture of the Charter: fundamental rights are (or express) principles that have legal force, that entail responsibilities and duties vis-à-vis the State or the European Union and bind also private parties in their legal relationship.

In 2007, a European Parliament Resolution gave legal force to the Charter, although the European Court of Justice and national courts had autonomously decided, long before that, to consider the Charter as a binding instrument and to draw on it in order to solve issues and settle disputes. The Charter immediately became part of the “law in action” and combined its political force with its legal force. Stefano Rodotà has been the first Italian jurist connecting legal force to the Charter which he himself contributed to draft.

Moreover, Article 2 of the Consolidated version of the Treaty on European Union, as amended by the Lisbon Treaty, proclaims:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Article 6 states:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

Let me emphasise again the legal force of the Charter – acquired, as it were, in the field of national courts’ decisions, then laid down in the 2007 resolution, and again enshrined in the TEU –, which means that its provisions are legally binding, must be enforced by EU and national courts, and can be applied both in vertical relationships (i.e., vis-à-vis States) and in horizontal relationships. I shall come back to this point further below.

Human rights, recognised and listed in the European Convention on Human Rights, were also recognised by the Treaty of Lisbon.

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16 Celotto e Pistorio, L’efficacia giuridica della Carta dei diritti fondamentali dell’Unione europea (case-law review 2001-2004), Giur.it, 2004

17 Rodotà, La Carta, cit., p. 111

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As a matter of fact, Article 6, paragraph 3, of the amended Treaty states:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

This wording better clarifies the text of the 1992 Maastricht Treaty, which provided that “the Union respects fundamental rights (…) as general principles of Community law”.

On the basis of this dual formal recognition, one might argue that, by now, the principles in the Charter and those in the Convention are part of an organic whole.

And yet the issue is more complex than it is sometimes described.

This issue was also echoed at the aforesaid Academy of the Lincei conference. Rodolfo Sacco addressed it – with reference to principles in general – when he mentioned the Treaty establishing the European Economic Community (former Article 215, paragraph 2), which included principles among the sources of EU law (principles are secondary rules of law on which the EU legal system is founded).18 Angelo Falzea emphasised the high axiological nature of fundamental principles,19 which, “despite their strong ideality, are rules of positive law”. As regards the principles included in the Constitution of the Italian Republic, and insofar as they are recognised by the international community, Pietro Rescigno maintained that they might even be considered as limiting national sovereignty.20 Giorgio Oppo and Luigi Mengoni acknowledged fundamental rights as having the status and role of general principles. Oppo stressed that general principles rule our behaviours even in the sphere of private autonomy: “freedom, equality, and ("political, economic, social") solidarity are supreme values [quoting Article 3 of the Italian Constitution] and the supreme principles derived from them are the equal autonomy of partners and agents’ accountability for the active and passive consequences of behaviours”.21 Mengoni identified inviolable rights with general principles, although he made it clear that they should be seen in comparison with the other principle-rules, because the Constitution is a “table of values” that often have opposite meanings and therefore need to be balanced out. He then restated Ronald Dworkin’s distinction between rules and principles with regard to their role: rules can only be strictly complied with, principles direct the interpretation of law.22

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18 Sacco, I principi generali nei sistemi giuridici europei, in Atti, cit., p. 163
19 Falzea, Relazione introduttiva, ibid., p. 25
20 Rescigno, Relazione conclusiva, ibid., p. 341
21 Oppo, L’esperienza privatistica, ibid., p. 227
22 Mengoni, I principi generali del diritto e la scienza giuridica, ibid., p. 325

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difference between the former and the latter lies not in their structure but in their effects.

All the aforesaid authors thought that principles should also be enforced *horizontally*, meaning that they could apply not only to relationships between citizens and the State, or between citizens and EU institutions, but also to relationships between private parties, hence to contract law. This conclusion is not unique among EU law interpreters, nor among civil law and common law lawyers.

In order to understand how fundamental rights/general principles can produce horizontal effects, the analysis must take place step by step.

Hugh Collins is right when he maintains that these issues can be understood more clearly if your background is one in which the distinction between private and public law has lost its centuries-old prominence, and one in which the process of constitutionalisation of private law has established itself.23

It is impossible to generalise.

One thing is the contexts in which the constitutionalisation of private law occurred before the establishment of a common EU law system. The driving models in this process leading to a new civil law system and its modernisation in the light of the fundamental values of society were the Italian model – where the private law constitutionalisation process was launched in the early 60’s, after the entry into force of the Constitution of the Italian Republic (1948) –, the German model, which also took shape in the same years (with the 1949 Law), and the Spanish model, which developed immediately after the introduction of the new constitution in 1978.

Another thing is the contexts in which the human rights/principles enshrined in the European Convention were upheld first by acknowledging the effect of international conventions and then by fully transposing them into their national constitutional systems or as national legislation rules as was the case with the Human Rights Act in Britain, just to mention a few examples.

Another thing is the contexts in which social values have made it possible to go beyond the formally egalitarian middle-class concept of protecting the relationships between private parties, and focus on human values rather then just focusing on the protection of consumers, workers, or savers/investors (which generally calls to our mind a more economic and financial perspective), as well as on discrimination and disparity based on gender, language, religion, ethnic origin, etc.


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4. Fundamental rights as general principles of contract law in the case-law of the Court of Justice

This section deals with the fundamental rights enshrined in the Charter, although this obviously involves the debate on the recognition at a European level of common principles on human rights to be found in Member States' constitutions. This also involves the link between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, as well as the so called dialogue between courts, the multi-level protection of fundamental rights, and the harmonisation of the decisions of the courts that, in their different jurisdictions and with different scope of action, deal with fundamental rights.

Courts’ judgments prove that fundamental rights stand for general principles, which are presented each time in the form of human values.

Experience teaches us that – regardless of more or less rigorous and technically correct formulations –, the law plays its role through values/principles/rights and that a principle can be legitimated by courts in their office of interpreting the law (ius dicere), and in their doing so, fundamental rights become “law in action”.

The labour market, hence the employment contract, has been the target most frequently hit by the Court of Justice of the European Union on grounds of general principles like the principle of equality (meaning here the equal treatment of men and women as regards pensions), which is a fundamental right recognised by all modern constitutions as well as by the first declarations of rights. This can be interpreted also in the opposite way that is the application of the principle of non discrimination. This is not the right venue for a review of the most sensational cases, like the Bartsch case (of 13th September 2008, C–46/07), or the cases regarding the applicability of the principle of human dignity (C152 / 82 of 13th November 1990) or the cases concerning the principle of free movement of workers. In the field of contracts, the Omega Spielhallen case (C-36/02) is a good example, in which a game was prohibited because it simulated the killing of human beings using laser devices.

More recently, in the field of insurance contracts, the ECJ ruled that Article 5, paragraph 2, of Directive 2004/113/EC on the principle of equal treatment between men and women is invalid, hence the terms and conditions of insurance policies that discriminate between men and women, on grounds of age, are null (C-236/09).

A rich and scholarly collection of commented cases was edited by Cosio and Foglia, Il diritto europeo nel dialogo delle Corti, Milano, 2012; on the same subject, see also Giurisprudenza della Corte europea dei diritti dell’uomo e influenza sul diritto interno, edited by Ruggeri, Napoli, 2012.
5. The dilemma before modern law-makers

A careful analysis of the impact of fundamental rights on courts’ decisions should include the decisions of the European Court of Human Rights and the decisions of Supreme Courts as well as those, of course, of Constitutional Courts. Within the framework of this paper, though, reference can be made to the collections of cases before the Strasbourg Court dealing with human rights violations. However, it should not be forgotten that the Strasbourg Court tends to consider fundamental rights less as general principles than as strong individual defences that parties are entitled to claim vis-à-vis the States of which they are nationals or guests, thus obtaining compensation from the infringing State as remedy to a breach.

5. The dilemma before modern law-makers

Is it possible to design an autonomous body of rules, also in the form of a Regulation, which evades the principles enshrined in the Charter of Fundamental Rights, hence does not include the Charter principles among its (guiding) principles?

There are different ways to include the Charter principles among the principles of European Contract Law, the principles of the Common Frame of Reference, and those of the Regulation on a Common European Sales Law:

(i) the easiest way is to directly refer in the text to those principles, even without quoting them;
(ii) the most natural way for a jurist who prefer to interpret a legal text rather than rewrite it, is to consider any legal text (from PECL to the CESL Regulation) as having necessarily to be interpreted and enforced in the light of the principles of the Charter (and the Convention, which stands as a body of general principles);
(iii) the most traditional way consists in considering fundamental principles as mandatory rules that must be enforced anyway.

In all the aforesaid cases, these rights/principles/rules are directly applicable to the relationships between private parties.

Authors have differing positions, though.

As regards freedom of contract, for instance, Collins argues that the solution can be boustrophedonic: if more emphasis is placed on a person’s freedom to contract (like the freedom to accept working time arrangements that are contrary to health protection standards), then other freedoms can be curtailed. If more emphasis is placed on dignity, any working rules that are contrary to health and rest time should be turned away and contract agreements should be considered as contravening fundamental rights.
Hans Micklitz stressed that fundamental rights should also include social rights, although the latter are not secured: “the expansion of social rights does not help to overcome the narrow boundaries of the EU competence on The Social”. In a wider analysis focusing on a review of EU law sources, Micklitz considered the combination of a European Constitution and European Civil Code as the framework that can truly lead to an integrated market in which not only individual rights but also collective rights are relevant and the principle of solidarity is fully acknowledged alongside the principle of dignity.

In a narrower and more cautious perspective, Olga Cherednychenko rather referred to the complementarity of fundamental rights and contract law. In the conclusion of a recently published essay, she wrote: “it is obvious that the complementarity between fundamental rights and contract law can only be achieved if the ECJ refrains from interfering in such cases by means of the fundamental rights review of the provisions of the CFR or the interpretation of the general clauses contained therein”. However, the relevance of fundamental rights in European private law – hence their direct applicability to contractual relationships – is not denied by the author, who raises an additional point thereon: in view of this assumption, the issue is not so much the recognition of fundamental rights in contract law, as the scope of their protection when parties’ opposing interests require an acceptable degree of balancing. In this respect, the author makes a distinction – taking into account the different models existing in European countries – between a direct effect, a strong indirect effect, and a weak indirect effect.

Now we have come to the point. If one moves from the assumption that the Charter of Fundamental Rights underlies the European Community legal system, rather then referring to the complementarity between fundamental rights and European contract law, one should rather refer to the subordination of the latter to the former, as was rightly argued by Chantal Mak at the end of a broad and accurate comparative analysis.

After all, the controversy about the direct or indirect effect of fundamental or inviolable rights that was experienced in countries like Italy and Germany where the constitutionalisation of private law has taken place, was replicated with many similarities also regarding the rules of the European Convention on Human Rights and interpreters’ difficult choices are due to several reasons: because the European Convention is an international act that is not directly

27 Mak, Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationship in Germany, the Netherlands, Italy and England, Alphen aan der Rijn, 2008

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applicable to domestic law, because *dignity* is not expressly mentioned in the 
Convention as the underlying value of the whole system of human rights and 
freedoms, because human freedoms include freedom of contract, which can be 
viewed as strengthening or restricting human rights.28

As a consequence, the dilemma before modern law-makers lies in the fol-
lowing: with a view to the correct and certain application of law, is it more ap-
propriate to disregard fundamental rights in contract law provisions and protect 
them by means of interpretation or to mention them so that their protection is 
ensured regardless of the interpretation given? This implies, of course, a pre-
requisite: that freedom of contract cannot go so far as to legitimise the infringe-
ment of fundamental rights.

Following the suggestions of many members of their working group the 
Authors of the DCFR preferred to expressly mention fundamental rights, even 
if their protection is not far-reaching and the only remedy available for their 
contractual infringement is damages rather than contract invalidity.

The wording used in the *principes directeurs* of the new draft bill to reform 
contract law supervised by François Terré 29 is a balanced solution, whereas 
fundamental rights were disregarded in the previous version by Pierre Catala. 
As a matter of fact, Article 4, paragraph 2, of Titre I Des Contrats states:

“On ne peut porter atteinte aux libertés et droits fondamentaux que dans la 
mesure indispensable à la protection d’un intérêt sérieux et légitime”.

This wording suggested by Georges Rouhette30 was welcome by Carole Aubert 
de Vincelles,31 who emphasised that its specific application is to be found in 
Article 59 of the draft bill, which deals with the content of the contract. 

Thus this discussion is not over: it is widely open!

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28 See Brownsword, *Freedom of Contract, Human Rights and Human Dignity*, in *The Foun-
29 *Pour une réforme due droit des contrats*, sous la direction de François Terré, Paris, 2009 
30 Rouhette, *Regard sur l’avant-projet de réforme de droit des obligations*, in Rev.dr.comp., 
4/2007, p. 1393
31 Aubert de Vincelles, *Les principes généraux relatifs au droit des contrats*, in *Pour une 

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The debate on CESL in the European Parliament

Luigi Berlinguer

I will offer a few reflections about “A perspective from the European Parliament” in my capacity as a member of this Institution and of the Legal Affairs Committee.

1. Development

With its communication of 2001, the Commission launched a process of extensive public consultation on the fragmented legal framework in the area of contract law and its hindering effects on cross-border trade.

In July 2010, the Commission launched a public consultation by publishing a “Green paper on policy options for progress towards a European contract law for consumers and businesses (Green paper) which set out different policy options on how to strengthen the internal market by making progress in the area of European contract law.

In response to the green paper, the European Parliament issued a resolution on 8 June 2011 in which it expressed its strong support for an instrument which would improve the establishment and the functioning of the internal market and bring benefits to traders, consumers and Member States judicial systems.

This resolution has encouraged the European Commission (DG Justice) to go ahead and, at the end of the last year, a proposal for a Regulation on a common European sales law was presented.

Against that background, the Legal Affairs Committee adopted an ambitious programme of events in order to hear a broad range of experts and interested groups. One hearing and three workshops have been held so far. A conference with the national parliaments is to be held the 27th of November with a further parliamentary event in 2013 in order to conduct an enhanced dialogue.

After a first analysis of the proposal, on the basis of the expertise gathered so far, we are now seeking to explore the main issues and criticism which we consider to be crucial for the debate: i.e the relationship between the proposal and the Rome I Regulation, the problem of the legal basis, the optional nature of the instrument, the extension of the scope (personal, material, territorial) and many other technical aspects which should be ameliorated – the provisions on unfair contract terms, on the remedies of the buyers, on the restitutions, on the digital content).

The complexity of the debate is further enhanced by the fact that the proposed Regulation is very long and complex (the Annex contains 183 articles)
The debate on CESL in the European Parliament

and some European Union countries, specially the common law ones, do not look favourably at these types of legislations which they feel extraneous to their system.

2. Coexistence of civil law and common law

We should in fact keep in mind that within the European Union coexist the two major legal systems of common law and civil law. This inevitably constitutes an obstacle to the integration process, given their deep differences, differences that reflect the historical and cultural diversity of these systems; differences which are also reflected in the legal terminology; a legal term can in fact assume a complete different meaning depending on the language in which it is translated.

We should be aware of the fact that we are spectators of a continuous contamination of different cultures which rends the European union an extremely fertile laboratory of new hybrid models of legislation and institutes but, at the same time, a source of legal complexity and uncertainty.

3. Procedure with associated committees

Another element of complexity is represented by the fact that, because of the complexity of the matter, it has been decided to apply Rule 50 (procedure with associated committees). This lead to the fact that there are two competent committee in the Parliament: the Legal affairs Committee – the leading one- and the Internal market and consumer protection committee (IMCO). A further obstacle comes from the decision to appoint two co-rapporteurs in the JURI Committee, Mr. Lehne and me, and other two in the IMCO Committee (Mrs Gebhardt Evelyne and Mr Hans Peter Mayer) while the normal practice is to have just one rapporteur in each committee. This means that the four co-rapporteurs should try to find a common agreement to favour this legislative initiative of the European Commission.

4. Criticisms from the consumers’ associations

The proposal was strongly criticized by some members of the European parliament; the major criticisms we are facing come however from the consumers’ associations, in particular from BEUC, the strongest European Consumers organization, which should be instead the major beneficiaries of the regulation. Those associations affirm, among other things, that an optional instrument is inappropriate for consumer contracts since it would result in detriment to consumers protection and that the notion of “legal option” does not exist for consumers; consumers are not in fact in the position to make an informed choice.
since they are only interested in buying a product and not about the problem of the applicable law.

According to this a political issues arises: “do you, consumers’ associations, really want to stop a process, which aims to strengthen the internal market and, consequently, the overall development of the European economy?” I believe that those associations are too conservatives, since they just want to keep the legal environment unmodified, they are not interested to strengthen the internal market, its growth, in reducing the prices and in having a wider range of less expensive products.

I am strongly persuaded that, if this project goes further, we will have a wider range of available products in the internal market, both from a quantitative and qualitative point of view.

Consumers’ associations are less sensitive to this issue, because they just want to defend their category and they look at the business, and not at the scarcity of products, as something to defend themselves from.

Europe is now facing a deep crisis, but I believe that we should take advantage of this peculiar moment in order to strengthen the internal market and to take all the possible measures to encourage its growth.

We are caught between these two extremes and we are facing another issue: when a new legislative text is published, despite all the impact assessments and the consultations, we know the content of the new instrument, but we do not know exactly what will be its practical impact since it is difficult to predict what will happen, especially in those cases where a theoretical and cultural complexity has to be faced.

5. Perspective

Despite these considerations, my colleague Mr. Lehne, Chairman of the JURI Committee, and I agree with the fact that in this political moment of economic crisis, is not possible to give up this proposal, which will foster the convergence of the different European contractual legislations. This is particularly true since we should keep in mind that the Parliament is a political body, not a Law faculty and neither a Court.

This is the strongest political argument, the economic one, which I believe will be able to influence and to partially overcome the the iuris subtilitatis.

I am personally persuaded that the presence of this legislative fragmentation within Europe restrains the development of the market.

As you may have noticed, I preferred to not go too much into the details of the proposal, although we are planning to present a series of amendments, in order to improve its content and to find a fair balance between the needs of consumers and enterprises.
In this situation, it is important to recognize that we are making important progress within the JURI Committee also thanks to the support of the European Commission.

In conclusion, despite all the oppositions and difficulties that we are facing, we feel confident, fostered as well by the enthusiasm and sincere support Italian Bar Council and CCBE have shown organizing the important conference on the CESL held in Rome last 11th of April 2012, and we will go on taking into account all the technical suggestion which should help us to improve the content of the current proposal.

An important question has been posed: “Do we really need a Common European Sales Law?”. The question is correct, but the answer has already been given. Personally I believe that it is a rhetorical question, not for everyone, but at least for the people here, for our committee and surely for the European Commission.

So the real question is: “What do we concretely need to change in this proposal? How we can improve it?”

This means that we should no longer focus on the possibility of its rejection; this is not the right attitude. We should instead identify the main issues and try to find, with the help of the stakeholders, the best solutions to those problems.
Draft optional Regulation on a Common European Sales Law
First considerations

Ubaldo Perfetti


1. Background. Optional nature and coexistence as features of the new Regulation

On October 11, 2011 a proposal for a Regulation on a Common European Sales Law was adopted as optional instrument of European Contract Law¹ with a view to harmonizing the rules to be applied to cross-border contracts in a more incisive way than done so far. In fact, all the proposals put forward so far to give rise to a Common European Contract Law have originated from the academic world in a sapiential perspective,² – to put in Di Maio’s words – whereas the most recent instrument in this regard – the Draft Common Frame of Reference – is, by its own admission, nothing more than a toolbox for the lawmaker that would like to harmonize its legislation with European standards or, in the best possible assumption, it could become a modern lex mercatoria for the companies which would agree to wholly or partially use it. Hence it is clear to what extent

¹ The proposal is the result of the consultation which took place following the Green Paper of July 1, 2010 on the possible options for a European Contract Law for consumers and companies, among which the one regarding the adoption of a regulation gained the widest consensus: B. SIRGIOVANNI, La Common European Sales Law (CESL) anche con riferimento ai rapporti con la Convenzione di Vienna e con il Regolamento n. 593/2008 Roma I, p. 1 of the typed version; according to the Author, option no. 4 of the Green Paper corresponding to the above stated proposal seems to have been presented as the best path to be followed, as if E.U. institutions had already decided this course of action. In this regard see also E. DONADIO, Diritto contrattuale comunitario e optional instrument: una valutazione preventiva, in Contratto, impresa, Europa, 2011, p. 649, nt. 3.

² Obviously reference is made to the UNIDROIT principles and PECLs.
there is awareness of the difficulties inherent in reaching the aim of a common set of regulations.

The rules apply to cross-border contracts between traders (provided that either party is a company with less than 250 employees and a yearly turnover not exceeding 50 million euros, or a yearly budget not exceeding 43 million euros), as well as between traders and consumers, however prior to an agreement between the parties. In the case of consumers, the agreement must result from an explicit statement, separate from the one with which reference is made to regulations, and the trader must confirm it on a durable medium.

Basically – and subject to what we will say later on regarding the role of good faith in checking the existence of unfair terms – there seem to be no interference between this regulation and Regulation no. 593/2008 on the law applicable to contract obligations (Regulation Rome I), since the latter is an instrument which identifies only the applicable law – in the absence of choice made by the parties – in case of a conflict of laws on contract obligations.

Hence, in compliance with article 3 of the above stated Regulation no. 593/2008, whereby the parties may choose the applicable law, they may decide to apply the regulation on a Common European Sales Law also to the contracts reached with consumers, without infringing article 6, paragraph 2, of the Regulation no. 593/2008, since the CESL provisions ensure to consumers a high level of protection (see whereas 11 and 12, as well as article 1 of the proposal for regulation).

In the absence of choice, or if a specific concrete case is not regulated by the CESL and the parties have not indicated which law applies in case of CESL shortcomings, should a conflict of laws arise between two States, the law regulating the contract is decided on the basis of the criteria established by article 4 of Regulation no. 593/2008.

If, in line with said criteria, reference is made to the law of a State which signed the 1980 Vienna Convention on the international sales of goods (Convention on Contracts for the International Sale of Goods, the so-called CISG) or if the parties decide to apply the Vienna Convention, the latter shall be applied, provided that a sales contract has been reached between the traders having their business seat in different States and both are contracting States.

Though there are many aspects to which legal experts may level criticism, probably the most interesting and positive characteristic of the proposal for a Common European Sales Law is the fact that it places itself – in an innovative way – in the framework of the efforts made to reach the goal set by the Lisbon conference of making the E.U. economy the most competitive in the world, provided that the obstacles existing in the internal market for companies and consumers are eliminated, so that the former can operate effectively in cross-border trade and the latter are ensured protection against unfair negotiations and transactions resulting from information or power asymmetries.

It is well-known that there exist diverging opinions on the way to reach said goals, all the more so there is an open debate whether the process to be followed
2. A more inclusive concept of the disadvantaged subject: the weak company

should be harmonisation, standardisation or even unification of rules. In this regard the proposal for a Common European Sales Law introduces a new element and, where possible, steps up the convergence process since it is spread by an instrument, namely the regulation which, by its nature, can prevail in the domestic legislation of a member State. Its intrinsic strength, however, is offset by the two characteristics of optional nature and coexistence. The optional nature is ensured by the fact that the implementation of regulations is made conditional upon the choice of the parties concerned, while coexistence means that, precisely because the adoption is optional, this new law is placed side by side (or better, below) national law, which is neither undermined nor overcome and keeps on playing its regulatory role in all the cases in which no choice has been made. It would be tantamount to a second national law and not a 28th European law.

This is the most interesting aspect since, at first glance, the nature of the regulation is hard to reconcile with the optional nature of the choice and we shall check whether such a hybrid\(^3\) may be successful and pursue its goals. Certainly it is clear that such a particular choice was also prompted by the political need to provide a regulatory justification, not requiring E.U. member States’ unanimity, as allowed by article 114 of the TFEU when measures regarding the approximation of legislation must be adopted. Conversely this is not allowed by article 352 for the introduction of exceptional measures needed to reach one of the aims of the Treaties. This is a particularly sensitive point on which diverging opinions have been expressed also by many European Parliaments maintaining that the proposal for Regulation cannot find its legal basis in the above mentioned article 114, such as the British, Belgian, German and Austrian Parliaments which, however, talk about the failure to comply with the principles of subsidiarity and proportionality.

\(^3\) Or the oxymoron, as a legal theory defines it: SIRGIOVANNI, op. loc. ult. cit.


2. A more inclusive concept of the disadvantaged subject: the weak company

An aspect which is worth of attention is the open-minded attitude in relation to a more inclusive concept of weak subject to be protected. In fact, regulations do not apply to consumers only, but – as already seen – also to companies and particularly to small and medium-sized companies identified according to precise quantitative parameters which consider the number of employees, the turnover and the budget value, even though jurists have opposed this choice of ruling out companies tout court.\(^4\) The tendency of including also entrepreneurs in the area of protection reserved for the weak contracting party is recorded

\(^4\) The oxymoron, as a legal theory defines it: SIRGIOVANNI, op. loc. ult. cit.
also in Italy,\textsuperscript{5} but in an occasional and so far insufficient way. A case in point is Law 192 of 1998 on sub-supply, whose article 9 forbids the abuse of economic dependence in which a company finds itself vis-à-vis the other, even though the case law on points of fact and part of the legal theory think that this rule has an expansion ability going well beyond the concept of sub-supply. Another example is Legislative Decree no. 231 of 2002 implementing the European Directive on Late Payment in Commercial Transactions between companies whose article 7 lays down that the agreements related to the consequences of default and non-performance are null and void when they are unfair. Nevertheless these are selective interventions, deprived of a wide and systematic scope, unlike the one ensured by the proposal for regulation under consideration.

Nevertheless, identifying the \textit{weak} company with the one meeting the requirements of article 7, paragraph 2, sub-paragraphs (a) and (b), is not fully satisfactory since the \textit{weakness} of a party in negotiations with the other is an aspect which defies formal definitions because, for example, it can also depend on the \textit{planning} and \textit{technological} dependence in which it finds itself vis-à-vis another, even though it is a company with thousands of employees.

3. \textbf{Good faith and the role it plays in checking the existence of unfair terms}

From many viewpoints, the rules envisaged by the proposal for Regulation are on the same wavelength as the Italian legal theory and sensitivity while, from other viewpoints, they complete pathways already started. Finally, from other viewpoints, they seem to fall short of the standard ensured by domestic legal theory and case law, or even in contrast with them.

We cannot review all the aspects which could demonstrate the above, but reference to the \textit{good faith} clause and the analysis of the ways in which it is used are a first excellent vintage point for observation.

For example, article 86, in section 3 devoted to \textit{Unfair Terms in Contracts between Traders}, while defining \textit{unfair terms}, specifies that they exist, \textit{inter alia}, when they are of such a nature that their use “(...) grossly deviates from good commercial practice, contrary to good faith and fair dealing”. In this regard and with the extension of its use to B2b relations, we can note that a central role is attributed to the \textit{good faith} clause in checking the genetic phase of the contract, in line with the legal theory opinion which calls for the recognition of a more marked rebalancing function attributed to it, in a context of ever more asymmetric negotiations.\textsuperscript{6}

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\textsuperscript{5} With reference to this issue, see the analysis of B. AGOSTINELLI, \textit{L’imprenditore debole}, Turin, 2005, passim.
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\textsuperscript{6} S. RODOTÀ, \textit{Il tempo delle clausole generali}, in Riv. trim. dir. proc. civ. 1987, p. 728
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On the contrary, the definition of good faith and fair dealing enshrined in article 2, sub-paragraph b), meaning “(...) a standard of conduct characterized by honesty, openness and consideration for the interests of the other party” defines the concept in terms which are now widely accepted in the Italian legal experience. In fact, since 1994, with ruling no. 3775 of the Supreme Court of Cassation, Italy’s case law has attributed to good faith a scope consistent with the one defined by the above stated article 2, sub-paragraph b), extended to the solidarity commitment – in line with article 2 of the Italian Constitution – and the protection of the other Party’s interest, which can be summarized in a now recurrent expression whereby the “(...) duty of fairness (article 1175 of the Civil Code), (...) is viewed in the system as an internal limit of any active or passive subjective legal situation, attributed by contract (...), so that compliance with formal lawfulness does not go to the detriment of substantive justice and hence the (unbreakable) duty of solidarity, now enshrined in the Constitution (article 2 of the Constitution), is fulfilled (...), in compliance with the well-known principle whereby each Contracting Party shall protect the interest of the other, unless this leads to considerably sacrifice its own interest”.

Conversely, a possible point of friction with the Italian legislation is the relevance again attributed to good faith, for the purposes of checking the existence of unfair terms in contracts between traders and consumers. Article 83 makes the unfairness of a contract term be conditional upon the fact that this term, not individually negotiated and served, causes a significant imbalance in the parties’ rights and obligations arising under the contract “(...) contrary to good faith and fair dealing”. In so doing, good faith is attributed the role of factor constituting the specific case of unfair terms, in contrast with the provisions of article 33 of the Italian Consumer Code for which this is not the case since the expression “(...) in spite of good faith” shall be construed in the sense that a term is unfair even though the Party serving it ignores this or has not meant to abuse its position. This aspect is not just an issue of exclusively theoretical relevance, since it has a precise practical impact on the concrete possibility of choosing this European Common Law, as we will see later on.

4. (follows) The level of protection ensured to consumers by the Consumer Code and CESL: uniformity or divergence? Possible interference with the Rome Regulation I.

As is well-known, Regulation no. 593/2008 of June 17, 2008 provides for the law applicable to contract obligations (Rome I) when there is a conflict of laws.

The system is based on the following rule: the contract is regulated by the law chosen by the Parties (see article 3) which may also decide that the contract must be governed by a law other than the member State’s law (see article 2). In-
indeed, whereas 13 of the regulation envisages that the Parties may also incorporate by reference into their contact a non-State body of law (such as the Unidroit principles) or an international convention (such as the Vienna Convention). In the absence of choice, the Rome I Regulation shall identify the criteria to define the applicable law. For example, in the absence of choice, the sales contract is regulated by the law of the country where the trader has its habitual residence (see art. 4). A protection clause is envisaged for contracts with consumers in which the parties (rectius traders, considering the large number of standard contracts in this field) may choose the applicable law. Nevertheless, said choice cannot deprive consumers of the protection ensured to them by the imperative rules enshrined in the law of the country where they habitually reside. After all, this rules applies in the absence of choice. The lawmaker has thus reconciled two different needs: on the one side, by letting the parties choose the applicable law, it ensures compliance with the principle of private autonomy and, on the other, by envisaging the implementation of the imperative rules enshrined in the country where traders habitually reside, it avoids traders circumventing consumer protection rules, which are now harmonized in all E.U. member States, by choosing or rather imposing on consumers a law other than the one of the country where they habitually reside.

After all, as noted by the legal theory, the rules for the protection of consumers are such as to ensure full compliance with the principle of private autonomy, since they place consumers and traders on an equal footing thus trying to overcome the structural contract imbalance.

Regulation no. 593/2008 and whereas 14, in particular, envisage the case in which “should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules”.

Said instrument is certainly the Common European Sales Law so that, from this first viewpoint, its choice is harmonized with the Rome I Regulation and this also implies that in B2b contracts no conflicts arise should the parties opt for the new uniform law.

According to the legal theory, those conflicts do not even arise in the B2C contracts, precisely as a result of the above stated safeguard clause. the choice of which, however, cannot deprive consumers of the protection ensured to them by the unbreakable law provisions which would be applicable in the absence of choice, namely the law of the country where consumers reside (article 6, paragraph, 2, of the Rome I Regulation).8 The reason is that – as is said – the choice does not elude this provision since, by choosing the uniform law, consumers are anyway ensured the highest level of protection and, however, not lower than the one ensured by the national regulation of the country of residence.

This explanation is not convincing.

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8 M. MELI, Proposta di regolamento etc. cit. 201

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4. The level of protection ensured to consumers by different rules

If we consider, on the one side, the Italian consumer rules and particularly article 33 of the Consumer Code and, on the other, article 83 of the Common European Sales Law, we realize that the latter makes the judgment on the existence of unfair terms in the contracts reached with consumers conditional upon the fact that, not negotiated and served individually, they cause such a significant imbalance in the parties’ rights and obligations arising under the contract “(…) contrary to good faith and fair dealing”. Conversely, Article 33 of the Italian Consumer Code lays down that “(…) terms are considered unfair when, in spite of good faith, they cause a significant imbalance in the consumers’ rights and obligations arising under the contract”. 

This is not the right place for going over again the uneven vicissitudes of the interpretation of the meaning of the phrase in spite of good faith; suffice to recall that for most people that expression was the result of a mistake in the translation of the European Directive no. 13/1993 transposed in Italy with Law 52 of 1996, for which reason it had to be replaced or interpreted as if the rule read contrary to good faith. When the Italian lawmaker drafted the Consumer Code, the Ministerial Committee established to this end, while drawing up the draft Legislative Decree, thought it was right time to correct the mistake and suggested, inter alia, to change that phrase by introducing the phrase contrary to good faith so as to replace the phrase in spite of good faith. The proposal was accepted by the Ministry that sent the draft to the Council of State which, in its opinion of December 20, 2004, rejected the suggestion by asking to keep the wording unchanged. It argued that, if the change were effected, the evaluation on the existence of unfair terms would depend on the contrast between the agreement and good faith. Nevertheless, in that way the level of consumers’ protection would be diminished since good faith became one of the constitutive elements of the specific case of unfair terms – hence, with a view to obtaining protection, consumers had to prove the concurrent existence of two factors, namely the significant imbalance and the fact of terms being contrary to good faith, even though one could exist without the other. Conversely, by keeping the wording unchanged, the only requirement upon which protection had to be made conditional would be the evidence of significant imbalance since the trader’s good faith would not be relevant. That was the lawmaker’s choice that in the above stated article 33 preserved the original wording in spite of good faith.

The clarification is needed to mean that the level of protection granted to consumers by the Common European Sales Law can appear lower than the one ensured by domestic legislation; this would create a possible conflict with the Rome I Regulation.

The doubt that the level of protection is really higher in domestic legislation could be corroborated by the cautious attitude on the conditions required for

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9 C. CASTRONOVO, La proposta di un diritto comune europeo della vendita: alcuni quesiti fondamentali, in Audizione pubblica dell’1.3.2012. By the same Author, see C. CASTRONOVO, L’utopia della codificazione europea e l’oscura realpolitik di Bruxelles

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the consumers’ choice of CESL to be valid, implying the need for an information notice and, in case of a contract reached by phone or by other means, the sending of a written confirmation on the implementation of the regulations, which must be followed by express agreement (article 9). In fact, we wondered why these precautionary measures and particular formalities were needed if it were true that the new uniform law was conceived to ensure consumers a high level of protection and a protection at least not lower than the one ensured by the individual national legislations.

5. The limits for compensating non-economic loss

Few words are now appropriate on article 2, sub-paragraph c), where, while defining the concept of loss, also non-economic loss is included, by confining it, however, “(…) only and exclusively to pain and suffering, thus excluding other forms of economic loss such as impairment of the quality of life and loss of enjoyment”. While it is inexplicable why impairment of the quality of life and loss of enjoyment must not fall within the scope of non-economic loss which can be compensated, certainly this limitation is a step backward compared to the Italian case law and legal theory acquis, whereby any constitutionally protected interest of the person must be compensated as a type of non-economic loss,\(^\text{10}\) while the provision regarding the compensation of non-economic loss resulting from breach of contract is in line with the current line of decisions by the Supreme Court of Cassation.\(^\text{11}\) This, too, produces the influence regarding the comparison between the weak party’s different levels of protection, and particularly consumers, which could jeopardise the effectiveness of the choice.

6. The use of general provisions and the organisation of the system

In the CESL there is a remarkable use of general provisions. As is well-known, they correspond to a regulatory technique which allows to introduce indefinite concepts by leaving to judges the task of detailing them; they have been defined the lungs of the legal system\(^\text{12}\) and their usefulness lies in ensuring flexibility to the regulatory structure, for it to be capable of adapting to societal changes. This happens, however, because judges perform the task of detailing their con-

\(^{10}\) See the ruling of the Supreme Court of Cassation, joint sitting, no. 29832 of December 29, 2008

\(^{11}\) Finally see ruling of the Supreme court of Cassation no. 7256 of May 11, 2012

\(^{12}\) S. RODOTÀ, Il tempo delle clausole generali, cit. loc. cit.
7. Conclusions

In general terms, despite some aspects to be reconsidered, undoubtedly the draft regulation must be given credit for making the proposal for a Common European Contract Law progress decisively and concretely, over and above the reservations on some aspects which may be overcome with adjustment changes.\(^{14}\)

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\(^{14}\) In line with the final conclusions drawn by G. ALPA in the international conference organized in the premises of the Consiglio nazionale forense (Italian Bar Council) in Rome on April 11, 2012 on *The proposed Common European Sales Law – The Lawyer’s View.*
Part II
Legal perspectives from different countries
The proposed regulation on a Common European Sales Law: An Italian perspective

Giuseppe Conte


1. The importance of a regulation on Common European Sales Law (CESL)

The choice to adopt a regulation on Common European Sales Law (CESL) appears highly advisable for cultural, practical and economic reasons.

From a political point of view, the CESL is a good instrument to increase and improve the process of harmonization of the European contract law. The debate about the future of the European contract law is still open, but we have to be aware that we are in the middle of a long term path: many steps have been taken since the first Resolutions of the European Parliament were adopted, in 1989 “on action to bring into line the private law of the Member States” (A2-157/89) and in 1994 “on the harmonization of certain sectors of the private law of the Member States” (A3-0329/94).

We cannot allow ourselves to stop in the middle of this path; I understand that it isn't always possible to walk at a cracking pace; sometimes it is opportune, maybe necessary, to slow down the pace; the difficulties to achieve wider political and economic agreements are evident but we cannot stop and give up to cover the path towards harmonization of the European contract law. After the great commitment with the Draft Common Frame of Reference, after the Feasibility Study and the noteworthy efforts for the revision of Acquis communautaire, I believe that it is time, now, to promote the adoption of common rules on contract law.

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3 About the political foundations of European private law see, recently, the contributions collected in the second part of the volume R. Brownsword, H.-W. Micklitz, L.
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The proposed regulation on CESL could appear less ambitious than the initial “private law codification project” which met the strong opposition by the majority of the member states. But we have to consider that sales involve a strategic area of the contract law.

From a practical point of view, maybe more proper of a lawyer’s view, I think that CESL would be an important step to overcome the legal fragmentation still existing in the field of European contract law. Maybe the Commission emphasizes too much the role of transaction costs as a barrier for the functioning of internal market; but it is reasonable to expect that CESL will contribute to strengthen the internal market increasing the cross-border transactions and make more confident traders and consumers in this kind of business with benefit to competition and to consumers who could choose better products at better prices.

The Eurobarometer survey seems to suggest that differences in national contract law are not so important to prevent traders from reaping the benefits of internal market.

In fact, there are many other potential obstacles on the businesses decisions to engage in cross-border trade (language and cultural barriers, logistical concerns, administrative and tax regulations and so on) and we can agree that the differences between national systems of contract law are not the most significant of them.

But we have to keep in mind the complexity of the legal framework within the European context and consider that the actual level of harmonization of European consumer law cannot be considered a final achievement: this level could go down in the next future because of initiatives of single Member States which could decide to regulate, in particular, the digital content market.


4 H.W. MICKLITZ, A ‘Certain’ Future for the Optional Instrument, in R. SCHULZE and J. STUYCK, eds., Towards a European Contract Law, Sellier, Munich, 2011, 181, considers that “The idea of transforming the codification project, more concisely the Draft Common Frame of Reference, into an Optional Instrument seems like the glimmer of hope the European Commission needed to bring the overall project to a ‘happy’ ending”.

5 Eurobarometer survey on European contract law in business-to-business transactions, Flash EB # 320, 2011.

In this perspective, a uniform set of contract law rules could contribute to improve the coherence and the quality of contract law and to stimulate cross-border trade and perhaps to reduce transaction costs.\(^7\)

From an *economic point of view*, in a future perspective, a set of uniform rules could play the role of a novel “lex mercatoria” offering a legal framework which could stimulate the economic growth in the European economic space.

The old continent is suffering very much in terms of stability and competitiveness. The old market of our continent risks to be marginalized by the new emerging markets. The adoption of an optional European regime on sales law, within a legal environment characterized by jurisdictional competition, could serve as a useful instrument to encourage the European economic growth and to support the member-states to compete in the global economy.

The possibility to achieve the goals of encouraging cross-border transactions and reducing transaction costs have been criticized by a few academics who have motivated their skeptical positions through the economic analysis of the benefits and costs arising from an optional instrument.\(^8\) The argument is that the transaction costs generally increase rather than decline if the new rules are offered as an option.\(^9\)

It is likely that CESL could increase transaction costs in a short term. But in a longer perspective, after the initial investments by the actors of the cross-border transactions to determine the impact and the effects of the common


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rules, we can expect a decline of those costs and, broadly, a reduction in uniformity costs.

Further, we have to consider that this kind of analysis is a useful instrument to try to foresee the economic impact and effects of the new common rules. But we have not to forget that it is based on the “rational choice theory”, which assumes that all the individuals have perfect information, cognitive ability and time to weigh every choice and to make rational and utility maximizing decisions.

According to this theoretical paradigm the high start-up costs associated with the CESL should discourage businesses to use the new provisions. But a few empirical analysis falsify this assumption because the majority of European businesses surveyed find attractive a uniform European contract law, even if optional and prefer a legal environment with less complexity.10 Also in the field of harmonization of European private law, the behavioral predictions of rational choice theory are confirmed as not plausible because they lack understanding the more complex actors’ motivations.

In conclusion, any consideration on the role, the impact and the effects of the new uniform contract law rules has to be extended through a medium and long term perspective. We can predict that the new instrument will create interpretative difficulties at the beginning and it will take some time to become attractive for all the actors of the European legal environment.

But we are confident that, after this initial period of application, the benefits and goals of this legal initiative will become more obvious and we can expect to verify that the CESL will contribute to give more attractiveness to our market,11 as well as to strengthen the European identity.12


2. The complex issues which arise regarding the legal basis

I am aware that the topic of the legal basis of CESL is complex and raises some questions, even more in consideration of its optional nature. The legal basis indicated by the European Commission appears very controversial: the proposal would be based in Article 114 of the Treaty on the Functioning of European Union (TFUE), assuming that CESL “would guarantee a high level of consumer protection by setting up its own set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU consumer law.”

This solution stimulated perplexity in some scholars convinced that the more appropriate legal vehicle for an optional instrument would be Article 352 TFUE, which legitimates the adoption of measures where “action by the Union should prove necessary … to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.”

The issue involves, of course, not only technical but also political aspects. The legislative procedure selected in accordance with Article 114 outlines, without doubt, a path less treacherous in light of the approval of the new instrument, considering that it requires the majority of votes with the full participation of the European Parliament, while the procedure of Art. 352 requires unanimity in

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12 See M.W. Hesselink, The Case for a Common European Sales Law in an Age of Rising Nationalism, in 8 European Review of Contract Law, 2012, at 342 ss., who assumes the CESL as an instrument to contribute to strengthen the European identity by thickening its moral dimension. Conversely E.A. Posner, The Questionable Basis of the Common European Sales Law, cit., at 12, considers unlikely that the CESL will contribute to a broader project of European integration and to European identity.

13 See the Explanatory Memorandum, chapter 3 on “Legal elements of the proposal” and the recital 11 of the Proposal.

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the Council after the consent of the European Parliament. But the same path exposes to the risk of litigation before the Court of Justice.

The European Court clarified that the Treaty does not authorize a legal instrument which has only the incidental effect of harmonizing market conditions within the Union; in the same perspective, a measure is considered valid just in case it helps to cure diversity between national laws and that diversity is shown to be harmful to the achievement of the European internal market.

The Court of Justice also tried to specify the meaning of the expression provided by Article 114, which requires that the measure has to “approximate” the contract laws of the Member States.

In Smoke Flavouring and ENISA cases, the Court seems to assume that “approximation” is a result which can be achieved through many different techniques. In particular, in the first case the Court held that Article 114 confers a “discretion” since the appropriate method to approximate depends “on the general context and the specific circumstances of the matter to be harmonized”.

Very interesting and worth of consideration is also the case European Cooperative Society. Evaluating the Council Regulation 1435/2003 which introduced the statute of the European Cooperative Society, the Court clarified that “the contested regulation … leaves unchanged the different national laws already in existence” and consequently it “cannot be regarded as aiming to approximate the laws of the Member States … but has as its purpose the creation of a new form of cooperative society in addition to the national forms”.

But the European Court of Justice in this case was asked to decide the correct legal basis for a Regulation which established a “28th regime” for public companies and cooperatives, introducing a new supranational legal entity add-

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15 H.-W. Micklitz and N. Reich, The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?, in EUI Working papers – Law 2012/04, European University Institute, Fiesole, 2012, 6, consider a pragmatic argument in favor of Art. 114 TFUE: the CESL, as the Consumer Rights Directive, will have to be “updated” continuously and in parallel to avoid discrepancies in the protective ambit of the two instruments and this requires the use of the same legislative mechanism: exactly the ‘ordinary legislative procedure’ of Art. 114 TFUE instead of the more complex procedure of Art. 352 TFUE.

16 See G. G. Low, A Numbers Game – The Legal Basis for an Optional Instrument in European Contract Law, cit., 2.

17 See S. Weatherill, The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide”, in 12 German Law Journal, 2011, 830.


ed to national entities. The Court judged that the appropriate legal basis was Art. 352 TFUE (then Art. 308 EC) instead of Art. 114 TFUE (then Art. 95 EC).

The Regulation 1435/2003 will have a deep impact on the existing legal framework and will set up a new legal entity.\(^\text{20}\) The proposed regulation on CESL, in the perspective chosen by European Commission, will introduce a contract law regime quite different by the 28th regime evoked in the former theoretical debate.

In both cases, the 28th regime and the second national regime, it seems that we are dealing with the same optional law. But the differences are worth considering: the solution proposed by the European Commission makes the CESL matter of national law; in this perspective, the CESL could be applicable as “a second contract law regime” existing within each member state. On the contrary, the 28th regime is located alongside the 27 national contract laws.

These considerations can remove the doubts about the legal basis of the CESL?

On one hand, the CESL, acting as a second regime within each national legal system, seems to leave the different national contract laws intact. On the other hand, the CESL, as a second contract law regime and albeit, as an optional instrument, is expected to approximate, in a “dynamic sense”\(^\text{21}\), the provisions existing in member states, combining conflict and substantive rules and also stimulating converging effects in a perspective of regulatory competition.\(^\text{22}\)

For these reasons it seems appropriate to consider the CESL based on art. 114 TFEU. The European Commission is persuaded that the CESL would contribute to the proper functioning of the internal market and would offer a complete set of fully harmonized mandatory consumer protection rules, which should guarantee a high level of consumer protection and provide consumers with an incentive to enter into cross-border contracts on this basis.\(^\text{23}\)

Differently, the same legal basis would not be possible to regime 28th because, as already observed, “this would not count as a measure which aims at the approximation of the laws of the Members States, for the reason that the arrival of a 28th European regime would change nothing to the existing national laws”.\(^\text{24}\)

Assuming that the proper functioning of the internal market through a uniform set of contract law rules cannot be achieved by initiative of a single

\(^\text{20}\) H.-W. Micklitz and N. Reich, *The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?*, cit., 5 et seq.

\(^\text{21}\) See H.-W. Micklitz and N. Reich, *The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?*, cit., 5.


\(^\text{23}\) See the proposal recital 11.

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State Member, the Union may adopt the CESL in accordance with the principle of subsidiarity as set out in Art. 5 TEU.

In the area of cross-border transactions member states have no possibility to achieve a similar goal, introducing a uniform instrument. They can only rely on the private international law.

The proposed regulation seems to comply also with the proportionality criteria, considering the broad discretion accorded by the European Court of Justice to the EU legislature on this ground.25

3. The relationship between the CESL and the system of private international law

The relationship between the new instrument and private international law suggests a few reflections according to the intensive academic debate triggered off on this topic.

We have already assessed (see above: § 2) that the new regulation will introduce a second contract law regime within each member state’s contract law. The parties may choose it if the law of a member state applies.

The envisioned optional instrument has not been considered in light of the 28th regime-model, therefore the validity and the effects of the choice of the new rules will be not governed by the rules of private international law and Rome I Regulation.

According to Article 8 of the Proposal the existence of an agreement on the use of the CESL and its validity shall be determined on the basis of the same provisions of the CESL (paragraph 2 and 3 of the same Article 8 and Article 9). This solution backs up the European Commission’s willingness to put the new rules out of the sphere of application of private international law and assures more efficiently the achievement of the aim to apply uniform rules on sales within the European legal environment.

Abandoning the perspective to integrate the CESL into the existing system of private international law prevents the complex problems related to the option of the 28th regime-model, such as the doubt about the possibility offered to the parties to choose (according to Art. 3.1 of the Rome I-Regulation) supra-national law instead of state-law, or the risk to provide a fragmented legal framework consisting of CESL rules and more protective mandatory provisions of the law of the consumer’s habitual residence (according to Art. 6.2 of the Rome I-Regulation).

The European Commission assumes the CESL as a 2nd regime-model and states that Rome I Regulation and Rome II Regulation will continue to apply determining the applicable law in the area of contractual obligations and in

25 See, for example, ECJ Vodafone Case C-58/08; ECJ The Queen v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd. et al. Case C-491/01.

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the field of non-contractual obligations, including those which arise from pre-contractual statements.\textsuperscript{26}

This solution implies that the rules of private international law will take precedence over the optional European contract law.\textsuperscript{27}

If we consider CESL as matter of national law, it is clear that when there will be a cross-border contract will be necessary to find the applicable law.

Rome I, in particular, but also Rome II for pre-contractual information duties will continue to apply and these instruments will consent to choose the applicable law according to private international law rules. The conclusion is that CESL will apply only if rules of Rome I and Rome II Regulations will allow to apply the law of a member state.

The application of the CESL requires two steps: firstly, to determine that the applicable law is the national law of a State member; secondly, to choose the CESL as a second national contract law.

A problem could arise in case of business-to-consumer (B2C) transactions. The conflict with Article 6 of Rome I Regulation is certain: if the parties have chosen the law of another Member State than the consumer’s law, the consumer could profit by the same level of the mandatory consumer protection law provided in his habitual residence (art. 6.2 Rome I Regulation).

For the European Commission this problem is just apparent: if the parties have chosen the CESL assuming it as a national law, being the CESL the same in all member states is not possible argue that the consumer’s habitual place of residence can offer a better level of protection than the CESL.\textsuperscript{28} The fact that the CESL is a second regime applicable in every State member would neutralize...

\textsuperscript{26} See \textit{Explanatory Memorandum}: “The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts”.


\textsuperscript{28} According to the \textit{Explanatory Memorandum}: “If the parties choose in business-to-consumer transactions the law of another Member State than the consumer’s law, such a choice may under the conditions of Article 6(1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6 (2) of the Rome I Regulation). The latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country’s law chosen are identical with the provisions of the Common European Sales Law of the consumer’s country. Therefore the level of the mandatory consumer protection laws if the consumer’s country is not higher and the consumer is not deprived of the protection of the law of his habitual residence”.

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the operation of Art. 6 of Rome I Regulation which implies different levels of consumer protection in Member States.29

But we cannot take this solution for granted. Article 6.2 provides that a choice of law may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue “of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1”.29

It is difficult to argue that the law applicable on this basis, in the absence of choice, would be the CESL instead of the national contract law (1st regime).30

In this perspective the provisions of the CESL will apply only if they ensure a level of consumer protection higher comparing the mandatory consumer protection standard offered by the law of the consumer’s habitual residence. So we cannot assert that it does not exist the risk to apply a mixed regulation combining provisions of the CESL and rules of the national contract law.

Maybe this risk is not concrete, according to the fact that the consumer protection provided by the CESL generally is not lower of the standard of consumer protection offered by the member states.

Some scholars, considering the problems which arise assuming the CESL as a 2nd regime-model, have suggested to introduce the new rules of the CESL relying on a “uniform law approach”31. The classification of CESL as an instrument of uniform law would permit to avoid the application of the rules of private international law and would simplify the choice of the parties to apply the CESL to their transaction. In this perspective, no issue of application of Article 6 of Rome I Regulation would arise.

In conclusion, the assumption of the CESL as a second regime applicable in every state member does not prevent conflicts with the provision of Art. 6.2 of Rome I Regulation even if the risk of such conflicts is minimum according the high standard of consumer protection offered by the CESL.

In any case we have to consider that the CESL does not cover every aspect of the contract, so for the residual matters we have to apply the rules of national contract law of the members state. Also in this case the restrictions of Article 6.2 of Rome I Regulation will apply. The recital 27 of the envisioned proposal

29 See M.W. Hesselink, op. cit., p. 3.
30 See G. Rühl, The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?, cit., p. 10 et seq., who for this reason suggests to insert a provision into the Rome I Regulation or into the CESL that excludes application of Article 6 Rome I Regulation if the parties have validly chosen the CESL in accordance with the provisions of the CESL.

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4. Potential conflict between CESL and the CISG

Giuseppe Conte highlights this point summarizing the matters non addressed in the CESL: legal personality, invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, representation, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law, the tort law and so on.


The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been ratified by 23 member states of European Union. The CISG governs contracts for the international sales of goods between businesses, excluding sales to consumers and sales of services. It applies to contracts between parties whose places of business are in two different contracting states or when the rules of private international law lead to the application of the law of a contracting state (Art. 1 CISG). Its rules may also apply by virtue of the parties’ choice: if parties have made the choice for the law of a contracting state, the rules of the CISG will be applicable, as national law of a contracting state, to contracts within its scope.

The conflict between CESL and CISG could arise in business-to-business transactions. Convention of Vienna, for the member states who ratified it, is neither foreign law nor international law: it is an uniform internal law. Also the agreement to use the CESL is a choice in favour of a (second) national contract law. That is the reason why the conflict between CESL and Convention of Wien is possible: they determine both a second national regime in the area of cross-border sales contracts.

Recital 25 of the proposed Regulation resolves the conflict stating that where the CISG “would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention”.

The recital 25 suggests that a clear choice to apply the CESL implies an intention to exclude the CISG.

This solution is not straightforward. According to Article 6 CISG, parties may exclude the application of the Vienna Convention or derogate from the effect

32 The CISG has been not signed by United Kingdom, Portugal, Ireland and Malta.

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of any its provisions, but these questions are matters to be decided in accordance with the rules of CISG themselves.\textsuperscript{34}

The CISG is a uniform instrument of substantive law so its status of law applicable to the contract allows it to determine, with priority over other conflict-of-law rules, the conditions of its own applicability.\textsuperscript{35}

The problem appears less dramatic if we consider that the application of the CISG can be excluded implicitly.

During the diplomatic conference which led to the approval of the Convention a few delegations advanced a proposal which would have allowed total or partial exclusion of the Convention only if done “expressly”. This proposal was rejected by the majority of delegations and a compromise was reached: an express reference to the possibility of an implicit exclusion was eliminated from the text because of the concern that this reference would have encouraged courts to conclude that the Convention had been wholly excluded.

\begin{flushright}
\textsuperscript{34} See M.W. Hesselink, \textit{How to Opt into the Common European Sales Law?}, cit.; also N. Kornet, \textit{The Common European Sales Law and the CISG: Complicating or Simplifying the Legal Environment?}, cit., 7.
\textsuperscript{35} For this reason the first commentators have considered without effect the recital 25 of the proposed regulation: M.W. Hesselink, \textit{How to Opt into the Common European Sales Law?}, cit., 4, assumes that claim as “ultra vires”; see also N. Kornet, \textit{The Common European Sales Law and the CISG: Complicating or Simplifying the Legal Environment?}, cit., 7.
\end{flushright}
Many courts expressly admitted the possibility of an implicit exclusion, as long as the parties’ intent to exclude the CISG is clear and real.

Arbitral awards and courts decisions seem more reluctant to admit an implicit exclusion if the parties choose the law of a contracting state to govern their contract.

A few some courts and arbitral tribunals stated that the parties can implicitly exclude the Convention at least when they refer to the “exclusive” applicability of the law of the contracting state.

But this solution is not accepted by the most courts decisions and arbitral awards which argue that when the choice of the law of a contracting state is made without particular reference to the domestic law of that state, is not possible to exclude the Convention’s applicability, being the Convention part of the law of the contracting state whose law the parties chose.

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36 Oberlandesgericht Linz, Austria, 23 January 2006 (at http://cisgw3.law.pace.edu/cases/060123a3.html); Tribunal Cantonal du Jura, Switzerland, 3 November 2004; U.S. Court of Appeals (5th Circuit), United States, 11 June 2003; Oberster Gerichtshof, Austria, 22 October 2001 (at www.cisg.at/1_7701g.htm).

37 Tribunal Cantonal du Jura, Switzerland, 3 November 2004.

38 See, for example: Hof’s-Hertogenbosch, the Netherlands, 13 November 2007.

Considering the case-law on CISG we can argue that the conflict between CESL and CISG appears less dramatic.

The use of the CESL requires an agreement of the parties to that effect (Art. 8 of the proposed Regulation), so the application of the CESL cannot issue from a generic reference to the domestic law of a state who ratified the CISG.

An express reference to the use of the CESL can be considered, therefore, as an implicit choice to exclude the application of the CISG.

In conclusion, if we consider CISG and CESL in a perspective of jurisdictional competition, we should remark that the former instrument has an advantage because it constitutes a default regime requiring an explicit choice to opt out, whereas the latter instrument requires an explicit choice to opt in.41

The CESL can close the gap, considering that not all EU member states have become parties to the Wien Convention. Furthermore, the CISG is an incomplete instrument because it does not deal with important matters as the validity of the contract and for this reason its application implies a fragmented legal framework.42

Some legal scholars remarked another advantage of the CESL: it would be subject to the jurisdiction of the European Court of Justice, which would ensure its uniform interpretation.43 The CISG cannot rely on the highest court to reconcile different interpretations: the only means to pursue the goal of an uniform interpretation is to create a database – easily accessible to the public – to share information and to reflect the evolution of case law.44 An important role is also played by the doctrine who through commentaries and other initiatives tries to address the CISG’s application.

But this issue is complex and ambivalent: we prefer to reason on the role of an uniform interpretation of the CESL at the end of our remarks. [voglio dire: preferisco tornare a riflettere sul ruolo dell’interpretazione uniforme … alla fine di queste pagine]


42 J. Basedow, European Contract Law – The Case for a Growing Optional Instrument, in R. Schulze e J. Stuyck, a cura di, Towards a European Contract Law, cit., 170, believes that in B2B we have already CISG and no need for additional uniform law.

43 N. Kornet, The Common European Sales Law and the CISG: Complicating or Simplifying the Legal Environment?, cit., 12 et seq.

44 See The UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods (available on the Internet at the official UNCITRAL web-site: www.uncitral.org) which is supporting the aim of uniform interpretation of CISG.
5. The scope of the new regulation

As already noted, the proposed regulation on the CESL is limited in its scope in three ways: by the contract’s cross-border character, by the contract’s subject-matter, by the status of the contracting parties.45

The proposed regulation on CESL seems to be conceived, for any aspects, as a “work in progress”. As regards the personal scope, the CESL has been planned for business-to-consumer transactions (B2C) and for business-to-business transactions (B2b) but it seems able to express a “expansion ability”.

We have to underline that in B2b transactions the first – B – is a capital letter, the second – b – is a lower case because the latter refers to a small or medium-sized enterprise (SME), meaning it employs fewer than 250 persons and has an annual turnover not exceeding euro 50 million or an annual balance sheet total not exceeding euro 43 million (or equivalent amount in another currency) (Article 7 of the proposed regulation).

The proposed regulation seems to intend the extension of some of consumer protection provisions to SMEs. A similar intent is suggested by the recital 13 of the Consumer Rights Directive 2011/83/EU which provides: “… Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not “consumers” within the meaning of this Directive, such as non-governmental organizations, start-ups or small and medium-sized enterprises”.

It should to be noted that the extension of the consumer protection does not imply an option of the proposed regulation for a broader definition of “consumer”: Article 2 states that “consumer” means “any natural person who is acting for purposes which are outside that person’s trade, business, craft, or profession”.

If the political intent of the European Commission is to extend the personal scope of the consumer protection principles also to small and medium-sized enterprises, it would be coherent to assign a broader meaning to the definition of consumer, involving the person who is acting for purposes “partly within and partly outside the person’s trade” (mixed purposes or dual purpose contracts).46

This political intent is undermined by the fact that the concept of “small and medium-sized enterprise” appears too broad and, being based only on quan-


46 A broader definition of consumer is suggested by recital 17 of the Consumer Rights Directive 2011/83/EU and by Art. 1.-1:105 of the Draft Common Frame of Reference; see, amplius, H.-W. Micklitz and N. Reich, The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?, cit., 12 et seq., who criticize the traditional narrow definition of consumer contained in the CESL and remark the paradoxical effects produced by opting-in the CESL in those countries which implemented the consumer contract directives – under the minimum harmonization principle – adopting a broader definition of consumer.
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titative parameters, it seems an unsuitable key to integrate the scope of the traditional consumer protection principles.

The Art. 15 of the proposed regulation contains a review clause: after the initial period of application the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of the new regulation “taking account of, amongst others, the need to extend the scope in relation to business-to-business contract”.

Another sign of what I would call “expansion ability” of CESL is provided by Article 12 of the proposed Regulation which offers to Member States the option to make the CESL available to parties for use in domestic transactions and for contracts B2B, even if neither of traders is a SME. The extension of the scope of CESL also to purely internal contracts seems to open the possibility that the member states could decide to abolish their first regime.47

Art. 5 described the substantive scope of the CESL which can be used for:
- “sales contracts”, meaning contracts for transferring the ownership of the goods (Art. 2 k);
- “contracts for supply of digital content” as defined by Art. 2 (j);
- “related services contracts”, meaning (i) any service related to goods or digital content provided by the seller of the goods or the supplier of the digital content “under the sales contract” or (ii) the contract for the supply of digital content or a separate related service contract which was concluded “at the same time” as the sales contract.

About related services contracts, it should be noted that the two criteria are very different and, in particular, the last one, assuming the “time” as connecting factor, seems to establish a connection too weak.48

6. The “optional nature” of CESL

The “optional nature” of CESL means that the new rules will be applied only if both the parties will agree to use them. The optional nature implies that its application is dependent upon a voluntary initiative of the parties.

The choice for an optional instrument characterized by a voluntary nature is appropriate because it seems a choice of low profile but in the meantime it will have a great impact for the future of European contract law: from a formal point of view this choice respects the national legal systems; from a substantial point of view this choice innovates them deeply; every national system will

47 M.W. Hesselink, How to Opt into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation, cit., 2, footnote 12.

have a second contract law regime and it is not difficult to predict that the CESL will experience a growing application in the field of cross-borders transactions.

The CESL does not remove or replace any pre-existing contract law rules; the Regulation will just add an optional regime and we can imagine that the CESL in a next future will become the new lex mercatoria applied all over the European legal space.

The requirements of the agreement of the parties confirming the choice about using the CESL is quite different for B2b and B2C contracts.

As regards B2b the provisions in CESL, they seem to support the conclusion that the choice could also be implicit (the art. 8 of Regulation evokes relevant provisions in CESL to determine the existence and validity of this agreement (see articles 30 and 58 could justify this conclusion). For B2b is also possible a partial choice for the CESL, but we can imagine how many difficulties will arise in this case to determine the rules governing the contract.

For B2C the agreement should be explicit and inserted in a separate statement and the seller has to send a confirmation to the consumer.

For B2C, Art. 8 paragraph 3 doesn’t allow the “depeçage”, id est a partial choice which would apply only to some rules of CESL. The solution prevents the seller’s temptation to opt only for more convenient rules.

7. The purposes of the CESL

We cannot deny that the procedure chosen by the Commission is very innovative. A set of uniform rules will become a second national regime not through a legislative initiative of each State Member, but through a regulation of the European Union.

We have also to underline that the future perspective cultivated by the European Commission is very ambitious; the CESL is an legal instrument which aims to achievement the following goals, fundamentally economic, some of them more specific and some of them more general.

To summarize the more specific aims:

a) to reduce transaction costs experienced by traders;

b) to give consumers more product choice at a lower price.

The more general aims:

c) to contribute to the proper functioning of the internal market and increase the level of competition among traders;

d) to offer a complete set of fully harmonized mandatory consumer protection rules.

We cannot disregard that the achievement of these aims depends upon the possibility to ensure an uniform interpretation of the meaning of the various provisions of the CESL.

The advantages to introduce common rules in an European legal environment so fragmented could easily be undermined by the fact that the cross-border disputes will continue to be adjudicated by national courts.

Article 14.1 of the proposed regulation provides that “member states shall ensure that final judgments of their courts applying the rules of the CESL are communicated without undue relay to the Commission”. Article 14.2 states that the Commission “shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgments of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public”.

The transparency, the open communication and the easy access to national rulings are important instruments to pursue legal certainty.

In light to ensure the uniform interpretation of the CESL, the European Court of Justice can play an important role. The European Court can supervise the case-law on the interpretation of the CESL promoting a coherent and uniform legal framework. In this perspective, we can be confident that the new common rules will lead to legal uncertainty.50

But the European Court can be involved only in a limited number of cases, as already predicted.51 And more generally, the uniform interpretation is a goal which can be achieved in a considerable lapse of time.

The development of a common European contract law space will depend upon the continuous political support, strong organizational efforts and, not least, will be pursued.

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50 E.A. Posner, The Questionable Basis of the Common European Sales Law, cit., at 10, observes that “This will create additional confusion, raising transaction costs, ad firms will need to consult not only the laws of 27 member states but also potentially as many as 27 interpretations of the CESL”.

The Common European Sales Law – a German perspective on the CESL

Georg Maier-Reimer

As in most countries, in Germany, the proposal of a CESL is the subject of controversial discussion. For instance, the German Parliament (Bundestag) has filed a Notice to Members, in which it questions the compliance with the principle of subsidiarity and the legal basis, whilst the German Federal Council (Bundesrat) has generally welcomed the project of a European Contract law. What I am going to present to you therefore cannot possibly be “the German view”. It is the view adopted by the Committee on European Contract Law of the German Lawyers’ Association, which Committee is chaired by the chairman of this session.

According to the program of this conference, the general perspective should be discussed with particular consideration of four aspects all of which, or at least the first three of which, are closely interrelated. Discussing them one by one, I will frequently talk about the CESL as if it had already been enacted in the form of the draft published by the Commission.

1. Do we need a CESL?

Clearly, there are many who do not need it. But, according to consultations made or initiated by the Commission, there is a significant percentage of traders in various jurisdictions who feel that the disparity between the sales laws of Member States and in particular the continuing disparity between consumer protection laws, works as an impediment to cross-border sales or purchases which make such cross-border contracts less appealing or less attractive than a domestic one. The consultations made by the Commission and the statistics on which it relies or the analysis of their result are subject to criticism. But that

3 See Deutscher Anwaltverein Stellungnahme 39/2012 (www.anwaltverein.de) and, regarding the legal basis for the regulation, 2012 ZIP (Zeitschrift für Wirtschaftsrecht) 809 et seqq.
4 See for instance Reasoned opinion by the House of Commons of the United Kingdom of Great Britain and Northern Ireland on the proposal for a regulation of the European
criticism could also apply to the critics who combine the responses saying that the diversity between the laws is not an impediment with those according to which it is not a big impediment into one group in order to show a high percentage of responders who do not regard the diversity to be a big impediment.\textsuperscript{5} Thereby those who see the diversity as an impediment albeit not a big one count together with those who do not see an impediment at all. In addition: if 80\% of companies were never or not very often deterred by the disparity,\textsuperscript{6} this means that 20\% very deterred often and some others were deterred occasionally.

It is argued that the biggest concern consumers have when shopping abroad is not about disparity of law but is about fraud and what to do if something goes wrong.\textsuperscript{7} But this is exactly why law is needed: to protect against fraud and to help if something does go wrong. Thus, the certainty that the same rules of substantive law apply to a purchase abroad as in the case of a domestic purchase certainly should help to accommodate that concern.

If a significant percentage of traders or consumers feel that the disparity of laws is an impediment, then in their view, there is such a need. And if a need is felt by a significant percentage then this means that there is a need. If it were a mandatory instrument, then the view of those who do not see a need would have to be balanced against the view of those who do see a need. The optionality of the instrument avoids such need of balancing: those who do not see a need simply will not use the instrument.

It is further argued that because of the limited scope and other imperfections of the CESL it is likely to fail to achieve its purpose.\textsuperscript{8} To be sure, the CESL can be and should be improved. I will revert to this later.\textsuperscript{9} However, in my view the quality of a legislative act of the Union should have no impact on the jurisdictional issues to which I will turn now. Whilst in relation to the legal basis of a legislative act, the European Court of Justice requires that the act must be intended and suitable to achieve the purpose of promoting the aim on which the competence is based, to my understanding, this requirement of suitability means the general suitability of the type of instrument chosen and the means generally applied. The issue of whether a more perfect legislation would be possible and would be likely to achieve the purpose even better or more efficiently should not be relevant in the context of judging

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5 See Reasoned opinion by the British House of Commons (fn. 4 above), p. 8.
6 Reasoned opinion by the British House of Commons (fn. 4 above), p. 8.
7 Reasoned opinion by the British House of Commons (fn. 4 above), p. 9.
9 See 4.2 below.

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the legal basis. This should be a matter of legislative discretion rather than one of the competence or authority of the legislator.

Saying that there is a need for harmonization, does not mean by itself that the CESL is sufficient to satisfy the need. For instance, because of other differences, uniformity of the law of substance alone cannot completely accommodate the concern about fraud or that something may go wrong.

Apart from the difference in languages, there is, of course, the difference in the procedures in all of the Member States. However, uniformity of procedures would not help if those procedures would have to apply substantive laws which significantly vary among Member States as is currently the case. It follows that the creation of a uniform law of substance is an essential step to reduce such impediments even though the effect would be significantly increased if it were combined with harmonization in the field of procedural law.

2. Legal Basis and Scope

This topic has several aspects:

2.1 Scope

The scope is limited both subjectively and objectively.

(a) Subjectively, the CESL can be used only for b2c contracts and to b2b contracts where at least one of the parties is a small or medium-sized enterprise, b2SME. This limitation reduces the practicability of the instrument for b2b contracts because a trader that is not itself an SME but wants to use the CESL can be certain of its availability only by checking the relevant data of the other party, which may be cumbersome. Moreover, in case of regular business relations to that party, that exercise would have to be repeated from time to time to make sure that the CESL is still available.

(b) Objectively, the scope is limited again in several respects:
   (i) The CESL is available only for cross-border contracts.
   (ii) It is available only for contracts for the sale of goods or the supply of digital contents and related services.
   (iii) The CESL does not address many aspects that may become relevant. For instance, it does not regulate aspects of legal personality, lack of capacity, representation, plurality of debtors or creditors, assignment and set-off, property law, illegality and immorality.

(c) These limitations of the objective scope of application may be criticised. However, pragmatically, it should be seen that the problems of conceiving
a body of law which would address all of these aspects would enormously increase the complexity of the task and the problems to be solved. This could not be achieved in a short period of time. On the other hand, the fact that the said topics are not regulated in the CESL should not be overestimated. For instance, legal personality and capacity are not matters governed by the applicable contract law anyway. Many of the other aspects do not become relevant in the vast majority of cases and, where they do arise, there are established principles of conflicts of law which law governs these aspects. The need, if an issue arises, to revert to any of the national laws, does not increase the complexity or difficulty. As regards the exclusion of property law: the CESL can be used only on the basis that the national law of any of the Member States governs the contract. If, according to the system of that national law, the sales contract includes also the elements of property law, in particular the transfer of ownership, then that national law will just apply in this respect, i.e., the same property law would apply as on the basis of the exclusive application of that national law: the property law implications of the contract would be determined by that national law. Where the underlying national law conceptually distinguishes between the sales contract and the transfer of ownership, again that national law will apply in respect of the transfer of ownership. It is assumed in both cases that the asset is situated in the jurisdiction the law of which is the underlying national law. If the asset is situated in another jurisdiction – which is not unlikely given the crossborder requirement for the possibility to use the CESL – the law of that country will apply to the transfer of ownership according to the principle of the *lex rei sitae*. It is not apparent that the limitation of the CESL to the contractual side excluding the transfer of ownership would be likely to result in any particular problems or complications.

Nevertheless, there are some areas where the conflicts’ rules are not that clear and the issue is not that easily separable. These areas include, for instance, the topics of illegality and immorality and possibly also issues of the responsibility of an agent who concluded the contract without authority or the issue of whether a representative who did have the authority nevertheless can be personally liable for breaches of contract under certain circumstances.

### 2.2 Subsidiarity

It has been argued that the enactment of the CESL would be a violation of the principle of subsidiarity and proportionality.\(^\text{10}\) I shall somewhat unsystematically address this topic before addressing the one of the legal basis. In connection with the discussion of whether there is a need for a common European Sales

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\(^{10}\) Reasoned opinion by the German Bundestag (fn. 1 above), p. 5 et seq.

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2. Legal Basis and Scope

Law those who deny such a need maintain by the same token that the enactment of the CESL would be in violation of the principle of subsidiarity. The other side of the same coin is this: if and to the extent there is a need for a common European Sales Law, it can be satisfied only by an European legislative act. The need here is not for regulation of certain problems or issues where the question can be whether that problem or issue needs to be regulated on a union-wide basis. Here the need – if there is a need – is for uniformity and that need can be satisfied only by an European legislation. The theoretical possibility of a harmonized congruent national legislation of all 27 Member States is unrealistic. Therefore: if there is a need, the principle of subsidiarity presents no problem.

In this connection the optional nature of the instrument plays an essential role. The CESL applies only if selected for the specific contract. It will not be selected where no need for it is felt by the parties. This optional nature of the instrument should be a conclusive response to a criticism that it is not in compliance with the principle of subsidiarity. True, Member States may still feel that by giving that option to the parties, matters are removed from the regulating power of the individual Member States. However, this argumentation has little weight because, by itself, the CESL can be chosen only for crossborder contracts and in cross border contracts the parties are always free to escape the regulating power of a Member State by selecting the law of another. There is one exception to this and this is the mandatory consumer protection laws of the individual Member State. But to that extent, the Union has another legal basis under which it could regulate full harmonization of consumer protection. Whilst an attempt to do that has proven to be politically unacceptable, this political point has no impact on the argumentation regarding the principle of subsidiarity in the present context.

In connection with the principle of subsidiarity, also the subjective limitations of the scope of application should be considered. The disparity of consumer protection laws or generally the disparity of contract laws typically presents less of a problem for a contract between large enterprises than for b2c contracts or for contracts where one of the parties is an SME.

2.3 Legal Basis

The Commission intends to rely on Article 114 TFEU for the purpose of the establishment and the functioning of the internal market. Under this article the EU may legislate to harmonize or approximate the laws of the Member States in order to remove or reduce impediments to cross border trade between Member States and thereby to promote the internal market. According to the practice of the European Court of Justice, the mere disparity of laws of Member States as
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such cannot be regarded as an impediment to trade between Member States.\(^1\)
If it were, there would be no tool to limit the competence of the European Legislator. However, it would appear that this issue is different to the extent that contract law is concerned. Disparity of contract laws directly affects the implications and legal consequences of what traders are doing because a contract with the same words may have one meaning and one set of consequences in one Member State and another meaning and another set of consequences in another Member State. Therefore, the disparity as such may already be seen as an impediment, if in fact it works as an impediment.

(a) According to Article 114 the European legislator may act in any of the forms contemplated in Art. 288 TFEU;\(^12\) accordingly, it may also act in the form of a regulation which is directly applicable. Whilst legal provisions of a regulation applying in this way in the Member States continue to be part of Union law applicable in the Member States, this is one way of approximating the legal and administrative regulations of the Member States.
In the political discussion concerning a common European contract or sales law, that instrument was frequently referred to as a “28th Regime”. The Commission now emphasises that it constitutes “a second contract law regime” “within each Member State’s national law”. I suggest that this difference is more semantic than real. Whilst the CESL can become applicable only on the back of an applicable national law of a Member State and for this reason, as a matter of international private law, it may be seen as part of the national law of that Member State, this does not change the fact that as a matter of European constitutional law the CESL is Union law.\(^13\)

(b) Irrespective of the classification of the CESL, it needs to be examined whether it achieves a harmonization or approximation of the national laws.
(i) The effect of harmonization is not affected by the fact that the CESL can be chosen only for cross-border contracts. It is possible that in a certain jurisdiction different substantive laws apply to purely domestic contracts and to cross-border contracts. The CISG is a telling example.
(ii) The real issue with the legal basis of Article 114 is connected with the optional nature of the CESL. It is argued that because of its optionality, the CESL does not approximate or harmonize the legal regulations of the Member States but just adds to the existing set of legal provisions another set which the parties may select. The mere fact that in all Member States there is an identical set of legal provisions unquestionably

\(^{11}\) ECJ in the Case C-376/98 paragraphs nos. 84 et seqq; and in the case C-380/03 paragraphs nos. 36 et seqq.

\(^{12}\) ECJ case C-217/04 paragraphs nos. 43 et sec.

\(^{13}\) See Hesselink, How to opt into the common European sales law? European Review of Private Law (1) pp. 159 et seqq. at footnote 23.
means that the laws are approximated to each other. This could not be
debated if the additional rules would apply to any specific category of
facts which would be governed by these rules whilst other sets of facts
would be governed by the unharmonized rules. There is no reason why
this should be seen differently in the case that the distinguishing factor
bringing a certain set of facts or, for present purposes, a certain contract
under the regime of these unionized regulations is the agreement of the
parties on the application of these rules. If the option were structured
as an opt-out scheme rather than an opt-in scheme, it could hardly be
doubted that the instrument has an effect of harmonization. Whilst this
is less apparent in an opt-in scheme, in principle, there is no difference
regarding the qualification as a harmonizing effect.

(iii) Unquestionably, the CESL constitutes an additional set of legal provi-
sions which become applicable only upon the express choice by the
parties. It has been argued that for this reason the CESL creates a “new
legal form” in addition to the pre-existing form of a contract governed
by the domestic national law, and that according to the European Co-
operative Society the decision of the ECJ on Article 114 (then Article
95 EC) is not available for the creation of a “new legal form” in ad-
dition to the existing legal forms. In an internal position paper of
the Directorate-General Justice, the Commission argues that the in-
troduction of the CESL does not create a new legal form of a European
sales contract and that therefore this case is not relevant. The juridical
service of the European Council agrees and, in addition, refers to the
Council’s argument in the ECS case that a European corporate society
could not be created by harmonized legislation of all Member States.
In theory the CESL could be created by such harmonized legislation.
These arguments are now to be considered in a bit more detail.

(c) If the optionality of the instrument would have the effect that Article 114 is
not available, this would have a paradoxical, not to say nonsensical result:
it would mean that with the CESL the European legislator is doing too lit-
tle, to have the competence. It would seem odd, if the EU would lack the
competence to do something less intrusive, namely to create an optional
instrument, where it would have the competence to do the same in a more
intrusive way, namely to make the Common Sales Law generally applicable
without the element of optionality. I am conscious of the point that the
optionality is an important argument in connection with the principle of

14 ECJ C-436/03, paragraphs nos. 40 et seqq.
15 Opinion of the Legal Service of the Council of the European Union, dated 16.03.2012,
Inter institutional dossier 2011 / 0284 (COD) – 7139/12.
16 Staudenmayer 2011 NJW (Neue juristische Wochenschrift) 3491 at 3495.
subsidiarity but, in my view, the issue of subsidiarity and that of the legal basis are two separate issues which should not be mixed.

(d) According to ECJ’s judgment in the ECS case, Article 114 is not available for the creation of a “new legal form”. Therefore, we need to consider what the ECJ meant by the phrase “new legal form”. Just as the preceding regulations on the European Stock Corporation, the SE, and the European Economic Interest Grouping, the EEIG, the regulation on the European Cooperative Society created a new category of legal subjects. They owe their very existence to the regulation. The same is true for European intellectual property rights to which the ECJ refers in its opinion. To the extent that, in a subsidiary manner, parts of national law apply to these legal entities or intellectual property rights, they become applicable as a result of an express reference in the European legislative act for the creation of these entities or rights which makes these rules of national law applicable to the European entity or title. Thus, to that extent the national law is incorporated by reference into the European form and that incorporation is part of the European legislative act.

(e) All of this is different for the CESL.

(i) A sales contract, also if governed by the CESL, does not owe its legally binding effect to the European regulation. It owes its existence to the agreement between the parties in connection with the principle “pacta sunt servanda”. This principle is a rule of law which is so self-evident that many laws do not even spell it out. The CESL can be chosen only within a Member State’s national law which assumes that the contract – and the choice of the CESL – is a legally binding instrument by virtue of the national law. The CESL does not create a new type of legal relation, a sales contract, nor does it create the binding nature of the contract. If it would spell this out, it would only repeat what exists anyway. Whilst the CESL governs some of the elements for the conclusion of a contract, the binding effect of a contract as such is something different. Accordingly, the CESL may modify some ramifications of a sales contract as would apply under any of the national laws, but it does not create a new category of legal relations. The very agreement on the choice of the CESL must be part of a binding contract which takes its binding effect from the national law underlying that choice.

(ii) Further, in those areas which are not covered by the CESL, the relevant national laws apply by their own force and not as a result of a reference incorporating those laws (as is the case in respect of the European company forms or the European intellectual property rights). This is evidenced by the feature that the CESL can be chosen only on the basis of an applicable national law. The national laws are applicable to a contract governed by the European Sales Law by their own force not
only in respect of areas which are outside the applicable contract law anyway (such as, e.g. legal personality, legal capacity or representation) but also in respect of those areas which are directly related to the contract law, e.g. plurality of debtors or creditors, assignment, set-off etc. The incomplete scope of objective application of the CESL therefore is an argument in favour of Article 114 rather than against it.

(iii) The point I am trying to make becomes particularly clear if one considers a partial selection of the CESL which is possible in a b2b transaction. In that case, national laws apply (again by their own force and not as a result of a reference in the regulation) to the extent the CESL has not been chosen. Thus, in that situation the contract even in respect of matters to which the CESL generally can apply, would be governed by a combination of national laws and CESL. Such a combination or mixture of regimes is conceptually impossible in respect of the new legal forms such as European company forms or European intellectual rights to which the ECJ refers. If it were permitted, the result would not be a hybrid but something like a tragelaph, a beast, of which the front part is a goat and the rear part is a stag. The argument on a potential choice of part of the CESL applies also to consumer contracts. Whilst, for a consumer contract, the Regulation does not permit an in-part choice of the CESL, it could provide for that possibility. Again, the jurisdictional issue of competence cannot depend on how that competence is exercised.

(f) To conclude this part: the paradoxical situation to which I referred before does not arise. A contract governed by the CESL is not a new type of legal instrument or relation created by the CESL but is a contract to which in many respects the CESL applies. This satisfies the notion of approximation or harmonization of laws.

3. The Optional Nature

3.1 Options for the Parties

I have repeatedly referred to the optional nature before in respect of the options which the parties to the contract have. I want to add only one aspect: it has been pointed out that unlike the French version the English and the German versions of the draft somewhat surprisingly us the phrase that the CESL may be “used”. Here in Rome this wording may recall that in old Roman law, one used to say “hoc iure utimur”, we use this law, to refer to the law as currently

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17 E contrario from Article 8(3) of the Draft Regulation.
18 Hesselink (fn 13 above) at footnote 28
applied. However, the identity of the user is different. “We” in Rome are not the legal subjects, the parties to a contract, but those who apply the law or the legal community as a whole, whilst in the context of the CESL it is the parties. They use a particular law, namely the CESL. I may be overestimating this, but the phraseology is telling: the CESL is seen as an offer of which participants may avail themselves or may not. This perception should be borne in mind when assessing the issue of subsidiarity.

3.2 Options for Member States

The CESL also has yet another element of optionality and that is the option for the Member States to extend the application, i.e. the range of situations in which the CESL may be selected. That option is granted in two respects: Member States may decide that the CESL can also be selected for contracts between large enterprises, i.e. to b2b contracts without one of the parties being an SME and the other option is to make the CESL available also for purely domestic contracts. Obviously, these two options can also be exercised in combination, i.e. a Member State may make the CESL available for domestic contracts between large enterprises. Among these options I would suggest that Member States should in any event avail themselves of the first option to make the CESL available for contracts between large enterprises. Otherwise, the CESL would be a dangerous instrument for b2b contracts because the selection of the CESL for a company which is not itself an SME would require an analysis of the size of the other party and, in case of continuing contracts or successive contracts between the same parties, that analysis would have to be repeated from time to time to ensure that the other party still is an SME.

If and to the extent that a Member State does exercise any of these options, it should take the necessary steps to ensure that also in this field of application resulting from the exercise of the option, the CESL will be handled in the same way as in the field of its original application, as European law with the aim of the uniform interpretation and application in all Member States. In this extended field of application the CESL would not be Union law but national domestic law. Therefore, special provisions have to be made to secure the interpretation and application as if it were Union law. Such provisions would have to be incorporated into the national law of a Member State exercising this option. Without a way to uniform interpretation and application of the CESL it will not achieve its purpose.

19 For instance D 43, 20, 3 pr. Pomponius and D 48, 17, 1 pr. Marcianus
20 Draft Regulation Art. 13.
4. Can the CESL achieve what it sets out to do?

This question has two aspects, a procedural one and a substantive one.

4.1 Procedure

First the procedural one: the CESL can achieve its purpose only if at least in the medium or long term it will be interpreted by and large in the same way in all Member States. For this purpose, the draft regulation provides for a data bank in which last instance decisions on the interpretation will have to be made available.\(^{21}\) This is indispensable, but far from sufficient. If the CESL meets with any degree of acceptance, there will be a host of cases with all kinds of issues to be resolved. It will be necessary for this purpose to set up a court system that ensures uniform resolution of these issues. The personal resources of the ECJ will have to be significantly expanded to enable it to cope with this kind of work. This does not only refer to the number of judges or sections, but also to the profile of the justices with this task. These justices need to have their background in private law rather than in public or constitutional law.

4.2 Substance

The substantive element of assessing the likely chances of the CESL concerns the likelihood of its acceptance. This depends to a large extent on the quality and this again relates to the fairness or appropriateness of the results to which the CESL will lead and the clarity for predictability of the law.

(a) Regarding the appropriateness of results, I just want to mention one point and that is the remedies of a consumer who has purchased goods which turn out not to be in conformity with the contract. According to the draft, the consumer has the free choice of four remedies: repair, replacement, rescission or reduction of the price, without any hierarchy. In addition he may claim damages.\(^{22}\) In combination with the provisions on restitution and the fact that normally no compensation for the use of the product is payable\(^{23}\) this means excessive rights for consumers which frequently will go beyond the legitimate interest of the consumer. They have the tendency to result in a waste of money (cost) and a waste of natural resources with a resulting burden for the environment (piles of goods which have been returned on the grounds of minor even remediiable defects, but no longer

\(^{21}\) Draft Regulation Art. 14.
\(^{22}\) CESL Art. 106 para. 1.
\(^{23}\) CESL Art. 112 (2); 174 (1).
in a saleable condition because they have been used). Unless the draft is changed in this respect, I would expect that for many industries the CESL would be categorically unacceptable. Another element of criticism concerns excessive information obligation.

(b) The other aspect is clarity and foreseeability. Compared to the preparatory works (in particular the draft Common Frame of Reference) the CESL contains significantly fewer indeterminate legal phrases. But I am not sure whether the avoidance or reduction of frequency of using such words in fact means a difference. For instance: The draft gives the definition of reasonableness which is to be ascertained “objectively”.24 It then contains a second definition of what is meant when the draft refers to something that can be expected of or by a person.25 That expectation means, that which can be expected reasonably. Thus, in every instance where the draft refers to that which can be expected, it could avoid repeating the word “reasonably”, but the indirect reference to the concept of reasonableness has not been reduced in number by this technique. There are about 40 instances where this phrase is used. But, this phrase is used in different contexts. Broadly, in about 25% of the cases, (about 10 of all) it refers to what a person or party can be expected to do.26 This refers presumably to that which a party should do in good faith and according to principles of fair dealing. This does not give much guidance to a judge other than his or her own feeling of justice or equity. That may not be a bad guide, but it depends on the individual judge and the outcome may be very different for similar cases depending on the identity of the judge.

In the other 75% (about 30 instances) the phrase “can be expected” refers to what a party can be expected to know.27 Clearly, this cannot depend on good faith considerations because good faith cannot dictate what a person knows or does not know. Perhaps the reference is to what it should know or ought to know. But then, what standard determines this? Under German law the phrase “ought to know” or “should know” means that the party did not know as a result of a failure to apply proper care and attention. We think that we have a fairly clear view of what this means. This is not the way it is described in the draft Regulation, but the term “what the party can be expected (or cannot be expected) to know” appears to relate to a similar standard. But what is that standard? Is it a cavea emptor standard which in transaction terminology translates as the failure to apply “due diligence”? And if so, what diligence is due?

24 CESL Article 5(1).
25 CESL Article 5(2).
26 For instance in CESL Articles 3, 9(3), 85(4), 87(2), 88(1), 100(e) and (g), 129(a).
27 For instance in CESL Articles 12(2), 13(1)(i), 20(1)(g), 23(1), 48(1)(a) and (b)(iii), 51(b).
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Another example of indeterminate notions and consequences is in the section of restitutions where there are two general references to equitableness namely:

Article 174 (1) (c): obligation to pay for the use of the returned goods if it would be inequitable to allow the free use and

Article 176: modification of the rules on restitution if they would have a grossly inequitable result.

(c) With this range of uncertainties, it seems overly optimistic to assume that the CESL will receive a uniform interpretation in all 27 Member States before long. Such uniformity will probably never be reached but eventually the differences may become smaller. It is another matter how these differences will be perceived by traders and consumers. Consumers are unlikely to notice these differences, but the issue is more one for traders. For traders, the individual case may not be so important. For a trader, it may be more important whether he can use the same general sales terms selecting the CESL throughout the EU. If the different interpretation may have the result that he is prevented (by an action of a consumer organisation or the like) to use certain conditions in one Member State which in other Member States are permissible, then the CESL will have failed, when measured by the very argumentation with which it is proposed.

(d) For b2b contracts the indeterminate nature of many concepts and phrases in the CESL may be more of a problem but for them there is more freedom to agree and substitute the indeterminate rules of the CESL by specific contractual provisions. From a German b2b perspective the CESL may be an attractive choice to get certainty that a contract will be valid as agreed and not become the subject of judicial review under the aspect of an “unfair standard term”. Whether that is good or bad is a matter on which opinions are divided.
The CESL – a German perspective on the CESL

Conclusion

There is a need for the CESL for some which, considering the optionality is sufficient to justify the CESL, the optionality ensures that it will be applied only where needed. A uniform substantive law alone without harmonization of procedures is incomplete and will only be a step in the right direction.

Article 114 TFEU is a proper legal basis for the instrument. Member states should expand the scope of application at least to all b2b situations.

To succeed, the CESL should be improved at least in three respects:
- adjust consumer remedies in case of conforming goods or digitale contents
- improve clarity and foreseeability
- provide for procedures that secure uniform application.
The proposed Common European Sales Law: scope and choice of law

W. James Wolffe

Introduction

For more than 300 years Scotland has, as a result of its participation in the United Kingdom, shared a single market with England and Wales, while retaining its own distinctive legal system. Until 1893, two different sales laws co-existed within that single market. In the late nineteenth century certain aspects of commercial law – including sales law – were harmonized, to a degree at least,

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1 The observations in this paper are my current personal views and do not represent the position of the Faculty of Advocates or the UK delegation to the CCBE. A precursor to the paper was presented at a Conference held in Rome under the auspices of the Consiglio Nazionale Forense and the CCBE on 11 April 2012. I am indebted to Friedrich Graf von Westphalen and my colleagues on the Contract Law Working Group/Private Law Committee of the CCBE and to the participants at the CNF/CCBE Conference – in particular to Georg Maier-Reimer and Dirk Staudenmeyer, to Simon James of Clifford Chance, London, for sharing his thoughts with me, and to Professor Simon Whitaker, Oxford University and Professor Hector Macqueen, Edinburgh University, each of whom generously allowed me sight of an unpublished paper. The errors are entirely my own.

2 Scots law is a mixed legal system. Its private law is rooted in the jus commune. Scots contract law rests on foundations different from the English common law: the doctrine of consideration is, for example, unknown to Scots law. On the other hand, the modern law has much in common with English law, for example, an objective approach to interpretation of contracts and the absence of any overarching principle of good faith. By the Treaty of Union 1706, between the separate Kingdoms of Scotland and England, the two countries voluntarily agreed to combine into a single state, the Kingdom of Great Britain. Key provisions of the Articles of Union were directed to the creation of a single market on the one hand, while containing guarantees preserving the national legal system and institutions of Scotland. In 1800, the Kingdom of Great Britain and the Kingdom of Ireland united into a single United Kingdom of Great Britain and Ireland. In 1922 the greater part of Ireland seceded from the Union, but Northern Ireland remained and remains a part of the United Kingdom which also has its own legal system.

3 Key differences between Scots and English law concerned: (i) the seller’s obligations as regards the quality of goods; (ii) transfer of property; and (iii) transfer of risk: see generally WM Gordon, “Sale” in Reid and Zimmermann, A History of Private Law in Scotland, ii, 305-332. On transfer of title, see further below.
The CESL: scope and choice of law

across the United Kingdom. But many features of the general law which may be relevant in the context of sales contracts and to the resolution of disputes arising from sales contracts remained – and remain today – unharmonised across the jurisdictions of the United Kingdom. So for lawyers from the United Kingdom some of the issues lying behind the proposed Common European Sales Law are not entirely new, though others are decidedly so.

My remit is to make some observations on the scope of the proposed CESL and on the relationship between the draft instrument and the choice of law rules of private international law. The context for the comments which I offer is set by certain structural features of the proposed CESL regime which, as it happens, are markedly different from the approach which was taken to harmonization of sales law within the United Kingdom. Firstly, the proposed CESL is to be an optional regime. Its application to any particular contract would depend on the agreement of the parties. By contrast, the UK Sale of Goods Act applies as a matter of law to all contracts within its scope. Secondly, as an optional regime, the CESL leaves unaffected the existing national sales laws. It is to be a second and alternative body of law which will apply only if the parties choose it in preference to the “ordinary” sales regime of some Member State. By contrast, the UK Sale of Goods Act amended the pre-existing sales laws of the different

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4 Sale of Goods Act 1893; the law is now contained in the Sale of Goods Act 1979. For the history of this legislation see Lord Rodger of Earlsferry, “The Codification of Commercial Law in Victorian Britain” (1992) 108 LQR 570. There are, however, some differences in the way the Act applies in the different jurisdictions of the United Kingdom, and there are specific provisions which take account of and recognise differences between the laws of those jurisdictions: see ss. 11, 12(5A), 13(1A), 14(6), 15(3), 15B, 20(4), 22, 30, 48A(1), 48D(2), 49(3), 53, 53A, 58 and 62. Views on the success, from a Scottish perspective, of the harmonization of sales law in the Sale of Goods Acts 1893 and 1979 have not been uniformly positive. Professor TB Smith was particularly critical: see, especially Property Problems in Sale, 1978.

5 E.g. capacity to contract; the law of unjustified enrichment; civil procedure.

6 In drawing attention to these differences, I do not necessarily suggest that the approach which was taken by the United Kingdom Parliament in 1893 could or should be adopted by the EU legislator today. The United Kingdom had, by 1893, enjoyed a common market – and common constitutional structures – for almost 200 years. It comprised only three separate legal systems, two of which were, for material purposes, the same, and a common language. Furthermore, the reform took place within a unitary state. According to the orthodox constitutional theory of the late nineteenth century, the United Kingdom Parliament was not, despite the terms of the Articles of Union, subject to constitutional limits on its powers. Nor was the UK Parliament in 1893 subject to the political constraints which might have arisen had the constituent parts of the United Kingdom retained at that time their own domestic legislatures.

7 Draft Regulation, Articles 3, 8.

jurisdictions to which it applied. Thirdly, the proposed CESL is to be available for cross-border contracts, although Member States have the option to extend its availability to domestic contracts. By contrast, the UK Sale of Goods Act applies both to domestic and to cross-border contracts governed by one of the laws of the United Kingdom. Fourthly, the CESL may be used only if the seller of goods or the supplier of digital content is a trader and, where all the parties to a contract are traders, at least one of those parties must be a SME, although Member States have the option to extend its availability to all business to business contracts. By contrast, the UK Sale of Goods Act applies to all contracts for the sale of goods governed by one of the laws of the United Kingdom.

These structural features of the proposed CESL should be seen in their constitutional context. The legal basis of the measure is said to be Article 114 TFEU. There is a question as to whether or not Article 114 may properly be relied upon as the basis of a measure which simply creates an alternative legal regime, leaving the existing national laws untouched. Be that as it may, Article 114 requires that the measure must have as its object the establishment and functioning of the internal market. The draft proceeds on the footing that different national contract laws represent a barrier to the functioning and continuing establish-

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10 Draft Regulation, Article 13(a).

11 Draft Regulation, Article 7(1).

12 Draft Regulation, Article 7. I proceed on the footing that the instrument does not permit the use of the CESL for contracts which are not “cross-border” contracts or for B2B contracts where none of the parties is a SME, unless the Member State in question has exercised the option. The instrument does not in terms state this: contrast Article 6 which states that the CESL may not be used for mixed-purpose contracts and Article 7(1) where it states that the CESL may be used only if the seller or supplier is a trader. But it would be inconsistent with the existence of the Member State option in Article 13 and the evident constitutional balance struck in the instrument for the provisions in Articles 4(1) and 7(1) to be treated as anything other than limitations on the available scope of the CESL. If right, this means that a deliberate agreement of the parties to use the CESL may be thwarted if the contract does not fall within the scope of the CESL. The position may, however, be more subtle. Let us suppose a contract between two businesses neither of which is a SME to use the CESL. On one view, it would be a matter for the law applicable to the contract to decide upon the effect and effectiveness of that choice. The issue might come to be focused in this way: does the Regulation, on a correct interpretation, prevent a Member State’s law from giving effect to that choice?

13 Draft Regulation, Article 13(b).

14 There are, of course, special provisions for consumer sales.


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One particular problem which is identified by the Commission results from the autonomy which Member States have in the field of consumer protection. EU measures in the field of consumer protection are minimum harmonization measures. Member States are free to establish, in their laws, a higher level of consumer protection. Further, where the contract is a consumer contract, the trader cannot, by imposing the choice of a different law, deprive the consumer of the protection of “the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law” of his habitual residence. Therefore, it is said, “traders need to find out in advance whether the consumer’s law provides higher protection and ensure that their contract is in compliance with its requirements”. It is a key aim of the proposed CESL to give traders the option of a sales regime which, while it contains within it significant consumer protection provisions, will, if selected, apply instead of the national consumer protection regimes of the individual Member States.

A measure which would deprive the Member States of their autonomy in the field of consumer protection in relation to consumer sales would have major constitutional significance. It is against that background: (a) that the proposal is for an optional regime which leaves untouched the “ordinary” sales law of the Member States; and (b) that the proposed CESL applies only to cross-border sales, unless the Member State should exercise the option to extend it to domestic sales. Member States accordingly remain free to amend their “ordinary” sales law, including the consumer protection measures which that law contains. A decision by a Member State to establish in its “ordinary” sales law a higher level of consumer protection than that contained within the CESL would, however, be undermined if traders could routinely opt out of the “ordinary” regime. This means that a Member State, deciding whether or not to exercise the option to extend the CESL to domestic contracts, would be faced with a dilemma. On the one hand, traders – particularly those using e-commerce – are unlikely to wish to have to differentiate, in the law which applies, between cross-border

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17 As defined in Article 6(1) Rome I Regulation.

18 Article 6(2) Rome I Regulation.

19 Recital (3).

20 For present purposes, I assume that the measure does achieve its purpose in that regard. I offer some observations on this below.

21 It is also the context against which the measure insists – perhaps unrealistically – that “the consent of a consumer to the use of the Common European Sales Law should be an informed choice”: Recital (23).

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and domestic contracts. But if the Member State were to extend the CESL to domestic contracts it could effectively undermine its autonomy in the field of consumer protection. As the UK Law Commissions have noted, such a state of affairs would have the potential to undermine a Member State's ability to respond to specific abuses.\textsuperscript{22}

The exclusion from the scope of the CESL of business to business contracts unless one of the parties is a SME is, it would appear, based on considerations of proportionality: the promoters of the measure acknowledge that there is no evidence that the divergence of national contract laws has a significant adverse impact on cross-border trade between businesses where neither of the parties is a SME.\textsuperscript{23} The requirement that one of the parties be a SME is, however, problematic. Article 7 of the draft Regulation defines a “SME” as a trader which: (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million or, for a SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country. According to recital (21) this is to be interpreted according to Recommendation 2003/361. As the UK Law Commissions have observed, this definition raises a number of potential difficulties:\textsuperscript{24} (i) the number of employees would apparently fall to be determined – to take account of part time and seasonal employees – by reference to the number of “annual work units” employed; (ii) for Member States which do not use the euro, the date at which the currency is to be converted needs to be defined; (iii) the rules concerning linked enterprises may need to be taken into account; and (iv) where a contract is extended or renewed, an initial selection of CESL may become invalid because neither of the parties is still a SME. Further, the financial limits may come to have changing practical effects in inflationary circumstances.

These considerations have practical implications for business parties negotiating a contract. The definition of SME includes entities which, in economic terms, may be quite significant. In principle, if the parties were to wish to apply the CESL to their contract, they would have to satisfy themselves that at least one of them fulfilled the definition of SME. If the parties do not wish to run the risk that their selection of CESL will be thwarted, this could well require inquiry into the circumstances of the contracting parties. Further, in the context of a contract dispute, in which one of the parties relies on a provision of the CESL,

\textsuperscript{22} Loc.cit., paras. 3.41 to 3.47. The Law Commissions suggest that Member States should be given the flexibility to extend the CESL to some but not all distance selling contracts, so that Member States could, for example, extend the CESL to all distance selling contracts whether cross-border or domestic, but retain their ability to deal effectively with consumer protection in the context of shop and off-premises sales.

\textsuperscript{23} Recital (21).

\textsuperscript{24} Loc. cit., paras. 6.40-6.47.
it is not unlikely that the other party would look closely at the selection of the CESL – including the question of whether or not the CESL was in fact available to the parties – with a view to challenging that reliance, and there might well accordingly have to be a retrospective inquiry at that stage into the issue of whether or not one of the parties was in fact a SME. There is, moreover, an issue of principle. If the CESL provides a potentially attractive alternative for business to business contracts, why should a SME which has, let us say, 240 employees and an annual turnover of EUR 45 million always have the power to contract for the CESL, while a business which has only ten more employees (but perhaps a lower turnover), may not unless the other party happens to be a SME?

Having regard to these considerations, it is perhaps unlikely that no Member State would exercise the option to extend the CESL to all business to business contracts. Were even one Member State to exercise that option, the restriction would be capable of being avoided by businesses wherever they may be situated by the simple expedient of agreeing that the law applicable to the contract will be the law of that Member State. It may be open to question whether the doctrine of proportionality really requires the Community legislator to draw lines which: (a) present potentially troublesome practical problems; and (b) are likely to be capable of being avoided by parties who wish to do so.\textsuperscript{25} On the other hand, an extension of the instrument to all business to business contracts would create uncertainty as the legal validity of the instrument at least to that extent – and such uncertainties could discourage its use. The key question, perhaps, is the strength of the justification and argument for the application of the measure to business to business contracts in the first place.

1. The CESL and choice of law

I turn, then, to choice of law considerations. The first question which presents itself is why one should be concerned about the interaction between the proposed CESL and choice of law rules. The draft Common European Sales Law is conceived as a harmonizing measure, albeit one which leaves the existing unharmonised national sales laws in place. One of the benefits of harmonization should be, one might think, to diminish the significance of choice of law questions.\textsuperscript{26} After all, the law is intended to be the same in each national legal

\textsuperscript{25} Cp Case C-110/05 \textit{Commission v. Italy}, para. 67.

\textsuperscript{26} No harmonizing measure will entirely displace the potential need for private international law analysis. Any EU harmonizing measure will depend for its effect on the applicability to the question at issue of the law of a Member State of the EU rather than the law of a non-EU jurisdiction. And there will always be scope for issues which are not covered by the harmonized measure to arise. The proposed CESL is, however, perhaps unusual: (a) in that it is explicitly conceived to depend on an agreement made within the law of particular Member State; and (b) in that, by reason of the optional nature of the
system. But there are conceptual and practical reasons why, in relation to the CESL, those questions will remain important. The first reason is that the CESL is to be regarded as a second sales regime within the national legal systems of Member States, so that, as a matter of analysis, the selection of the CESL implies a prior choice of one of those national legal systems. The second is that, although the content of the CESL will be the same in each of those national legal systems, its scope (in the sense of the contracts in relation to which the CESL is available) may not be – indeed will not be if some Member States take up the option to extend the CESL to domestic contracts and/or to contracts between businesses where none of the parties is a SME. The third is that the CESL does not purport to deal with all of the issues which might arise in the context of a cross-border sale of goods contract. I have already commented on the second of these considerations, but let me offer some further observations on the others.

2. CESL as a second national regime

Although the intention is that the CESL should be enacted in the form of a Regulation, the proposal proceeds on the basis that the Regulation would create “within each Member State’s national law a second contract law regime for CESL regime, and the availability of Member State options as to its scope, the question of which Member State’s law applies could have significant practical consequences.

The CESL is to be given autonomous meaning, without recourse to the national law which would be applicable in the absence of agreement to use the CESL or to any other law: Article 4(2) CESL. Consistent application of the CESL across the Union may be secured by reference to the European Court of Justice. So goes the theory. It seems to me to be open to question, however, whether at the level of practice, the CESL would in fact be applied to the same effect in all Member States. Key provisions of the instrument use open-textured concepts such as “good commercial practice” (Article 86) and “good faith and fair dealing” (Articles 2, 59, 86). The question of what is “good commercial practice” would appear, on the face of it, to be a question upon which evidence might well be led. Quite apart from the possibility that lawyers from different backgrounds may bring their own preconceptions to the application of such provisions, it is not axiomatic that there is a uniform standard of “good commercial practice” which applies across all sectors and in all Member States. Quite apart from the potential for the issue to be one on which competing evidence might be led, if, in fact, there are variable standards of “good commercial practice”, interesting questions may arise – in a cross-border context – as to which standard of “good commercial practice” is to apply.

United Kingdom experience should not encourage optimism that harmonization can avoid such questions, though no doubt it might reduce their significance.

In the case of a Member State such as the United Kingdom, which comprises more than one legal system, within each of those legal systems.

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contracts within its scope”\(^{30}\) Recital (10) states: “The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to [the Rome I Regulation] or, in relation to pre-contractual information duties, pursuant to [the Rome II Regulation], or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict-of-law rules”.\(^{31}\) It follows that, in any case involving the CESL, there are two steps in the analysis: (i) the identification of the appropriate national legal system, by reference – depending on the point at issue – to Rome I or Rome II; and (ii) within that legal system, the agreement by the parties to use the CESL.\(^{32}\) It also follows that the agreement by the parties that the CESL will apply to their contract is not the incorporation by reference of a “non-State body of law”\(^{33}\) – it is of the essence of the proposal that the CESL is a State law.

Let me illustrate, by reference to an example, how the characterisation of the CESL as a “second national regime” would appear to work. Assume a sales contract between an Italian seller and a French buyer. Assume, for present purposes, that the contract is not a consumer contract within the meaning of Article 6 Rome I. Assume also that the parties have agreed explicitly that the contract shall be governed by the law of a particular Member State (let us say, French law) and by the CESL. By virtue of Article 3(1) Rome I, the applicable law is the law of the selected Member State, in this case French law.\(^{34}\) On the footing that the CESL is seen as a “second national regime” within the selected national law, it is the CESL regime within French law (which is of course iden-

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\(^{30}\) Recital (9). At first blush, it is odd to see find a European measure described as creating a second regime within national law. There is, though, no necessary inconsistency. On the plane of European constitutional law, the proposed Regulation would, if enacted, be a European measure. But for the purposes of private international law, it takes effect as law (albeit by reason of the directly applicable effect of Regulations in European law) within the particular national legal system which is identified by the relevant choice of law rules.

\(^{31}\) It is accordingly apparent that, so far as the drafters of the measure are concerned, the rules defining the applicability of CESL do not fall to be regarded as “provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations” for the purposes of Article 23 Rome I.

\(^{32}\) see MW Hesselink, “How to opt into the Common European Sales Law? Brief comments on the Commission’s proposal for a Regulation” (2012) 1 European Review of Private Law 195

\(^{33}\) cp Rome I Regulation, Recital (13).

\(^{34}\) Rome I Regulation, Article 3(1).

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ticial in substance to the CESL regime in the laws of the other Member States) which applies to the contract.35

What if the parties have not explicitly chosen the law which is to govern their contract, but have agreed that the contract shall be governed by the CESL? In some cases, no doubt, the national law which is to apply might be “clearly demonstrated”,36 even though there has been no explicit selection of that law. In other cases, Article 4 Rome I specifies the rules which are to be applied in determining the governing law “To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 …”. Applying Article 4 Rome I, and assuming that the contract is not a consumer contract within Article 6 Rome I, the contract would be governed by the law of the country where the seller has his habitual residence, which in our example would be Italian law.37 On one view, though, it would be somewhat odd, in a case where the parties have agreed that the CESL is to govern the contract, to apply Article 4 Rome I. If the CESL is always a second national regime within the law of some Member State, the agreement that the contract will be governed by the CESL must implicitly be an agreement that the law of one of the Member States of the Union is the applicable law. The only question would be: which law?

What if the applicable law identified by choice of the parties, or by the application of the relevant rules of Rome I, is not the law of one of the Member States of the Union, but the parties have nevertheless agreed that the CESL will apply? This is quite possible. Even if all parties are habitually resident in Member States of the Union, they would be free, under reference to Article 3(1) of the Rome I Regulation, to choose as the law governing the contract, the law of a third country, which need not be a Member State of the Union. And, for the CESL to be available, only one of the parties need have its habitual residence in a Member State.38 So, for example, a Russian seller and an Italian buyer might agree that

35 So far as non-contractual obligations arising out of dealings prior to the conclusion of the contract are concerned, the law of the selected Member State, namely, in the example, French law, would appear to apply by virtue of Article 12 Rome II and, within that law, the CESL would govern any matters within its scope which would properly fall to be characterized as non-contractual obligations arising out of dealings prior to the conclusions of the contract. If the contract is not in fact concluded, the law applicable to non-contractual duties arising out of pre-contractual dealings would also be the law of the selected Member State, namely French law: Article 12(I) Rome II. Article 11 of the draft Regulation tells us that “Provided that the contract was actually concluded the CESL shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties”. The wording is not as clear as it might be, but one might reasonably infer that if the contract is not concluded, the CESL does not govern these matters.

36 Rome I Regulation, Article 3(I).
37 Rome I Regulation, Article 4(I)(a).
38 Article 4(2) of the proposed Regulation.
Russian law is to govern that their contract and that the CESL is to apply to it. And, if Article 4 of the Rome I Regulation were to apply, then, assuming it is not a consumer contract, the applicable law would be Russian law in any event.

This scenario presents a puzzle. The law which governs the contract, whether by choice or by virtue of Article 4 of the Rome I Regulation is a law which does not include the CESL as a second national regime. What is one to make, then, of the parties’ agreement that CESL is to apply? One possibility is that the agreement that the CESL is to apply is simply ineffective because that is not an option which is available within the law which governs the contract. Although an outcome at odds with the parties’ clearly stated intention might seem surprising, as we have already seen, there are other quite plausible scenarios where the parties’ attempt to choose the CESL might be thwarted: for example, if the contract is a purely domestic one and the Member State has not exercised the option under Article 13 of the proposed Regulation; or the contract is a business to business contract and none of the parties is a SME. So one should perhaps have no predisposition against this conclusion. There are, though, analyses which might save the parties’ intention. Firstly, if the chosen foreign law permits the incorporation into the contract of a body of rules from another legal system, the CESL might be incorporated into the contract on that basis. Secondly, it may be that the case involves depecage39 – with the law of a Member State of the EU selected (and within that law the CESL) in respect of those matters governed by the CESL, and the selected foreign law in respect of all other matters which fall to be determined by reference to the applicable law. An interesting question would arise as to whether such an analysis could be adopted without identifying the Member State whose law (including its CESL) applies.

3. Consumer contracts

Thus far, the examples have assumed that the contract is not a consumer contract within the meaning of Article 6(1) of the Rome I Regulation. Article 6(2) of the Rome I Regulation provides that a consumer may not be deprived, by the choice of law applicable to such a contract, of “the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law” of his habitual residence.40 The general purpose of Article 6(2) is clear. It recognizes the Member State autonomy in the field of consumer protection to which reference has already been made. If there was no provision such as Article 6(2), traders could effectively impose on consumers the law of a Member State with a low level of consumer protection by including that choice of that law in their standard form contracts. The autonomy of Member States in the field of consumer protection would be undermined and there could, in relation to

39 Rome I Regulation, Article 3(1).
40 Rome I Regulation, Article 6(2).
consumer protection, be a “race to the bottom”, to the detriment of consumers. It is accordingly a legitimate aim of policy to prevent traders from using choice of law to deprive their customers of statutory consumer protection measures.41

But as we have seen it is one of the purposes of the CESL to allow traders to avoid the consequences of Article 6(2) by opting into the CESL, which has its own consumer protection regime. It is evident that this aim would be thwarted if an agreement that the CESL shall apply to a contract did not “trump” or displace Article 6(2). The analysis of the promoters of the CESL is set out in the recitals to the draft Regulation:

“(11) The Common European Sales Law should comprise of a complete set of fully harmonized mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law.

(12) Since the Common European Sales Law contains a complete set of fully harmonized mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) [Rome I], which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law.”

This reasoning invites closer analysis. Let us recall that the proposers conceptualise CESL as a “second” national sales law which exists within national law along with each national legal system’s “first” sales law. It follows that the national legal system will contain two sales laws. In its “first” sales law the Member State may grant consumers a level of protection which is higher than that guaranteed by EU law. Its “second” sales law, embodied in CESL, will have the level of consumer protection articulated in CESL. As the recital states, this “should maintain or improve the level of protection that consumers enjoy under Union consumer law”. Ex hypothesi, this may nevertheless be a lower level of protection than that which is guaranteed by mandatory provisions of the Member State’s “first” sales law.

Let us suppose – in a pre-CESL world – that a trader in Member State A markets its goods by internet in Member State B to consumers habitually resident in B. Let us suppose that the trader’s terms and conditions, which are

41 e.g. Article 6(2), Directive 93/13/EC.

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accepted by the consumer placing orders through the website, identify the law of Member State A as the law governing the contract. This is permissible under Article 6 Rome I, but, by virtue of Article 6(2) Rome I, the choice cannot deprive the consumer of the protections of his “home” law, the law of Member State B.

Let us now suppose that – in a post-CESL world – the consumer in Member State B placing orders through the website is required by the trader in Member State A: (a) to choose Member State A’s law as the law governing the contract; and (b) to choose CESL. The choice of CESL is, for reasons which we have already identified, CESL as a second national regime within the law of Member State A. Although the choice is for CESL, this is still a choice of one of the two sales regimes under the law of Member State A. It is still a choice of the law of Member State A under Article 6(2) Rome I. According to Article 6(2) “Such a choice may not ... have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.” The short question which arises is this: if, by virtue of Article 6(2) Rome I, a choice of the law of Member State A cannot deprive the consumer in Member State B of the benefit of his “home” consumer protection provisions, why should it matter whether the choice of the law of Member State A is a choice of Member State A’s “first” or “second” sales regime?

Let me make the issue concrete by considering the factual circumstances of a very recent European Court of Justice decision, Case C-453/10 Jana Perenicova, Vladislav Perenic v. SOS financ spol. s.r.o. Article 6 of Directive 93/13 requires Member States to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer “and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”. The applicants in the main proceedings sought to have a credit agreement declared void. The national court found that a declaration that the agreement was invalid as a whole would be more advantageous to the applicant consumers than maintaining the validity of the non-unfair terms of the agreement. On a reference, the ECJ held that the decision as to whether a contract can continue to exist without the unfair terms cannot be based solely on a possible advantage for one of the parties. Nevertheless, the Court concluded that Article 6(1) of Directive 93/13 did not preclude a Member State from providing, in compliance with EU law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer.

42 I am grateful to Ross Anderson of Glasgow University and the Law Society of Scotland for drawing this case to my attention.
3. Consumer contracts

Article 79 of the CESL is in the following terms:

“1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.

2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.”

Let us suppose that the primary regime of the consumer’s habitual residence – let us say the law of Member State B – allows the Court to declare that a contract which contains unfair terms is void in toto where that is more advantageous to the consumer than simply striking out the unfair term. Let us suppose, then, that a consumer in Member State B orders goods from a trader in Member State A, and that they agree that the contract will be governed by the law of Member State A. The law of Member State A does not empower the Court to declare the contract void in the manner envisaged in Perenicova but the law of Member State B does. In proceedings by the trader against the consumer, the consumer relies seeks to have the contract declared void by reason of the presence in it of an unfair term, relying on Article 6(2) Rome I. In a pre-CESL world, the consumer would be entitled to rely on this feature of his “home” law notwithstanding the parties’ agreement that the law applicable to the contract would be the law of Member State.

What would the trader’s answer be in a post-CESL world, where the parties have agreed that the CESL shall apply to their contract?

(1) One possible line of argument would be to the effect that the choice of the law of Member State A has not had the result of depriving the consumer of the protection afforded to him by provisions that “cannot be derogated from by agreement by virtue of” the law of member state B precisely because the law of member state B also contains the optional CESL regime, in which the relevant remedy is that provided by Article 79. The parties could, by choosing the CESL within the law of member state B, have derogated from the consumer protection laws of member state B’s primary contract regime. Why, after all, it might be said, should the trader be held to the standard imposed by the higher of two optional regimes within the law of the consumer’s habitual residence?

But this approach, if correct, would mean that, in a post-CESL world, no provision of a Member State’s primary sales regime which provides greater protection than the CESL would be a provision that “cannot be

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43 Perenicova provides a concrete proof that it cannot be assumed that the consumer protections laws of Member States will in no case provide greater protection to the consumer than the CESL.

44 I assume for present purposes that the issue properly falls to be characterized as one of substantive law, rather than adjectival law to be determined by reference to the lex fori.

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derogated from by agreement”. If this line of argument were to be cor-
rect, it would appear to apply whether or not the parties had opted for
CESL, which would be a surprising result. And the implications which
it would have for Member State autonomy in the field of consumer
protection would raise potential constitutional questions.

(2) Alternatively, it might be said that because the parties have chosen the
“second” regime within law A (namely the CESL), the relevant compari-
son in law B for the purposes of considering the application of Article
6(2) is the “second” regime in law B (which is also the CESL). That the
“first” regime in law B would provide a higher level of consumer pro-
tection than CESL is, on this line of thinking, neither here nor there.
But law B contains both regimes. Why should the relevant comparison
within law B be law B’s “second” regime (CESL)? After all, Article 6(2)
Rome I refers only to “the protection afforded to him by provisions that
cannot be derogated from by agreement by virtue of the law” of the con-
sumer’s habitual residence. If law B’s “first” regime contains such rules,
then why should those be ignored? If the parties cannot, by reason of
Article 6(2) Rome I, “contract out” of those rules by selecting law A
as the law applicable to the contract, on what basis can they be said to
have done so simply because, within law A, they have chosen law A’s
CESL regime?

(3) There is, however, a more subtle way of approaching the matter – and it
may be that this is the approach assumed by the promoters of the legis-
lation. The starting point is that one has a contract in which the parties
have chosen the CESL. That is a given. In such a case, if the parties had
explicitly chosen the law of the consumer’s habitual residence as the law
applicable to the contract, the CESL would apply by virtue of the par-
ties’ agreement. In such a case, then, according to the “law which in the
absence of choice would have been applicable on the basis of” Article
6(1) – namely the law of the consumer’s habitual residence – the CESL
would apply, at least provided the consumer is habitually resident in a
Member State,45 because that is a provision of the contract. The “law
which in the absence of choice would have been applicable on the basis
of” Article 6(1) would have applied the same legal regime – namely the
CESL – as the law which the parties have chosen, provided at least both
laws are the laws of Member States of the EU.

If the issue were being addressed in a different constitutional context, one might
have expected the legislator to deal with the matter directly and explicitly by

45 If the consumer is habitually resident in a country which is not a Member State of the
EU the position may be more difficult: cp the discussion above.

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4. Incompleteness of the CESL

The proposed CESL does not purport to (and probably never could) deal with all the legal issues which might arise in the context of a cross-border contract for the sale of goods. Necessarily there will be gaps which will require to be filled by the relevant national law. Recital (27) contains a non-exclusive list of matters which are "not addressed" in the CESL, and these include "legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts". The national law which is to govern each of these issues, and any other matters which are not regulated by the CESL, will be determined by the choice of law rules relevant to the particular matter at issue. This is not the place for a treatise on the relevant rules, but the point to recall is that, if we are dealing with a cross-border contract, it cannot necessarily be assumed that the issue is only one of co-ordination between the CESL and a single system of national law. The issue will be one of co-ordination between the CESL and such system or systems of national law as may be identified by the relevant choice of law rules. Let me mention three issues which seem to me to be of some potential importance in the context of cross-border trade, particularly internet trade.

(1) **Transfer of ownership.** When the UK Sale of Goods Act 1893 was enacted, it harmonised the rules on transfer of ownership. Arguably, it was in this respect that the Act had its most significant effect on the pre-existing law of Scotland.\(^{46}\) The reason for harmonizing the rules

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\(^{46}\) Scots common law draws a clear distinction between contract and conveyance. In relation to corporeal moveable property, the transfer of ownership generally requires

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on transfer of ownership is perhaps obvious. The purpose of a sale is to transfer the ownership of goods from the seller to the buyer. Particularly – but not exclusively – upon the insolvency of one of the parties, the question of whether or not ownership has been transferred (and, indeed, whether the goods are subject to an undisclosed right in security or other proprietary right) may be very significant. It follows that the outcome of a dispute, insofar as it depended on such a question, could well be different according to the law which, by reason of the relevant choice of law rules, decides questions relating to the transfer of property and the creation of proprietary rights, notwithstanding that the parties have opted for a harmonised sales regime, namely the CESL. It may be important that parties are aware of this – not least because the arrangements which parties may make to protect themselves might be affected by assumptions as to the transfer of ownership and about the potential for goods to be subject to undisclosed rights in security or other proprietary rights. This might be particularly significant in at least some business to business contracts. Parties opting to use the CESL may need to inform themselves about the provisions of relevant legal systems in this respect.

(2) Capacity to contract. For an internet trader dealing in products attractive to the youth market, the question of capacity to contract might be a material issue. Capacity to contract is not dealt with by the CESL, so the issue is left to be determined by whichever law is identified by the relevant private international law rules. In this case, that law is not nec-
essarily the law identified a the law applicable to the contract by Rome I because questions involving the legal capacity of natural persons are, subject to the particular rule in Article 13 Rome I, also excluded from Rome I. Likewise, questions as to the legal capacity of companies and other bodies, corporate or unincorporated, are excluded from Rome I. In these areas, indeed, a trader trading across borders might not be safe to identify the laws on capacity of the country in which he trades, since that country’s private international law rules may be to the effect that capacity issues are dealt with by some third country law, e.g. the personal law of a natural person or the law under which a corporate body has been incorporated.

(3) **Illegality.** There are classes of goods which may not be sold legally across borders. The UK Law Commissions identify a number of such goods which may not be brought into the UK, including illicit drugs, flick and gravity knives, self defence sprays such as pepper and CS sprays, or stun guns, indecent and obscene material. The import of certain other items is subject to requirements for a licence or permit. The relevant lists may vary from country to country. The Law Commissions mention pepper sprays in that regard. Traders could not avoid the effect of such restrictions by choosing the CESL (or indeed by any other choice of law): the application of such restrictions are likely to be preserved by Article 3(3) or Article 9, Rome I. Nor does the CESL seek to regulate the consequences of such illegality. So a trader dealing in goods of a sort which may be subject to prohibition or restriction in certain Member States may, regardless of the law which is selected to govern the contract, need to find out about the rules applicable in the jurisdictions from which orders may emanate – and, if he wished to be fully apprised of the risks – to understand not only how the law applicable to the contract would resolve any issues arising from any illegality but also how the relevant law would resolve any consequential claims, e.g. under the law of unjustified enrichment.

Although the rules on transfer of ownership have been harmonised across the UK in the context of contracts for the sale of goods, the UK Sale of Goods Act

49 Article 1(2)(b).
50 Article 1(2)(e).
51 On the various approaches to this question, see JA Clarence Smith, “Capacity in the Conflict of Laws” (1952) 1 ICLQ 446; J.Blaikie, “Capacity to Contract” 1984 SLT (News) 161; Dicey & Morris, Conflict of Laws, 14th edn, 32R-216 to 32-228.
52 The Law Commissions, loc. cit., paras. 4.163-4.172.

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does not purport to harmonise either capacity to contract\textsuperscript{53} or the effects of illegality.\textsuperscript{54} These matters are left to the general law of the various jurisdictions of the United Kingdom. Why that should have been is perhaps speculative. Perhaps they are issues which are intrinsically difficult to harmonise. Questions of capacity (and, indeed, perhaps the choice of law rules for capacity), for example, may be too bound up with national social mores to be readily capable of harmonization. Perhaps they raise issues upon which it is thought more important that there should be a consistent rule within each jurisdiction than that there should be consistency in relation to sale contracts across jurisdictions. Perhaps they have not given rise to difficulties sufficiently numerous or pressing to justify change. What these examples illustrate is that any harmonization measure in this field is likely to be partial – and that there will always be a balance to be struck between the competing demands of local autonomy and harmonisation. It is unsurprising that the CESL should be more modest in that regard than the UK Sale of Goods Act and should strike the balance in a different way. If only by reference to its longevity and the familiarity which comes with long duration, the UK Sale of Goods Act may be accounted, in the context of the UK, a success. Whether the CESL will strike, in the context of the EU, as acceptable, successful and stable a balance between the competing demands of Member State autonomy and the pressure for harmonization, remains to be seen.

\textsuperscript{53} Sale of Goods Act 1979, section 3(1). The Act enacts one statutory rule for both jurisdictions, namely that where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them: section 3(2).

\textsuperscript{54} See the saving in Sale of Goods Act 1979, section 62(2).

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Part III
The provisions of the CESL on performance, termination and damages
Requiring and withholding performance, termination and price reduction: the CESL compared to the Vienna Sales Convention

Enrica Senini

1. Introduction

This paper aims at illustrating the point of view of a practicing lawyer regarding the introduction of a Common European Sales Law (CESL) in a legal framework where another uniform law on sales of goods already exists, i.e. the UN Convention on Contracts for the International Sale of Goods adopted in Vienna in 1980 that applies in all EU countries except the United Kingdom, Portugal and Malta, pending ratification.

The optional character of the proposed CESL, as opposed to the opt-out regime of the Vienna Convention, has been assessed as having fully met the European Commission’s goal to help SMEs and consumers to enhance cross-border trade by using common, user-friendly legislation.¹

But the real challenge of this optional instrument is to be perceived as such by its potential users: as correctly pointed out by some authors² “as one of the main beneficiaries of this reform, it is crucial to understand whether and how the firm perceives of legal diversity as a problem and an optional instrument as a solution in cross-border trade”.

Lawyers have often witnessed their clients’ desire to opt-out of the Vienna Sales Convention, but the reason for this is mostly unclear. The recurrent excuse is a preference for their national law, it being more familiar and more frequently applied by the courts designated as having jurisdiction over their sales contracts.

The CESL compared to the Vienna Sales Convention

It was therefore a sort of professional curiosity that led me to compare some provisions of the CESL with the corresponding rules of the Vienna Sales Convention, namely those concerning certain remedies available to the parties in case of non-performance of their obligations or breach of contract (which constitute the main concerns when choosing the applicable law to a sales contract), in order to offer legal practitioners a tool for evaluating whether the CESL could reverse this trend and prove more attractive than the Vienna Sales Convention currently is to SMEs.

Interestingly, some relevant differences have emerged which may lead SMEs to reconsider the advantages of choosing the CESL to govern cross-border B2B and B2C sales contracts.

2. General provisions regarding remedies

Both the proposed Regulation on the CESL (Part IV, Chapter 9) and the Vienna Sales Convention (Part III, Chapter I) contain general provisions regarding the remedies available to buyer and seller in the event of a breach of a sales contract.

A cursory reading of the first article of the respective chapters of the CESL and the Vienna Sales Convention on remedies available to the parties immediately reveals that while Article 87 (1) of the CESL employs the term “non-performance” of an obligation as the condition that gives rise to the remedies provided, Article 25 of the Vienna Sales Convention requires a “breach of contract”.

The different wording used in the CESL and in the Vienna Sales Convention is not without importance.

Under certain national laws, a breach of contract has to be distinguished from a non-performance of an obligation, since a breach is normally defined as a non-performance which is not excused, while in some other European legal systems non-performance covers both excused and non-excused non-performance.3

Turning to general principles of European or international contract law, it should be noted that in the Principles on European Contract Law (“PECL”) the term “non-performance” is used as a general term covering any failure to perform, for whatever cause (Article 8:108) and it includes all forms of failure in performance, whether it consists of total inactivity or of conduct in or towards performance which in some way fails to conform to the contract. Non-performance also includes failure to fulfil the duty imposed by Article 1:202 to co-operate in order to give full effect to the contract.

2. General provisions regarding remedies

UNIDROIT Principle 7.1.1 defines “non-performance” as a: “failure by a party to perform any of its obligations under the contract, including defective performance or late performance” and the comment to this principle expressly specifies that the concept of “non-performance” includes both non-excused and excused performance.

The Vienna Sales Convention that does not refer to a “non-performance”, but considers a “breach of contract” as a condition for one party to claim the remedies provided therein. In Articles 45 (under “Remedies for breach of contract by the seller”) and 61 (under “Remedies for breach of contract by the buyer”), breach of contract covers a failure of one party “to perform any of his obligations under the contract or this Convention”. Therefore, breach of contract seems to cover any failure to perform any obligation, subject to the exemptions set forth in Articles 79 and 80.

Article 25 of the Vienna Sales Convention provides a definition of what constitutes a “fundamental breach of contract” but there is no list of possible situations illustrating such a breach. Reference to case-law rendered by various courts and arbitral tribunals is therefore necessary in order to better identify what has been deemed a breach of the contract entitling the parties to apply for a remedy thereunder.

Under cases interpreting the Vienna Sales Convention, fundamental breach of contract under Article 25 includes:

– Lack of conformity of goods;

Article 79 of the Vienna Sales Convention states: “(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. (2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to know of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention”.

Article 80 of the Vienna Sales Convention: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission”.

Many decisions have been rendered on this matter (all available at www.unilex.info). In Germany: Oberlandesgericht Frankfurt am Main, 18/01/1994; Oberlandesgericht Düsseldorf, 10/02/1994; Oberlandesgericht München, 02/03/1994; Oberlandesgericht München.

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- Late delivery;
- Partial delivery;
- Non-delivery;
- Non-payment of price.


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In this existing complex scenario, Article 87 of the proposed CESL continues to employ the term “non-performance” in two separate contexts, clearly specified in the headings: “non-performance of an obligation” (Art. 87 (1)) and “fundamental non-performance” (Art. 87 (2)).

Non-performance of an obligation is described as “any failure to perform that obligation, whether or not the failure is excused”, and includes:
- Non-delivery or delayed delivery of the goods;
- Non-supply or delayed supply of digital content;
- Delivery of goods which are not in conformity with the contract;
- Supply of digital content which is not in conformity with the contract;
- Non-payment or late payment of the price;
- Any other purported performance which is not in conformity with the contract.

Article 87 (2) of the CESL considers non-performance of one party’s obligation as “fundamental” if:
- it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen the result, or
- it is of such a nature as to make it clear that the non-performing party’s future performance cannot be relied on.

Set against the Vienna Sales Convention, the CESL could be seen as providing more certainty on what may be deemed non-performance of an obligation, all the more in that this concept may differ significantly from the national laws of EU Member States. The stipulation that non-performance includes both excused and non-excused failure also seems to remove any uncertainty regarding a possible different presupposition (“breach of contract” rather than “non-performance of an obligation”) for the parties to claim the remedies provided both in the Vienna Sales Convention and the CESL.


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Comparison of Art. 25 of the Vienna Sales Convention and Art. 87 of the CESL

<table>
<thead>
<tr>
<th>Art. 25 of the Vienna Sales Convention</th>
<th>Art. 87 of the CESL Non-performance and fundamental non-performance</th>
</tr>
</thead>
</table>
| A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. | (1) Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:  
- Non-delivery or delayed delivery of the goods;  
- Non-supply or delayed supply of the digital content;  
- Delivery of goods which are not in conformity with the contract;  
- Supply of digital content which is not in conformity with the contract;  
- Non-payment or late payment of the price;  
- Any other purported performance which is not in conformity with the contract.  
(2) Non-performance of an obligation by one party is fundamental if:  
- it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen the result, or  
- it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on. |

Apart from the main difference that instantly emerges from reading Article 25 of the Vienna Sales Convention and Article 87 of the CESL, a parallel between the other general provisions can be drawn to observe if other differences exist.

General provisions on sale of goods in the Vienna Sales Convention and corresponding articles in the CESL

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 26 Notice of avoidance</td>
<td>Article 52 Notice of avoidance</td>
</tr>
<tr>
<td>A declaration of avoidance of the contract is effective only if made by notice to the other party.</td>
<td>Part II (“Making a binding contract”), Chapter 5 (“Defects in consent”) of the CESL</td>
</tr>
</tbody>
</table>
| 1. Avoidance is effected by notice to the other party.  
2. A notice of avoidance is effective only if it is given within the following period after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely:  
(a) six months in case of mistake; and  
(b) one year in case of fraud, threats and unfair exploitation. |
2. General provisions regarding remedies

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 27</strong></td>
<td><strong>Article 10</strong></td>
</tr>
<tr>
<td>Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.</td>
<td><strong>Notice</strong></td>
</tr>
<tr>
<td>Part I (&quot;Introductory provisions&quot;), Chapter 1 (&quot;General principles&quot;) of the CESL</td>
<td></td>
</tr>
<tr>
<td>1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.</td>
<td></td>
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<tr>
<td>2. A notice may be given by any means appropriate to the circumstances.</td>
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<tr>
<td>3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.</td>
<td></td>
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<tr>
<td>4. A notice reaches the addressee:</td>
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<tr>
<td>(a) when it is delivered to the addressee;</td>
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<tr>
<td>(b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee's habitual residence;</td>
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<tr>
<td>(c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or</td>
<td></td>
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<tr>
<td>(d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay. The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest.</td>
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<tr>
<td>5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.</td>
<td></td>
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<tr>
<td>6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 3 and 4 or derogate from or vary its effects.</td>
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<tr>
<td><strong>Article 28</strong></td>
<td></td>
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<tr>
<td>If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.</td>
<td>There is no similar provision in the CESL but this seems of minor relevance, since only one case has been reported so far on the application of Article 28 of the Vienna Sales Convention.11</td>
</tr>
</tbody>
</table>

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The CESL compared to the Vienna Sales Convention

### Vienna Sales Convention

**Article 29**

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

### CESL

**Article 30**

**Requirements for the conclusion of a contract**

Part I ("Introductory provisions"), Chapter 3 ("Conclusion of contract") of the CESL

1. A contract is concluded if:
   (a) the parties reach an agreement;
   (b) they intend the agreement to have legal effect; and
   (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect.

2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct.

3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.

4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

**Article 66**

**Contract terms**

Part III ("Assessing what is in the contract"), Chapter 7 ("Contents and effects") of the CESL

The terms of the contract are derived from:

(a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;

(b) any usage or practice by which parties are bound by virtue of Article 67;

(c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and

(d) any contract term implied by virtue of Article 68.

**Article 186 (1)**

**Agreements concerning prescription**

Part VIII ("Prescription"), Chapter 18 ("Prescription") of the CESL

The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.

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The CESL, on the other hand, contains certain provisions under the “General provisions” chapter that are absent from the Vienna Sales Convention, namely:

**Article 88 – Excused non-performance**

1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken

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2. General provisions regarding remedies

the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.
3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

Article 89 – Change of circumstances
1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
   Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.
2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:
   (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
   (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.
3. Paragraphs 1 and 2 apply only if:
   (a) the change of circumstances occurred after the time when the contract was concluded;
   (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
   (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.
4. For the purpose of paragraphs 2 and 3 a ‘court’ includes an arbitral tribunal

and

Article 90 – Extended application of rules on payment and on goods or digital content not accepted
1. Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12 apply with appropriate adaptations to other payments.
2. Article 97 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.
The CESL compared to the Vienna Sales Convention

In conclusion, it must be said that no relevant difference exists between the Vienna Sales Convention and the CESL in the general provisions as to remedies available to the parties to a sales contract.

3. Requiring performance

Both the buyer and the seller are entitled to require performance should the other party fail to perform any of its obligations.

In the Vienna Sales Convention this remedy is set out in Articles 46 and 47 with regard to the buyer and in Article 62 as to the seller.

According to Article 46, unless the buyer has claimed a remedy which is inconsistent with requiring performance, the buyer may, at his option:

- in the event of a lack of conformity which constitutes a fundamental breach of contract, require delivery of substitute goods within a reasonable time;13
- require the seller, within a reasonable time, to remedy by repair, unless this is unreasonable having regard to all circumstances.

The buyer may also allow an additional period of time to the seller so that the latter may perform his obligation, during which buyer may not claim any remedy for breach of contract, unless the seller has declared that he will not perform within the period so fixed (Article 47).

The CESL also grants the buyer the right to require performance, unless it would be impossible or has become unlawful, or the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Regarding the choice between repair and replacement, which is unconditionally granted to buyers under the Vienna Sales Convention, the CESL reserves this right to consumers in the event of lack of conformity of goods. This

12 It has been held for example by the Tribunale di Forlì (Court of Forlì, Italy), 16/02/2009, applying Article 46 of the CISG, that the buyer’s request to have the bank guarantee’s duration prolonged after the goods had been delivered prevented it from relying on late performance by the seller.

13 According to Article 39 of the Vienna Sales Convention, “(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee”. See Hof van Beroep, Gent, Belgium, 02/12/2002, at http://www.unilex.info/case.cfm?id=1203 that has ruled that a period of more than eight weeks after delivery is not reasonable for sending a notice of non-conformity of goods, since defects in that case were recognizable after a primary examination upon delivery.
right to choose may not be exercised if the option selected would be impossible or unlawful or, compared to the other option available, would impose disproportionate costs on the seller.

Having opted for the repair or replacement remedy, the consumer may not claim other remedies for breach until the trader has completed repair or replacement within a maximum period of thirty days, but may, during that time, withhold performance.

In addition to the aforementioned provisions, the CESL also entitles and requires the seller to take back the replaced item at its expense, waiving its right to claim any payment for the use of the item made by the buyer during the period prior to replacement (Article 112).

**Buyer’s remedies: Requiring performance**

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 46</td>
<td>Article 110</td>
</tr>
<tr>
<td>(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.</td>
<td>Requiring performance of seller’s obligations</td>
</tr>
<tr>
<td>(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.</td>
<td>1. The buyer is entitled to require performance of the seller’s obligations.</td>
</tr>
<tr>
<td>(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.</td>
<td>2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.</td>
</tr>
<tr>
<td>Article 110</td>
<td>3. Performance cannot be required where:</td>
</tr>
<tr>
<td>Consumer’s choice between repair and replacement</td>
<td>(a) performance would be impossible or has become unlawful; or</td>
</tr>
<tr>
<td></td>
<td>(b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.</td>
</tr>
</tbody>
</table>

1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:
   (a) the value the goods would have if there were no lack of conformity;
   (b) the significance of the lack of conformity; and
   (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.

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<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.</td>
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</tbody>
</table>

**Article 47**
(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

No corresponding provision in the CESL.

| No corresponding provision in the Vienna Sales Convention. | Article 112
<table>
<thead>
<tr>
<th>Return of replaced item</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.</td>
</tr>
<tr>
<td>2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.</td>
</tr>
</tbody>
</table>

Both the Vienna Sales Convention (Article 62) and the CESL (Article 132) contain almost identical provisions granting seller the right to require performance, which consists of requiring payment of price, taking delivery or performing other obligations arising out of the sales contract.

While the Vienna Sales Convention allows the seller to fix an additional period of time for the buyer to perform his obligations, during which the seller may not claim any remedy for breach of contract (save damages for delay in performance), the CESL provides that the seller may require the buyer to take delivery and may recover the price where the buyer has not yet taken over the goods (or the digital content) and it is clear that buyer is unwilling to receive performance.
## Seller’s remedies: Requiring performance

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 62</strong>&lt;br&gt;The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.</td>
<td><strong>Article 132</strong>&lt;br&gt;&lt;br&gt;<strong>Requiring performance of buyer’s obligations</strong>&lt;br&gt;1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.&lt;br&gt;2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.</td>
</tr>
<tr>
<td><strong>Article 63</strong>&lt;br&gt;(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.&lt;br&gt;(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.</td>
<td>No corresponding provision in the CESL.</td>
</tr>
</tbody>
</table>

### 4. Withholding performance

The Vienna Sales Convention fails to articulate a general right to suspend performance of a contract for breach, but rather contains particular applications of the *exception inadimpleni non est adimplendum*, notably in Articles 58 and 71.

Article 58 provides that the buyer may pay the price after either the goods or the documents are handed over, or – if this is consistent with the agreement between the parties – after the goods have been examined. The seller may also make payment by the buyer a condition for handing over the goods or documents.

Case law\(^{14}\) under Article 58 and some authors\(^{15}\) highlight that the buyer’s right to withhold payment of price in the event of non-conforming perfor-

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\(^{14}\) Oberester Gerichtshof (Austria), 08/11/2005, in www.unilex.info; Arrondissementsrechtbank Arnhem (The Netherlands), 31/01/2008, *ivi*.

mance by the seller is a matter governed but not expressly settled by the Vienna Sales Convention.

The \textit{exceptio inadimpleti contractus} derives from the principle of simultaneous exchange of performances contained in the Convention and from the principles underlying Articles 58, 71, 85 and 86. It has been also considered a general right of the parties\textsuperscript{16} further justified by Article 7.1.3 of the UNIDROIT Principles.\textsuperscript{17}

Furthermore, it has been held\textsuperscript{18} that a general right to suspend performance can be grounded on the “gap-filler” contained in Article 7 (2) of the Vienna Sales Convention providing that “questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

Conversely, other authors\textsuperscript{19} infer that in accordance with Article 48 of the Vienna Sales Convention, the non-breaching party to the contract may not withhold performance, its sole remedies being to avoid the contract or claim for damages.

Nor can Article 71 of the Vienna Sales Convention be read as granting the general right to suspend performance, when applicable as expressly stated in the Explanatory Note by the UNCITRAL Secretariat on the Vienna Sales Convention,\textsuperscript{20} before performance is due and before any breach occurs.\textsuperscript{21} This


\textsuperscript{19} Schnyder/Straub in Honsell, Kommentar, Art. 48, para 55 et seq.

\textsuperscript{20} Available at \url{http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf}.

\textsuperscript{21} This principle was applied by the ICC Court of Arbitration, Zurich, in Case No. 9448/98 (in \url{www.unilex.info}) stating that the buyer was not entitled to withhold performance since deliveries had already been received by him.

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4. Withholding performance

provision, moreover, has been held to be applicable only when the seller has not performed a substantial part of his obligation and it becomes apparent that he will not perform, and does not concern when the seller’s performance fails to conform to the contract.22

Under Chapter 11 ("the Buyer’s remedies") the CESL sets out in Article 106(1)(b), as well as in Article 131(1)(b) of Chapter 13 ("the Seller’s remedies") the right of the buyer and the seller to withhold their own performance under the provisions, respectively, of Article 113 and Article 133.

As opposed to the various gaps left by the vague provisions of the Vienna Sales Convention regarding suspension of performance, the CESL provides a clear right to withhold performance:
- to the buyer who is to perform at the same time, or after the seller performs, until the seller has tendered performance or has performed (Article 113(1));
- to the seller who is to perform at the same time, or after the buyer performs, until the buyer has tendered performance or has performed (Article 133(1));
- to the buyer or to the seller who is to perform before the other party performs, where it has to be reasonably believed that there will be non-performance (Article 113(2) and Article 133 (2)).

It is apparent that the right to withhold performance is exercisable under the provisions of the CESL before the other party tenders to perform, or performs, but what if – for example – the seller delivers non-conforming goods? Does the buyer have the right to suspend payment of the price?

It is essential to determine whether the buyer has the duty not only to take delivery but also to further accept what the seller delivers in performance of the contract. Such a duty may be found in Article 120(1) of the CESL, providing that "a buyer who accepts a performance not conforming to the contract may reduce the price". What results from this provision is that: (i) it seems to impose a duty on the buyer not only to take delivery, but also to accept the goods delivered; (ii) acceptance of the goods merely entitles the buyer to reduce the price, but not to withhold its performance, namely to pay the price.

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The CESL compared to the Vienna Sales Convention

Withholding performance: relevant articles in the Vienna Sales Convention and in the CESL

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 7</td>
<td>Article 113</td>
</tr>
<tr>
<td>(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.</td>
<td>Right to withhold performance (right of the buyer)</td>
</tr>
<tr>
<td></td>
<td>1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.</td>
</tr>
<tr>
<td>Article 113</td>
<td>2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller’s performance becomes due may withhold performance for as long as the reasonable belief continues.</td>
</tr>
<tr>
<td>Right to withhold performance (right of the buyer)</td>
<td>3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller’s obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller’s non-performance is such as to justify withholding the buyer’s performance as a whole.</td>
</tr>
<tr>
<td>Article 58</td>
<td>Article 133</td>
</tr>
<tr>
<td>(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer’s disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.</td>
<td>Right to withhold performance (right of the seller)</td>
</tr>
<tr>
<td>(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.</td>
<td>1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.</td>
</tr>
<tr>
<td>(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.</td>
<td>2. A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer’s performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.</td>
</tr>
<tr>
<td></td>
<td>3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the buyer’s obligations are to be performed in separate parts or are otherwise divisible, the seller may withhold performance only in relation to that part which has not been performed, unless the buyer’s non-performance is such as to justify withholding the seller’s performance as a whole.</td>
</tr>
</tbody>
</table>
5. Termination

In the Vienna Sales Convention’s parlance, termination of a contract is referred to as “avoidance” and is a remedy that the aggrieved party may exercise upon occurrence of a fundamental breach as defined by Article 25\(^{23}\) and as interpreted by international case law.\(^{24}\)

\(^{23}\) Article 25 – “A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”.

\(^{24}\) On fundamental breach, in general, see in **Australia**: Supreme Court of Queensland, 07/11/2000; in **Finland**: Court of Appeal of Turku, 18/02/1997; in **Spain**: Audiencia Provincial de Madrid, 22/03/2007; in **Switzerland**: Schweizerisches Bundesgericht, 15/09/2000; in the **U.S.A.**: U.S. District Court, E.D., Louisiana, 17/05/1999, U.S. District Court, S.D. of New York, 16/04/2008; **Arbitral awards**: Arbitral Institute of the Stockholm Chamber of Commerce, 05/04/2007. All cases are available at www.unilex.info. For specific cases of fundamental breach under Article 25, see *supra*, footnotes no. 7-11.
It has been asserted\textsuperscript{25} that avoidance has to be qualified as an \textit{ultima ratio} remedy granted only when it is almost certain that a party shall not perform any of his obligations, amounting to a fundamental breach.

When the non-performing party is the seller, Article 49 entitles the buyer to declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

Where the seller has delivered the goods, however, this remedy is precluded to the buyer unless he gives notice of avoidance, in respect to late delivery or any other breach other than late delivery, within a reasonable time after he has become aware of delivery or after he knew or ought have known of the breach, or after the expiration of any additional period of time fixed according to Articles 47 or 48.

The same mechanism applies – in a comparable manner – if a failure by the buyer to perform any of his obligations amounts to a fundamental breach or if the buyer does not pay the price or take delivery of the goods within the additional period of time fixed in accordance with Article 63 (1) and (Article 64). At this occurrence, the seller may declare the contract avoided but it loses such a right in cases where the buyer has paid the price and the seller fails to give notice of avoidance before he becomes aware of late performance or, in respect of any breach other than late performance, within a reasonable time.

Avoidance of contract is also available, under the Vienna Sales Convention, in case of anticipatory breach as per Article 72, when “it is clear that one of the parties will commit a fundamental breach of contract” prior to the date of performance, and in the event of instalment sales (Article 73), where avoidance is permitted in respect of any instalment if failure to perform constitutes a fundamental breach with reference to that instalment, or in respect to the

\begin{flushright}
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contract as a whole if the party’s failure to perform gives the other party good grounds to conclude that a fundamental breach of future instalments will occur.

The CESL’s provisions on termination of contract are more coherent.

Similar to the Vienna Sales Convention, the CESL also grants the right to terminate the contract if one party is aggrieved by a fundamental breach of the other party (Article 114 for buyer’s remedy, and Article 134 – interestingly headed, in contrast to the former, “Termination for fundamental non-performance” – for seller’s remedy).

In the event of non-performance by the seller, however, the buyer may also terminate the contract in case of delay in delivery “which is not in itself fundamental” if the buyer provides notice fixing an additional period of time of reasonable length for performance by the seller, and the latter does not perform within that period (Article 115). Moreover, the buyer may also terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance such as to justify termination (Article 116).

In the event of non-fundamental breach in itself, the seller holds a correlative right to terminate the contract should the buyer fail to perform within the additional period of time of reasonable length fixed by the seller. While Article 115 is silent on the maximum length of such additional period of time, Article 135(2) provides that it “is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article 167(2)”.

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26 Termination of a contract is defined by Article 8 (1) of the CESL as the bringing “to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination”.

27 For the meaning of “fundamental breach” under the CESL, see Article 87(2).
The CESL compared to the Vienna Sales Convention

**Buyer’s right to avoid or terminate the contract**

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
</table>
| Article 49 | Article 114  
Termination for non-performance |
| (1) The buyer may declare the contract avoided: | |  
| (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or | |  
| (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed. | |  
| (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: | |  
| (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; | |  
| (b) in respect of any breach other than late delivery, within a reasonable time: | |  
| (i) after he knew or ought to have known of the breach; | |  
| (iii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or | |  
| (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance. | |  

No corresponding provision in the Vienna Sales Convention.

| Article 114  
Termination for delay in delivery after notice fixing additional time for performance |
| 1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period. |
| 2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay. |
| 3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice. |

| Article 116  
Termination for anticipated non-performance |
<p>| A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination. |</p>
<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 26</strong></td>
<td><strong>Article 118</strong></td>
</tr>
<tr>
<td>A declaration of avoidance of the contract is effective only if made by notice to the other party.</td>
<td><strong>Notice of termination</strong></td>
</tr>
<tr>
<td><strong>Article 51</strong></td>
<td><strong>Article 117</strong></td>
</tr>
<tr>
<td>(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.</td>
<td><strong>Scope of right to terminate</strong></td>
</tr>
<tr>
<td>(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.</td>
<td>1. Where the seller’s obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.</td>
</tr>
<tr>
<td>(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.</td>
<td>2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.</td>
</tr>
<tr>
<td><strong>Article 73</strong></td>
<td>3. Where the seller’s obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.</td>
</tr>
<tr>
<td>(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.</td>
<td>No corresponding provision in the CESL.</td>
</tr>
<tr>
<td>(2) If one party’s failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.</td>
<td></td>
</tr>
<tr>
<td>(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.</td>
<td></td>
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</tbody>
</table>
Seller's right to avoid or terminate the contract

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 64</strong>&lt;br&gt;(1) The seller may declare the contract avoided:&lt;br&gt;(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or&lt;br&gt;(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.&lt;br&gt;(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:&lt;br&gt;(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or&lt;br&gt;(b) in respect of any breach other than late performance by the buyer, within a reasonable time:&lt;br&gt;(i) after the seller knew or ought to have known of the breach; or&lt;br&gt;(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.</td>
<td><strong>Article 134</strong>&lt;br&gt;Termination for fundamental non-performance&lt;br&gt;A seller may terminate the contract within the meaning of Article 8 if the buyer's non-performance under the contract is fundamental within the meaning of Article 87 (2).&lt;br&gt;<strong>Article 135</strong>&lt;br&gt;Termination for delay after notice fixing additional time for performance&lt;br&gt;1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.&lt;br&gt;2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article 167(2).&lt;br&gt;3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</td>
</tr>
<tr>
<td><strong>Article 139</strong>&lt;br&gt;Loss of right to terminate&lt;br&gt;1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the lack of conformity.&lt;br&gt;2. A seller loses a right to terminate by notice under Articles 136 unless the seller gives notice of termination within a reasonable time after the right has arisen.&lt;br&gt;3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.</td>
<td></td>
</tr>
</tbody>
</table>
### Vienna Sales Convention

**Article 26**
A declaration of avoidance of the contract is effective only if made by notice to the other party.

**Article 73**
(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

No corresponding provision in the Vienna Sales Convention.

### CESL

**Article 138**
Notice of termination
A right to terminate the contract under this Section is exercised by notice to the buyer.

**Article 137**
Scope of right to terminate
1. Where the buyer's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part.
2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.
3. Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.
With regard to the effects of termination (or avoidance), the Vienna Sales Convention establishes two different rules:

- the parties are released from performing their future obligations, in whole or in part (if the contract is partially avoided), subject to any damages which may be due (Article 81 (1));
- the performing party has the right to claim restitution of whatever he had supplied in the past (Article 82 (2)), unless impossibility of making restitution is not due to his act or omission, or if the goods have deteriorated or perished, or if they have been sold or transformed before the buyer discovered or ought to have discovered the lack of conformity (Article 83). It is worth noting that, in contrast to other international uniform principles on sale of goods, namely those of the UNCITRAL and the PECL, the Vienna Sales Convention subordinates the right of avoidance to full restitution of the goods where possible.

It has been debated whether avoidance of contract under the Vienna Sales Convention voids the contract ab initio, or ex nunc, given the fact that Article 81 (2) refers only to past performances and “redirects the main obligations of the contract”, the effects of avoidance are considered to operate ex nunc. The prospective effect of termination is also provided for both in the UNIDROIT Principles and in the PECL.


See Mirghasem Jafarzadeh, supra n. 16.


Article 7.3.5(1): “Termination of the contract releases both parties from their obligation to effect and to receive future performance”.

Article 9:305(1) of the PECL states: “Termination of the contract releases both parties from their obligation to effect and to receive future performance, but, subject to Articles 9:306 to 9:308, does not affect the rights and liabilities that have accrued up to the time of termination”. For a comparison of Article 81 of the Vienna Sales Convention and the PECL, see also Francesco G. Mazzotta, in Commentary on CISG Article 81 and its PECL counterparts, 2003, available at http://www.cisg.law.pace.edu/cisg/text/peclcomp81.html#er.

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Upon termination of the contract, the CESL only provides for the restitution by each party of what that party has received as performance of the contract (Article 172), with the addition of any natural or legal fruits. This seems to conform to what has been opined under the Vienna Sales Convention in relation to the fact that mutual restitution has to be made concurrently.

A cursory comparison of the respective provisions of the Vienna Sales Convention and the CESL concerning effects of termination or avoidance shall suffice to highlight any eventual important differences between the two sets of rules.

**Effects of termination or avoidance**

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Article 81</td>
<td>Article 172</td>
</tr>
<tr>
<td>(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.</td>
<td><strong>Restitution on avoidance or termination</strong></td>
</tr>
<tr>
<td>(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.</td>
<td>1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party.</td>
</tr>
<tr>
<td>(Restitution in instalment sales is not authorized under the Vienna Sales Convention).</td>
<td>2. The obligation to return what was received includes any natural and legal fruits derived from what was received.</td>
</tr>
<tr>
<td></td>
<td>3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 8 (2), unless the nature of the contract is such that part performance is of no value to one of the parties.</td>
</tr>
</tbody>
</table>

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34 It is worth noting that the heading of Article 172, as well as Article 172(1) itself both refer to “avoidance” and “termination”, although the remedy referred to in Section 5 of Chapter 11 and Section 4 of Chapter 13 is “termination”.

The CESL compared to the Vienna Sales Convention

<table>
<thead>
<tr>
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<th>CESL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 82</strong></td>
<td><strong>Article 173</strong></td>
</tr>
<tr>
<td>(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.</td>
<td><strong>Payment for monetary value</strong></td>
</tr>
<tr>
<td>(2) The preceding paragraph does not apply:</td>
<td>1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party’s proprietary interests.</td>
</tr>
<tr>
<td>(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;</td>
<td>2. The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.</td>
</tr>
<tr>
<td>(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or</td>
<td>3. Where a related service contract is avoided or terminated by the customer after the related service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the related service.</td>
</tr>
<tr>
<td>(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.</td>
<td>4. In a case of digital content the monetary value of what was received is the amount the consumer saved by making use of the digital content.</td>
</tr>
<tr>
<td><strong>Article 83</strong></td>
<td><strong>Article 174</strong></td>
</tr>
<tr>
<td>A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.</td>
<td><strong>Payment for use and interest on money received</strong></td>
</tr>
<tr>
<td><strong>Article 84</strong></td>
<td>1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:</td>
</tr>
<tr>
<td>(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.</td>
<td>(a) the recipient caused the ground for avoidance or termination;</td>
</tr>
<tr>
<td>(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:</td>
<td>(b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or</td>
</tr>
<tr>
<td>(a) if he must make restitution of the goods or part of them; or</td>
<td></td>
</tr>
</tbody>
</table>
of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

(c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.

2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 166, where:
(a) the other party is obliged to pay for use; or
(b) the recipient gave cause for the contract to be avoided because of fraud, threats and unfair exploitation.

3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received or interest on money received in any circumstances other than those set out in paragraphs 1 and 2.

Unlike the Vienna Sales Convention Article 81(1), the CESL does not expressly provide that upon termination the parties are released from performing their future obligations; this effect, however, seems nonetheless to apply, it being a general principle contained both in the UNIDROIT Principle 7.3.5. (1) and in Article 9:305 of the PECL.

The same must be said regarding the right to claim damages that is not offered by the CESL yet is safeguarded both by the UNIDROIT Principles and the PECL, and regarding the future of dispute settlement clauses, which are similarly not affected by termination according to the aforementioned uniform laws.

The comparison between Article 82 of the Vienna Sales Convention and Article 173 of the CESL again outlines that the CESL has moved towards the principles adopted by the uniform international sales law, thus distancing itself from the Vienna Sales Convention’s provision under which the buyer may not restitute the delivered goods in the same condition in which they were received, save as per the exceptions set forth in Article 82(2), without forfeiting its right to avoid the contract.36

Inspired by Article 7.3.6(1) of UNIDROIT Principles stating that “if restitution in kind is not possible or appropriate, an allowance should be made in money whenever reasonable”, and of PECL Article 9:309 that provides that “on termination of the of the contract a party who has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance

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36 It is worth noting that avoidance of contract under the Vienna Sales Convention is forfeited only to the buyer who cannot return the goods, but the seller can always declare the contract avoided since the monies received from the buyer can always be restituted. This principle has also been confirmed by ICC Court of Arbitration, Case No. 9978 of March 1999, available at http://www.cigsonline.ch/cisg/urteile/708.htm.

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to the other party”, Article 173 of the CESL significantly differs from the Vienna Sales Convention by granting the buyer who is prevented from restituting the goods delivered the right to nonetheless avoid the contract and pay a monetary allowance instead.

6. Price reduction

The right to reduce the price in case of non-conforming performance dates back to the Roman law that provided, among the actiones aediliciae, the action quanti minoris (or aestimatoria) that could be exercised by the buyer within six months from when non-conformity of the goods (vitia rei emptae) had been discovered.

Article 50 of the Vienna Sales Convention entitles the buyer who has been delivered non-conforming goods to reduce the price in the same proportion that “the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time”. Price reduction is not possible if the seller has remedied the failure or if the buyer has refused to accept performance offered by the seller in accordance with Articles 37 or 48.37

Since by virtue of Article 45(1)(b) and Articles 74 et seq. the buyer, in case of breach of contract, can always claim damages of “a sum equal to the loss, including loss of profit”, resorting to the sole remedy of price reduction may not always be desirable by the buyer since claiming damages may serve him better as to the amount he may eventually recover.

But this remedy may be successfully sought when, for example, it is difficult for the buyer to prove the loss, or when the seller is exempt from liability due to force majeure, or simply when the sum resulting from application of Article 50 would be higher than the loss calculated as per Article 74.

Case law shows, in fact, that reduction of price and damages have been concurrently sought before courts and arbitral tribunals.38

The CESL also grants the buyer the right to reduce price and such reduction shall amount to the “decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance” (Article 120).

In addition to what is set forth in the Vienna Sales Convention, the CESL entitles the buyer who has already paid the price to recover the excess amount paid, but as stated in Article 50 of the UNCITRAL Digest, the remedy of price reduction “does not depend on whether the buyer has paid the price”,39 hence the same rule of the CESL also applies under the Vienna Sales Convention.

As to damages as a concurrent or alternative remedy to reduction of price, the CESL specifies that the buyer who has resorted to price reduction is only entitled to damages for any further loss suffered which has not already been compensated by the sum obtained through price reduction.

### Price reduction

<table>
<thead>
<tr>
<th>Vienna Sales Convention</th>
<th>CESL</th>
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<tbody>
<tr>
<td><strong>Article 50</strong>&lt;br&gt; If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.</td>
<td><strong>Article 120</strong>&lt;br&gt; <strong>Right to reduce price</strong>&lt;br&gt;1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.&lt;br&gt;2. A buyer who is entitled to reduce the price under paragraph 1 and who has already paid a sum exceeding the reduced price may recover the excess from the seller.&lt;br&gt;3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.</td>
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38 Schweizerisches Bundesgerichts 28/10/1998; Supreme Court of Western Australia, 17/01/2003; ICC Court of arbitration, Case No. 8247 of June 1996.

The CESL compared to the Vienna Sales Convention

7. Conclusion

This brief excursus on remedies for breach is intended to offer a preliminary overview as to whether the CESL may offer SMEs advantages in opting for its provisions.

As stated in the introduction, the success of the CESL very much depends on how firms perceive a uniform European law to possibly govern their sales across the European Economic Community. Needless to say, provisions on remedies available in case of non-performance of one of the parties are a primary test in this regard.

As an Italian lawyer, I fail to spot convincing arguments to induce SMEs to opt in the CESL in light of facilitating their business across Europe. Sellers especially, for the same reasons cited for opting out of the Vienna Sales Convention, would prefer their national law since, for example, it may provide strict terms of loss and prescription periods for the buyer to notify non-conformities which are far shorter than those contained in the CESL40 (although prescription periods may be shortened by agreement of the parties as per Article 186).

Another dissuasive element for companies considering choosing the CESL could be the (at least initial) uncertainty on how its provisions would be interpreted by the different courts: reference to “reasonableness” made at Articles 111(2), 113(2), 115(1), 119(1), 122(1), 133(2), 135(1), 139(1) or other open ended terms leaves wide discretion and decisions rendered under the Vienna Sales Convention show that courts have to determine a “reasonable time” on a case by case basis.

In addition to this, it should be noted that interpretation of the CESL’s provisions is submitted to the EU Court of Justice via a preliminary ruling, which of course implies a time-consuming procedure and costs which sellers may not want to bear.

In conclusion, the competitiveness of the CESL in governing European cross-border sales contracts relies on its capacity to offer innovative and alternative solutions as opposed to national laws; surely yet a more burdensome set of rules would fail to attain such a goal.

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40 As is the case, for example, under Italian and German law.

Enrica Senini
The CESL’s contribution in terms of damages and interest

Louis-Bernard Buchmann

Firstly, I wish to explain why I chose the specific subject of damages. To my great regret, I am not, as some of you are, a professor. I am a litigator, and in my litigation practice, the question of damages is what the clients are essentially interested in, and their question is invariably: “How much am I going to get at the end of the proceedings?”; although obviously it is impossible to answer this question.

Secondly, this topic is interesting when one compares the provisions on point in the Common European Sales Law and in the Vienna Convention. Why?

1. A practical view on the Vienna Convention

We litigators are not always immediately aware of the importance of the Vienna Convention because commercial companies are often advised, in the context of buying or selling goods internationally, to opt-out of the otherwise tacit applicability of Vienna Convention (and more rarely to keep it applicable).

It is usually conceded, and it may well be true, that the Vienna Convention is “buyer friendly”, in the sense that it favours (or at least it preserves) the interests of the buyer over the interests of the seller, and most of the time, when we are asked to draft sales contract, this is because our client is the seller.

As a consequence, in our day to day practice, we are often inclined to be adverse to the applicability of the Vienna Convention (obviously when the contractual parties are from countries which have signed the Vienna Convention). There are over 70 countries which are signatories of the Vienna Convention. At latest count, there are 78 such countries, of which 23 are members of the European Union, so one can already see that almost 30% of the signatories of the Vienna Convention are countries which are likely to be impacted by the future Common European Sales Law, and it is there that we see how the comparison between the two becomes important.

2. Relevant provisions dealing with damages

The relevant provisions of the Vienna Convention dealing with damages are five Articles, from 74 to 78. In these provisions is concentrated the most interna-
The CESL’s contribution in terms of damages and interest

tionally applied contractual standard in terms of damages and interest. It has generated abundant case-law and academic comments.

The relevant provisions of the CESL draft regulation dealing with the same topic are a dozen Articles: from 159 to 171. It is tempting to contrast the contents of the provisions of the draft CESL regulation pertaining to damages with those of the CISG, to see how they measure up against that benchmark.

This inflation in the number of articles of CESL gives some people a headache. In 1980, or just a little before, when the Vienna Convention was drafted, there was a sense of concision which seems to be lacking in the current draft regulation, but let this not spoil the achievement of having nonetheless a draft regulation for an optional regime. What really matters is that the five articles from the Vienna Convention dealing with damages are included in the draft regulation.

Which ones are they? Very briefly, what I would like to emphasise is that Article 74 of the Vienna Convention (and I shall explain a little more about this article), sets out the principle that damages must be equal to, but not greater than, the loss suffered.

Thus, after the principle laid out in Article 74, there is in Article 75 one way to compute the damages, based on the spread between different prices, and in Article 76 an alternative way, based on the spread with the current market price, when there is such a market price. Article 77 deals with mitigation of losses, i.e. the obligation on the party suffering the loss to limit the loss to the extent possible, and Article 78 deals with interest accruing on the damages amount.

These are clear and simple notions which seem evident today, after 30 years of applying the Vienna Convention. We note that these notions are almost universally applied and we see that in fact, there is completely accessible case law stemming from the Vienna Convention and that it is available online on a certain number of websites.

Just two weeks ago, I was in Vienna for an arbitration moot competition which is known as the Willem C. Vis moot, it has been going on for 19 years, and during these 19 years, university teams have competed before arbitrators on subjects which combine arbitration issues with Vienna Convention provisions, and those who participate in the competition are struck by the knowledge that the university teams have of the Vienna Convention. This year, 280 universities from all over the world, including some from countries which are not even signatories of the Vienna Convention (such as Great Britain and Ireland), entered the competition.

Interestingly, this body of online case law, to which I referred, is exactly the same idea as that stressed by Mr. Staudenmayer in his contribution to this volume: i.e. to build an online database providing the resulting case law, once the CESL Regulation will be in force.

This is very important because with the knowledge of case law which will spread from such easy access, we will have what professor Conte calls in his contribution: the “Lex Mercatoria”.

Louis-Bernard Buchmann
3. The “Lex Mercatoria”

Indeed, and maybe some of you did not suspect it already existed, over the past thirty years, a “Lex Mercatoria” has been created around the international sale of goods, with all the national decisions and the redacted arbitral awards which have been published.

This said, I would like to point out that in the draft CESL regulation, we find articles which precisely correspond to those of the Vienna Convention I just mentioned.

Functionally equivalent to Article 74 of the Vienna Convention, there are three articles in the draft CESL regulation, Articles 159, 160 and 161. Equivalent to Article 77 of the Vienna Convention, there are Articles 162 and 163 of the draft CESL regulation. Equivalent to Article 75 of the Vienna Convention, there is Article 164 of the draft CESL regulation. Article 76 of the Vienna Convention is Article 165 of the draft CESL regulation and the exact contents of Article 78 of the Vienna Convention are included in Article 166 of the draft CESL regulation.

4. Conclusion

The conclusion we could draw is that the contribution of the draft CESL regulation with respect to damages is fairly minimal, and we could regret this, we could even say that it is a shame, that we are disappointed, but one should really go beyond this first conclusion and realise that even with the enormous intellectual contribution of all the academics who contributed to the draft CESL regulation, the fact that we find ourselves with something close to what we have in the Vienna Convention is actually a very good thing, and this for two reasons: firstly, practitioners will be spared the effort of having to learn new ropes, because of the familiarity of the ground covered in the draft CESL regulation in terms of damages, and secondly, all the case law which has resulted from the Vienna Convention will not be lost and will still be usable as a reference point because the draft CESL damages rules are so aligned with the damages rules in the Vienna Convention.

So what we can hope for, as practitioners, is that the legislative process to which the draft regulation will now be submitted or to which it is already in the process of being submitted (involving in particular the JURI committee and IMCO\(^1\) committees of the European Parliament) will not generate, as far as damages are concerned, any major changes or the introduction of new concepts or a new standard for damages and interest, and that all that has been decided, and, I might add, well decided, by the arbitral tribunals and the state courts for the application of the Vienna Convention, will continue to inspire the future CESL Regulation and the case law which will derive from it.

\(^1\) Internal Market and Consumer Protection

Louis-Bernard Buchmann
The CESL’s contribution in terms of damages and interest

So I feel that on this specific point of damages there is nothing new, there is no autonomous concept introduced by the draft regulation, but this is not a good reason to condemn the draft CESL regulation. This is for the legal practitioners a blessing in disguise, as one does not discern an urge to modify time-tested principles.

Another important issue regards the role of the fault in the damages provisions.

Many national contract law allow large damage claims only when there was grave negligence in breaching a contract. Both the Vienna Convention and the CESL offer damages without fault, consequently this interesting and practically relevant question arises: is there, to some of the damages that might be attributed due to a breach of contract, any difference? Do you know of that, or is it actually the same perspective on the basis of enforcement versus negligence and causation?

I would just like to answer by saying that in my opinion there are no real differences, there must be a breach of an obligation to give rise to a right of relief, we are dealing with well-known principles of civil law, i.e. a fault, a damage and a causation link between the two, all this suffices for a civil law lawyer and, in any case, continental law on this is fairly standard.

Therefore, it is not really necessary to deal with the distinctions between negligence and grave negligence, between reckless misconduct and misconduct that is not reckless, these are issues that are determined by the courts and weigh on the measure of relief for loss or harm, but I think that precisely one of the qualities which we find both in the Vienna Convention and this draft regulation is that the distinctions that legal professionals love to hide behind when they are unsure are not included in these texts.

Finally, I believe that European Court of Justice will indeed have the last word, but if this happens in several years, we have to plod along until then and work and advise our clients in a clear and sensible manner. I think that we shall succeed, because once again, I see similarities between the draft CESL regulation and the Vienna Convention, and I am absolutely convinced that the accumulation of experience and knowledge that we have of the Vienna Convention for thirty years cannot leave legal practitioners indifferent, it will help in the development of a Common European Sales Law.
Annex 1:
Proposal for a Regulation on
a Common European Sales Law
Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

11 October 2011, COM(2011) 635 final

Explanatory Memorandum

1. Context of the proposal

• Grounds for and objectives of the proposal

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.

Currently, only one in ten of Union 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. Contract law related barriers are one of the major factors contributing to this situation. Surveys\(^1\) 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.

The need for traders to adapt to the different national contract laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer’s law in business-to-consumer transactions.

In cross-border transactions between a business and a consumer, contract law related transaction costs and legal obstacles stemming from differences between different national mandatory consumer protection rules have a significant impact. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of

17 June 2008 on the law applicable to contractual obligations (Rome I), whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State. In cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer’s law need to be respected. Traders therefore need to find out in advance whether the law of the Member State of the consumer’s habitual residence provides a higher level of protection and ensure that their contract is in compliance with its requirements. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas but the differences between Member States’ laws remain substantial. In e-commerce transactions, traders incur further contract law related costs which stem from the need to adapt the business’s website to the legal requirements of each Member State where they direct their activity.

In cross-border transactions between traders, parties are not subject to the same restrictions on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company’s turnover, the greater the share of transaction costs.

Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.

Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.

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4 A. Turrini and T. Van Ypersele, Traders, courts and the border effect puzzle, Regional Science and Urban Economics, 40, 2010, p. 82: Analysing international trade across OECD countries we show that controlling for countries specific factors, distance, the presence
Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to a more limited choice of products at a higher price in the consumer’s market.

While cross-border shopping could bring substantial economic advantages of more and better offers, the majority of European consumers shop only domestically. One of the important reasons for this situation is that, because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market. They miss out on opportunities in the internal market, since better offers in terms of quality and price can often be found in another Member State.

E-commerce facilitates the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established. However, when consumers try to place orders with a business from another Member State, they are often faced with the business practice of refusal to sell which is often due to differences in contract law.

The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.

Traders should be able to apply the Common European Sales Law in all their cross-border dealings within the European Union instead of having to adapt to different national contract laws, provided that the other party to the contract agrees. It should cover the full life cycle of a contract and thus comprise most of the areas which are relevant when concluding cross-border contracts. As a result, the need for traders to find out about the national laws of other Member States would be limited to only some, much less important, matters which are not covered by the Common European Sales Law. In business-to-consumer transactions there would be no further need to identify the mandatory consumer protection provisions in the consumer’s law, since the Common European Sales Law would contain fully harmonised consumer protection rules providing for a high standard of protection throughout the whole of the European Union. In cross-border transactions between traders, negotiations about the applicable law could run more smoothly, as the contracting parties would have the opportunity to agree on

of common border and common language […], similar legal systems have a significant impact on trade […]. If two countries share common origins for their legal system, on average they exhibit trade flows 40% larger.”

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the use of the Common European Sales Law – equally accessible to both of them – to
govern their contractual relationship.

As a direct consequence, traders could save on the additional contract law related
transaction costs and could operate in a less complex legal environment for cross-border
trade on the basis of a single set of rules across the European Union. Thus, traders would
be able to take better advantage of the internal market by expanding their trade across
borders and, consequently, competition in the internal market would increase. Consume-
ers would benefit from better access to offers from across the European Union at lower
prices and would face fewer refusals of sales. They would also enjoy more certainty about
their rights when shopping cross-border on the basis of a single set of mandatory rules
which offer a high level of consumer protection.

General context

With its Communication of 2001, the Commission launched a process of extensive
public consultation on the fragmented legal framework in the area of contract law and
its hindering effects on cross-border trade. In July 2010, the Commission launched a
public consultation by publishing a ‘Green Paper on policy options for progress towards
a European contract law for consumers and businesses’ (Green Paper), which set out
different policy options on how to strengthen the internal market by making progress in
the area of European contract law.

In response to the Green Paper, the European Parliament issued a Resolution on 8
June 2011 in which it expressed its strong support for an instrument which would im-
prove the establishment and the functioning of the internal market and bring benefits to
traders, consumers and Member States’ judicial systems.

The Commission Communication ‘Europe 2020’ recognises the need to make it easi-
er and less costly for traders and consumers to conclude contracts with partners in other
Member States, notably by making progress towards an optional European contract law.
The Digital Agenda for Europe envisages an optional instrument in European contract
law to overcome the fragmentation of contract law and boost consumer confidence in
e-commerce.

- Existing provisions in the area of the proposal

There are significant differences between the contract laws in the Member States. The
Union initially started to regulate in the field of contract law by means of minimum har-
monisation Directives adopted in the field of consumer protection law. The minimum
harmonisation approach meant that Member States had the possibility to maintain or
introduce stricter mandatory requirements than those provided for in the acquis. In
practice, this approach has led to divergent solutions in the Member States even in ar-
eas which were harmonised at Union level. In contrast, the recently adopted Consumer

Rights Directive fully harmonises the areas of pre-contractual information to be given to consumers, the consumer’s right of withdrawal in distance and off-premises contracts, as well as certain aspects of delivery of goods and passing of risk.

In respect of relations between traders, the Union has regulated the area of combating late payments by setting up rules on minimum interest rates. At international level, the Vienna Convention on International Sales of Goods (the Vienna Convention) applies by default whenever the parties have not chosen to apply another law. The Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription. Further limitations to its applicability arise as not all Member States have signed the Vienna Convention⁷ and there is no mechanism which could ensure its uniform interpretation.

Some Union legislation is relevant for both business-to-consumer and business-to-business relations. The E-commerce Directive⁸ contains rules on the validity of contracts concluded by electronic means and on certain pre-contractual requirements.

In the field of private international law, the Union has adopted instruments on choice of law, in particular Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),⁹ and, in relation to pre-contractual information duties, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).¹⁰ The first of those instruments sets out rules for determining the applicable law in the area of contractual obligations and the second in the field of non-contractual obligations, including those which arise from pre-contractual statements.

The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts. This will be done by the normal operation of the Rome I Regulation. It can be determined by the parties themselves (Article 3 of the Rome I Regulation) and, if they do not do so, this will be done on the basis of the default rules in Article 4 of the Rome I Regulation. As regards consumer contracts, under the conditions of Article 6(1) of the Rome I Regulation, if the parties have not chosen the applicable law, that law is the law of the habitual residence of the consumer.

The Common European Sales Law will be a second contract law regime within the national law of each Member State. Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules. This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be

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⁷ Exceptions are the UK, Ireland, Portugal and Malta.
confused with, the previous choice of the applicable law within the meaning of private international law rules.

Since the Common European Sales Law will not cover every aspect of a contract (e.g. illegality of contracts, representation) the existing rules of the Member State's civil law that is applicable to the contract will still regulate such residual questions.

Under the normal operation of the Rome I Regulation there are however restrictions to the choice of law for business-to-consumer transactions. If the parties choose in business-to-consumer transactions the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6(1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6 (2) of the Rome I Regulation). The latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.

• Consistency with the other policies and objectives of the Union

This proposal is consistent with the objective of attaining a high level of consumer protection as it contains mandatory rules of consumer protection from which the parties cannot derogate to the detriment of the consumer. Furthermore, the level of protection of these mandatory provisions is equal or higher than the current acquis.

The proposal is also consistent with the Union policy of helping SME benefit more from the opportunities offered by the internal market. The Common European Sales Law can be chosen in contracts between traders where at least one of them is an SME, drawing upon the Commission Recommendation 2003/36111 concerning the definition of micro, small and medium-sized enterprises while taking into account future developments.

Finally, the proposal is consistent with the international trade policy of the Union, in that it does not discriminate against parties from third countries who could also choose to apply the Common European Sales Law as long as one party to the contract is established in a Member State.

This proposal is without prejudice to future Commission initiatives concerning the liability for infringements of the Treaty on the functioning of the European Union, for example relating to the competition rules.

2. Results of consultations with the interested parties and impact assessments

• Consultation of interested parties

With the publication of the Green Paper, the Commission launched an extensive public consultation which closed on 31 January 2011. In response to the Green Paper consultation, the Commission received 320 replies from all categories of stakeholders from across the Union. Many respondents saw value in Option 1 (publication of the results of the Expert Group) and Option 2 (a toolbox for the Union legislator). Option 4 (an optional instrument of European contract law) received support either independently or in combination with a toolbox from several Member States as well as other stakeholders; provided that it fulfilled certain conditions, such as a high level of consumer protection, and clarity and user-friendliness of the provisions. One of the main concerns in the stakeholders’ responses to the Green Paper was the lack of clarity in relation to the substantive content of a possible European contract law instrument. The Commission addressed this concern by giving stakeholders the opportunity to comment on the Feasibility Study developed by the Expert Group on a European contract law.

The Green Paper responses also expressed preferences for the material scope of the instrument. As a result, the proposal focuses on contracts for the sale of goods.

By a Decision of 26 April 2010, the Commission set up the Expert Group on European contract law. This Group was tasked with developing a Feasibility Study on a possible future European contract law instrument covering the main aspects which arose in practice in cross-border transactions.

A key stakeholder group (businesses and consumer associations, representatives of the banking and insurance sectors and of the legal professions of lawyers and notaries) was set up in September 2010 with the purpose of giving practical input to the Expert Group on the user-friendliness of the rules developed for the Feasibility Study. The Feasibility Study was published on 3 May 2011 and an informal consultation was open until 1 July 2011.

• Impact Assessment

The Impact Assessment (IA) analysed the seven policy options set out in the Green Paper; the IA Report contains the full description and analysis of these options.

These options were: the baseline scenario (no policy change), a toolbox for the legislator, a Recommendation on a Common European Sales Law, a Regulation setting up an optional Common European Sales Law, a Directive (full or minimum harmonisation) on a mandatory Common European Sales Law, a Regulation establishing a European contract law and a Regulation establishing a European Civil Code.

On a comparative analysis of the impacts of these options, the IA Report arrived at the conclusion that the options of an optional uniform contract law regime, a full harmonisation Directive and a Regulation establishing a mandatory uniform contract law were the least costly and most effective.

law regime would meet the policy objectives. While the latter two would considerably reduce transaction costs for traders and offer a less complex legal environment for those wishing to trade cross-border, these options would however also create a considerable burden for traders as those who only traded domestically would also need to adapt to a new legislative framework. The costs attached to familiarise themselves with such a new mandatory law would be particularly significant when compared to an optional uniform contract law regime, because they would impact upon all traders. An optional uniform contract law regime would on the other hand only create one-off costs for those traders wishing to use it for their cross-border trade. The establishment of an optional uniform contract law regime was therefore reasoned to be the most proportionate action as it would reduce transaction costs experienced by traders exporting to several Member States and give consumers more product choice at a lower price. It would also, at the same time increase the level of consumer protection offered to consumers who shopped across a border thereby creating confidence as they would experience the same set of rights across the Union.

3. Legal elements of the proposal

• Summary of the proposed action

The Proposal provides for the establishment of a Common European Sales Law. It harmonises the national contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.

• Legal basis

This proposal is based on Article 114 Treaty on the Functioning of the European Union (TFEU).

The proposal provides for a single uniform set of fully harmonised contract law rules including consumer protection rules in the form of a Common European Sales Law which is to be considered as a second contract law regime within the national law of each Member State available in cross-border transactions upon a valid agreement by the parties. This agreement does not amount to, and must not be confused with, a choice of the applicable law within the meaning of private international law rules. Instead, this choice is made within a national law which is applicable according to the private international law rules.

This solution has as its objective the establishment and the functioning of the internal market. It would remove obstacles to the exercise of fundamental freedoms which result from differences between national laws, in particular from the additional transaction costs and perceived legal complexity experienced by traders when concluding cross-
border transactions and the lack of confidence in their rights experienced by consumers when purchasing from another EU country – all of which have a direct effect on the establishment and functioning of the internal market and limit competition.

In accordance with Article 114 (3) TFEU, the Common European Sales Law would guarantee a high level of consumer protection by setting up its own set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU consumer law.

• **Subsidiarity principle**

The proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union (TEU).

The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear cross-border dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems.

As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions. Furthermore, as market trends evolve and prompt Member States to take action independently, for example in regulating the emerging digital content market, regulatory divergences leading to increased transaction costs and gaps in the protection of consumers are likely to grow.

• **Proportionality principle**

The proposal complies with the principle of proportionality as set out in Article 5 TEU.

The scope of the proposal is confined to the aspects which pose real problems in cross-border transactions and does not extend to aspects which are best addressed by national laws. In respect of the material scope, the proposal contains provisions regulating the rights and obligations of the parties during the life-cycle of the contract, but it does not touch for example, upon the rules on representation which are less likely to become litigious. In terms of territorial scope, the proposal covers cross-border situations where the problems of additional transactions costs and legal complexity arise. Finally,
the personal scope of the proposal is limited to transactions where the internal market problems are mainly found, i.e. business-to-business relations where at least one of the parties is an SME and business-to-consumer relations. Contracts concluded between private individuals and contracts between traders none of which is an SME are not included, as there is no demonstrable need for action for these types of cross-border contracts. The Regulation leaves Member States two options: to decide to make the Common European Sales Law also available to parties for use in an entirely domestic setting and to contracts concluded between traders neither of which is an SME.

The proposal is a proportionate action, when compared to other possible solutions analysed, because of the optional and voluntary nature of the Common European Sales Law. This means that its application is dependent upon an agreement by the parties to a contract whenever it is jointly considered beneficial for a particular cross-border transaction. The fact that the Common European Sales Law represents an optional set of rules applying only in cross-border cases means also that it can lower barriers to cross-border trade without interfering with deeply embedded national legal systems and traditions. The Common European Sales Law will be an optional regime in addition to pre-existing contract law rules without replacing them. Thus the legislative measure will only go as far as necessary to create further opportunities for traders and consumers in the single market.

- **Choice of instruments**

The instrument chosen for this initiative is a Regulation on an optional Common European Sales Law.

A non-binding instrument such as a toolbox for the EU legislator or a Recommendation addressed to Member States would not achieve the objective to improve the establishment and functioning of the internal market. A Directive or a Regulation replacing national laws with a non-optional European contract law would go too far as it would require domestic traders who do not want to sell across borders to bear costs which are not outweighed by the cost savings that only occur when cross-border transactions take place. In addition, a Directive setting up minimum standards of a non-optional European contract law would not be appropriate since it would not achieve the level of legal certainty and the necessary degree of uniformity to decrease the transaction costs.

4. **Budgetary implication**

After the adoption of the proposal, the Commission will set up a database for the exchange of information concerning final judgments referring to the Common European Sales Law or any other provision of the Regulation, as well as relevant judgements of the Court of Justice of the European Union. The costs associated with this data-base are likely to grow as more final judgments become available. At the same time, the Commission will organise training sessions for legal practitioners using the Common European Sales
Law. These costs are likely to decrease with time, as knowledge about how the Common European Sales Law works spreads.

5. Additional information

• Simplification

The proposal for an optional second contract law regime has the advantage that, without replacing the national contract laws in the Member States, it allows parties to use one single set of contract law rules across the EU. This self-standing, uniform set of rules has the potential of offering parties a solution to the most prevalent problems which could arise in cross-border situations in relation to contract law. Therefore, for traders this option would eliminate the need for research of different national laws. To help consumers understand their rights in the Common European Sales Law, a standard information notice would be presented to them which would inform them about their rights.

Finally, the proposal has the potential of ensuring the future coherence of the EU legislation in other policy areas where contract law becomes relevant.

• Review clause

The proposal provides for a review of the application of the Common European Sales Law or any other provision of the Regulation 5 years after its date of application, taking into account, amongst others, the need to extend further the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis. For this purpose, the Commission will submit a report, if necessary accompanied by proposals to amend the Regulation, to the European Parliament, the Council and the European Economic and Social Committee.

• European Economic Area

The proposed Regulation concerns an EEA matter and should therefore extend to the EEA.

• Explanation of the proposal

The proposal consists of three main parts: a Regulation, Annex I to the Regulation containing the contract law rules (the Common European Sales Law) and Annex II containing a Standard Information Notice.

Annex 1: Proposal for a Regulation on a Common European Sales Law

A. The Regulation

Article 1 sets out the objective and subject matter of the Regulation.

Article 2 contains a list of definitions for terms used in the Regulation. While some definitions already exist in the relevant acquis, others are concepts defined here for the first time.

Article 3 explains the optional nature of the contract law rules in cross-border contracts for sale of goods, supply of digital content and provision of related services.

Article 4 sets out the territorial scope of the Regulation which is limited to cross-border contracts.

Article 5 states the material scope of contracts for sale of goods and supply of digital content and related services, such as installation and repair.

Article 6 excludes mixed-purposes contracts and instalment sales from the scope of application.

Article 7 describes the personal scope of application which extends to business-to-consumer and those business-to-business contracts where at least one party is an SME.

Article 8 explains that the choice for the Common European Sales Law requires an agreement of the parties to that effect. In contracts between a business and a consumer, the choice of the Common European Sales Law is valid only if the consumer’s consent is given by an explicit statement separate from the statement indicating the agreement to conclude a contract.

Article 9 contains several information requirements about the Common European Sales Law in contracts between a trader and a consumer. In particular the consumer shall receive the information notice in Annex II.

Article 10 requires Member States to ensure that there are sanctions in place for breaches by the traders of the duty to comply with the special requirements established by Articles 8 and 9.

Article 11 explains that as a consequence of the valid choice of the Common European Sales Law this is the only applicable law for the matters addressed in its rules and that consequently other national rules do not apply for matters falling within its scope. The choice of the Common European Sales Law operates retroactively to cover compliance with and remedies for failure to comply with the pre-contractual information duties.

Article 12 clarifies that the Regulation is without prejudice to the information requirements of Directive 2006/123/EC on services in the internal market.14

Article 13 presents the possibility for Member States to enact legislation which makes the Common European Sales Law available to parties for use in an entirely domestic setting and for contracts between traders, neither of which is an SME.

Article 14 requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation. The Commission will set up a database of such judgments.

Article 15 contains a review clause.

Article 16 provides that the Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

B. Annex I

Annex I contains the text of the Common European Sales Law.

Part I ‘Introductory provisions’ sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II ‘Making a binding contract’ contains provisions on the parties’ right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III ‘Assessing what is in the contract’ makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

Part IV ‘Obligations and remedies of the parties to a sales contract’ looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.

Part V ‘Obligations and remedies of the parties to a related services contract’ concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties’ rights and obligations under such contracts are.

Part VI ‘Damages and interest’ contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII ‘Restitution’ explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII ‘Prescription’ regulates the effects of the lapse of time on the exercise of rights under a contract.

Appendix I contains the Model instruction on withdrawal that must be provided by the trader to the consumer before a distance or an off-premises contract is concluded, while Appendix 2 provides for a Model withdrawal form.

C. Annex II

Annex II comprises the Standard Information Notice on the Common European Sales Law that must be provided by the trader to the consumer before an agreement to use of the Common European Sales Law is made.
Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national Parliaments,
Having regard to the opinion of the European Economic and Social Committee,\textsuperscript{15}
Having regard to the opinion of the Committee of the Regions,\textsuperscript{16}
Acting in accordance with the ordinary legislative procedure,
Whereas:

(1) There are still considerable bottlenecks to cross-border economic activity that prevent the internal market from exploiting its full potential for growth and job creation. Currently, only one in ten traders in the Union exports goods within the Union and the majority of those who do, only export to a small number of Member States. From the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders consider the difficulty in finding out the provisions of a foreign contract law among the top barriers in business-to-consumer transactions and in business-to-business transactions. This also leads to disadvantages for consumers due to limited access to goods. Different national contract laws therefore deter the exercise of fundamental freedoms, such as the freedom to provide goods and services, and represent a barrier to the functioning and continuing establishment of the internal market. They also have the effect of limiting competition, particularly in the markets of smaller Member States.

(2) Contracts are the indispensable legal tool for every economic transaction. However, the need for traders to identify or negotiate the applicable law, to find out about the provisions of a foreign applicable law often involving translation, to obtain legal advice to make themselves familiar with its requirements and to adapt their contracts to different national laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade. Contract-law-related barriers are thus a major contributing factor in dissuading a considerable number of export-oriented traders from entering cross-border trade or expanding their operations into more Member States. Their deterrent effect is particularly strong for small and medium-sized enterprises (SME) for which the costs of entering multiple foreign markets are often particularly high in relation to their turnover. As a consequence, traders miss out on cost savings they could achieve if it were possible to market goods and services on the basis of one uniform contract law for all their cross-border transactions and, in the online environment, one single web-site.

(3) Contract law related transaction costs which have been shown to be of considerable proportions and legal obstacles stemming from the differences between national

\textsuperscript{15} OJ C, p. \\
\textsuperscript{16} OJ C, p. 

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mandatory consumer protection rules have a direct effect on the functioning of the internal market in relation to business-to-consumer transactions. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation (EC) No 593/2008),\(^\text{17}\) whenever a trader directs its activities to consumers in another Member State the consumer protection provisions of the Member State of the consumer’s habitual residence that provide a higher level of protection and cannot be derogated from by agreement by virtue of that law will apply, even where another applicable law has been chosen by the parties. Therefore, traders need to find out in advance whether the consumer’s law provides higher protection and ensure that their contract is in compliance with its requirements. In addition, in e-commerce, web-site adaptations which need to reflect mandatory requirements of applicable foreign consumer contract laws entail further costs. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas. However the differences between Member States’ laws remain substantial; existing harmonisation leaves Member States a broad range of options on how to comply with the requirements of Union legislation and where to set the level of consumer protection.

(4) The contract-law-related barriers which prevent traders from fully exploiting the potential of the internal market also work to the detriment of consumers. Less cross-border trade results in fewer imports and less competition. Consumers may be disadvantaged by a limited choice of goods at higher prices both because fewer foreign traders offer their products and services directly to them and also indirectly as a result of restricted cross-border business-to-business trade at the wholesale level. While cross-border shopping could bring substantial economic advantages in terms of more and better offers, many consumers are also reluctant to engage in cross-border shopping, because of the uncertainty about their rights. Some of the main consumer concerns are related to contract law, for instance whether they would enjoy adequate protection in the event of purchasing defective products. As a consequence, a substantial number of consumers prefer to shop domestically even if this means they have less choice or pay higher prices.

(5) In addition, those consumers who want to benefit from price differences between Member States by purchasing from a trader from another Member State are often hindered due to a trader’s refusal to sell. While e-commerce has greatly facilitated the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established, orders by consumers from abroad are very frequently refused by traders which refrain from entering into cross-border transactions.

(6) Differences in national contract laws therefore constitute barriers which prevent consumers and traders from reaping the benefits of the internal market. Those contract-law-related barriers would be significantly reduced if contracts could be based on a single uniform set of contract law rules irrespective of where parties are established. Such a uniform set of contract law rules should cover the full life cycle of a contract and thus comprise the areas which are the most important when concluding contracts. It should also include fully harmonised provisions to protect consumers.

\(^{17}\) OJ L 177, 4.7.2008, p. 6.
Proposal for a Regulation on a Common European Sales Law

(7) The differences between national contract laws and their effect on cross-border trade also serve to limit competition. With a low level of cross-border trade, there is less competition, and thus less incentive for traders to become more innovative and to improve the quality of their products or to reduce prices. Particularly in smaller Member States with a limited number of domestic competitors, the decision of foreign traders to refrain from entering these markets due to costs and complexity may limit competition, resulting in an appreciable impact on choice and price levels for available products. In addition, the barriers to cross-border trade may jeopardise competition between SME and larger companies. In view of the significant impact of the transaction costs in relation to turnover, an SME is much more likely to refrain from entering a foreign market than a larger competitor.

(8) To overcome these contract-law-related barriers, parties should have the possibility to agree that their contracts should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common Sales Law. The Common European Sales Law should represent an additional option increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade. It should become the basis of a contractual relationship only where parties jointly decide to use it.

(9) This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.

(10) The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007),18 or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

(11) The Common European Sales Law should comprise of a complete set of fully harmonised mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law.

(12) Since the Common European Sales Law contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law.

(13) The Common European Sales Law should be available for cross-border contracts, because it is in that context that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships. The cross-border nature of a contract should be assessed on the basis of the habitual residence of the parties in business-to-business contracts. In a business-to-consumer contract the cross-border requirement should be met where either the general address indicated by the consumer, the delivery address for the goods or the billing address indicated by the consumer are located in a Member State, but outside the State where the trader has its habitual residence.

(14) The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.

(15) Traders engaging in purely domestic as well as in cross-border trade transactions may also find it useful to make use of a single uniform contract for all their transactions. Therefore Member States should be free to decide to make the Common European Sales Law available to parties for use in an entirely domestic setting.

(16) The Common European Sales Law should be available in particular for the sale of movable goods, including the manufacture or production of such goods, as this is the economically single most important contract type which could present a particular potential for growth in cross-border trade, especially in e-commerce.

(17) In order to reflect the increasing importance of the digital economy, the scope of the Common European Sales Law should also cover contracts for the supply of digital content. The transfer of digital content for storage, processing or access, and repeated use, such as a music download, has been growing rapidly and holds a great potential for further growth but is still surrounded by a considerable degree of legal diversity and uncertainty. The Common European Sales Law should therefore cover the supply of digital content irrespective of whether or not that content is supplied on a tangible medium.

(18) Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a later stage. In view of this specific market structure and of the fact that defects of the digital content provided may harm the economic interests of consumers irrespective of the conditions under which it has been provided, the avail-
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ability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.

(19) With a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law, and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content.

(20) The Common European Sales Law should not cover any related contracts by which the buyer acquires goods or is supplied with a service, from a third party. This would not be appropriate because the third party is not part of the agreement between the contracting parties to use the rules of the Common European Sales Law. A related contract with a third party should be governed by the respective national law which is applicable according pursuant to Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule.

(21) In order to tackle the existing internal market and competition problems in a targeted and proportionate fashion, the personal scope of the Common European Sales Law should focus on parties who are currently dissuaded from doing business abroad by the divergence of national contract laws with the consequence of a significant adverse impact on cross-border trade. It should therefore cover all business-to-consumer transactions and contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. This should, however, be without prejudice to the possibility for Member States to enact legislation which makes the Common European Sales Law available for contracts between traders, neither of which is an SME. In any case, in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms.

(22) The agreement of the parties to a contract is indispensable for the application of the Common European Sales Law. That agreement should be subject to strict requirements in business-to-consumer transactions. Since, in practice, it will usually be the trader who proposes the use of the Common European Sales Law, consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. Therefore, the consumer's consent to use the Common European Sales Law should be admissible only in the form of an explicit statement separate from the statement indicating the agreement to the conclusion of the contract. It should therefore not be possible to offer the use of the Common European Sales Law as a term of the contract to be concluded, particularly as an element of the trader's standard terms and conditions. The trader should provide the consumer with a confirmation of the agreement to use the Common European Sales Law on a durable medium.

(23) In addition to being a conscious choice, the consent of a consumer to the use of the Common European Sales Law should be an informed choice. The trader should therefore not only draw the consumer's attention to the intended use of the Com-

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mon European Sales Law but should also provide information on its nature and its salient features. In order to facilitate this task for traders, thereby avoiding unnecessary administrative burdens, and to ensure consistency in the level and the quality of the information communicated to consumers, traders should supply consumers with the standard information notice provided for in this Regulation and thus readily available in all official languages in the Union. Where it is not possible to supply the consumer with the information notice, for example in the context of a telephone call, or where the trader has failed to provide the information notice, the agreement to use the Common European Sales Law should not be binding on the consumer until the consumer has received the information notice together with the confirmation of the agreement and has subsequently expressed consent.

(24) In order to avoid a selective application of certain elements of the Common European Sales Law, which could disturb the balance between the rights and obligations of the parties and adversely affect the level of consumer protection, the choice should cover the Common European Sales Law as a whole and not only certain parts of it.

(25) Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.

(26) The rules of the Common European Sales Law should cover the matters of contract law that are of practical relevance during the life cycle of the types of contracts falling within the material and personal scope, particularly those entered into online. Apart from the rights and obligations of the parties and the remedies for non-performance, the Common European Sales Law should therefore govern pre-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights. It should settle the sanctions available in case of the breach of all the obligations and duties arising under its application.

(27) All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.

(28) The Common European Sales Law should not govern any matters outside the remit of contract law. This Regulation should be without prejudice to the Union or national law in relation to any such matters. For example, information duties which are imposed for the protection of health and safety or environmental reasons should remain outside the
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...scope of the Common European Sales Law. This Regulation should further be without prejudice to the information requirements of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.\textsuperscript{20}

(29) Once there is a valid agreement to use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope. The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions.

(30) Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.

(31) The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedence over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context.

(32) The Common European Sales Law should aim at the preservation of a valid contract whenever possible and appropriate in view of the legitimate interests of the parties.

(33) The Common European Sales Law should identify well-balanced solutions taking account the legitimate interests of the parties in designating and exercising the remedies available in the case of non-performance of the contract. In business-to-consumer contracts the system of remedies should reflect the fact that the non-conformity of goods, digital content or services falls within the trader's sphere of responsibility.

(34) In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission.

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to extend further the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

\textsuperscript{20} OJ L 376, 27.12.2006, p. 36.
(36) Since the objective of this Regulation, namely to contribute to the proper functioning of the internal market by making available a uniform set of contract law rules that can be used for cross-border transactions throughout the Union, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Articles 16, 38 and 47 thereof,

HAVE ADOPTED THIS REGULATION:

Article 1 – Objective and subject matter
1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ("the Common European Sales Law"). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.
2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.
3. In relation to contracts between traders and consumers, this Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.

Article 2 – Definitions
For the purpose of this Regulation, the following definitions shall apply:
(a) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;
(b) ‘good faith and fair dealing’ means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question;
(c) ‘loss’ means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment;
(d) ‘standard contract terms’ means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law;
(e) ‘trader’ means any natural or legal person who is acting for purposes relating to that person’s trade, business, craft, or profession;
(f) ‘consumer’ means any natural person who is acting for purposes which are outside that person’s trade, business, craft, or profession;
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(g) ‘damages’ means a sum of money to which a person may be entitled as compensation for loss, injury or damage;

(h) ‘goods’ means any tangible movable items; it excludes:
   (i) electricity and natural gas; and
   (ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity;

(i) ‘price’ means money that is due in exchange for goods sold, digital content supplied or a related service provided;

(j) ‘digital content’ means data which are produced and supplied in digital form, whether or not according to the buyer’s specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software; it excludes:
   (i) financial services, including online banking services;
   (ii) legal or financial advice provided in electronic form;
   (iii) electronic healthcare services;
   (iv) electronic communications services and networks, and associated facilities and services;
   (v) gambling;
   (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;

(k) ‘sales contract’ means any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the goods to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;

(l) ‘consumer sales contract’ means a sales contract where the seller is a trader and the buyer is a consumer;

(m) ‘related service’ means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:
   (i) transport services,
   (ii) training services,
   (iii) telecommunications support services; and
   (iv) financial services;

(n) ‘service provider’ means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;

(o) ‘customer’ means any person who purchases a related service;

(p) ‘distance contract’ means any contract between the trader and the consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

(q) ‘off-premises contract’ means any contract between a trader and a consumer:
(i) concluded in the simultaneous physical presence of the trader or, where the trader is a legal person, the natural person representing the trader and the consumer in a place which is not the trader’s business premises, or concluded on the basis of an offer made by the consumer in the same circumstances; or
(ii) concluded on the trader’s business premises or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the trader’s business premises in the simultaneous physical presence of the trader or, where the trader is a legal person, a natural person representing the trader and the consumer; or
(iii) concluded during an excursion organised by the trader or, where the trader is a legal person, the natural person representing the trader with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;

‘business premises’ means:
(i) any immovable retail premises where a trader carries out activity on a permanent basis, or
(ii) any movable retail premises where a trader carries out activity on a usual basis;

‘commercial guarantee’ means any undertaking by the trader or a producer to the consumer, in addition to legal obligations under Article 106 in case of lack of conformity to reimburse the price paid or to replace or repair, or service goods or digital content in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

‘durable medium’ means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

‘public auction’ means a method of sale where goods or digital content are offered by the trader to the consumer who attends or is given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or digital content;

‘mandatory rule’ means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary;

‘creditor’ means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;

‘debtor’ means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;

‘obligation’ means a duty to perform which one party to a legal relationship owes to another party.

**Article 3 – Optional nature of the Common European Sales Law**

The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.
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**Article 4 – Cross-border contracts**
1. The Common European Sales Law may be used for cross-border contracts.
2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.
3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if:
   (a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader’s habitual residence; and
   (b) at least one of these countries is a Member State.
4. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a trader who is a natural person shall be that person’s principal place of business.
5. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located shall be treated as the place of the trader’s habitual residence.
6. For the purpose of determining whether a contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the Common European Sales Law.

**Article 5 – Contracts for which the Common European Sales Law can be used**
The Common European Sales Law may be used for:
(a) sales contracts;
(b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.
(c) related service contracts, irrespective of whether a separate price was agreed for the related service.

**Article 6 – Exclusion of mixed-purpose contracts and contracts linked to a consumer credit**
1. The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5.
2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments.

**Article 7 – Parties to the contract**
1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common
European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise (‘SME’).

2. For the purposes of this Regulation, an SME is a trader which
   (a) employs fewer than 250 persons; and
   (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet
   total not exceeding EUR 43 million, or, for an SME which has its habitual residence in
   a Member State whose currency is not the euro or in a third country, the equivalent
   amounts in the currency of that Member State or third country.

**Article 8 – Agreement on the use of the Common European Sales Law**

1. The use of the Common European Sales Law requires an agreement of the parties to that
   effect. The existence of such an agreement and its validity shall be determined on the
   basis of paragraphs 2 and 3 of this Article and Article 9, as well as the relevant provisions
   in the Common European Sales Law.

2. In relations between a trader and a consumer the agreement on the use of the Common
   European Sales Law shall be valid only if the consumer’s consent is given by an explicit
   statement which is separate from the statement indicating the agreement to conclude
   a contract. The trader shall provide the consumer with a confirmation of that agreement
   on a durable medium.

3. In relations between a trader and a consumer the Common European Sales Law may not
   be chosen partially, but only in its entirety.

**Article 9 – Standard Information Notice in contracts between a
trader and a consumer**

1. In addition to the pre-contractual information duties laid down in the Common Euro-
   pean Sales Law, in relations between a trader and a consumer the trader shall draw the
   consumer’s attention to the intended application of the Common European Sales Law
   before the agreement by providing the consumer with the information notice in Annex
   II in a prominent manner. Where the agreement to use the Common European Sales Law
   is concluded by telephone or by any other means that do not make it possible to pro-
   vide the consumer with the information notice, or where the trader has failed to provide
   the information notice, the consumer shall not be bound by the agreement until the
   consumer has received the confirmation referred to in Article 8(2) accompanied by the
   information notice and has expressly consented subsequently to the use of the Common
   European Sales Law.

2. The information notice referred to in paragraph 1 shall, if given in electronic form, contain
   a hyperlink or, in all other circumstances, include the indication of a website through
   which the text of the Common European Sales Law can be obtained free of charge.

**Article 10 – Penalties for breach of specific requirements**

Member States shall lay down penalties for breaches by traders in relations with consumers
of the requirements set out in Articles 8 and 9 and shall take all the measures necessary
to ensure that those penalties are applied. The penalties thus provided shall be effective,
proportionate and dissuasive. Member States shall notify the relevant provisions to the Com-
mission no later than [1 year after the date of application of this Regulation] and shall notify
any subsequent changes as soon as possible.
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Article 11 – Consequences of the use of the Common European Sales Law
Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

Article 12 – Information requirements resulting from the Services Directive
This Regulation is without prejudice to the information requirements laid down by national laws which transpose the provisions of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and which complement the information requirements laid down in the Common European Sales Law.

Article 13 – Member States’ options
A Member State may decide to make the Common European Sales Law available for:
(a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State; and/or
(b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).

Article 14 – Communication of judgments applying this Regulation
1. Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission.
2. The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgements of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public.

Article 15 – Review
1. By … [4 years after the date of application of this Regulation], Member States shall provide the Commission with information relating to the application of this Regulation, in particular on the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and on the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.
2. By … [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.
Article 16 – Entry into force and application
1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.
2. It shall apply from [6 months after its the entry into force].

This Regulation shall be binding in its entirety and directly applicable in the Member States.

Done at Brussels,

For the European Parliament For the Council
The President The President

Annex I – Common European Sales Law

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Part I – Introductory provisions
Chapter 1 – General principles and application
Section 1 – General principles

Article 1 – Freedom of contract
1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.
2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 2 – Good faith and fair dealing
1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 3 – Co-operation
The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

Section 2 – Application

Article 4 – Interpretation
1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.
2. Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and
Proposal for a Regulation on a Common European Sales Law

all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.

3. Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

Article 5 – Reasonableness
1. Reasonableness is to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved.
2. Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.

Article 6 – No form required
Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.

Article 7 – Not individually negotiated contract terms
1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.
2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.
4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.
5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.

Article 8 – Termination of a contract
1. To ‘terminate a contract’ means to bring to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.
2. Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance or for anticipated non-performance, the terminating party is also entitled to damages in lieu of the other party’s future performance.
3. The effects of termination on the repayment of the price and the return of the goods or the digital content, and other restitutionary effects, are governed by the rules on restitution set out in Chapter 17.

Article 9 – Mixed-purpose contracts
1. Where a contract provides both for the sale of goods or the supply of digital content and for the provision of a related service, the rules of Part IV apply to the obligations and
remedies of the parties as seller and buyer of goods or digital content and the rules of Part V apply to the obligations and remedies of the parties as service provider and customer.

2. Where, in a contract falling under paragraph 1, the obligations of the seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination for non-performance of a part to which a part of the price can be apportioned, the buyer and customer may terminate only in relation to that part.

3. Paragraph 2 does not apply where the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.

4. Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

**Article 10 – Notice**

1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. ‘Notice’ includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

2. A notice may be given by any means appropriate to the circumstances.

3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.

4. A notice reaches the addressee:
   (a) when it is delivered to the addressee;
   (b) when it is delivered to the addressee’s place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee’s habitual residence;
   (c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or
   (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.

   The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest.

5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.

6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 3 and 4 or derogate from or vary its effects.

**Article 11 – Computation of time**

1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.

2. Subject to paragraphs 3 to 7:
   (a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;
(b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month.

3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.

4. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.

5. Where the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.

6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.

7. For the purposes of this Article:
   (a) “public holiday” with reference to a Member State, or part of a Member State, of the European Union means any day designated as such for that Member State or part in a list published in the Official Journal of the European Union; and
   (b) “working days” means all days other than Saturdays, Sundays and public holidays.

Article 12 – Unilateral statements or conduct

1. A unilateral statement indicating intention is to be interpreted in the way in which the person to whom it is addressed could be expected to understand it.

2. Where the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the person making the statement.

3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.

4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention.

5. Any reference to a statement referred to in this Article includes a reference to conduct which can be regarded as the equivalent of a statement.
Annex 1 – Article 13

Part II – Making a binding contract
Chapter 2 – Pre-contractual information
Section 1 – Pre-contractual information to be given by a trader dealing with a consumer

Article 13 – Duty to provide information when concluding a distance or off-premises contract

1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:
   (a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;
   (b) the total price and additional charges and costs, in accordance with Article 14;
   (c) the identity and address of the trader, in accordance with Article 15;
   (d) the contract terms, in accordance with Article 16;
   (e) the rights of withdrawal, in accordance with Article 17;
   (f) where applicable, the existence and the conditions of the trader’s after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy;
   (g) where applicable, the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it;
   (h) where applicable, the functionality, including applicable technical protection measures, of digital content; and
   (i) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.

2. The information provided, except for the addresses required by point © of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.

3. For a distance contract, the information required by this Article must:
   (a) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;
   (b) be in plain and intelligible language; and
   (c) insofar as it is provided on a durable medium, be legible.

4. For an off-premises contract, the information required by this Article must:
   (a) be given on paper or, if the consumer agrees, on another durable medium; and
   (b) be legible and in plain, intelligible language.

5. This Article does not apply where the contract is:
   (a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer’s home, residence or workplace;
   (b) concluded by means of an automatic vending machine or automated commercial premises;
   (c) an off-premises contract if the price or, where multiple contracts were concluded at
the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.

**Article 14 – Information about price and additional charges and costs**

1. The information to be provided under point (b) of Article 13 (1) must include:
   (a) the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; and
   (b) where applicable, any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable.

2. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price. Where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided.

3. Where applicable, the trader must inform the consumer of the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.

**Article 15 – Information about the identity and address of the trader**

The information to be provided under point © of Article 13 (1) must include:

(a) the identity of the trader, such as its trading name;
(b) the geographical address at which the trader is established;
(c) the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;
(d) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and
(e) where different from the address given pursuant to points (b) and (d) of this Article, the geographical address of the trader, and where applicable that of the trader on whose behalf it is acting, where the consumer can address any complaints.

**Article 16 – Information about the contract terms**

The information to be provided under point (d) of Article 13 (1) must include:

(a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;
(b) where applicable, the duration of the contract, the minimum duration of the consumer’s obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; and
(c) where applicable, the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
(d) where applicable, the existence of relevant codes of conduct and how copies of them can be obtained.
Annex 1 – Article 17

Article 17 – Information about rights of withdrawal when concluding a distance or off-premises contract

1. Where the consumer has a right of withdrawal under Chapter 4, the information to be provided under point (e) of Article 13 (1) must include the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2.

2. Where applicable, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, that the consumer will have to bear the cost of returning the goods in the event of withdrawal if the goods by their nature cannot be normally returned by post.

3. Where the consumer can exercise the right of withdrawal after having made a request for the provision of related services to begin during the withdrawal period, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer would be liable to pay the trader the amount referred to in Article 45 (5).

4. The duty to provide the information required by paragraphs 1, 2 and 3 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.

5. Where a right of withdrawal is not provided for in accordance with points © to (i) of Article 40 (2) and paragraph 3 of that Article, the information to be provided under point (e) of Article 13 (1) must include a statement that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses the right of withdrawal.

Article 18 – Off-premises contracts: additional information requirements and confirmation

1. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including where applicable, the confirmation of the consumer’s consent and acknowledgment as provided for in point (d) of Article 40(3) on paper or, if the consumer agrees, on a different durable medium.

2. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes such an express request on a durable medium.

Article 19 – Distance contracts: additional information and other requirements

1. When a trader makes a telephone call to a consumer, with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call.

2. If the distance contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader must provide at least the information referred to in paragraph 3 of this Article on that particular means prior to the conclusion of such a contract. The other information referred to in Article 13 shall be provided by the trader to the consumer in an appropriate way in accordance with Article 13(3).
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3. The information required under paragraph 2 is:
   (a) the main characteristics of the goods, digital content or related services, as required
       by point (a) of Article 13 (1);
   (b) the identity of the trader, as required by point (a) of Article 15;
   (c) the total price, including all items referred to in point (b) of Article 13 (1) and Article
       14(1) and (2);
   (d) the right of withdrawal; and
   (e) where relevant, the duration of the contract, and if the contract is for an indefinite
       period, the requirements for terminating the contract, referred to in point (b) of
       Article 16.

4. A distance contract concluded by telephone is valid only if the consumer has signed the
   offer or has sent his written consent indicating the agreement to conclude a contract. The
   trader must provide the consumer with a confirmation of that agreement on a durable
   medium.

5. The trader must give the consumer a confirmation of the contract concluded, including
   where applicable, of the consent and acknowledgement of the consumer referred to in
   point (d) of Article 40(3), and all the information referred to in Article 13 on a durable
   medium. The trader must give that information in reasonable time after the conclusion
   of the distance contract, and at the latest at the time of the delivery of the goods or
   before the supply of digital content or the provision of the related service begins, unless
   the information has already been given to the consumer prior to the conclusion of the
   distance contract on a durable medium.

6. Where the consumer wants the provision of related services to begin during the with-
   drawal period provided for in Article 42(2), the trader must require that the consumer
   makes an express request to that effect on a durable medium.

Article 20 – Duty to provide information when concluding contracts other
than distance and off-premises contracts

1. In contracts other than distance and off-premises contracts, a trader has a duty to provide
   the following information to the consumer, in a clear and comprehensible manner before
   the contract is concluded or the consumer is bound by any offer, if that information is not
   already apparent from the context:
   (a) the main characteristics of the goods, digital content or related services to be sup-
       plied, to an extent appropriate to the medium of communication and to the goods,
       digital content or related services;
   (b) the total price and additional charges and costs, in accordance with Article 14(1);
   (c) the identity of the trader, such as the trader’s trading name, the geographical address
       at which it is established and its telephone number;
   (d) the contract terms in accordance with points (a) and (b) of Article 16;
   (e) where applicable, the existence and the conditions of the trader’s after-sale services,
       commercial guarantees and complaints handling policy;
   (f) where applicable, the functionality, including applicable technical protection meas-
       ures of digital content; and
   (g) where applicable, any relevant interoperability of digital content with hardware and
       software which the trader is aware of or can be expected to have been aware of.
2. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion.

**Article 21 – Burden of proof**
The trader bears the burden of proof that it has provided the information required by this Section.

**Article 22 – Mandatory nature**
The parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

**Section 2 – Pre-contractual information to be given by a trader dealing with another trader**

**Article 23 – Duty to disclose information about goods and related services**
1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
2. In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
   (a) whether the supplier had special expertise;
   (b) the cost to the supplier of acquiring the relevant information;
   (c) the ease with which the other trader could have acquired the information by other means;
   (d) the nature of the information;
   (e) the likely importance of the information to the other trader; and
   (f) good commercial practice in the situation concerned.

**Section 3 – Contracts concluded by electronic means**

**Article 24 – Additional duties to provide information in distance contracts concluded by electronic means**
1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.
2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.
3. The trader must provide information about the following matters before the other party makes or accepts an offer:
   (a) the technical steps to be taken in order to conclude the contract;
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(b) whether or not a contract document will be filed by the trader and whether it will be accessible;
(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
(d) the languages offered for the conclusion of the contract;
(e) the contract terms.

4. The trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.

Article 25 – Additional requirements in distance contracts concluded by electronic means
1. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must make the consumer aware in a clear and prominent manner, and immediately before the consumer places the order, of the information required by point (a) of Article 13(1), Article 14(1) and (2), and point (b) of Article 16.
2. The trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words “order with obligation to pay” or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order.
3. The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.

Article 26 – Burden of proof
In relations between a trader and a consumer, the trader bears the burden of proof that it has provided the information required by this Section.

Article 27 – Mandatory nature
In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

Section 4 – Duty to ensure that information supplied is correct

Article 28 – Duty to ensure that information supplied is correct
1. A party who supplies information before or at the time a contract is concluded, whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.
2. A party to whom incorrect or misleading information has been supplied in breach of the duty referred to in paragraph 1, and who reasonably relies on that information in concluding a contract with the party who supplied it, has the remedies set out in Article 29.

3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 5 – Remedies for breach of information duties

Article 29 – Remedies for breach of information duties
1. A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.
2. Where the trader has not complied with the information requirements relating to additional charges or other costs as referred to in Article 14 or on the costs of returning the goods as referred to in Article 17(2) the consumer is not liable to pay the additional charges and other costs.
3. The remedies provided under this Article are without prejudice to any remedy which may be available under Article 42 (2), Article 48 or Article 49.
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Chapter 3 – Conclusion of contract

Article 30 – Requirements for the conclusion of a contract
1. A contract is concluded if:
   (a) the parties reach an agreement;
   (b) they intend the agreement to have legal effect; and
   (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect.
2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct.
3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.
4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

Article 31 – Offer
1. A proposal is an offer if:
   (a) it is intended to result in a contract if it is accepted; and
   (b) it has sufficient content and certainty for there to be a contract.
2. An offer may be made to one or more specific persons.
3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.
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Article 32 – Revocation of offer
1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.
2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.
3. A revocation of an offer is ineffective if:
   (a) the offer indicates that it is irrevocable;
   (b) the offer states a fixed time period for its acceptance; or
   (c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 33 – Rejection of offer
When a rejection of an offer reaches the offeror, the offer lapses.

Article 34 – Acceptance
1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.
2. Silence or inactivity does not in itself constitute acceptance.

Article 35 – Time of conclusion of the contract
1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.
2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.
3. Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

Article 36 – Time limit for acceptance
1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.
2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.
3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

Article 37 – Late acceptance
1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.
2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.
Article 38 – Modified acceptance
1. A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.
2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.
3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.
4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:
   (a) the offer expressly limits acceptance to the terms of the offer;
   (b) the offeror objects to the additional or different terms without undue delay; or
   (c) the offeree makes the acceptance conditional upon the offeror’s assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

Article 39 – Conflicting standard contract terms
1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance.
2. Notwithstanding paragraph 1, no contract is concluded if one party:
   (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or
   (b) without undue delay, informs the other party of such an intention.

Chapter 4 – Right to withdraw in distance and off-premises contracts between traders and consumers

Article 40 – Right to withdraw
1. During the period provided for in Article 42, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article 45, from:
   (a) a distance contract;
   (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.
2. Paragraph 1 does not apply to:
   (a) a contract concluded by means of an automatic vending machine or automated commercial premises;
   (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the
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trader on frequent and regular rounds to the consumer’s home, residence or workplace;

(c) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;

(d) a contract for the supply of goods or digital content which are made to the consumer’s specifications, or are clearly personalised;

(e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;

(f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;

(g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;

(h) a contract concluded at a public auction; and

(i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.

3. Paragraph 1 does not apply in the following situations:

(a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;

(b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;

(c) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed after delivery;

(d) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer’s prior express consent and with the acknowledgement by the consumer of losing the right to withdraw;

(e) the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods.

4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter, the consumer may withdraw the offer even if it would otherwise be irrevocable.

Article 41 – Exercise of right to withdraw

1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.

2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.

3. Where the trader gives the consumer the option to withdraw electronically on its trading website, and the consumer does so, the trader has a duty to communicate to the
consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.

4. A communication of withdrawal is timely if sent before the end of the withdrawal period.
5. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

Article 42 – Withdrawal period
1. The withdrawal period expires after fourteen days from:
   (a) the day on which the consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services;
   (b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately, including a contract under which the seller also agrees to provide related services;
   (c) the day on which the consumer has taken delivery of the last lot or piece in the case of a contract where the goods consist of multiple lots or pieces, including a contract under which the seller also agrees to provide related services;
   (d) the day on which the consumer has taken delivery of the first item where the contract is for regular delivery of goods during a defined period of time, including a contract under which the seller also agrees to provide related services;
   (e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;
   (f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the supply of digital content where the digital content is supplied on a tangible medium;
   (g) the day of the conclusion of the contract in the case of a contract where the digital content is not supplied on a tangible medium.
2. Where the trader has not provided the consumer with the information referred to in Article 17 (1), the withdrawal period expires:
   (a) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1; or
   (b) where the trader provides the consumer with the information required within one year from the end of the withdrawal period as determined in accordance with paragraph 1, after fourteen days from the day the consumer receives the information.

Article 43 – Effects of withdrawal
Withdrawal terminates the obligations of both parties under the contract:
(a) to perform the contract; or
(b) to conclude the contract in cases where an offer was made by the consumer.

Article 44 – Obligations of the trader in the event of withdrawal
1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer’s decision to
withdraw from the contract in accordance with Article 41. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.

3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.

4. In the case of an off-premises contract where the goods have been delivered to the consumer’s home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

Article 45 – Obligations of the consumer in the event of withdrawal

1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 41, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.

2. The consumer must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.

3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 17 (1).

4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.

5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.

6. The consumer is not liable for the cost for:
   (a) the provision of related services, in full or in part, during the withdrawal period, where:
      (i) the trader has failed to provide information in accordance with Article 17(1) and (3); or
(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);
(b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where:
(i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);
(ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or
(iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).
7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.

Article 46 – Ancillary contracts
1. Where a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 41 to 45, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in paragraphs 2 and 3. For the purpose of this Article an ancillary contract means a contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.
2. The provisions of Articles 43, 44 and 45 apply accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.
3. For ancillary contracts which are not governed by the Common European Sales Law the applicable law governs the obligations of the parties in the event of withdrawal.

Article 47 – Mandatory nature
The parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Chapter 5 – Defects in consent

Article 48 – Mistake
1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
(b) the other party:
(i) caused the mistake;
(ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;
(iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided
that good faith and fair dealing would have required a party aware of the mistake to point it out; or
(iv) made the same mistake.

2. A party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

3. An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

Article 49 – Fraud
1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.

2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

3. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:
(a) whether the party had special expertise;
(b) the cost to the party of acquiring the relevant information;
(c) the ease with which the other party could have acquired the information by other means;
(d) the nature of the information;
(e) the apparent importance of the information to the other party; and
(f) in contracts between traders good commercial practice in the situation concerned.

Article 50 – Threats
A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act.

Article 51 – Unfair exploitation
A party may avoid a contract if, at the time of the conclusion of the contract:
(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and
(b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party’s situation by taking an excessive benefit or unfair advantage.

Article 52 – Notice of avoidance
1. Avoidance is effected by notice to the other party.

2. A notice of avoidance is effective only if it is given within the following period after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely:
(a) six months in case of mistake; and
(b) one year in case of fraud, threats and unfair exploitation.

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Article 53 – Confirmation
Where the party who has the right to avoid a contract under this Chapter confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.

Article 54 – Effects of avoidance
1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.
2. Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.
3. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent, is regulated by the rules on restitution in Chapter 17.

Article 55 – Damages for loss
A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.

Article 56 – Exclusion or restriction of remedies
1. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, directly or indirectly exclude or restrict remedies for mistake.

Article 57 – Choice of remedy
A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.

Part III – Assessing what is in the contract
Chapter 6 – Interpretation

Article 58 – General rules on interpretation of contracts
1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give to it.
Article 59 – Relevant matters
In interpreting a contract, regard may be had, in particular, to:
(a) the circumstances in which it was concluded, including the preliminary negotiations;
(b) the conduct of the parties, even subsequent to the conclusion of the contract;
(c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
(d) usages which would be considered generally applicable by parties in the same situation;
(e) practices which the parties have established between themselves;
(f) the meaning commonly given to expressions in the branch of activity concerned;
(g) the nature and purpose of the contract; and
(h) good faith and fair dealing.

Article 60 – Reference to contract as a whole
Expressions used in a contract are to be interpreted in the light of the contract as a whole.

Article 61 – Language discrepancies
Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.

Article 62 – Preference for individually negotiated contract terms
To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.

Article 63 – Preference for interpretation which gives contract terms effect
An interpretation which renders the contract terms effective prevails over one which does not.

Article 64 – Interpretation in favour of consumers
1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 65 – Interpretation against supplier of a contract term
Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.
Chapter 7 – Contents and effects

Article 66 – Contract terms
The terms of the contract are derived from:
(a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;
(b) any usage or practice by which parties are bound by virtue of Article 67;
(c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and
(d) any contract term implied by virtue of Article 68.

Article 67 – Usages and practices in contracts between traders
1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

Article 68 – Contract terms which may be implied
1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
   (a) the nature and purpose of the contract;
   (b) the circumstances in which the contract was concluded; and
   (c) good faith and fair dealing.
2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.
3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.

Article 69 – Contract terms derived from certain pre-contractual statements
1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:
   (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or
   (b) the other party’s decision to conclude the contract could not have been influenced by the statement.
2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.
3. Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of
transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.

4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 70 – Duty to raise awareness of not individually negotiated contract terms
1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party’s attention to them, before or when the contract was concluded.
2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer’s attention by a mere reference to them in a contract document, even if the consumer signs the document.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 71 – Additional payments in contracts between a trader and a consumer
1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader’s main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 72 – Merger clauses
1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.
2. Unless the contract otherwise provides, a merger clause does not prevent the parties’ prior statements from being used to interpret the contract.
3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.
4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 73 – Determination of price
Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.
Article 74 – Unilateral determination by a party
1. Where the price or any other contract term is to be determined by one party and that party’s determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.
2. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 75 – Determination by a third party
1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.
2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.
3. For the purpose of paragraph 1 a ‘court’ includes an arbitral tribunal.
4. In relations between a trader and a consumer the parties may not to the detriment of the consumer exclude the application of paragraph 2 or derogate from or vary its effects.

Article 76 – Language
Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

Article 77 – Contracts of indeterminate duration
1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party by giving a reasonable period of notice not exceeding two months.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 78 – Contract terms in favour of third parties
1. The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.
2. The nature and content of the third party’s right are determined by the contract. The right may take the form of an exclusion or limitation of the third party’s liability to one of the contracting parties.
3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:
   (a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a contract with the third party; and
(b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.

4. The third party may reject a right conferred upon them by notice to either of the contracting parties, if that is done before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.

5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred.

Chapter 8 – Unfair contract terms

Section 1 – General provisions

Article 79 – Effects of unfair contract terms
1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.

2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

Article 80 – Exclusions from unfairness test
1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.

2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.

3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

Article 81 – Mandatory nature
The parties may not exclude the application of this Chapter or derogate from or vary its effects.

Section 2 – Unfair contract terms in contracts between a trader and a consumer

Article 82 – Duty of transparency in contract terms not individually negotiated
Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language.

Article 83 – Meaning of “unfair” in contracts between a trader and a consumer
1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties’ rights and
obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.

2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
   (a) whether the trader complied with the duty of transparency set out in Article 82;
   (b) the nature of what is to be provided under the contract;
   (c) the circumstances prevailing during the conclusion of the contract;
   (d) to the other contract terms; and
   (e) to the terms of any other contract on which the contract depends.

Article 84 – Contract terms which are always unfair
A contract term is always unfair for the purposes of this Section if its object or effect is to:
   (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader;
   (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;
   (c) limit the trader’s obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
   (d) exclude or hinder the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;
   (e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
   (f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
   (g) provide that the consumer is bound by the contract when the trader is not;
   (h) require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for conclusion of the contract;
   (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
   (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
   (k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.

Article 85 – Contract terms which are presumed to be unfair
A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:
   (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;
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(b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
(c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;
(d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;
(e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance;

(f) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
(g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
(h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;
(i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;
(j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;
(k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;
(m) allow a trader to transfer its rights and obligations under the contract without the consumer’s consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
(n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;
(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;
(q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;
(r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
(t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
(u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;
(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
(w) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days.

Section 3 – Unfair contract terms in contracts between traders

Article 86 – Meaning of “unfair” in contracts between traders
1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
   (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
   (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
   (a) the nature of what is to be provided under the contract;
   (b) the circumstances prevailing during the conclusion of the contract;
   (c) the other contract terms; and
   (d) the terms of any other contract on which the contract depends.

Part IV – Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content
Chapter 9 – General provisions

Article 87 – Non-performance and fundamental non-performance
1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:
   (a) non-delivery or delayed delivery of the goods;
   (b) non-supply or delayed supply of the digital content;
   (c) delivery of goods which are not in conformity with the contract;
   (d) supply of digital content which is not in conformity with the contract;
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(e) non-payment or late payment of the price; and
(f) any other purported performance which is not in conformity with the contract.

2. Non-performance of an obligation by one party is fundamental if:
   (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
   (b) it is of such a nature as to make it clear that the non-performing party’s future performance cannot be relied on.

Article 88 – Excused non-performance

1. A party’s non-performance of an obligation is excused if it is due to an impediment beyond that party’s control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.

3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

Article 89 – Change of circumstances

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

   Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:
   (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
   (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

3. Paragraphs 1 and 2 apply only if:
   (a) the change of circumstances occurred after the time when the contract was concluded;
   (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
   (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

4. For the purpose of paragraphs 2 and 3 a ‘court’ includes an arbitral tribunal.
Article 90 – Extended application of rules on payment and on goods or digital content not accepted

1. Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12 apply with appropriate adaptations to other payments.

2. Article 97 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.

Chapter 10 – The seller’s obligations

Section 1 – General provisions

Article 91 – Main obligations of the seller

The seller of goods or the supplier of digital content (in this part referred to as ‘the seller’) must:

(a) deliver the goods or supply the digital content;
(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;
(c) ensure that the goods or the digital content are in conformity with the contract;
(d) ensure that the buyer has the right to use the digital content in accordance with the contract; and
(e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.

Article 92 – Performance by a third party

1. A seller may entrust performance to another person, unless personal performance by the seller is required by the contract terms.

2. A seller who entrusts performance to another person remains responsible for performance.

3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

Section 2 – Delivery

Article 93 – Place of delivery

1. Where the place of delivery cannot be otherwise determined, it is:

(a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer’s place of residence at the time of the conclusion of the contract;

(b) in any other case,
   (i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier;
   (ii) where the contract does not involve carriage, the seller’s place of business at the time of conclusion of the contract.
2. If the seller has more than one place of business, the place of business for the purposes of point (b) of paragraph 1 is that which has the closest relationship to the obligation to deliver.

**Article 94 – Method of delivery**

1. Unless agreed otherwise, the seller fulfils the obligation to deliver:
   (a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods or the digital content to the consumer;
   (b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or
   (c) in cases that do not fall within points (a) or (b), by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.

2. In points (a) and (c) of paragraph 1, any reference to the consumer or the buyer includes a third party, not being the carrier, indicated by the consumer or the buyer in accordance with the contract.

**Article 95 – Time of delivery**

1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered without undue delay after the conclusion of the contract.

2. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract.

**Article 96 – Seller’s obligations regarding carriage of the goods**

1. Where the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

2. Where the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

3. Where the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer’s request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

**Article 97 – Goods or digital content not accepted by the buyer**

1. A seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.
2. The seller is discharged from the obligation to deliver if the seller:
   (a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or
   (b) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer.

3. The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

Article 98 – Effect on passing of risk
The effect of delivery on the passing of risk is regulated by Chapter 14.

Section 3 – Conformity of the goods and digital content

Article 99 – Conformity with the contract
1. In order to conform with the contract, the goods or digital content must:
   (a) be of the quantity, quality and description required by the contract;
   (b) be contained or packaged in the manner required by the contract; and
   (c) be supplied along with any accessories, installation instructions or other instructions required by the contract.
2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 100, 101 and 102, save to the extent that the parties have agreed otherwise.
3. In a consumer sales contract, any agreement derogating from the requirements of Articles 100, 102 and 103 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it.
4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of paragraph 3 or derogate from or vary its effects.

Article 100 – Criteria for conformity of the goods and digital content
The goods or digital content must:
(a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller’s skill and judgement;
(b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;
(c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;
(d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;
(f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69; and
(g) possess such qualities and performance capabilities as the buyer may expect. When determin- 
ing what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.

**Article 101 – Incorrect installation under a consumer sales contract**
1. Where goods or digital content supplied under a consumer sales contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if:
   (a) the goods or the digital content were installed by the seller or under the seller’s re- sponsibility; or
   (b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

**Article 102 – Third party rights or claims**
1. The goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party.
2. As regards rights or claims based on intellectual property, subject to paragraphs 3 and 4, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party:
   (a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer’s place of business or in contracts between a trader and a consumer the consumer’s place of residence indicated by the consumer at the time of the conclusion of the contract; and
   (b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.
3. In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.
4. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.
5. In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

**Article 103 – Limitation on conformity of digital content**
Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.

**Article 104 – Buyer’s knowledge of lack of conformity in a contract between traders**
In a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity.
Article 105 – Relevant time for establishing conformity
1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter 14.
2. In a consumer sales contract, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity.
3. In a case governed by point (a) of Article 101(1) any reference in paragraphs 1 or 2 of this Article to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. In a case governed by point (b) of Article 101(1) it is to be read as a reference to the time when the consumer had reasonable time for the installation.
4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.
5. In a contract between a trader and a consumer, the parties may not, to the detriment of a consumer, exclude the application of this Article or derogate from or vary its effect.

Chapter 11 – The buyer’s remedies
Section 1 – General provisions

Article 106 – Overview of buyer’s remedies
1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:
   (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;
   (b) withhold the buyer’s own performance under Section 4 of this Chapter;
   (c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;
   (d) reduce the price under Section 6 of this Chapter; and
   (e) claim damages under Chapter 16.
2. If the buyer is a trader:
   (a) the buyer’s rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and
   (b) the buyer’s rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.
3. If the buyer is a consumer:
   (a) the buyer’s rights are not subject to cure by the seller; and
   (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.
4. If the seller’s non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.
5. The buyer may not resort to any of the remedies referred to in paragraph 1 to the extent that the buyer caused the seller’s non-performance.
6. Remedies which are not incompatible may be cumulated.
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Article 107 – Limitation of remedies for digital content not supplied in exchange for a price
Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1). The buyer may only claim damages under point (e) of Article 106(1) for loss or damage caused to the buyer’s property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.

Article 108 – Mandatory nature
In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader’s attention by the consumer.

Section 2 – Cure by the seller

Article 109 – Cure by the seller
1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.
2. In cases not covered by paragraph 1 a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.
3. An offer to cure is not precluded by notice of termination.
4. The buyer may refuse an offer to cure only if:
   (a) cure cannot be effected promptly and without significant inconvenience to the buyer;
   (b) the buyer has reason to believe that the seller’s future performance cannot be relied on; or
   (c) delay in performance would amount to a fundamental non-performance.
5. The seller has a reasonable period of time to effect cure.
6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Section 3 – Requiring performance

Article 110 – Requiring performance of seller’s obligations
1. The buyer is entitled to require performance of the seller’s obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
   (a) performance would be impossible or has become unlawful; or
(b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Article 111 – Consumer’s choice between repair and replacement
1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:
   (a) the value the goods would have if there were no lack of conformity;
   (b) the significance of the lack of conformity; and
   (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.

Article 112 – Return of replaced item
1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller’s expense.
2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

Section 4 – Withholding performance of buyer’s obligations

Article 113 – Right to withhold performance
1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.
2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller’s performance becomes due may withhold performance for as long as the reasonable belief continues.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller’s obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller’s non-performance is such as to justify withholding the buyer’s performance as a whole.

Section 5 – Termination

Article 114 – Termination for non-performance
1. A buyer may terminate the contract within the meaning of Article 8 if the seller’s non-performance under the contract is fundamental within the meaning of Article 87 (2).
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2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.

Article 115 – Termination for delay in delivery after notice fixing additional time for performance
1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.
2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay.
3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.

Article 116 – Termination for anticipated non-performance
A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.

Article 117 – Scope of right to terminate
1. Where the seller’s obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.
2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
3. Where the seller’s obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

Article 118 – Notice of termination
A right to terminate under this Section is exercised by notice to the seller.

Article 119 – Loss of right to terminate
1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.
2. Paragraph 1 does not apply:
   (a) where the buyer is a consumer; or
   (b) where no performance at all has been tendered.
Section 6 – Price reduction

Article 120 – Right to reduce price
1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.
2. A buyer who is entitled to reduce the price under paragraph 1 and who has already paid a sum exceeding the reduced price may recover the excess from the seller.
3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Section 7 – Requirements of examination and notification in a contract between traders

Article 121 – Examination of the goods in contracts between traders
1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.
2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
3. If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 122 – Requirement of notification of lack of conformity in sales contracts between traders
1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity. The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later.
2. The buyer loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.
3. Where the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph 2 does not expire before the end of the agreed period.
4. Paragraph 2 does not apply in respect of the third party claims or rights referred to in Article 102.
5. The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.
6. The seller is not entitled to rely on this Article if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer.

Chapter 12 – The buyer’s obligations
Section 1 – General provisions

Article 123 – Main obligations of the buyer
1. The buyer must:
   (a) pay the price;
   (b) take delivery of the goods or the digital content; and
   (c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.
2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

Section 2 – Payment of the price

Article 124 – Means of payment
1. Payment shall be made by the means of payment indicated by the contract terms or, if there is no such indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction.
2. A seller who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The seller may enforce the original obligation to pay if the order or promise is not honoured.
3. The buyer’s original obligation is extinguished if the seller accepts a promise to pay from a third party with whom the seller has a pre-existing arrangement to accept the third party’s promise as a means of payment.
4. In a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means.

Article 125 – Place of payment
1. Where the place of payment cannot otherwise be determined it is the seller’s place of business at the time of conclusion of the contract.
2. If the seller has more than one place of business, the place of payment is the place of business of the seller which has the closest relationship to the obligation to pay.

Article 126 – Time of payment
1. Payment of the price is due at the moment of delivery.
2. The seller may reject an offer to pay before payment is due if it has a legitimate interest in so doing.
Article 127 – Payment by a third party
1. A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.
2. The seller cannot refuse payment by a third party if:
   (a) the third party acts with the assent of the buyer; or
   (b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time that payment is due.
3. Payment by a third party in accordance with paragraphs 1 or 2 discharges the buyer from liability to the seller.
4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.

Article 128 – Imputation of payment
1. Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.
2. If the buyer does not make a notification under paragraph 1 the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.
3. An imputation under paragraph 2 is not effective if it is to an obligation which is not yet due or is disputed.
4. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:
   (a) the obligation which is due or is the first to fall due;
   (b) the obligation for which the seller has no or the least security;
   (c) the obligation which is the most burdensome for the buyer;
   (d) the obligation which arose first.
   If none of those criteria applies, the payment is imputed proportionately to all the obligations.
5. The payment may be imputed under paragraph 2, 3 or 4 to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.
6. In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.

Section 3 – Taking delivery
Article 129 – Taking delivery
The buyer fulfils the obligation to take delivery by:
(a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and
(b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.
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Article 130 – Early delivery and delivery of wrong quantity
1. If the seller delivers the goods or supplies the digital content before the time fixed, the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.
2. If the seller delivers a quantity of goods or digital content less than that provided for in the contract the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.
3. If the seller delivers a quantity of goods or digital content greater than that provided by the contract, the buyer may retain or refuse the excess quantity.
4. If the buyer retains the excess quantity it is treated as having been supplied under the contract and must be paid for at the contractual rate.
5. In a consumer sales contract paragraph 4 does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.
6. This Article does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

Chapter 13 – The seller’s remedies
Section 1 – General provisions

Article 131 – Overview of seller’s remedies
1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:
   (a) require performance under Section 2 of this Chapter;
   (b) withhold the seller’s own performance under Section 3 of this Chapter;
   (c) terminate the contract under Section 4 of this Chapter; and
   (d) claim interest on the price or damages under Chapter 16.
2. If the buyer’s non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.
3. The seller may not resort to any of the remedies referred to in paragraph 1 to the extent that the seller caused the buyer’s non-performance.
4. Remedies which are not incompatible may be cumulated.

Section 2 – Requiring performance

Article 132 – Requiring performance of buyer’s obligations
1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.
2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.
Section 3 – Withholding performance of seller’s obligations

Article 133 – Right to withhold performance
1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.
2. A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer’s performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the buyer’s obligations are to be performed in separate parts or are otherwise divisible, the seller may withhold performance only in relation to that part which has not been performed, unless the buyer’s non-performance is such as to justify withholding the seller’s performance as a whole.

Section 4 – Termination

Article 134 – Termination for fundamental non-performance
A seller may terminate the contract within the meaning of Article 8 if the buyer’s non-performance under the contract is fundamental within the meaning of Article 87 (2).

Article 135 – Termination for delay after notice fixing additional time for performance
1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.
2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article 167(2).
3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.
4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 136 – Termination for anticipated non-performance
A seller may terminate the contract before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.

Article 137 – Scope of right to terminate
1. Where the buyer’s obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section
of a part which corresponds to a divisible part of the seller’s obligations, the seller may terminate only in relation to that part.

2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.

3. Where the buyer’s obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.

Article 138 – Notice of termination
A right to terminate the contract under this Section is exercised by notice to the buyer.

Article 139 – Loss of right to terminate
1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the lack of conformity.

2. A seller loses a right to terminate by notice under Articles 136 unless the seller gives notice of termination within a reasonable time after the right has arisen.

3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.

Chapter 14 – Passing of risk

Section 1 – General provisions

Article 140 – Effect of passing of risk
Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 141 – Identification of goods or digital content to contract
The risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.

Section 2 – Passing of risk in consumer sales contracts

Article 142 – Passing of risk in a consumer sales contract
1. In a consumer sales contract, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied.

2. In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.
3. Except where the contract is a distance or off-premises contract, paragraphs 1 and 2 do not apply where the consumer fails to perform the obligation to take over the goods or the digital content and the non-performance is not excused under Article 88. In this case, the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed.

4. Where the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.

5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 3 – Passing of risk in contracts between traders

Article 143 – Time when risk passes
1. In a contract between traders the risk passes when the buyer takes delivery of the goods or digital content or the documents representing the goods.
2. Paragraph 1 is subject to Articles 144, 145 and 146.

Article 144 – Goods placed at buyer’s disposal
1. If the goods or the digital content are placed at the buyer’s disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 113.
2. If the goods or the digital content are placed at the buyer’s disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods or digital content are placed at the buyer’s disposal at that place.

Article 145 – Carriage of the goods
1. This Article applies to a contract of sale which involves carriage of goods.
2. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.
3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.
4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

Article 146 – Goods sold in transit
1. This Article applies to a contract of sale which involves goods sold in transit.
2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.
3. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Part V – Obligations and remedies of the parties to a related service contract

Chapter 15 – Obligations and remedies of the parties

Section 1 – Application of certain general rules on sales contracts

Article 147 – Application of certain general rules on sales contracts
1. The rules in Chapter 9 apply for the purposes of this Part.
2. Where a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated.

Section 2 – Obligations of the service provider

Article 148 – Obligation to achieve result and obligation of care and skill
1. The service provider must achieve any specific result required by the contract.
2. In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service.
3. In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:
   (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the customer;
   (b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and
   (c) the time available for the performance of the related service.
4. Where in a contract between a trader and a consumer the related service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 101.
5. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or derogate from or vary its effects.

Article 149 – Obligation to prevent damage
The service provider must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the related service.

Article 150 – Performance by a third party
1. A service provider may entrust performance to another person, unless personal performance by the service provider is required.
2. A service provider who entrusts performance to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or derogate from or vary its effects.

Article 151 – Obligation to provide invoice
Where a separate price is payable for the related service, and the price is not a lump sum agreed at the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.

Article 152 – Obligation to warn of unexpected or uneconomic cost
1. The service provider must warn the customer and seek the consent of the customer to proceed if:
   (a) the cost of the related service would be greater than already indicated by the service provider to the customer; or
   (b) the related service would cost more than the value of the goods or the digital content after the related service has been provided, so far as this is known to the service provider.
2. A service provider who fails to obtain the consent of the customer in accordance with paragraph 1 is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods or digital content after the related service has been provided.

Section 3 – Obligations of the customer

Article 153 – Payment of the price
1. The customer must pay any price that is payable for the related service in accordance with the contract.
2. The price is payable when the related service is completed and the object of the related service is made available to the customer.

Article 154 – Provision of access
Where it is necessary for the service provider to obtain access to the customer’s premises in order to perform the related service the customer must provide such access at reasonable hours.

Section 4 – Remedies

Article 155 – Remedies of the customer
1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely:
   (a) to require specific performance;
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(b) to withhold the customer’s own performance;
(c) to terminate the contract;
(d) to reduce the price; and
(e) to claim damages.

2. Without prejudice to paragraph 3, the customer’s remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.

3. In the case of incorrect installation under a consumer sales contract as referred to in Article 101 the consumer’s remedies are not subject to a right of the service provider to cure.

4. The customer, if a consumer, has the right to terminate the contract for any lack of conformity in the related service provided unless the lack of conformity is insignificant.

5. Chapter 11 applies with the necessary adaptations, in particular:
(a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;
(b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and
(c) Article 156 applies instead of Article 122.

Article 156 – Requirement of notification of lack of conformity in related service contracts between traders

1. In a related service contract between traders, the customer may rely on a lack of conformity only if the customer gives notice to the service provider within a reasonable time specifying the nature of the lack of conformity. The time starts to run when the related service is completed or when the customer discovers or could be expected to discover the lack of conformity, whichever is later.

2. The service provider is not entitled to rely on this Article if the lack of conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the customer.

Article 157 – Remedies of the service provider

1. In the case of a non-performance by the customer, the service provider has, with the adaptations set out in paragraph 2, the same remedies as are provided for the seller in Chapter 13, namely:
   (a) to require performance;
   (b) to withhold the service provider’s own performance;
   (c) to terminate the contract; and
   (d) to claim interest on the price or damages.

2. Chapter 13 applies with the necessary adaptations. In particular Article 158 applies instead of Article 132 (2).

Article 158 – Customer’s right to decline performance

1. The customer may at any time give notice to the service provider that performance, or further performance of the related service is no longer required.

2. Where notice is given under paragraph 1:
   (a) the service provider no longer has the right or obligation to provide the related service; and
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(b) the customer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.

3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Part VI – Damages and interest
Chapter 16 – Damages and interest
Section 1 – Damages

Article 159 – Right to damages
1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.
2. The loss for which damages are recoverable includes future loss which the debtor could expect to occur.

Article 160 – General measure of damages
The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

Article 161 – Foreseeability of loss
The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.

Article 162 – Loss attributable to creditor
The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.

Article 163 – Reduction of loss
1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Article 164 – Substitute transaction
A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.
Proposal for a Regulation on a Common European Sales Law

Article 165 – Current price
Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

Section 2 – Interest on late payments: general provisions

Article 166 – Interest on late payments
1. Where payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate specified in paragraph 2.
2. The interest rate for delayed payment is:
   (a) where the creditor’s habitual residence is in a Member State whose currency is the euro or in a third country, the rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus two percentage points;
   (b) where the creditor’s habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus two percentage points.
3. The creditor may recover damages for any further loss.

Article 167 – Interest when the debtor is a consumer
1. When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 166 only when non-performance is not excused.
2. Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.
3. A term of the contract which fixes a rate of interest higher than that provided in Article 166, or accrual earlier than the time specified in paragraph 2 of this Article is not binding to the extent that this would be unfair according to Article 83.
4. Interest for delay in payment cannot be added to capital in order to produce interest.
5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 3 – Late payments by traders

Article 168 – Rate of interest and accrual
1. Where a trader delays the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused by virtue of Article 88, interest is due at the rate specified in paragraph 5 of this Article.
2. Interest at the rate specified in paragraph 5 starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:
   (a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or
   (b) 30 days after the date of receipt of the goods, digital content or related services, if the date provided for in point (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.
3. Where conformity of goods, digital content or related services to the contract is to be ascertained by way of acceptance or examination, the 30 day period provided for in point (b) of paragraph 2 begins on the date of the acceptance or the date the examination procedure is finalised. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of related services, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.
4. The period for payment determined under paragraph 2 cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.
5. The interest rate for delayed payment is:
   (a) where the creditor’s habitual residence is in a Member State whose currency is the euro or in a third country, the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus eight percentage points;
   (b) where the creditor’s habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus eight percentage points.
6. The creditor may recover damages for any further loss.

Article 169 – Compensation for recovery costs
1. Where interest is payable in accordance with Article 168, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor’s recovery costs.
2. The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph 1 and incurred due to the debtor’s late payment.

Article 170 – Unfair contract terms relating to interest for late payment
1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.
2. For the purpose of paragraph 1, a contract term providing for a time or period for payment or a rate of interest less favourable to the creditor than the time, period or rate
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specified in Articles 167 or 168, or a term providing for an amount of compensation for
recovery costs lower than the amount specified in Article 169 is presumed to be unfair.

3. For the purpose of paragraph 1, a contract term excluding interest for late payment or
compensation for recovery costs is always unfair.

Article 171 – Mandatory nature
The parties may not exclude the application of this Section or derogate from or vary its
effects.

Part VII – Restitution
Chapter 17 – Restitution

Article 172 – Restitution on avoidance or termination
1. Where a contract is avoided or terminated by either party, each party is obliged to return
what that party (“the recipient”) has received from the other party.
2. The obligation to return what was received includes any natural and legal fruits derived
from what was received.
3. On the termination of a contract for performance in instalments or parts, the return of
what was received is not required in relation to any instalment or part where the obliga-
tions on both sides have been fully performed, or where the price for what has been done
remains payable under Article 8 (2), unless the nature of the contract is such that part
performance is of no value to one of the parties.

Article 173 – Payment for monetary value
1. Where what was received, including fruits where relevant, cannot be returned, or, in a
case of digital content whether or not it was supplied on a tangible medium, the recipient
must pay its monetary value. Where the return is possible but would cause unreasonable
effort or expense, the recipient may choose to pay the monetary value, provided that this
would not harm the other party’s proprietary interests.
2. The monetary value of goods is the value that they would have had at the date when pay-
ment of the monetary value is to be made if they had been kept by the recipient without
destruction or damage until that date.
3. Where a related service contract is avoided or terminated by the customer after the re-
lated service has been performed or partly performed, the monetary value of what was
received is the amount the customer saved by receiving the related service.
4. In a case of digital content the monetary value of what was received is the amount the
consumer saved by making use of the digital content.
5. Where the recipient has obtained a substitute in money or in kind in exchange for goods
or digital content when the recipient knew or could be expected to have known of the
ground for avoidance or termination, the other party may choose to claim the substitute
or the monetary value of the substitute. A recipient who has obtained a substitute in
money or kind in exchange for goods or digital content when the recipient did not know
and could not be expected to have known of the ground for avoidance or termination
may choose to return the monetary value of the substitute or the substitute.
6. In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made.

Article 174 – Payment for use and interest on money received
1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:
   (a) the recipient caused the ground for avoidance or termination;
   (b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or
   (c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.
2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 166, where:
   (a) the other party is obliged to pay for use; or
   (b) the recipient gave cause for the contract to be avoided because of fraud, threats and unfair exploitation.
3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received or interest on money received in any circumstances other than those set out in paragraphs 1 and 2.

Article 175 – Compensation for expenditure
1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.
2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

Article 176 – Equitable modification
Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the party did not cause, or lacked knowledge of, the ground for avoidance or termination.

Article 177 – Mandatory nature
In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.
Part VIII – Prescription
Chapter 18 – Prescription
Section 1 – General provisions

Article 178 – Rights subject to prescription
A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.

Section 2 – Periods of prescription and their commencement

Article 179 – Periods of prescription
1. The short period of prescription is two years.
2. The long period of prescription is ten years or, in the case of a right to damages for personal injuries, thirty years.

Article 180 – Commencement
1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.
2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.
3. Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each non-performance of the obligation.

Section 3 – Extension of periods of prescription

Article 181 – Suspension in case of judicial and other proceedings
1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.
2. Suspension lasts until a final decision has been made, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.
3. Paragraphs 1 and 2 apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.
4. Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the
national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.

Article 182 – Postponement of expiry in the case of negotiations
If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.

Article 183 – Postponement of expiry in case of incapacity
If a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed.

Section 4 – Renewal of periods of prescription

Article 184 – Renewal by acknowledgement
If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run.

Section 5 – Effects of prescription

Article 185 – Effects of prescription
1. After expiry of the relevant period of prescription the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for non-performance except withholding performance.
2. Whatever has been paid or transferred by the debtor in performance of the obligation in question may not be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out.
3. The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.

Section 6 – Modification by agreement

Article 186 – Agreements concerning prescription
1. The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.
2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.
3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.
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4. The parties may not exclude the application of this Article or derogate from or vary its effects.
5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.

Appendix 1 – Model instructions on withdrawal

Right of withdrawal

You have the right to withdraw from this contract within 14 days without giving any reason. The withdrawal period expires after 14 days from the day [1].

To exercise the right of withdrawal, you must inform us ([2]) of your decision to withdraw from this contract by a clear statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory. [3]

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

Effects of withdrawal

If you withdraw from this contract, we will reimburse all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement. [4]

Instructions for completion:
[1] Insert one of the following texts between inverted commas here:
a) in the case of a related service contract or a contract for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium: “of the conclusion of the contract.”;
b) in the case of a sales contract: “on which you acquire, or a third party other than the carrier and indicated by you acquire, physical possession of the goods.”;
c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: “on which you acquire, or a third party other than the carrier and indicated by you acquire, physical possession of the last good.”;
d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: “on which you acquire, or a third party other than the carrier and indicated by you acquire, physical possession of the last lot or piece.”;
e) in the case of a contract for regular delivery of goods during a defined period of time: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first good.”

[2] Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.

[3] If you give the option to the consumer to electronically fill in and submit information about his or her withdrawal from the contract on your website, insert the following: “You can also electronically fill in and submit the model withdrawal form or any other clear statement on our website [insert internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a withdrawal on a durable medium (e.g. by e-mail) without delay.”

[4] In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following: “We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest.”

[5] If the consumer has received goods in connection with the contract, insert the following:

[a] insert:
- “We will collect the goods.”; or
- “You shall send back the goods or hand them over to us or ____ [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your withdrawal from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired.”

[b] insert either:
- “We will bear the cost of returning the goods.”; or
- “You will have to bear the direct cost of returning the goods.”; or
- If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: “You will have to bear the direct cost of returning the goods, ____ EUR [insert the amount].”; or if the cost of returning the goods cannot reasonably be calculated in advance: “You will have to bear the direct cost of returning the goods. The cost is estimated to a maximum of approximately ____ EUR [insert the amount]”; or
- If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer’s home at the time of the conclusion of the contract: “We will collect the goods at our own expense.”

[c] “You are only liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.”

[6] In the case of a contract for the provision of related services insert the following: “If you requested to begin the performance of related services during the withdrawal period, you shall pay us an amount which is in proportion to what has been provided until you have communicated us your withdrawal from this contract, in comparison with the full coverage of the contract.”
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Appendix 2 – Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)
– To [here the trader’s name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:
– I / We* hereby give notice that I / We* withdraw from my / our* contract of sale of the following goods* / for the supply of the following digital content / for the provision of the following related service*
– Ordered on*/received on*
– Name of consumer(s)
– Address of consumer(s)
– Signature of consumer(s) (only if this form is notified on paper)
– Date
* Delete as appropriate.

Annex II – Standard Information Notice

The contract you are about to conclude will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross-border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection.

These rules only apply if you mark your agreement that the contract is governed by the Common European Sales Law.

You may also have agreed to a contract on the telephone or in any other way (such as by SMS) that did not allow you to get this notice beforehand. In this case the contract will only become valid after you have received this notice and confirmed your consent.

Your core rights are described below.

The Common European Sales Law: Summary of key consumer rights

Your rights before signing the contract
The trader has to give you the important information on the contract, for instance on the product and its price including all taxes and charges and his contact details. The information has to be more detailed when you buy something outside the trader’s shop or if you do not meet the trader personally at all, for instance if you buy online or by telephone. You are entitled to damages if this information is incomplete or wrong.

Your rights after signing the contract
In most cases you have 14 days to withdraw from the purchase if you bought the goods outside the trader’s shop or if you have not met the trader up to the time of the purchase (for instance if you bought online or by telephone). The trader must provide you with information
and a Model withdrawal form. If the trader has not done so, you can cancel the contract within one year.

What can you do when products are faulty or not delivered as agreed? You are entitled to choose between: 1) having the product delivered 2) replaced or 3) repaired. 4) Ask for a price reduction. 5) You can cancel the contract, return the product and get a refund, except if the defect is very small. 6) You can claim damages for your loss. You do not have to pay the price until you get the product without defects.

If the trader has not performed a related service as promised in the contract, you have similar rights. However, after you have complained to the trader, he normally has the right to first try to do the job correctly. Only if the trader fails again you have a choice between 1) asking the trader again to provide the related service, 2) not paying the price until you get the related service supplied correctly, 3) requesting a price reduction or 4) claiming damages. 5) You can also cancel the contract and get a refund, except if the failure in providing the related service is very small. Period to claim your rights when products are faulty or not delivered as agreed: You have 2 years to claim your rights after you realise or should have realised that the trader has not done something as agreed in the contract. Where such problems become apparent very late, the last possible moment for you to make such a claim is 10 years from the moment the trader had to deliver the goods, supply the digital content or provide the related service.

Unfair terms protection: Trader’s standard contract terms which are unfair are not legally binding for you.

This list of rights is only a summary and therefore not exhaustive, nor does it contain all details. You can consult the full text of the Common European Sales Law here. Please read your contract carefully.

In case of dispute you may wish to ask for legal advice.

21 Insert a link here.
Annex 2

CCBE Position Paper on the Proposal on a Common European Sales Law
CCBE POSITION PAPER ON THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW (COM(2011)0635)
CCBE Position Paper on the proposal for a Regulation on a Common European Sales Law (COM(2011)0635)

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers. In relation to European contract law, the CCBE has been actively following political and legislative developments and has contributed to the debate through various position papers which support initiatives to promote a European contract law.1

In this paper, the CCBE responds to the proposal for a Regulation on a Common European Sales Law (CESL). The CCBE had issued a preliminary position paper on the matter. In view of doubts regarding the appropriate legal basis of the CESL, the CCBE has called upon the Commission to further investigate whether the enactment of CESL is in line with the legal requirements of Art. 114 of the Treaty on the Functioning of the European Union and whether there are actually no infringements of Art. 6 of the Rome I Regulation.2

After a number of meetings of its European Private Law Committee, the CCBE has now had the opportunity to evaluate the proposal further and wishes to express some points of concern to the legal profession.3

The CCBE notes that a number of important legal principles are embodied in the proposal for a CESL that correspond with principles proposed in a number of prior position papers issued by the CCBE. Below the main considerations are outlined for a Common European Sales Law that are contained in previous position papers and resolutions of the CCBE:

1. Back in November 2006, the CCBE resolved that it is in full support of the initiative to create a Common Frame of Reference in order to improve the quality and coherence of the ‘acquis communautaire’ and future legal instruments in the area of contract law.4

2. At the beginning of 2008, the CCBE issued a number of overriding principles that should be taken into account in creating a Common European Sales Law.5 In this respect the CCBE acknowledged that the principle of freedom of contract should be considered to be the decisive corner stone of such law. However, the CCBE also stressed that avoidance of unfair...

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1 These Position Papers are available at the website of the CCBE European Private Law Committee: http://www.ccbe.eu/index.php?id=54&id_comite=59&L=0.
4 The UK delegation abstains:
   - The Bar Council of England and Wales has engaged fully in discussions but, as it does not agree that the Commission’s proposal is likely to achieve the objectives sought, is not able to support the CCBE position: http://www.barcouncil.org.uk/media/166880/bar_council_of_england_and_wales_summary_position_on_cesl_june_2012.pdf.
   - The Faculty of Advocates agrees with CCBE’s concerns regarding legal certainty but takes no position on issues of general policy, including whether the instrument should be available for domestic transactions: http://www.advocates.org.uk/downloads/news/responses/eurosales.pdf.
   - The Law Society of England and Wales has engaged fully in discussions but, as it does not agree that the Commission’s proposal is likely to achieve the objectives sought, is not able to support the CCBE position: http://international.lawsociety.org.uk/node/10660.
   - The Law Society of England and Wales has engaged fully in discussions but, as it does not agree that the Commission’s proposal is likely to achieve the objectives sought, is not able to support the CCBE position: http://www.lawscot.org.uk/media/492884/obl_mog_call_for_evidence_common_european_sales_law_law%20society%20of%20wales_response_2006.pdf.
   - The Law Society of Scotland has consistently supported the CCBE position: http://www.lawscot.org.uk/media/1183711837735.pdf.
contract terms in view of the inequality of bargaining power of the parties to a contract should not only be considered to be applicable in b2c-transactions, but also in b2b-transactions. With respect to unfair contract terms in b2c-contract terms, the CCBE stressed that it is desirable to achieve a higher level of uniformity in all European Member States in interpreting Directive 93/13/EEC, dated April 5, 1993, by establishing a “grey list” of such terms that in light of the specific facts of the contract and its circumstances could be judged unfair—contrary to the present rules of the ECJ—not by national courts, but rather by the ECJ itself. Apart from this, the CCBE favoured the establishment of a “black list”, containing clauses that are unfair per se. Furthermore, the CCBE supported the connotation of the term “individually negotiated” to be adequate in order to avoid the applicability of the unfairness test.7

- In this respect the CCBE now notes that the Proposal for a CESL is very much in line with these suggestions. Art. 84 CESL contains a “black list” of standard contract terms that are per se unfair, whilst the “grey list” is contained in Art. 85 CESL. The connotation of an “individually negotiated” contract term is now embodied in Art. 7 CESL. Without going into detail, the CCBE also notes that the level of consumer protection has been raised, and a higher degree of uniformity has been obtained with the now completed Directive on Consumer Rights (2011/83). In view of the principle of autonomous interpretation laid down in Art. 4 CESL, the CCBE wants to underline that the ECJ, and not mainly the national courts should finally adjudicate whether a standard contract term contained in the “grey list” of Art. 85 CESL is to be considered unfair. The CCBE recognises that this would involve a departure from the present system of preliminary rulings at the ECJ, whereby interpretation of EU law is made by the ECJ but appraisal of the facts and circumstances particular to one specific case, and the eventual resolution of that case, are left in the hands of the national court.

- Furthermore, the CCBE in its position paper of 2008 also resolved that standard terms of contract in b2b-sales contracts should be considered unfair pursuant to the rules contained in Art. 3(3) of the Late Payment Directive 2000/35/EC, provided that the respective standard contract term grossly “deviates from legal principles and good commercial practise”. In respect of the proposed CESL, the CCBE notes that this suggestion is being reflected in Art. 86, however, without the inclusion of the reference to “legal principles”. The CCBE is of the opinion that a reference to the underlying “legal principles” of which the standard contract term may not grossly deviate, together with the reference to “good commercial practice” carries more legal certainty and, therefore, calls upon the EU institutions to add the term “legal principles” in Art. 86(1b) CESL. In 2009 the CCBE considered carefully the legal principles and various rules embodied in the Draft of a Common Frame of Reference (CFR). In view of the suggestions and proposals contained in the CFR the, CCBE outlined a number of propositions for a European Sales Law in a position paper that was issued at the beginning of 2010.8 In general, the CCBE held that the provisions contained in the Sales Directive 1999/44/EC and those contained in the Convention on Contracts for the International Sales of Goods (CISG) should be taken as a general basis. Thus, the CCBE proposed that the leading principles of the Sales Directive should also be implemented with regard to sales transactions between traders/professionals9. Without repeating what has been resolved, it needs to be stressed that the CCBE furthermore proposed that the damage sections of the CFR—III—3.701 sequ. should—as a general rule—be considered as an appropriate basis for any damage claims caused by a breach of contract imputable upon the debtor. Therefore, the CCBE also notes that Art. 159 sequ. CESL almost exactly reflects the position previously taken by the CCBE.

- Finally, as already suggested in its response to the Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses10, the CCBE proposes that the CESL should not only be applicable to cross-border transactions but also to domestic sales contracts. Such extension of the territorial

scope of the CESL would clearly increase the number of opt-ins, as traders and consumers will become more and more acquainted with the CESL. Furthermore, the application of the CESL for domestic sales contracts would much sooner clear any legal uncertainties as the number of court decisions would necessarily be increased thereby. Some bars, however, have noted that such an extension of scope could lead to greater national divergences as most domestic cases which are taken to court are very likely to be dealt with at lower national court level, rather than the ECJ. References for preliminary rulings which are sent to the ECJ are likely to take some time before they are considered given the current very high caseload and the lack of clarity on how the ECJ would fulfill its role in this field.

As a consequence, the CCBE calls upon the EU institutions to adopt the proposed CESL as a useful legal instrument not only for cross-border, but also – by amending Art. 1(2) CESL (Regulation) – for domestic transactions.

However, the CCBE is concerned that the lack of legal certainty contained in some Articles of the proposal, including in Art. 2 (good faith and fair dealing) and 5 (reasonableness) CESL, and the lack of coherence between different provisions, could be a barrier to the CESL’s acceptance. The CCBE therefore calls upon the EU institutions to optimise the practicability of the CESL, e.g. by amending these concepts. In addition the CCBE would like to recommend the EU institutions to carefully review the terminology that has been used throughout the proposal, as well as the different language versions in order to avoid any inconsistencies.

Nevertheless, some CCBE members maintain that the alleged lack of legal certainty will duly be taken care of by enlarging the number of recitals and thus by better explaining the exact content and meaning of many general terms used (good faith, fair dealing, reasonableness, appropriateness etc.), whilst other members believe that the formation of a reliable body of jurisprudence would still take many years, with national divergences being likely, with the risk of increasing uncertainty and thereby cost for contracting parties. In this respect, some CCBE members strongly believe that the provision of “official” comments by the “drafters” of the CESL would decrease the level of legal uncertainty and foster the higher practicability of the CESL and that it might be helpful if the European Commission issues standard terms of contract in b2b and b2c-transactions with comments from the drafters on each article.

Furthermore, the CCBE calls upon the EU institutions not to restrict the applicability to SMEs\(^{11}\), but rather to include any and all businesses, regardless of their size. The CCBE also recommends enlarging the applicability of the CESL with regard to digital content over and above its present scope, as the practical importance of CESL will mainly be for distance selling contracts. Therefore, the CCBE calls upon the EU institutions to revise Art. 70(2) CESL, as the incorporation of standard contract terms in a b2c-transaction must reflect the practical requirements (simple click in order to incorporate the standard contract terms by virtue of an agreement). In addition, it is up to the consumer in any distance selling contract, which will be the main field of application of the CESL, to secure that the standard contract terms are incorporated. As a consequence, the CCBE also suggests amending Art. 70(2) CESL by indicating which concrete steps/measures should be observed by both parties.

Some CCBE delegations also maintain that the lack of a hierarchy of remedies in Art. 106 CESL is overprotective to the consumer and that Art. 111(2) CESL does not cure the relatively high risk for the trader of being unable to influence the remedies available to the consumer in case of any non-fulfilment of the sales contract by the seller. This might significantly impair the opt-in-choice of the trader, as the lack of hierarchy of remedies is not known to most of the sales laws of the Member States and goes beyond the Sales Directive.

\(^{11}\) Art. 7 of the CESL.
Conclusion

The CCBE therefore urges the EU institutions to take into account the following guidelines when considering the proposal for a CESL:

1. to adopt the proposed CESL as a useful optional instrument not only for cross-border, but also – by amending Art. 1(2) CESL (Regulation) – for domestic transactions;
2. to optimise the practicability of the CESL by trying to clarify general concepts such as ‘good faith and fair dealing’ and ‘reasonableness’ as far as possible, e.g. by issuing official comments and standard contract terms for both b2c and b2b-transactions;
3. to enlarge the applicability of the CESL to any and all businesses, regardless of their size;
4. to enlarge the applicability of the CESL with regard to digital content over and above its present scope, and, in particular, to create more clarity regarding Art. 70(2) CESL;
5. to include a reference to “legal principles” (vide Art. 80 CESL) as an appropriate further benchmark for the unfairness test in Art. 86(1b) CESL;
6. to carefully review the terminology that has been used throughout the proposal, as well as the different language versions in order to avoid any inconsistencies and to optimise the practicability of CESL.
Annex 3
Working Document on the Proposal on a CESL
European Parliament, 8.10.2012
8.10.2012

WORKING DOCUMENT

on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law


Committee on Legal Affairs

Rapporteurs: Luigi Berlinguer and Klaus-Heiner Lehne
Annex 3

A. Introduction

The Commission's proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) (COM(2011)0635) is a ground-breaking initiative of key importance for consumers and businesses in the internal market. It is the fruit of the European contract law initiative – targeted at addressing internal market problems created by diverging national contract laws – which has been under discussion for many years, with Parliament repeatedly giving guidance and support1, most recently in its 2011 resolution on the Commission's Green Paper2. That resolution favoured, inter alia, the option of "setting up an optional instrument" and stressed that the legislative procedure should be as "inclusive and transparent as possible".

Against that background, the Legal Affairs Committee adopted – at the proposal of your co-rapporteurs – an ambitious programme of events in order to hear a broad range of experts and interest groups. One hearing3 and three workshops4 have been held so far. A conference with national parliaments is to be held 27 November 2012, with a further interparliamentary event already scheduled for 2013 in order to conduct an enhanced dialogue.

After a first analysis of the proposal, on the basis of the expertise gathered so far, this working document – by no means an exhaustive paper, but work in progress – seeks to explore the main issues which your rapporteurs consider to be crucial for the debate.

B. Issues

In general, your rapporteurs wish to reiterate Parliament's call, in its 2011 resolution, for an instrument "drawn up in a simple, clear and balanced manner which makes it simple and attractive to use for all parties"5. They believe that the text could be improved, so as to be more user-friendly, clearer and more coherent with the acquis as regards terms and definitions, and less vague in its terminology.

I. Regulation

Issues under discussion regarding the regulation relate mainly to the functioning of the CESL.

1. Legal basis

Your rapporteurs are aware that questions have been raised as to whether the proposal can indeed be based on Article 114 TFEU. However, they believe that, by creating a harmonised second regime within Member States' law (see Recital 9), the proposal clearly qualifies as a

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5 Paragraph 29.
"measure for [...] approximation" and therefore should be based on Article 114 TFEU, as has been confirmed by the Legal Services of the three institutions.

2. Optional nature of the instrument
Your rapporteurs are aware that the optional nature of the instrument has come up against some resistance from some groups of stakeholders. However, it has been shown that working with optional instruments is a widely used approach\(^1\). In line with the 2011 resolution\(^2\), and strengthened by the conviction of your rapporteurs, this working document departs from the point of view that an optional instrument in the area of contract law is useful for consumers and businesses, and thus focuses on how to increase its attractiveness to potential users and its practicability.

3. Relationship with the Rome I Regulation
This is a crucial issue for the functioning of the CESL. As a starting point, your rapporteurs wish to highlight that the agreement to use the CESL is "not to be confused with a choice of the applicable law", but is a "choice exercised within the scope of the respective national law" (see Recital 10).

At present, Article 6(2) of the Rome I Regulation allows there to be a choice of law in consumer contracts where businesses direct their activity towards consumers subject to the mandatory rules of the consumer's place of habitual residence. The CESL states in Recital 12 that "Article 6(2) of Regulation (EC) No 593/2008 [...] has no practical importance for the issues covered by the Common European Sales Law".

The proposal can achieve its effect only if this is truly the case, since otherwise the benefit for businesses of choosing a uniform instrument so as to overcome differences between Member States' laws and thereby avoid having to research, to apply and to litigate under foreign law will not be attained. However, avoiding the application of Article 6(2) of the Rome I Regulation is desirable only if its objective – to guarantee that the consumer is as protected as he would be under his own law – is ensured in a different way. In its 2011 resolution, Parliament, emphasised "that the optional instrument must offer a very high level of consumer protection\(^3\)" and went on to say that a high level of consumer protection is also "in the interest of business as they will only be able to reap the benefits of the optional instrument if consumers of all Member States are confident that choosing the optional instrument will not deprive them of protection\(^4\).

Your rapporteurs believe that the relationship to the Rome I Regulation, in particular Article 6, must be made as clear as is possible and necessary in the text of the CESL, in the interest of legal certainty. Further work will be needed on how this can be achieved. As regards the level of consumer protection provided by the CESL, first evidence appears to indicate that it is indeed very high; this will have to be explored further.

3. References to national law

\(^1\) Study "Implementation of optional instruments within European Civil Law"

\(^2\) Paragraph 5.

\(^3\) Resolution, paragraph 14.

\(^4\) Resolution, ibid.

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Whereas the principle of self-standing interpretation applies to matters within the scope of the CESL (Article 4(2) of the Annex), matters "not addressed" in it fall under the national law identified according to relevant private international law rules, in first instance the Rome I Regulation (see Recital 27). Such recourse to national law adds complexity, but is necessary where issues cannot or should not be included in the CESL. Your rapporteurs see it as a valid approach to have the CESL "cover the matters of contract law that are of practical relevance during the life cycle of the contracts falling within the scope, particularly those entered into online" (Recital 26). However, they reserve the right to consider possible extensions, e.g. as regards lack of capacity or representation, which are of relevance in online trade.

4. Scope
As regards the scope of the proposal, your rapporteurs are aware that some advocate excluding B2B contracts. However, since the CESL is merely offered to the parties, there is no reason why it should not be offered as well for B2B cases. The CESL could provide interesting benefits in particular for SMEs (to which it offers a ready-made set of rules, with some protective elements), and it is clear that it will probably not be chosen by multinationals, which the CESL does not target in any case. However, in your rapporteurs' view, acknowledging that the CESL might be interesting to SMEs does not necessarily mean that the scope should be limited, as is proposed, to B2B contracts where one of the parties is an SME. This creates confusion and uncertainty – even to the awkward and frequently mooted situation of a party having to ask a potential contracting party about its balance sheet.

Secondly, the limitation to cross-border contracts will have to be examined. Technical issues have been raised concerning the definition of the cross-border element, and as a matter of fact the difference between cross-border and domestic contracts is starting to fade anyway, with increased mobility, the internet, mobile devices and sales platforms starting to operate across Europe. A limitation to cross-border cases might jeopardise the advantages the CESL can offer, as it will still be necessary to differentiate between domestic and cross-border transactions. Obviously, it will have to be made sure that any misuse of the CESL for situations it was not designed for is avoided.

Whether the CESL should be limited to online or distance transactions is a difficult question. It is widely argued that the CESL could be advantageous in online trade, particularly for low-value transactions. But would this have to mean that it should be limited to such transactions? Given that the CESL is merely offered to the parties, it might be regrettable to limit the circle to which this offers is made. On the other hand, it is obvious that the CESL, as one set of EU-wide rules, is the ideal tool for online trade. There might thus be some appeal in choosing this important and rapidly growing area as a pilot. Further reflection will have to be given to this issue. In any event, should there be a limitation of scope, this will have to be carefully formulated, also in the light of the recent Alpenhof1 and Mühleitner2 judgments.

Further analysis as regards the substantive scope might be also needed with a view to mixed-purpose contracts and contracts with a credit element.

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2 Case C-190/11, Daniela Mühleitner v Ahmad Yassfi and Wadat Yassfi, yrfr.
5. Flanking measures
Your rapporteurs welcome the proposed establishment of a database of judgments. It must be comprehensive, well-maintained and regularly updated as well as easily understandable and accessible, in particular for consumers.

The link with ADR and ODR is important. The legislative package on ADR and ODR is currently under negotiation with the aim of achieving a first-reading agreement. However, it might be worth reflecting on whether it might be desirable to have a stronger connection between ADR and the CESL (e.g. combining the CESL with a recommendation to parties to use ADR, or providing for some link between the agreement to use the CESL and the consent to use ADR).

The need to produce EU-wide standard model contracts in parallel to the CESL, as emphasised already in the 2011 resolution1, must be reiterated. It is important to recall that standard model contracts – in particular owing to Article 6(2) of the Rome I Regulation – would not work in the current legal setting. Your rapporteurs are convinced that such model contracts, available off-the-shelf, will be crucial for the success of the CESL, and urge the Commission to start working on them as soon as possible and in parallel to the ongoing legislative process. They welcome the Commission’s commitment in the communication accompanying the CESL2, but believe that an express reference thereto is needed in the operative text.

Furthermore, suggestions have been made that CESL should be accompanied by a commentary or that an advisory body should be established. Your rapporteurs wish to further look into these proposals, while underlining that such initiatives would have to be closely linked to the database of judgments and be of the highest standard of quality and independence, so that parties, in particular consumers, can have confidence in the assistance provided.

The point has also been made that it might be useful to explore the possibilities of the Treaties in order to ensure that the ECJ will be prepared for any additional workload that might be expected.

II. Annex

As regards the Annex containing the CESL rules, the co-rapporteurs will only raise a limited number of issues, as any more detailed discussion would go beyond the scope of this working document.

1) Unfair contract terms
As regards B2C cases, analyses have been made listing various terms from national laws which are not present in the same way in the CESL. Your rapporteurs will closely consider any evidence provided. However, it does not seem a sound approach – neither on this nor on other aspects – to view the CESL as a sum of national laws, adding up different elements of consumer protection (e.g. of terms on black or grey lists). The overall result achieved by the

1 Paragraph 30.
2 COM(2011)0636, p. 11.
restrictions on unfair contract terms under the CESL should be assessed and compared to the overall result under national law. Your rapporteurs will work carefully and thoroughly on the provisions on unfair contract terms. The scope of the restrictions on unfair terms, and the relevant test, will need to be clear and sufficiently close to the Unfair Contract Terms Directive in order to ensure the desired result of enabling reference to be made to the case-law of the ECJ.

For B2B transactions, it has been argued that the proposed regime – as opposed to its competitor, the CISG – does not give enough emphasis to promoting certainty in commercial transactions, on the grounds that the scope is too broadly defined and the test for unfair contract terms does not give sufficient guidance or is open to erosion from B2C cases. Your rapporteurs will analyse this and propose appropriate modifications.

2) Remedies of the buyer
Whether the system of consumer remedies put forward by the CESL – characterised by free choice of remedies, absence of cure by the seller, no requirement to give notice of termination with a certain time – is viable and can ensure the attractiveness required for the success of an optional instrument is one of the "hot topics" under discussion. Consumer representatives request clarification and more protection; business and their legal counsel predict that businesses would not use such an overly protective instrument. After a first analysis, the system proposed indeed seems to offer a very high level of consumer protection, which goes beyond the acquis, in particular the Consumer Sales Directive, and which matches almost entirely, or even goes beyond, national laws. Obviously, further research will have to be carried out into this aspect.

Your rapporteurs are aware that a link has been made between the extent of rights granted to the consumer, in which some see a risk for abuse, and the principle of good faith and fair dealing, which might work as a corrective in abuse cases. The latter principle is not known to all Member States' legal orders, and it might bear risks of diverging interpretation. On the other hand, there might be some need for case-by-case solutions under general clauses, and a database of judgments and auxiliary documentation might be of tremendous help in this connection.

Your rapporteurs believe that it will be necessary to assess the system of remedies in its overall architecture in order that concerns raised can be dealt with through technical corrections (clearer wording coupled, if necessary, with restructuring of provisions) where substantive changes are necessary. This exercise will have to be undertaken in an open-minded way, while not pre-empting any solution from the outset and closely listening to all future CESL users.

3) Restitution
Your rapporteurs will have a close look at the suggestions made for reformulation and restructuring of the restitution rules. To them it is most important that the solution proposed should strike a viable balance between both sides, and that it should be clear and foreseeable for consumers what they have to pay or return so that they may be confident when exercising their rights.

4) Digital content
Your rapporteurs, at first sight, see some merit in including digital content, given that a common regulatory framework is particularly needed in this area. However, it appears that a number of issues have to be reassessed, i.e. how to deal with cases where digital content is not paid for with money, but e.g. with personal data, or whether further adaptations of the provisions on non-conformity or restitution are necessary, taking into account the specific nature of digital content.

5) Prescription
After a first analysis, your rapporteurs acknowledge that the subjective start of the short prescription period corresponds to the choice of modern national and international legislation.

The 10-year prescription period has triggered critical reactions, whereas others, including the Commission, explain that its aim is to create legal certainty, but its practical relevance is limited. Only in very rare cases would a buyer not be aware of a non-conformity for nine-and-a-half years, then become aware of it, and still be able to prove that it existed at the time of delivery.

Your rapporteurs aim at providing clear rules on prescription which correspond closely to practical needs, without losing sight of the fact that the prescription periods will have to be assessed as one element of the system of remedies, and not isolated.

C. Conclusion

It is the view of your rapporteurs that the CESL has huge potential advantages for consumers and businesses in the internal market, in particular in the digital era, and offers an opportunity that should not be missed. Your rapporteurs invite further consideration of the elements that could ensure the success of this instrument and look forward debating these matters further.