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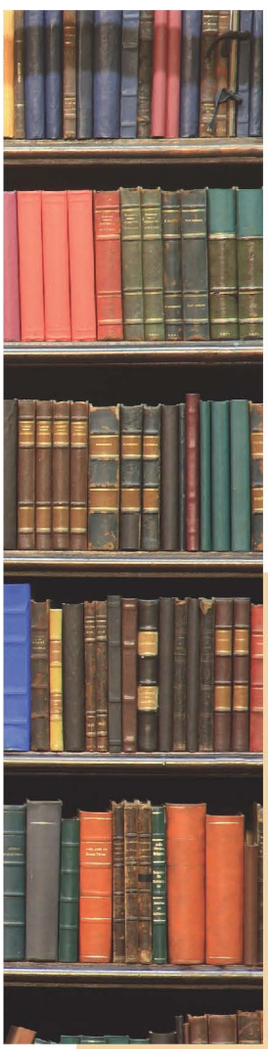

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The regime of remedies in the CESL – suitable and balanced for SMEs?

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LEGAL AFFAIRS

The regime of remedies in the CESL – suitable and balanced for SMEs?

BRIEFING NOTE

Abstract

This paper is based on the position of UEAPME members on the proposal for a regulation on the Common European Sales Law. It gives some general remarks on the proposal as such and focuses in the second part on the different remedies introduced from the point of view of SMEs, one of the main target groups of the proposal. If the aim to boost cross-border business activities is to be achieved, improvements in line with the remarks of this note are necessary.

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UEAPME incorporates 83 member organisations and represents 12 million SMEs with nearly 55 million of employees.

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CONTENTS

LIST OF ABBREVIATIONS

CESL	Common European Sales Law
SME	Small and Medium-sized Enterprises
UEAPME	The European Association of crafts, small and medium-sized enterprises

EXECUTIVE SUMMARY[1]

Regarding remedies in case of non-performance, which is covering the case of lack of conformity, the optional instrument of the Common European Sales Law has not followed the approach of the Directive 1999/44/EC[2]. According to the latter, a hierarchy of remedies has been established. In the first place the consumer has the right, in case of lack of conformity, to require repair or replacement. Only after this request, and under certain circumstances, can the consumer go ahead with the "second" level of remedies, namely his/her right for price reduction or termination[3]. In contrast, the CESL has taken a broader approach, firstly because it focuses on non-performance as such, and not only on lack of conformity, and secondly in respect of providing a free choice of all remedies to the buyer.

From the SME point of view, this approach is more than controversial and undermines the attractiveness of the instrument. Moreover, other imbalances can be observed, mainly in B2C relations but also in B2B, as outlined in detail further in this note.

From the legal point of view, the proposed system of Part IV and V of the CESL on the remedies might give the impression that consumers will have more rights. However, the economic point of view should be not forgotten, in addition to the legal one. If this system remains in the final version of the Regulation, and if any SME is going to opt for the CESL, either the profit for the SME will be reduced or the uncertain situation will be calculated in the price of the good as a consequence of the remedies of the buyer. The consumer might have more rights, but just from a quantitative point of view and not from the quality perspective. It is a strong belief of the authors that unpredictable negative economic risks could appear for SMEs if the proposed regime of the remedies in CESL is not modified. This result does not correspond to the initial aim of the proposal to give consumers a wider choice of products for lower prices.

The instrument has been introduced as a "package" by the European Commission, which seems to consider some parts of it, for instance the clauses on remedies, as aspects that should not be modified during the legislative procedure. SMEs disagree with this point of view. In fact, since the exercise of the CESL is a completely new one in the field of contract law, it also has, in a certain way, the duty to achieve the right balance. Especially with regard to such important issues as remedies, not appropriately shaped provisions can discourage SMEs to opt for the instrument. This again would have the serious consequence that one of the main target groups would not make use of the CESL, and this could in turn harm the integration of the Single Market.

[1] This note deals with Part IV, Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content and with Part V, Obligations and remedies of the parties to a related service contract. The remarks are focusing on the sale of goods, only when explicitly mentioned is digital content covered.

[2] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*

[3] Article 3.3 and 3.5, *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*

1. INTRODUCTION

The proposal for a Regulation on a Common European Sales Law aims to boost cross-border sales of goods within the Single Market[4]. In order to achieve this, the two main target groups, European consumers and small and medium-sized enterprises, constitute the two focus points of the proposal. The latter should cover their contractual relations in respect of sales of goods and digital products.

The exercise of the CESL has been put forward also in response to the fact that full harmonisation under the Consumer Rights Directive could not been achieved with regard to some fields of the original proposal[5,6]. The aforementioned Directive is fully harmonising certain aspects of distance and off-premises contracts. However, consumer rights in case of lack of conformity are still governed on the basis of minimum harmonisation by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees[7]. The main reasons for this are the diverging national exercises in this field. No agreement could be achieved for full harmonisation during the legislative procedure. This has created the impression to the legislators that full harmonisation as such is a very difficult and controversial issue in this respect. Taking this into account, the European Commission came to the conclusion that an optional instrument could solve those problems which could not be solved with mandatory rules in the field of sales of goods and, in order to meet the challenges of the 21st century, in the field of digital contents.

However, from a European perspective, giving up full harmonisation in favour of optional instruments in general can be considered a very dangerous move. Optional instruments could be introduced after an in-depth analysis of circumstances and needs. Even if optional instruments as such are going to be established and may be put in place at European level, these should strongly avoid giving the impression that the European Union and the Single Market are undertaking fundamental changes in the direction of optional regimes, instead of going ahead with full harmonisation.

[4] *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

[5] *Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.*

[6] *Proposal for a Directive of the European Parliament and of the Council on consumer Rights,* Brussels 8.10.2008, COM(2008) 614 final

[7] *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*

2. GENERAL REMARKS

UEAPME incorporates 83 member organisations and represents 12 million SMEs with nearly 55 million of employees. UEAPME is a recognised European Social Partner.

It should be noted that 99.8% of all enterprises in Europe are SMEs. 50% of those are one-person enterprises, and the average European SME has no more than 6 employees. In order to understand the needs and attitudes of SMEs concerning any kind of legislative act at European level, these figures must be borne in mind.

When talking about SMEs' cross-border business activities, the following particularities have to be taken into account:

- It is typical that SMEs undertaking cross-border transactions start first with one country (mostly one of their neighbouring countries), after having done detailed market analyses to find out whether it is useful from a commercial point of view to go cross-border. Only after the experience and monitoring of the relevant market has shown that the business can operate successfully in one foreign market, will an SME **probably** consider extending their activities to the territory of other Member States. In most cases, SMEs' cross-border activities **are focusing only on a few countries** of the 27 Member States of the European Union.

- Just very **few** of the SMEs have the intention to pursue **direct** cross-border transactions **in all 27 Member States.** The reason for this is that the business model of an average SME is not meant to deal with cross-border activities **in 27 Member States**. If an SME would like to direct its sales to all 27 Member States, it has to change completely its business model.

- SMEs' growth does not have necessarily anything to do with the quantity of the Member States that they sell to within the European Union.

From the economic point of view, the analysis of the law of the country in which the SME wishes to extend its business activity will be undertaken anyway. Only in this way can the financial benefits for an SME be made clear, namely whether the national law of the addressed county or the CESL will bring more profit. Because of the complexity of the proposed instrument and since **SMEs do not have their own legal department** to clarify the open questions, they will still have to contact lawyers and/or legal practitioners[8] to implement the articles of the CESL eventually in a real contract and to clarify the extensive list of issues that the proposal is not dealing with. In order to support SMEs in this respect, it is crucial that the European Commission provides EU-funded trainings on the instrument for national and European SME organisations, and not only for legal practitioners, as it is mentioned in the proposal[9]. Besides the aforementioned points, an in-depth analysis of all

[8] "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 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 whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law" Recital 27, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

[9] "At the same time, the European Commission will organise training sessions for legal practitioners, using the Common European Sales Law", Budgetary Implication, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

aspects that can appear in relation to the use of Rome I and CESL is necessary in order to provide legal certainty in this respect.

3. THE "CHAPEAU" OF THE PROPOSAL

Missing a provision on the language issue

The instrument does not contain any provision on the language issue at this stage. It should be considered whether this would be needed, since the CESL is an instrument that is meant to be used in cross-border transactions for sales contracts. Leaving this question open can cause more uncertainty and difficulties than providing clear rules governing the language of the contract.

Article 8.2 and article 9, Agreement on the use of the Common European Sales Law (CESL)

Article 8 and article 9 should serve as a basis for a high level of consumer protection. The aim of these provisions is to ensure that in B2C relations the consumer is sufficiently informed about the application of CESL. However, the framework proposed by the regulation in order to achieve this would cause more confusion for both parties. Moreover, from the small business point of view it will put unnecessary extra administrative burden on SMEs. Since these two provisions can be considered as part of the core provisions of the regulation, it would be necessary to establish a user-friendly system for both parties, which would provide legal certainty at the same time.

According to article 8.2 the application of the CESL will be only valid in B2C relations *"if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract."* In addition, article 9 is establishing the rules on "*standard information notice in contracts between a trader and a consumer".* The following issues need further consideration:

- In recital 23, it is stated that there is in the regulation a "*standard information notice*" in order to avoid "*unnecessary administrative burdens*" for traders**.** If an SME has to provide information twice, it costs time and money, meaning an unnecessary administrative burden. Why is it not possible to include the information and the explicit statement of the consumer on the application of the CESL in the pre-contractual information notices?

- Article 9.1 is stating that the consumer is not "*bound by the agreement until the consumer has received the confirmation"* on the agreement "*accompanied by the information notice and has expressly consented subsequently to use of the Common European Sales Law".* There is no time limit as to when the consumer has to give its explicit statement for the trader. The only reference is that the trader has to provide the "*additional information*" "*before the agreement"*. This gives the impression that it is not possible to make an agreement at all before the consumer has given his/her confirmation on the extra information statement. However, further in this article it is stated that the consumer is not bound by the agreement if he did not receive the extra information notice. What is happening if the trader is providing and *sending the good to the consumer, but for the consumer there is no time limit* within w*hich he/she has to provide an answer on the application of the CESL? Furthermore, how can the trader prove that the* statement was received by the consumer? There are also provisions missing concerning the burden of prove with respect to this article. This provision can *lead to confusion for both sides:*

    a. If there is no clear time indication, the consumer can have the impression that this explicit statement can be done any time.

    b. The trader can easily face a situation in which the consumer has already started to use the good for a while without giving the explicit statement. This

can lead to a situation that the consumer at the end is not bound according to article 9.2 by *the agreement.*

What should also be clearly stated is what happens in case of failure to comply with the terms of article 8.2 or with the obligation to provide the standard information notice according to article 9:

1) is there no valid contract at all?
2) is the contract going to be put forward under the national law regime in accordance with Rome I?
3) do both parties have to have an agreement on whether CESL will be applicable or whether national mandatory consumer protection will apply?

Scenario nr. 1, namely not having any contract and not having the possibility to perform, could in several cases not be in favour of the parties.

On the other side, from the SME point of view, scenario nr.2 could also cause several difficulties. If an SME is going to opt for the application of CESL, it might be because it is not acquainted with the concerned Member State's national mandatory consumer protection rules, or it might be because it wishes to make use of another instrument, although it does already know the national law from previous experiences. Scenario nr. 2 would be the least wanted solution, because of the difficult concatenation of article 8 and article 9 (see above).

Most probably, scenario nr. 3 would be the most appropriate solution. Nevertheless, because of the importance of this question, a detailed consultation on this question with the concerned stakeholders would be welcome to establish the preferable system.

Article 10, Penalties for breach of specific requirements

The introduction of this article, especially taking into account the already stated difficulties in relation with article 8 and article 9, will have a negative effect on SMEs and will discourage them from the application of CESL. Since the structure of article 8 and article 9 is very complicated, an SME can easily face a situation in which the requirements stated in those articles have not been correctly fulfilled. In that case, an SME not only has to face the contractual consequences, it also has to face the penalties laid down by the Member States according to this article. The introduction of this kind of penalties is unknown in contractual relations, and for this reason should not be part of the regulation.

The issue of B2B, including SME2SME

If the optional instrument is going to be put in force at European level, the introduction of a B2B regime regarding the scope is needed in order to have an added value[10]. The instrument would not harm the relation between big and small businesses, since they are free to decide if they are going to use it for their contractual relations. Furthermore, freedom of contract is also sufficiently ensured in B2B relations, even if there are rooms for improvement with respect of the proposed B2B provisions. From the SME point of view, if such an instrument is adopted, the application in B2B relations can be only an advantage in SME2SME business activities. It can be a solid ground for a possible contract, even without using the whole instrument as such. In this stage, we have to underline that model contracts are of bigger benefit in any kind of B2C and B2B relations than abstract law instruments. It is important that the European Commission takes action on this issue as well.

[10] For a more detailed explanation and for a detailed outline of the UEAPME members' position, please see: http://ueapme.com/IMG/pdf/120119_pp_Specific_Remarks_CESL.pdf

4. OBLIGATIONS AND REMEDIES OF THE PARTIES TO A SALES CONTRACT OR A CONTRACT FOR THE SUPPLY OF DIGITAL CONTENT

4.1. Chapter 9, General Provisions

The general approach that the CESL has taken regarding non-performance is far too broad from an SME point of view. The currently applicable regime of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been a well established one at European level[11]. The Directive 1999/44 EC is focusing on the lack of conformity, and its structure should be followed also regarding the optional instrument of sales law.

In this context, it is to be noted that the definition of "fundamental non-performance" according to article 87.2 is to be considered from the SME point of view as broad and vague. One of the core general provisions is article 88 on excused non-performance. This provision is giving the impression that the CESL is following the approach of strict liability. Since the instrument is meant to be addressed to SMEs, in order to stimulate cross border business activities in the first place, strict liability will be definitely not supportive to achieve this aim.

Article 89 on the change of circumstances refers to an obligation for the parties to enter into negotiations with a view to adapting or terminating the contract in case of excessively onerous performance "*because of an exceptional change of circumstances*". From a practical point of view, which is decisive for SMEs when it comes to the decision to opt for CESL, this rule is far too unclear. Firstly, there is an obligation of the party to perform "*even if the performance has become more onerous*" because of higher costs of the performance as agreed or "*because the value of what is to be received in return has diminished*". This again means that everything else in the change of circumstances should be considered as "*exceptional change*" and "*excessively onerous*". In these cases, the parties have to start negotiations in order to adapt or terminate the contracts. Still, clarity on this point is not really ensured and it is not evident whether this point is going to be understood in practice in the way described above. From a practical point of view, it can be also quite challenging for an SME to judge when it has to start negotiations with the other party in order to comply with this obligation.

4.2. Chapter 10, The seller's obligations

Article 91.b includes the transfer of ownership as one of the seller's obligations, although this is not regulated by the proposal as such. The reasons for leaving the issue of transfer of ownership out might be that this question is not considered to have a direct link to the contract as such. Despite this perception, this is an important point when it comes to sales of goods. The idea and aim behind any kind of sale of goods is that the ownership of a good is going to be transferred to another party. For this reason, the lack of any reference in this respect will cause difficulties from an SME point of view. A solution could be that it is stated that the ownership is going to be transferred at the conclusion of the contract, unless otherwise indicated.

[11] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Article 97 is dealing with the case where the goods or digital content are not accepted by the buyer. The seller has to take reasonable steps in order to protect the good, if the buyer left him/her in the possession of the good. At this point, it is important to make a reference to article 134, which deals with the termination by the seller in case of fundamental non-performance by the buyer, and on article 135 about the termination for delay after notice. According to article 135.2 if the non-performance of the buyer is non-fundamental, the seller has to give in B2C relations an additional time for performance of 30 days to the buyer. From the SME point of view, this clause is more than burdensome. Also in this respect the fundamental question of consumer responsibility and responsible consumer behaviour has to be raised. It is without doubt that one of the core responsibilities of the buyer, apart from the obligation to pay the price of the good, is to collect it. However, article 97 states in an indirect way that not collecting the good is not a fundamental non-performance. Otherwise, the seller would have the right to terminate the contract immediately. Not only this is not the case, but in addition the seller has to allow for another 30 additional days for the consumer's performance[12]. In the meantime, the seller bears costs to preserve the good. Although article 97.3 is providing for the seller to be reimbursed for any of his/her justified costs, after having sold the good the question of what happens with the costs related to the storage, in case the value of the good does not cover them, remains open. For this reason, it would be important to clarify that receiving delivery is a fundamental obligation of the buyer. If receiving delivery is not considered a fundamental obligation, at least the period of 30 days which the seller has to give the buyer in addition for performance before termination of the contract according to article 135.2 must be shortened to a maximum of 14 days.

Article 99 deals with the conformity of the goods and digital content with the contract and article 100 with the criteria for such conformity. It is again not understandable why the CESL has decided not to follow the structure of Directive 1999/44/EC. Article 2 of 1999/44/EC regulates this issue quite clearly and in a user friendly way. From an SME point of view, this is not the case for the CESL. In general, it can be said that it would be useful to put forward under CESL already existing and well established approaches. The approach of 1999/44/EC is already in use and well known for all related parties. If the CESL tries to bring in a new exercise, this could be in practice very confusing for the contractual parties.

4.3. Chapter 11, The buyer's remedies

For SMEs, the provisions related to the buyer's remedies are considered among the most relevant issues of the instrument. The main question in this respect is whether provisions are providing completely free choice to the consumer in B2C relations in case of non-performance, and particularly in case of lack of conformity, or whether they follow the principle of remedies based on the hierarchy. At European level, the approach of hierarchy is provided in article 3 of 1999/44/EC in case of lack of conformity[13]. From the SME point of view, it is not understandable why the proposal has chosen a different approach instead of following the established and well functioning one. The reason behind this choice might be to make the instrument more attractive for consumers. At the same time, this does not mean that the instrument is going to provide more certainty for the consumer. There are often cases, when it comes to the application of remedies by a buyer, that the latter is simply unable to decide which remedy is the appropriate one for the situation in question.

[12] Article 135.2, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

[13] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Often, technical knowledge is also required for the trader to find out which remedy is the most appropriate one. Termination as such can be hardly in the interest of any of the parties already at the first stage.

There are also practical reasons which would make the instrument not attractive for SMEs, if no hierarchy of remedies is guaranteed at all. The aim to make the instrument through the proposed system of remedies attractive but not in all circumstances more legally certain for the consumers, will make the instrument nearly completely unacceptable for the trader. As already stated in the executive summary, not knowing how the buyer might use its choice of remedies will establish such an uncertain situation for the SME that it will not make use of the instrument.

Article 106.1.c) deals with the buyer's right to terminate the contract immediately. Termination should be the last resort in all cases. It can clearly be said that SMEs will be discouraged from using the instrument through this very radical solution. On the second place of the list is the strict regime of article 106.3 a) "*the buyer's rights are not subject to cure by the seller"*. In this context, it is even worse that the buyer does not have any obligation to examine the goods in B2C. Only in B2B relations is the examination of the good required, according to article 121.

Article 114 on the termination for non-performance is also considered from an SME point of view very problematic. It has been already mentioned in relation to article 106 that the termination of the contract should always be the last resort. Article 114.2 puts forward the approach that termination can be used by the consumer in case of non-performance, adding the requirement that the lack of conformity should be not insignificant. However, how "insignificance" should be understood is not exactly clear from the proposal. This means again that this will be left to the interpretation of the courts. From an SME point of view, significant legal uncertainty is to be expected in this respect. In order to decrease this chance, termination of the contract must be at the bottom of the buyer's remedies' hierarchy and be used only as a last resort. In this connection, article 119.2 a) on the loss of the right to terminate makes the situation even worse. According to this provision, in B2C contracts there is no time limit for the consumer to terminate the contract. This means that besides the provisions on prescription, which again are considered too extensive for SMEs, the consumer does not lose his/her right to terminate. Even if he/she becomes aware of non-performance at the beginning of the contractual relation, he/she can enforce his right on termination at least up to one year. This clause is bringing a far too extensive imbalance in the contractual relation. In order to correct this issue, the provision of article 119.1 should apply for B2C sales contracts as well.

It is welcome that article 121 regulates the examination of the goods in contracts between traders. However, two important issues in this respect have to be mentioned. As it was already mentioned above, it is not understandable why this obligation is not extended to B2C contracts as well. Firstly, just because Directive 1999/44/EC does not contain the obligation of examination, it does not mean that the CESL should not introduce it. We have seen, with regard to the remedies of the buyer, that the CESL is looking to establish a different system from Directive 1999/44/EC. At this point, a new approach is clearly necessary, especially since, due to the strict and unbalanced regime of the buyer's remedies, it is not possible to abstain from the examination obligation. Secondly, in B2B relations 14 days might be too restrictive for examination in some cases. In B2B relations, the buyer often needs to examine the good from the technical point of view because of the particularities of B2B contracts. With regards to technically complex goods, 14 days might be not always enough. For this reason, it would be more useful for SMEs to establish a flexible regime, by reference to and taking into account the characteristics of the goods.

Article 122 regulates the requirement of notification of lack of conformity in B2B cases and in this way establishing the same situation as the aforementioned article 121. Here again

the question why the same provision has not been introduced for B2C relations must be asked.

4.4. Chapter 12, The buyer's obligations

As mentioned before, the buyer should be obliged to examine the good and notify the lack of conformity, just as it is foreseen for B2B relations in article 121 and article 122.

4.5. Chapter 13, The seller's remedies

From the SME point of view, the structure of article 132 can be considered critical. The first impression is that this provision seems to protect the seller. Nevertheless, to benefit from this protection SMEs have to fulfil requirements which are practically nearly impossible for them.

One of the main concerns is that most of the times the fact that the buyer is not taking delivery is also combined with non payment. These cases cause the biggest financial and cash flow problems for SMEs. Although it is a legal text, we should not forget the economical background of our times. Not receiving payments is the most typical problem for SMEs, and this jeopardises their existence, especiallyin times of economic crisis. Article 132.2 states that it is the right of the seller to require delivery by the buyer and recover the price "*unless the seller could have made a reasonable substitute transaction without significant effort or expense".* With respect to this requirement, the interpretation of *"significant effort"* should be clarified. The buyer will still have the possibility to prove that the seller could have made a substitute transaction. The requirement of making any kind of substitute transactions with or without effort, in order to recover the price is not appropriate. Especially in the practical reality of SMEs, if an SME has the possibility to have a substitute transaction, it will do so. The possibility of substitute transactions could also have additional financial costs and waste extra human resources. It can be also costly in terms of time to look for substitute transactions, and maybe it would not be worth the effort in some cases. Moreover, in relation to this issue, article 135.2 is requiring that in B2C relations the trader can only terminate the contract in case of non performance of the buyer, if the trader has given an extra 30 days period for performance (see comments under 4.2 as well). This again means that the seller, even if he/she wants to look for a substitute transaction according to article 132.2, has to notify the buyer in advance and has to give him the mentioned additional time for performance. Only after this time has expired can the seller start to look for a substitute transaction. This establishes a clear unbalance in B2C relations.

The requirement concerning substitute transactions should be deleted, since as mentioned above it would bring about an uncertain situation for SMEs, on one hand. On the other hand, it could also lead to legal uncertainty for the consumer, who will try to prove that the SME does not undertake all possibilities to find a substitute transaction. In addition, there will be no clarity about the interpretation of this requirement for none of the parties. Moreover, it is also important to establish, especially in the time of economic recovery, a business environment for SMEs, the backbones of the European economy, which is not slowing down this process. The requirement of article 135.2 with respect to the additional 30 days in B2C relations would definitely undermine this aim. 30 days represent a long time in the life of an SME. This aspect has been already outlined in relation with the Consumer Rights Directive as well[14]. In addition, according to article 97.1, the seller has to protect the good during this 30-day period. This again is bringing more imbalances and unpredictable consequences in the trade relations.

[14] http://ueapme.com/IMG/pdf/1004_pp_consumer_rights_updated.pdf

4.6. Chapter 14, Passing of risk

In general, article 140 is stating that after the risk has been passed to the buyer, he/she is obliged to pay the price. This is the case in B2C relations in general when the buyer "*has acquired the physical possession of the goods"* according to article 142.1. In case of B2B relations, this happens according to article 143 *"when the buyer takes delivery of the goods or digital content or the documents representing the goods".* The buyer only has the right to reject the payment for the price after the risk has been passed, and according to article 140, only if the *"loss or damage is due to an act or omission of the seller".* This establishes a regime of strict liability without taking into account whether the trader has any fault in the case of the act or the omission which cause the loss or damages. This causes a significant imbalance and is an aspect on which improvement is definitely needed from the SME point of view.

In other words: Once the risk has been passed to the buyer, he/she is obliged to pay the full price for the goods even if these goods are damaged or lost. Only in cases where the loss or damage is due to an act or omission of the seller this obligation shall not apply, i.e. when the loss or damage of the goods is due to an act or omission of the seller, the buyer does not have to pay for the lost or damaged goods even though the risk has passed already.

The wording of article 140 CESL (*"...is due to..."*) seemingly only refers to the relevant chain of causation, whereas the question if any fault leading to the mentioned "act or omission" is required for the loss/damage to be attributed to the seller is not taken into account.

Thus, this wording establishes a regime of strict liability without taking into account whether the trader has any fault in the case of the act or the omission which caused the loss or damages. This causes a significant imbalance and is an aspect on which improvement is definitely needed from the SME point of view.

4.7. Chapter 15, Obligations and remedies of the parties (to a related service contract according to Part V)

Article 152 gives the impression that the proposal is trying to ensure the subordinated character of the related services as such through this provision. The approach is welcome. However, the proposed article is not meeting this requirement in an appropriate way. Article 152.1 stipulates that the service provider needs to draw to the attention of the customer if (a) the related service would cost more than originally indicated or (b) "*the related service would cost more than the value of the goods"* and this is known by the service provider. From the SME point of view, additional information on article 152.1 (b) would clearly cause extra burdens. In the everyday reality, if the aforementioned case according to article 152.1 (b) appears and the difference between the amount of the good and the related service is so high, this should be already known from the beginning. If the difference is not high, then it is not relevant. Moreover, there are types of related services which could be more expensive than the good, despite the fact that the service is considered "only" related to the good. For this reason, article 152.1(b) is considered as not necessary.

Article 154 foresees that the customer has to provide access to his/her premises to the trader if it is necessary. This logically would mean that if the customer denies this (for whatever reason), the service provider can make use of his/her remedies according to article 157. However, this should be stated explicitly. Therefore, for clarification reasons, it would be advisable to add an additional paragraph to article 154 in this respect.

Article 156 is dealing with the requirement of notification of lack of conformity in B2B service contracts. In line with article 122.2, it could be suggested to introduce the same (or at least some) period within which notification has to be given by the customer[15]. Since this rule would not be mandatory in B2B contracts, any other timeframe could be negotiated as well. However, it would help to establish a coherent framework for the CESL and to improve the self-standing character of the instrument, as far as this is possible. For the same reasons, it would be also very useful to introduce the same kind of notification obligation in respect of B2C contracts.

According to article 158.1, *"the customer may at any time give notice to the service provider"* that there is no need for performance at all, or of further performance, of the related service. Although article 158.2 (b) states that the customer has to pay the price if there is no reason for termination and in this way it is ensured that the service provider can get paid, in order to establish clear rules it is needed to fix a time limit, instead of what is mentioned in paragraph 1 of article 158. This is needed especially because in B2C relations this rule has a mandatory nature.

[15] 'According to the requirement of notification of lack of conformity in sales contracts between trader the buyer has to notify the seller about the lack of conformity within two years after the good was handed over to the buyer, article 122.2, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

5. CONCLUSIONS

When talking about the Common European Sales Law and in particular about those who are its main addressees and should be its main beneficiaries, i.e. consumers and SMEs, the following key elements should be always kept in mind during the legislative procedure:

- User friendliness
- Legal certainty

The second should be ensured during the legislative procedure by drafting as clear rules as possible. The first should be guaranteed by drafting as simple rules as possible on the content. Moreover, from the SME point of view, the instrument can only be a success if there is a balance between the interest of consumers and the assumed economic benefits for SMEs that decide to use it. At this stage, there are several aspects, including the proposed regime of remedies, on which improvement is needed in order to achieve these goals.

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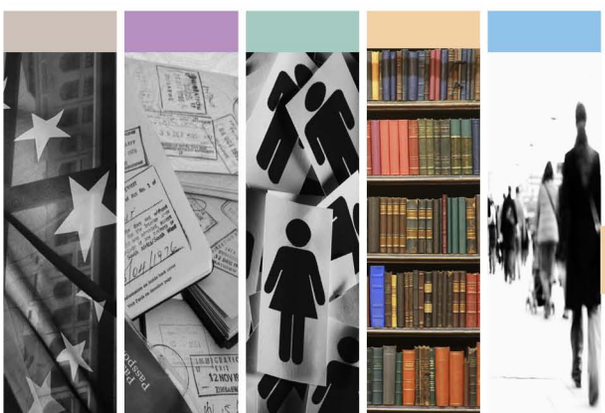

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