Briefing

EU Legislation in Progress

February 2016

European Parliament

Contracts for online and other distance sales of goods

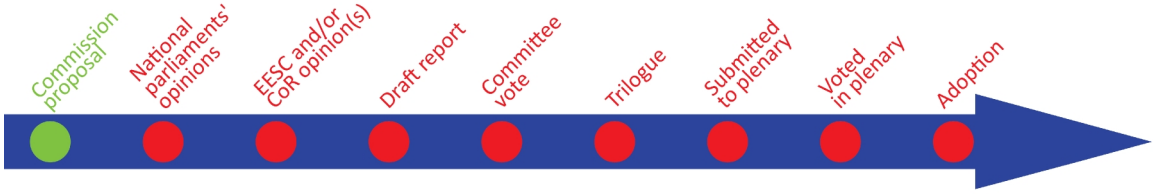
SUMMARY

In December 2015, the Commission proposed a directive on contracts for online and other distance sales of goods (online sale of goods directive). This would partly replace the existing Consumer Sales Directive with regard to distance sales (both online and offline). Unlike the Consumer Sales Directive, the proposed online sale of goods directive would provide for maximum (total) harmonisation, thereby prohibiting Member States from introducing a higher level of consumer protection within the scope of the directive.

The proposed online sale of goods directive is part of the Digital Single Market Strategy, and comes alongside several other proposed legal instruments, notably the digital content supply directive [2015/0287(COD)] and the portability of digital content directive. Although, legally speaking, the proposal is new, in political terms it aims to replace the 2011 proposal for a Common European Sales Law, in line with the commitment made by the Juncker Commission in December 2015.

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods

Committee responsible:	Internal Market and Consumer Protection (IMCO)	COM(2015) 635 *of* 9.12.2015
Rapporteur:	(not yet appointed)	*procedure ref.*: 2015/0288(COD)
Next steps expected:	Initial discussions in committee	Ordinary legislative procedure



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Author: Rafał Mańko

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Introduction

In 2015, the Commission published its communication on the Digital Single Market (DSM) Strategy, thereby addressing priority No 2 in Jean-Claude Juncker's 'Political Guidelines for the Next Commission' of July 2014. The latter had promised 'ambitious legislative steps towards a connected digital single market ... by modernising and simplifying consumer rules for online and digital purposes'. The **contract law** aspect of the Digital Single Market had already been addressed in the Commission's 2015 Work Programme, and in more detail, in its recently unveiled DSM strategy. Indeed, one of the three 'pillars' of the strategy is 'better access for consumers and businesses to online goods and services across Europe'. Specifically, the Commission undertook to present, by the end of 2015, an **amended proposal for a Common European Sales Law** ('CESL proposal').

On 9 December 2015, the Commission unveiled **two proposals**: the proposal for a Directive on contracts for online and other distance sales of goods, which is the topic of the present briefing, as well as a second proposal for a directive on the supply of digital content. Both, jointly, are intended to replace the 2011 CESL proposal, as concerns the supply of digital content.[1]

Context

The political and legal context of the current proposal is the former CESL proposal. Tabled by the Commission in 2011, it was intended to become an 'optional code' of sales law, which parties would be able to choose to govern a specific contract instead of national law. Technically, the CESL was to have the legal form of a regulation, applicable directly (without transposition) and in the same wording across the EU. The CESL was to be available for cross-border consumer contracts, as well as contracts between SMEs and large companies.

The CESL gave rise to legal and political controversies, both as regards its legal basis, and the actual need for such an optional code.[2] Whilst it finally received backing in Parliament (subject to numerous amendments) it never met with the Council's approval.

Existing situation

Four Directives applicable to online sale of consumer goods

At present, four EU Directives are concerned with online (and other distance) sales of consumer goods: the Consumer Sales Directive ('CSD'), the Consumer Rights Directive, the Unfair Terms Directive, as well as the e-Commerce Directive. All four of these, save for the Consumer Rights Directive, are **minimum harmonisation** instruments, which means that they set only the minimum standards of consumer protection, leaving Member States the right to maintain or adopt more consumer-friendly implementing provisions if they wish. However, whilst there is no legal lacuna (in the sense that EU legislation is in place regarding distance sales of consumer goods), the existing rules are undoubtedly fragmented and, as some argue, in need of an update.[3]

The proposed directive aims to **replace the Consumer Sales Directive** with regard to online and other distant sale of goods but would leave the three other existing Directives in place. Hence, the existing fragmentation of EU rules would not disappear.

Consumer Sales Directive

The CSD applies (indistinctly) to all consumer sales transactions (online/offline at a distance/face to face; cross-border/domestic. The Directive is a **minimum harmonisation** instrument.

Conformity of goods

The CSD introduced the concept of **'conformity with the contract'** which extends the traditional concept of liability for faulty goods to include liability for any public statements regarding the goods (e.g. in advertising or promotion materials). Sellers may escape this liability only if they can show that they were either not aware of such statements, or that the statement was corrected before the sale took place, or that the consumer's decision to buy was not influenced by such a statement. The burden of proof lies with the seller. The deadline for pursuing remedies in case of non-conformity is set at **two years** from delivery of the goods, and during the first six months there is a reversed burden of proof in favour of the consumer.

Consumer's remedies against seller

The CSD divides the consumer's remedies into two groups – **primary remedies** (repair or replacement) and **secondary remedies** (price reduction or rescission of contract). The secondary remedies are available only if the primary remedies cannot be completed, or if the seller has failed to complete them in a timely manner and/or without significant inconvenience for the consumer. This is in contrast to the **higher standard of protection of buyers traditionally found in many contract laws** of the Member States, whereby buyers had a full choice of remedies and could head straight for price reduction and/or rescission of contract without having to ask the seller to try to repair and/or replace the goods first.[4] Arguably, especially in online sales, a refund instead of repair/replacement may be a better remedy.[5]

As regards the primary remedies, consumers have the right to **propose which remedy they prefer** (repair or replacement). However, the trader may refuse the remedy proposed by the consumer, and force the consumer to accept the alternative remedy instead, if the remedy required by the consumer is deemed disproportionate. The choice between secondary remedies is made exclusively by the consumer. However, the consumer may not cancel the entire contract if the non-conformity is 'minor'.

Optional guarantee

On top of the seller's liability for non-conformity, the CSD regulates the optional guarantee provided by a third party (usually the producer) which does not in any way affect the consumer's remedies against the seller.

The Consumer Rights Directive

The recent Consumer Rights Directive is a **total harmonisation** directive which applies indistinctly to all consumer contracts, with certain exceptions (e.g. package travel, financial services, timeshare property, social services – such as social housing and social child care – healthcare and construction). The Directive provides for the consumer's right to **terminate the contract at will** within 14 days, a number of **information duties** incumbent upon traders, as well as several **formal requirements** regarding the contract. It also provides for a number of ancillary rights, including the right to timely delivery,

the right not to be charged additional fees for using a specific payment method, and provides that the **risk of damage to shipped goods** passes to consumers, in principle, only once the goods are actually delivered.

Unfair Terms Directive

The Unfair Terms Directive applies to all consumer contracts indistinctly, with only some exceptions. It is a **minimum harmonisation** instrument which prohibits 'unfair' terms in non-negotiated consumer contracts. With regard to **sale of goods**, the Directive does not apply to the **price and description of goods**, unless drafted non-transparently.

E-Commerce Directive

The e-Commerce Directive is a minimum harmonisation directive, which applies inter alia to online contracts, including contracts for the online sale of consumer goods. It sets out detailed **information rights** for parties concluding an electronic contract, which are mandatory in the case of consumer contracts.

The changes the proposal would bring

General issues

In essence, the proposed Directive is a ***de facto*** **recast** of the CSD, but limited to online (and other distance) contracts only, and switched from minimum harmonisation to total (maximum) harmonisation. Most of the provisions of the proposal are either taken over from the existing CSD, or from the CJEU case law interpreting it.

If the proposal enters into force in its current shape, the scope of the existing CSD would be limited to face-to-face contracts only, whilst all distance contracts (not just online ones) would be covered by the new online sale of goods directive.

Towards greater fragmentation?

The entry into force of the proposed directive (which provides for total harmonisation) and the limitation of the existing CSD (which provides for minimum harmonisation) to face-to-face transactions could lead to a further fragmentation of contract law. This is because for face-to-face transactions the Member States will be allowed to preserve their more consumer-friendly rules, whilst for online transactions they will have to stick precisely to the level provided for in the proposed directive.

In consequence, those Member States which wish to keep a higher level of protection for offline sales, will have to introduce a dual regime of consumer sale of goods rules – an online regime (common EU level of consumer protection) and an offline regime (possibly with a higher level of consumer protection, e.g. with regard to the consumer's choice of remedies.[6] At present, most Member States already have a dual regime of sale of goods rules – a 'common' sale of goods regime and a 'special' consumer sale of goods regime.[7] Furthermore, the Convention on the International Sale of Goods (CISG) also applies if parties so choose.

However, some Member States already have three regimes of sales law in place – a fall-back 'common' regime (for consumer-to-consumer transactions), and two special regimes: a 'commercial' regime (for business-to-business transactions)[8] and a 'consumer' regime (for business-to-consumer transactions). If those Member States still wish to preserve a higher level of consumer protection for offline transactions, for instance granting consumers the right to reject defective goods upfront, they would end up having four parallel regimes of sales law – or even five, counting the CISG.

Conformity of goods

Notion of conformity of goods

Under the CSD, goods have to be in conformity inter alia with the description given by the seller. The proposed directive introduces a direct reference to the *content* of the contract. Hence, the goods need to conform to the seller's description 'as required by the contract'. Likewise, only precontractual statements which are 'an integral part of the contract' are binding on the seller. With regard to contracts concluded at a distance and off-premises, the Consumer Rights Directive provides that the obligatory pre-contractual information given to the consumer is an integral part of the contract, unless the contracting parties expressly agree to alter it. However, whether any other pre-contractual information or statements become an integral part of the parties' contract depends on national law. A proposed uniform rule with that regard was laid down in the Draft Common Frame of Reference, a non-binding restatement of European contract law prepared for the Commission by academic experts.[9]

Legal defects

The proposal introduces a new rule on legal defects, requiring that conformity of the goods includes that they must be free from any third-party rights, including IP rights. This is a new rule which is not found in the CSD.

Relevant time for analysing non-conformity

The CSD currently in place provides that the relevant time for ascertaining non-conformity is the delivery of the goods. The new proposal provides for a more elaborate set of rules, depending on whether the goods were installed (e.g. in the consumer's house) by the seller or under their responsibility, and who delivered the goods (whether the carrier was chosen by the seller or by the consumer).

Presumption of non-conformity

The proposal significantly raises the level of consumer protection by extending the deadline during which the presumption of non-conformity operates. Under the CSD, only if the non-conformity appears within six months of delivery is it presumed that it was already present at delivery. The proposal would extend this period to two years.

Buyer's remedies against seller

Cascade system (hierarchy of remedies) for online sales

Unlike the withdrawn CESL proposal, the proposed directive upholds the 'hierarchy of remedies', whereby the consumer does not have a free choice between repair, replacement and refund, but must first accept repair or replacement (as chosen by the seller). Under the new proposal, there would be some differences, though. First of all, the consumer, if entitled to termination or reduction of price, would be allowed to terminate even if the defect is minor (under the CSD this is not possible).

Secondly, whilst under the CSD the consumer may terminate or demand a partial refund only if a repair/replacement is not available, or if the seller did not complete it within a reasonable time and without 'significant inconvenience' to the consumer, under the proposal the consumer would also have a right to demand a refund in two additional circumstances: if the seller declares that they will not complete a first-degree remedy in reasonable time or if it is clear from the circumstances that the seller will not complete such a remedy timeously. Thirdly, a new rule provides that consumers will not be entitled to a remedy to the extent that they themselves have caused the non-conformity or its effects.

Codification of CJEU case law

The proposal codifies the rules established by the CJEU in Joined Cases C-65/09 and C-98/09, *Wittmer and Putz*, whereby if goods were installed in line with their nature and purpose, it is the seller who needs to cover the costs of their de- and re-installation. Likewise, the proposal codifies the rule established in Case C-404/06 *Quelle AG* whereby the consumer does not need to pay for the use they made of the defective goods prior to their return to the seller.

Consumer's right to withhold payment

The proposal introduces a new rule, not in the CSD, whereby in case of non-conformity a consumer may withhold payment of any outstanding part of the price, for as long as the seller does not cure the non-conformity.

Detailed rules on termination and refunds

The CSD lacks any detailed provisions on termination of contract. The proposal fills that gap with a number of detailed rules. Firstly, the seller must reimburse the price 'without undue delay' and no later than 14 days from receiving the notice of termination. The seller must also bear the costs of reimbursement (e.g. banking fees). Secondly, the proposal makes it clear that the consumer sends back the goods under the same timing conditions, and at the seller's expense.

The proposal provides that if the non-conformity relates only to some goods in a batch (e.g. a number of faulty floor tiles), and not to others, consumers may terminate the contract only with regard to the non-conforming goods and are forced to keep the other ones. Furthermore, two rules oblige the consumer to make **payments to the seller** in case of termination. Firstly, if the goods were **destroyed or lost** (even with no fault on the part of the consumer), they must – upon termination – pay to the seller the monetary value which the goods would have had on the date of return. Secondly, the consumer must also **pay to the seller for the decrease in the value of the goods** if such a decrease exceeds 'regular use', but not more than the price originally paid.

Time limits and deadlines

Under the proposal the seller would be liable to the consumer if the non-conformity appears within two years of delivery. National law may not impose a shorter prescription period than two years from delivery. These two rules are the same as in the Consumer Sales Directive. What would change, however, is that the Member States will no longer be allowed to provide for an exception for second-hand goods (shorter period of liability). Furthermore, the period of liability of the seller will be identical to the timeframe of the presumption of non-conformity.

Commercial guarantee

New terminology

The proposal includes terminological changes. 'Guarantee' (in the sense of a legal act) under the CSD would become 'commercial guarantee', whilst 'guarantee' (in the sense of a document handed over to the consumer) would become a 'guarantee statement'. The party giving the guarantee will uniformly be called 'guarantor' (whilst the CSD also used the term 'offerer').

Minimum harmonisation only

The regime of the commercial guarantee is the only part of the proposed directive subject to minimum harmonisation only. Therefore, the Member States may enact rules providing for a higher level of consumer protection with respect to guarantees.

Furthermore, under recital 14, Member States are explicitly allowed to fill in legal gaps with regard to guarantees.

Sources of content of the guarantee
The content of the commercial guarantee would be determined not only on the basis of the guarantee statement and associated advertising (as in the CSD), but also on the basis of precontractual information provided by the seller, including (but not limited to) precontractual statements which form an integral part of the contract. Due to the variety of sources of the commercial guarantee, and potential conflicts between them, the proposal includes a new rule whereby if the guarantee statement (i.e. the document handed over to the consumer) is less advantageous than precontractual information or advertising, the conditions of the guarantee laid down in the precontractual information or advertising will prevail.

Procedural rules
New rules on locus standi *to defend the application of the directive*
The current CSD does not contain any procedural rules. The proposal introduces such rules, providing that Member States must ensure that 'adequate and effective means' exist to ensure compliance with the directive. In particular, Member States must allow for an administrative or judicial procedure to be launched by certain bodies and organisations. The proposal does not clarify what kind of judicial proceedings (civil or criminal) are envisaged, hence the choice is left to the Member States. Furthermore, the Member States may choose whether to grant standing to one more of the following: public bodies; consumer organisations; professional organisations.

Conflict of law rules
The CSD provides that Member States must ensure that consumers are not deprived of the protection under that Directive if the law applicable to the contract is the law of a non-Member State, although the contract in fact has a close connection with the EU. However, the proposal does not contain any equivalent rule.

Nevertheless, despite the lack of an equivalent provision, the same result is obtained under Article 6(2) of the Rome I Regulation. Under that rule, if the parties to a consumer contract make a choice of law (and choose a law different to the law of the consumer's habitual residence), such a choice may not result in depriving the consumer of the protection afforded them by mandatory legal provisions. Since all provisions implementing the proposed Directive are to be semi-mandatory (in favour of the consumer), they fall within the scope of Article 6(2) of Rome I.

However, in cases where a seller does not direct their offer to the Member States, and an active consumer concludes a contract with such a seller, the protective rule of Article 6(2) would not operate. Under the proposed Article 4(1)(a) such contracts are, by default, subject to the law of the seller. If it is a non-EU country, it is probable that the consumer will not have the rights enshrined in the proposed directive.

Preparation of the proposal

During summer 2015, the Commission conducted a public consultation in which stakeholders had the opportunity to answer a set of 22 detailed questions on the online sale of goods as part of a questionnaire devoted also to the supply of digital content. A total of 189 stakeholders replied, and the Commission summarised their views in a brief document. The proposal was accompanied by an impact assessment, in which the Commission claims that total harmonisation of contract law rules for online trade

(including the directive on supply of digital content) would lead to a 'permanent increase in EU GDP of €4 billion'. It admits that making the hierarchy of buyer's remedies obligatory will lead to a reduced level of consumer protection in eight EU Member States, in which consumers may claim a refund on a defective product without waiting for the seller to repair or replace it.

Parliament's starting position

Owing to the fact that the proposal is, in political terms, a replacement of the CESL proposal, Parliament's position on CESL is particularly relevant. In 2013, the Legal Affairs Committee (JURI) adopted a report backing the CESL, and in particular the optional character of the instrument and the legal form of a regulation. Importantly, the Parliament opted to limit the scope *ratione materiae* of CESL to **distance contracts only**. In its opinion the Internal Market Committee (IMCO), in turn, suggested to change the **legal form of CESL from optional code to a directive**, which would harmonise certain aspects of the seller's liability towards consumers, thereby supplementing the existing Consumer Rights Directive. The IMCO Committee had 'fundamental doubts concerning the suitability of the Commission proposal' and warned that CESL would only 'complicate the legal situation and would disadvantage the consumer'. The Economic and Monetary Affairs Committee (ECON), in turn, stressed the political difficulties entailed by total harmonisation, and therefore supported an optional instrument. In February 2014, the Parliament adopted its legislative resolution on the CESL, proposing to limit the scope of the CESL to **cross-border business-to-consumer transactions only**.

Stakeholders' views

Consumers

The European Consumer Organisation (BEUC) suggested the criteria for conformity of goods be expanded to cover **durability**, to promote a green, circular economy in which goods have a certain minimum guaranteed lifetime. It supported a period of reversed burden of proof of two years (instead of six months under the CSD) and the removal of the consumer's duty to notify non-conformity to the seller. They also advocated a **free choice of remedies** for consumers, instead of the hierarchy system of the CSD.

Businesses

UEAPME, the EU-wide SME federation, took the view that, before proposing a new instrument, the Commission should evaluate and review the Consumer Rights Directive. They warned against fragmentation of the legal regime and considered that full harmonisation of only a part of contract law does not solve the existing problems and reduces transparency of the legal regime. This is a problem especially for SMEs which do not have the means for legal advice on contract law. Instead, UEAPME would prefer the **country of origin principle** for the trader, allowing sellers to sell abroad on the basis of their home law, which in their view would encourage traders to engage in e-commerce. On the substance of the online sales rules, UEAPME is against extending the period of reversal of burden of proof with regard to non-conformity, and supports maintaining the regime of remedies as provided for under the Consumer Sales Directive.

BusinessEurope, the EU-wide federation of national business interest representations, opted for full targeted harmonisation of online sales rules. They warned against adopting different rules for offline and online sales, which would discriminate businesses on the basis of the sales method. They support upholding the existing hierarchy of remedies, with no free choice for consumers.

Apart from UEAPME, a number of businesses and national business federations supported the **country of origin principle** ('sale like at home' option) whereby the seller should be allowed to sell to consumers abroad under the law of the seller's country of origin. This was the view taken e.g. by EuroCommerce (federation of trade and retail companies), the Austrian Economic Chamber (*Wirtschaftskammer Österreich*), the Polish business federation 'Lewiatan', the Polish chamber of e-Commerce, the European and International Federation of Booksellers and others.

Legal practitioners

The Council of Bars and Law Societies of Europe pointed out that Article 6(1) of Rome I, which prohibits the choice of seller's law in a consumer sale of goods transaction, is problematic, generates additional costs and dissuades traders from selling cross-border. They advocated covering all types of sale of goods (tangible and digital, business-to-business and consumer-to consumer) in one instrument in order to avoid legal fragmentation. They would opt to take over the CESL system of remedies, which gave consumers a free choice between repair, replacement and refund.

In March 2015, the General Council of the Bar of England and Wales welcomed the withdrawal of CESL and urged the Commission to abide by the principles of subsidiarity and proportionality, stressing that contract law rules are not a real obstacle to cross-border trade. Instead, the EU should take more action in the field of civil procedure.

In September 2015, the English barristers' association indicated that the consumer *acquis*, especially the CSD, should be updated to reflect the needs of online purchase of tangible goods and digital content. In their view there is no need for a new instrument on contract law, especially given that the harmonisation of the buyer's remedies is a politically difficult question. They underlined the need to bring more coordination between the consumer *acquis* and EU civil procedure instruments.

Legal scholars

The European Law Institute warned that enacting a full harmonisation directive will lead to further fragmentation of sales law, leading to up to six different regimes in a single Member State if business-to-business transactions are included. ELI considered that the most appropriate legal form would be a regulation, jointly covering the sale of tangible goods and digital content, applicable to all types of sales (including business-to-business) in the electronic environment. Christian Twigg-Flessner argued that the harmonisation of contract rules should be limited to cross-border transactions only, and should be done by way of a regulation. Gianni Ballarani argued that the existing legal framework applicable to distance sales contracts is fragmented, and requires both an update and unification; in his view, the online sales law should be dealt with in a cross-border-only regulation, instead of a directive also applicable to domestic transactions.

National parliaments

A number of national parliaments are examining the proposal. To date, none has issued a reasoned opinion on subsidiarity concerns; the deadline for doing so is 8 March 2016. The Irish Parliament, prior to its recent dissolution, adopted a committee statement underlining the need to ensure consumers do not suffer a retrograde step, in terms of losing rights to which they are currently entitled.

Parliamentary analysis

In September 2015, the Members' Research Service of EPRS published a paper on Contract law and the Digital Single Market. This publication analysed in detail the contract-law related aspects of the Digital Single Market Strategy and explored the

regulatory options available to the EU legislature. Following this publication, the Members' Research Service held a policy hub with the participation of **Dirk Staudenmayer**, the Commission official responsible for drafting the current proposal, and **Professor Martijn Hesselink** (University of Amsterdam), who was one of the academic co-drafters of the Common European Sales Law. EPRS is currently preparing an initial appraisal of the Commission's impact assessment, as well as a comparison of the existing legal framework on consumer sales with the Commission proposal.

Legislative process

The first step in Parliament's examination of the proposal is the appointment of rapporteurs within the IMCO committee (lead committee) and the JURI committee (associated for opinion).

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Twigg-Flesner, C. 'CESL, Cross-Border Transactions and Domestic Law: Why a Dual Approach Could Work (Although CESL Might Not)', *ERPL* 23.2 (2015): 231-250.

Endnotes

[1] M.B.M. Loos, 'The Regulation of Digital Content B2C Contracts in CESL', *Centre for the Study of European Contract Law Working Paper* 10/2013.

[2] For details see R. Mańko, *Contract Law and the Digital Single Market: Towards a new EU online consumer sales law?*, EPRS in-depth analysis, PE 568.322 (2015), pp. 15-16 (with further references).

[3] See e.g. G. Ballarani, 'The transition from the Proposal of a Common European Sales Law towards the new Online Sales Act', paper presented at Colloquium on *Supernational Trends of Civil and Commercial Law: Towards a Reunification of Private Law?* (Siena, 8-10 October 2015), p. 5.

[4] See e.g. R. Zimmermann, *The Law of Obligations* (OUP 1996), p. 305ff.

[5] R. Mańko, Contract Law..., pp. 11, 26-27.

[6] Consumers in the UK, Portugal and Greece enjoy the right to reject defective goods and demand a refund, without waiting for the trader to try to repair or exchange them. See S. 20-22 Consumer Sales Act 2015 (for UK); H. Schulte-Nölke, F. Zoll, *Remedies for buyers in B2C contracts: general aspects*, PE 462.460 (2012), p. 15 (Portugal, Greece).

[7] Some Member States, such as Poland, have attempted to integrate both regimes in one chapter of the Civil Code, by including special rules applicable only to consumer sales. In other Member States, such as France, the two regimes exist in parallel legal acts – the 'common' sales in the Civil Code (Art. 1582-1701), and 'consumer' sales in the Consumer Code (Art. L.211-1 – L.211-23). Similarly in the UK as from 1 October 2015, common sales is regulated in the Sale of Goods Act 1979 (b2b and b2c), whilst consumer sales is now regulated in the Consumer Rights Act 2015. A mixed solution was adopted in Germany, where rules on consumer sales are a sub-section within the sale of goods section in general (§§ 474-479 BGB).

[8] A special regime of 'commercial' sale of goods exists e.g. in Germany (§§ 373-382 HGB) and Austria (§§ 373-381 UGB).

[9] Art. II-4.104 DCFR on the 'Merger clause'.

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