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Common European Sales Law: focus on the remedies provisions

NOTE

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The Proposal for a Regulation on a Common European Sales Law: focus on the remedies provisions

NOTE

Abstract

This briefing note provides general comments on the CESL and an overview of the level of consumer protection in the CESL, particularly the unfair contract terms. Furthermore, the note concentrates on the remedies provisions, analysing the legal guarantee provisions and other rights of the buyer from the viewpoint of a consumer organization.

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LIST OF ABBREVIATIONS

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
BEUC	European Consumers' Organisation
CESL	Common European Sales Law
EUCJ	Court of Justice of the European Union
KSchG	Konsumentschutzgesetz (Austrian Consumer Protection Act)
TFEU	Treaty on the Functioning of the European Union

GENERAL INFORMATION

Background

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social, educational, economic, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership and a member to the European consumer organization BEUC. The Federal Chamber of Labour is registered in the transparency register (identification number: 23869471911-54).

1. GENERAL COMMENTS ON CESL

KEY FINDINGS

- The **demand analysis in the Commission impact assessment** is to a large extent lacking in conclusiveness. For example, it is not uncertainty in respect to applicable law, which prevents consumers from concluding a cross-border contract; rather, they are mostly worried about an eventual failure to have the law enforced.
- The **legal basis** of Article 114 TFEU and the compliance with the principles of **subsidiary** and **proportionality** should be questioned.
- The introduction of the CESL would lead to a **complicated mix of several legal systems**, which, combined with the fact that the CESL is new legal territory, will entail significant legal uncertainty.
- A **free, well-informed choice by consumers of the 28th Contract Law regime under the Regulation** cannot take place: they are only left with the option of deciding against a purchase or accepting the possibly unfavourable CESL.

1.1. Demand analysis of the Commission

In the draft of the Commission, the requirement for a proposal on a Common European Sales Law was above all justified on the basis of high local transaction costs incurred by companies. The Commission states in a fact sheet accompanying the proposal that "nearly 99 % of EU companies […] cannot afford to trade across EU borders because selling abroad means adapting sales contracts for up to 26 different legal systems"[1]. These figures refer to a Eurobarometer survey conducted among 6,465 managers of enterprises, which are either already engaged in, or plan, cross-border activities. However, it is worth to take a closer look at the survey: only 10 % of the surveyed enterprises stated that difficulties with foreign contracts laws would be a great obstacle for their cross-border activities. 54 % did not regard this as an obstacle and another 17 % only confirmed a minimal impact[2]. The same survey reveals that managers rate legal obstacles in almost the same way as other obstacles, such as the question of different tax regulations, languages, cross-border delivery and even cultural differences. A differentiated account of the findings by the Commission would therefore be most welcome.

In addition, the Commission refers to another Eurobarometer survey, according to which 44% of consumers said that "they do not buy abroad because they are uncertain of their rights"[3]. However, the fact that in the same survey 59 % of consumers agreed that they were not interested in cross-border shopping, because they were worried about falling victim to scams or frauds, has not been mentioned[4].

Practical experiences also show that there is an array of completely different concerns apart from those related to applicable law. Such concerns include the uncertainty in respect of

[1] European Commission, A Common Sales Law for Europe, http://ec.europa.eu/commission_2010-2014/reding/pdf/news/20111011_en.pdf.
[2] Flash Eurobarometer 321, European contract law in consumer transactions, Summary 7, http://ec.europa.eu/public_opinion/flash/fl_321_sum_en.pdf.
[3] An optional Common European Sales Law: Frequently asked questions, MEMO/11/680, 3, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/680&format=HTML&aged=1&language=EN&guiLanguage=en.
[4] Flash Eurobarometer 299, Consumer attitudes towards cross-border trade and consumer protection, Summary 6, http://ec.europa.eu/public_opinion/flash/fl_299_sum_en.pdf.

unknown providers, language barriers, data security problems, the fact that not all parts of the population have access to the internet, the more difficult out-of-court settlement and judicial enforcement across the border, as well as the fear of fraud based on the increase of dubious online offers.

Finally, the – enormous – predicted additional revenue of EUR 26 billion generated by EU-wide trading has to be put into question. If at all, there might be a shift from national trade towards cross-border trade. The trading volume remains the same, as people can only spend what they have available.

1.2. Legal basis

The European Commission has chosen Article 114 TFEU as the legal basis. Art. 114 TFEU enables "adopting the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". Hence, Art. 114 TFEU is aimed at removing differences relating to national legal systems and at preventing any disruption of the proper functioning of the internal market respectively distortions of competitions. It appears extremely doubtful whether the implementation of an optional instrument, which does not affect national law, will actually perform an "approximation" of legal provisions, as defined in Art. 114 TFEU. Art. 352 TFEU, which requires a unanimous decision by the Council, appears to be a more suitable legal basis.

The Austrian Bundesrat also stated in a subsidiarity objection on this subject that "there is no evidence of the added value to be obtained through the creation of a 28th contract law regime, as those applying the law would in future have to deal not only with two different legal regimes, i.e. the counterparty's and their own, but with a third one as well "[5].

1.3. The problematic nature of an optional instrument

However, there are also concerns of principle against a unification of laws by way of an optional instrument: it cannot be that further harmonisation of national laws depends on whether business will choose the optional regime or not. In this context, mandatory rules – as minimum standards and in some areas fully harmonised standards – will also be in the future indispensable across the EU. From our point of view they will represent the more suitable way to drive forward further harmonisation at EU level in respect of civil and consumer protection law.

There can also be no question that economic considerations will influence the decision whether one is for or against the CESL. Businesses will not be very interested in applying the CESL in practice, if it provides a high level of consumer protection. Apart from that, the structure and design of an optional instrument provide businesses with the opportunity of indulging in "cherry picking": it allows enterprises to systematically exploit the legal advantages based on the co-existence of different legal systems by deciding once in favour of the CESL and another time in favour of national law, depending on how high the level of protection is in the consumer's country compared to that of the CESL. Such consideration

[5] Austrian Parliament, European Sales Law: http://www.parlament.gv.at/PAKT/AKT/SCHLTHEM/SCHLAG/383Subsidiaritaetsruege.shtml.

has to be feared in particular in connection with the very different levels of protection within the EU in respect of legal guarantee. Hence, on the one hand, the implementation of the CESL in form of an optional instrument will come closer to depriving consumers of better national consumer protection standards. On the other hand, even the implementation of an optional instrument cannot ensure that consumers will be able to enjoy an, at best, high level of protection of the CESL. For that reason, an added value for the consumer, which is part of implementing the CESL, cannot be recognised.

1.4. Mix of legal systems

In spite of the alleged clarity, the implementation of the CESL results in a complex and confusing mix of different legal systems. On the one hand, this has its origins in the fact that the CESL shall only regulate direct contract law issues, and not general legal institutions, such as representation/proxy, legal capacity or unlawfulness. The applicable law would again be subject to Rome I Regulation - either by choice of law or by specified conflict of law connections. Hence, some parts of such a contract would have to be evaluated and treated in accordance with aspects and principles of EU law, whilst other parts would be subject to national law. In some other areas – for example in respect of the question as to how to treat the unsolicited supply of goods – there is confusion whether these are unregulated issues, to which the corresponding law in accordance with Rome I will apply, or whether they are deliberate omissions, therefore regulating the issue in a definite manner.

On the other hand, there will also be a complicated situation with regard to the interaction with the Consumer Rights Directive. The latter has only just come into force and shall be implemented by the end of 2013. It would have been sensible to wait, first, for certain practical experiences to be drawn from this Directive and for a corresponding evaluation, before carrying out a new and extensive revision of this legal issue. Apart from that, the Consumer Rights Directive creates to a large extent full harmonisation. Hence, the legal issues that are essential for the conclusion of a contract, in particular all pre-contractual and contractual information requirements and any other requirements concerning the conclusion of a contract, which traders come across in cross-border trading, but also the right to withdraw, all modalities relating to its exercise as well as the reverse transaction of the contract after withdrawal, will be fully harmonised EU-wide. However, it has not been possible to find a common denominator in respect of other parts of the civil law aspects of the consumer acquis (Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, Directive 1993/13 on unfair terms in consumer contracts) within the scope of the negotiations in respect of the Consumer Rights Directive. Now, the draft of a Common European Sales Law just takes up these disputed regulations without any significant re-evaluation, and in doing so ignores a difficult political decision-making process as well as the reservations of the Member States.

1.5. Problematic nature of the free choice of law

The CESL shall be applied to a contract if it has been chosen as a law regulation by the parties to the contract: it has to be pointed out that a free, well-informed choice of the 28th contract law regime by consumers cannot take place. In practice they are only left with the option of deciding against the purchase. If consumers want to purchase a product, they have to accept the possibly unfavourable CESL. The argument according to which consumers shall always have a choice between national regulations and the CESL rather fails to take into account the everyday reality: who wants to look into issues of applicable law when making a simple purchase, such as buying books, CDs, textiles or a camera online? Advertising the Common European Sales Law as a “reliable quality mark” may turn

out to be deceptive, as in the end the details and the terms and conditions of the concrete contract will be decisive for its potential for conflict.

This shows once again that Rome I provides for better consumer protection, as its provisions correspond better to real life conditions. Consumers do not have to worry prior to concluding a contract which applicable law is better for them. The safety net of the Art. 6 Sec. 2 has been set up just for the case of conflict. If, by way of exception, no choice of law has been made, consumers can at least be certain that they will be able to cope with an eventual problem on the basis of the law of their native country with which they are familiar, without the requirement and the additional effort to familiarize themselves with an unknown legal system.

In addition, in particular with regard to cross-border online trading, there is already quite an array of reference data, which the Austrian Chamber of Labour's consumer protection experts are making available to consumers to prepare them for the conclusion of a contract on the internet: for example, consumers are to check whether a provider discloses his/her full address on his/her homepage, whether his/her product or service is adequately described or whether questions remain unanswered, whether there are references to hidden costs, whether large advance payments are requested and whether secure forms of payment are provided. To lumber consumers, on top of all these, with the requirement to check the issue of the best applicable law might in the end turn out to be counterproductive for cross-border trade.

1.6. Overload of the EUCJ

One of the logical consequences of implementing the Common European Sales Law is the significant requirement of clarifying jurisdiction, a process, which will take years and decades. All legal terms and institutions are new; some of them are still vague and have to be refined through a legal framework by the EUCJ. In this context, one must also raise the question concerning the limits of the capacities of the Court of Justice, notably ther human resources and financial endowment of the EUCJ.

1.7. Potential effects on other contracts

Which impact respectively negative consequences the CESL project might have on other contract types, such as employment or rental agreements, has not been considered or included at all. However, it is to be feared that those general contract law provisions, which will form the basis of purchase contracts, will be applied to the entire European contract or civil law as a next step. A particularly sensitive aspect would be a direct transfer to the employment law sector. Above all, we see a problem in reducing the short prescription period.

2. LEVEL OF CONSUMER PROTECTION IN THE CESL

KEY FINDINGS

- The CESL is **lacking a consistently high level of consumer protection**.
- In particular in respect of the **unfair terms**, the CESL is far less favourable for Austrian consumers than the current legal situation.
- From the viewpoint of consumers, other significant deteriorations can be found, for example, in respect of the **prescription period**, the provision on **unexpected or uneconomic costs** as well as those concerning **modified acceptance**.

2.1. Deterioration of the level of consumer protection at the example of unfair contract terms

The provisions on unfair contract terms in respect of the relationship between consumer and trader contained in the CESL are based on the existing Directive 13/1993 on unfair terms in consumer contracts. As this Directive is a minimum harmonisation directive, Austria has rightly been able to maintain its far more consumer-friendly and stricter law. Concerning the unfair contract terms, the implementation of an optional sales law instrument would now result in a drastic reduction of the level of consumer protection for Austrian consumers wanting to make cross-border purchases. More particularly, in respect of the following provisions, the Austrian level of consumer protection is significantly higher than that provided by the provisions of the CESL:

- **Duty of transparency**: In its Article 82, the CESL requires that contract terms have to be drafted in plain and intelligible language. However, it is entirely possible that individual clauses are legible and intelligible, but that their context is difficult to recognise, as they might have been used in different places or are “hidden” somewhere else. The Austrian Supreme Court of Justice has established a comprehensive legal framework, which specifies the concrete obligations linked with the duty of transparency. It must now be feared that this broad understanding of the duty of transparency does no longer apply to contracts based on the CESL. What is even more serious in this context is the fact that lack of transparency does not render a clause unfair per se and thereby ineffective, but the issue of transparency has been made part of the unfairness control, in which apart from transparency other criteria are also included (Article 83).

- **Validity control**: § 864a Austrian Civil Code [ABGB] lays down that unusual provisions in pre-formulated General Terms and Conditions and contract form sheets will not become part of the contract when they are unfavourable for consumers and if consumers cannot be expected to anticipate this regulation. The CESL does not include a similar provision to provide protection against being caught off-guard by unexpected terms and conditions.

- **Individually negotiated terms**: Austria has a large number of banned terms (§ 6 Sec. 1 Consumer Protection Act [KSchG]) in respect of action to be taken against unfairness, independently of whether these terms have been pre-formulated or individually negotiated. The CESL contains sporadic provisions in respect of

individually negotiated contract terms, for example in Article 62, which deals with the preference for such terms. On the other hand, Chapter 8 on unfair contract terms between a trader and a consumer only refers to pre-formulated terms. Austrian consumers, who are only able to undertake cross-border transactions on the basis of the CESL contracts, are definitely in a less favourable legal position.

- **Content control:** Nor does the structure of the content control on the basis of the general CESL provision (Article 83) meet the high Austrian standard of protection concerning this issue. The unfairness control shall take a wide range of different circumstances into account, such as the requirement of good faith and fair dealing as well as all aspects of the conclusion of the contract, the other contract terms and the terms of any other contract on which the contract depends. This implies certain relativisation, as this approach would for example also create discrepancies between more or, to a certain degree, less informed consumers.

  Only the terms of the Black List in Article 84, which includes eleven banned terms, are always considered unfair. Article 85 of the CESL describes a Grey List of banned terms, where unfairness is only presumed, but which leave the consumer to bear the burden of proof. The Black List contains eleven banned terms, while Austrian law contains a significantly longer list of per se ineffective terms, including terms which are highly relevant in practice, such as on automatic contract renewals in case of normally fixed-term contracts, shifting the burden of proof at the expense of consumers, exclusion or restriction of retention or avoidance rights or price or performance changes after the contract has been concluded.

  Compared to Austrian law, many terms banned by the CESL are not only formulated differently, but they also provide consumers with a lower level of protection. In this context one should mention the banned term in respect of automatic contract renewal. According to Austrian law, in order for an automatic contract renewal to become effective, a trader has to comply with several requirements. The trader is, more particularly, obliged to alert consumers before the automatic contract renewal comes into effect, in order to grant consumers appropriate time to declare that they are not interested in renewing the contract. Furthermore, unfairness is not only presumed but directly attributed to such a term, and therefore the trader is unable to prove otherwise.

  Something similar applies also to subsequent price changes. In respect of the subsequent performance changes mentioned in Article 85 (j) the CESL also makes it easier for traders than the corresponding Austrian law clause.

2.2. Deterioration of the level of consumer protection in other areas

Apart from those deteriorations concerning unfair contract terms, reference should also be made to three further examples which represent a significant deterioration for consumers:

- **Prescription period concerning damages**: The general prescription provisions also result in a significant worsening of the situation for Austrian consumers. The short prescription period in the CESL is 2 years. However, in Austria compensation claims only become statute-barred 3 years from knowing the damage and the party causing the damage (exception: outstanding debts of traders). Apart from that, the

long limitation period is normally 30 years and not 10 years, as provided for by the CESL. In the CESL, the long prescription period for compensation begins from "on the time of the act which gives rise to the act" (Art. 180 Sec. 2), while in Austria the commencement point is when the damage occurs.

- **Estimate of costs:** Article 152 of the CESL is also not without problems. No differentiation - as under Austrian law - is made between a binding and a non-binding estimate of costs with regard to significant overruns of costs. Apparently, a warning given by the trader always enables him/her, even in the case of a previous binding estimate of costs, to pass such cost overruns on to consumers. Apart from that, it is not required that these extra costs, in order to be passed on the the consumer, - as under Austrian law - are considerable and could have been expected, but that they are either considerable (in the sense of a disproportionality of associated services to the value of the goods or digital content) or unforeseeable. This actually also renders § 5 (2) KSchG obsolete, which stipulates that, in a contractual relation between consumer and trader, an estimate of costs is binding, unless there is express provision to the contrary.

- **Modified acceptance:** It is also necessary to scrutinize individual provisions of the CESL in connection with the conclusion of a contract. Article 38, for example, regulates that a contract will also be concluded when the acceptance includes additional or deviating terms provided that do not materially alter the terms of the offer. Only if the other contract partner objects without undue delay will this declaration be treated as a new offer. It is unreasonable to impose such regulations on an average consumer, as it cannot be expected that he/she will carefully examine the small print to detect whether it contains something which was not originally agreed.

3. PROVISIONS ON REMEDIES

KEY FINDINGS

- In contrast to other issues (see section 2), an effort has been made to achieve a better level of consumer protection for **legal guarantee rights**.
- From the consumers' point of view, the **free choice between remedies of legal guarantee** as well the fact that the Commission did not opt for setting a **notification period** within which the consumer must inform the seller of any lack of conformity has to be welcomed.
- However, there is still a need for clarification, or rather improvement, in respect of the regulations concerning the **commencement of the prescription period**, the **burden of proof** as well as the **conformity of the goods**. However, the different levels of protection in respect of **associated service contracts** present a problem.
- All other legal remedies reveal significant gaps: the CESL does not include a remedy, which corresponds to the Austrian remedy of ***laesio enormis*** (in case of reduction of the real value by half). Both the **avoidance on grounds of error** and the **right to withhold performance** do not meet the Austrian level of protection.

3.1. General comments on the remedies of the buyer

Whilst the CESL, by incorporating to a large extent the provisions of Directive 83/2011 on consumer rights, is redundant in view of the largely fully harmonised Directive text, and whilst the planned regulations of abusive terms of the CESL might result in a significant deterioration of the situation in particular for Austrian consumers, having a closer look at the remedies available to the buyer, once the contract has been concluded, show a different picture. The legal guarantee rights show that an effort has been made to provide an improved level of consumer protection compared to Directive 44/1999 on certain aspects of the sale of consumer goods and associated guarantees. However, taking all other possible remedies of the buyer into account, the result is once again rather ambivalent.

3.2. Legal guarantee

3.2.1. Obligation to notify defects

With regard to the legal guarantee rights of the buyer it is welcome that the Commission did not opt for setting a period within which the consumer must inform the seller of any lack of conformity, as prescribed in Directive 44/1999 on certain aspects of the sale of consumer goods and associated guarantees. In Article 5 Section 2, Directive 44/1999 provides Member States with the option that “the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity”. However, from our point of view, the implementation of such an obligation would entail obvious disadvantages for the consumer. In general, consumers have a great interest in notifying any defects as soon as possible, as they want a product that is in working order. What is usually time-consuming is the fact that the consumer has to obtain technical and legal knowledge in order to clarify and correctly assert a legal guarantee claim. This should be added to the fact that consumers often overlook that they have to secure evidence when asserting their rights. Hence, implementing an obligation to

notify defects within a certain period always penalises the inexperience and unawareness of consumers.
Otherwise, one should refrain from raising formal obstacles in the enforcement of consumer rights, which will add extra conflict potential to a legal matter such as the legal guarantee right, which is already brimming with complex and difficult issues. Therefore, Austria too has refrained from doing so when implementing Directive 83/2011.

3.2.2. Free choice of remedy

According to the CESL, the consumer shall be able to freely choose right from the start all legal remedies of legal guarantee – repair, exchange, price reduction and modification. On the contrary, Directive 44/1999 gives preference to improvements. There may be many reasons in practice, where consumers prefer improvement or exchange to being back to square one and being provided with a completely new product. Due to their particular quality, for example, some items cannot be easily substituted by another product; in turn, some purchase decisions may entail significant time and effort, which one does not want to go through again; long delivery times can also count against choosing another provider or another product. It is nevertheless important to leave the decision, as to which remedy is the right one for the respective situation, with the consumer. Particularly in case of cross-border contracts it might be more sensible for consumers to immediately ask for a price reduction or a new product when a defect occurs. These remedies are far less complicated and easier to handle if there is a large distance between seller and buyer.

3.2.3. Flexible commencement of prescription period

The prescription period is also relevant in the context of remedies. The prescription period continues to be 2 years; however, it has a flexible start: it begins with the recognisability of the defect. Hence, hidden defects may possibly be claimed long after the purchase.

However, one has to put into perspective that the prescription period also begins when the buyer “could be expected to have become aware” of the defect. This does not provide a clear definition for a limitation: what are the circumstances where one has to assume that the consumer would have been obliged to obtain relevant knowledge? Does it remain without consequences, that is, does the prescription period commence on the day of purchase, for example, when a consumer buys a pair of skis, but is for private reasons unable to ski during two consecutive winter seasons and only establishes a defect in the third season? Or are we talking about a kind of obligation on behalf of the consumer to test the item as soon as it has been purchased for its good working order?

3.2.4. Relevant time for establishing conformity

The issue of the burden of proof must also be taken into account when dealing with remedies. From the point of view of consumers, the burden of proof is a very important issue. From this perspective, it is difficult to understand why the CESL does not include an extension of the presumption period for defects (Art. 105 Sec. 2), making the burden of proof easier for consumers. The presumption period for the existence of a defect provided for in the CESL is fully oriented towards the minimum standard of Directive 44/1999; it begins on the date of purchase and is still 6 months.

This in turn devaluates the flexible commencement of the prescription period. It might easily happen that years after the purchase the consumer is no longer in a position to prove that the defect occurred is covered by legal guarantee.

3.2.5. Conformity of the goods

Inaccuracies and ambiguities in respect of this issue have also crept in compared to Directive 44/1999. For example, Article 100 lays down the criteria for conformity of the goods. With regard to public pre-contractual statements and concrete statements made to the contract partner, this Article refers to Article 69. However, if certain requirements are met, traders are not bound by such statements: for example, if they have not made the statements themselves, if they were not aware of them or if they could not be expected to be aware of them. In accordance with Directive 44/1999, the burden of proof regarding these circumstances lies with the trader. However, this has not been made clear in Article 69; this distribution of the burden of proof should under no circumstances be changed.

Further, the criterion for conformity of the goods does not apply, if goods are not suitable for the purpose requested by the consumer on concluding the contract. However, if the circumstances show "that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skills and judgment" (Article 100), the seller is no longer obliged to take action for repairing non-conformity. Directive 44/1999 contains slightly different criteria. It requires concrete knowledge of the lack of conformity on behalf of consumers, or at least that they could not reasonably expect the criteria for conformity of the goods to be met. With regard to this point, the formulation of the Directive is more precise.

3.2.6. Legal guarantee in respect of associated service contracts

A differentiation concerning the legal guarantee is made with regard to service contracts, which are associated with purchase contracts and thereby fall within the scope of the CESL. The same favourable legal guarantee terms apply if the service contract concerns the incorrect installation as defined in Article 101; but not if it concerns other service contracts. In this case another regime applies, for example the trader shall be given the opportunity to "cure" the situation (Art. 155 Sec. 4 lit. a); hence, he/she will be granted a privilege of improvement. Apart from that, an obligation to notify defects coupled with a loss of rights after a certain period has been imposed: consumers lose their legal guarantee rights, if they do not meet this obligation within a "reasonable period". These different levels of protection are incomprehensible. Why are consumers not deemed to be worthy of protection in the same way, in particular where purchase and service contract are closely linked? Furthermore, such double standards are difficult to understand for legal practitioners and especially for consumers, which makes them difficult to comply with.

3.3. Other remedies of the buyer

3.3.1. Laesio enormis

The CESL requires that the essential part of the contract and thereby the price are not subject to any content control. With regard to excessive prices, the CESL only provides a legal remedy, a provision of unfair exploitation in Article 51. This only applies to very extreme cases of shifting the balance between performance and price, and involves a number of additional requirements on behalf of the disputing party.

Austrian law knows another legal remedy against unjustified prices, the *laesio enormis* or reduction of the real value by half. However, it can only be applied if price and performance are grossly disproportionate; however, it has the advantage that no other subjective elements have to exist on the side of the disputing party. With regard to contracts, which

were concluded on the basis of the CESL, consumers would no longer be able to assert this right if they had concluded contracts with very inflated prices. In practice, the legal remedy plays an important role in the relation between a consumer and a trader, in particular in respect of dubious traders - a role that the Austrian Chamber of Labour does not want to be jeopardised.

3.3.2. Avoidance on grounds of error

The CESL will make it more difficult for consumers to avoid the contract on grounds of error, as they have to notify the trader's error. The period for doing this is 6 months; in case of malice, threat and violation of moral principles it is 1 year, but we know from experience that such formal requirements in the relation between consumer and trader are often at the expense of uninformed consumers. In Austria, a "notification" of avoidance on grounds of error is not provided for. The right can be asserted within 3 years in case of simple error, and within 30 years in case of malice or threat. The decision whether the contract is cancelled because of error or whether the contract will be adjusted is determined by the CESL on the basis of whether the reason for the dispute only refers to "individual contract terms". In turn, this approach is "balanced", if retaining the contracts would not be reasonable for the disputing party. The Austrian solution of a differentiation between a significant and an insignificant error, depending on whether the error refers to a main issue of the conclusion of the contract or only to a side issue, is less laborious and more accurate.

3.3.3. Right to withhold performance

According to Article 113 Section 3, the buyer is only entitled to "withhold performance only in relation to that part which has not been performed". Hence, a relation to the degree and extent of the non-fulfilment is created for exercising the right of retention. The right of retention of the CESL is therefore far less extensive than in Austria. The Austrian consumer may – for example, in case of inadequate service or defect products – always retain the entire amount. The only limit is the prohibition of acting contrary to good faith, i.e. retaining the entire amount would be excessive in cases where a significant imbalance exists between the services/products owed and the amount retained. Structured in that way, the right of retention in Austria is one of the most efficient legal instruments, which is available to consumers to put pressure on traders.

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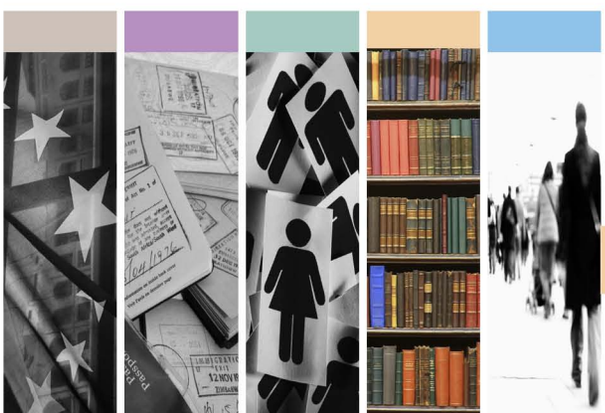

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