

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**The proposal for a
Regulation on a Common
European Sales Law:
provisions on remedies**

NOTE



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LEGAL AFFAIRS

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NOTE

Abstract

This note contains an analysis of the remedial system under the proposal for a Regulation on a Common European Sales Law and some suggestions for possible amendments, focusing in particular on the delivery of goods not conforming to the contract, in line with the position of the German Federal Bar.

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CONTENTS

List of abbreviations	4
Executive summary	5
1. The system of remedies	6
2. The delivery of non-conforming goods	8
3. Technical and linguistic shortcomings	10
4. Some general remarks	11
5. CONCLUSIONS	13

LIST OF ABBREVIATIONS

- B2B** Business-to-Business
- B2C** Business-to-Consumer
- CESL** Common European Sales Law (proposal)
- CISG** Convention on the International Sale of Goods

EXECUTIVE SUMMARY

The successful implementation of an opt-in instrument like the Common European Sales Law (CESL) depends above all on its acceptance by the prospective users and is strongly influenced by its appreciation in academic circles. Therefore, apart from agreeing to the intrinsic cornerstones of the instrument, dogmatic coherence and reasonably accessible, consistent orientation are the prerequisites with which the CESL should comply, and which will be decisive for the success or the failure of the CESL.

From a practitioner's perspective, the touch-stone of any sales law is the regulation of the remedies to which one party can resort if the other party does not meet the expectations established by the sale contract. This is true in particular with regard to the remedies of which the buyer may avail himself in case the seller delivers non-conforming goods. This outline will therefore focus on the remedial system of the CESL the buyer has at hand in case of lack of conformity of the delivered goods.

1. THE SYSTEM OF REMEDIES

The buyer's remedies summarized in Art. 106(1) CESL just like the seller's remedies outlined in Art. 131(1) CESL reflect in general European as well as international standards.

The remedy of 'price reduction' applies in any case of non-conforming performance (Art. 120(1) CESL) and is not restricted to the delivery of non-conforming goods. This corresponds to modern trends and expands the possibilities of the buyer, if the seller can rely on an excused non-performance (Art. 88 CESL), and therefore is exempt from paying damages (Art. 159(1) CESL). However, a special challenge will be to apply the mechanism of proportionate price reduction provided by Art. 120(1) CESL if the non-conforming performance is not at the same time a delivery of non-conforming goods.

Whether the buyer's right to withhold his/her performance under Art. 106(1)(b), 113 CESL should be included in the list of remedies or rather be stipulated as a provision common to the obligations of the seller and buyer is more a question of convenience than one of academic theory. However, the remedies 'performance', 'termination', 'price reduction' and 'damages' compensate the non-performance of the seller; in contrast, the remedy 'withholding performance' operates on a different level as it only leads to a suspension and puts the contract "on hold". Since the buyer rightfully withholding his/her performance cannot be reproached with not performing his/her obligations - or in other words the unilateral suspension by the buyer does not trigger any remedy of the seller -, the right to 'withhold performance' seems to be better placed in the chapters covering the seller's and the buyer's obligations or in the common chapter on General Provisions. Furthermore, the right of the buyer to withhold his/her performance seems to make sense only as long as the buyer has a right to require performance by the seller. Once the buyer has exercised a remedy not compatible with performance by the seller ('termination', 'price reduction' and 'damages instead of performance') his/her right to 'withhold performance' merges into the respective remedy. Finally, when the seller exercises the right to withhold performance, this right is lost if the buyer provides adequate assurance or security (Art. 133(2) CESL). However, Art. 120 CESL does not entitle the seller to provide adequate assurance or security in order to avert withholding performance by the buyer. A reason for this differing treatment is not clear, since there are situations where providing assurance or security by the seller is in the interest of both parties.

According to Art. 106(4) CESL the buyer is barred from requiring performance if the seller's non-performance is excused. Unlike the other remedies, requiring performance often becomes less attractive as time passes by. However, finding out whether the seller's non-performance is excused usually is disputed and takes some time. Therefore, the buyer should be entitled to avail himself/herself of the remedy of requiring performance irrespective of whether the seller's non-performance is excused or not. The same applies with regard to an impossibility or unlawfulness of performance (Art. 110(3)(a) CESL). If the seller remains not performing for whatever reason, the buyer will most often claim damages. In this context it will in any case be scrutinized whether the non-performance was excused or not (Art. 106(4), 159(1) CESL). In other words, the remedy of 'requiring performance' should be eliminated in Art.106(4) CESL and excused non-performance (Art. 88 CESL) should be restricted to the remedy of damages.

The right to require performance includes replacement of the goods (Art. 106(1)(a) CESL). Whereas the remedy of termination is applicable only if the breach by the seller is fundamental (Art. 114(1) CESL), the right of the buyer to demand replacement of the goods is not restricted in any such way. Bearing in mind that a replacement of the goods usually requires more endeavours by the seller than a termination of the contract by reason of the delivery of non-conforming goods, there seems to be an inconsistency between the conditions for exercising these two remedies. The requirements set out in Art. 114 CESL

should therefore apply also with regard to the remedy of performance in the form of replacement of the goods.

Unfortunately, even though Art. 106 CESL seems to give a résumé of the remedies the buyer can avail himself of in a sales contract or a contract for the supply of digital content, there are further remedies regulated outside Chapter 11 CESL entitled “The buyer’s remedies”. Art. 2(2) and Art. 29(1) CESL establish liability “for any loss” caused to the other party in case the respective obligations are not complied with. Apart from creating obligations leading to legal uncertainty to an extent which will most probably not be accepted by the business community, these provisions do not give any indication as to what is their relation to Art. 106(1)(e) CESL and to Chapter 16 CESL. Could the party liable pursuant to Art. 2(2) or Art. 29(1) CESL rely on an excused non-performance under Art. 159(2) CESL? Would the debtor have to compensate only the foreseeable loss under Art. 161 CESL, or is he liable “for any loss” according to Art. 2(2), Art. 29(1) CESL? These and other questions remain unanswered and turn the field of remedies into a rather unpredictable, “swampy ground”. This is even more the case as Art. 2 CESL is mandatory and does not permit any modifications by the parties (Art. 2(3) CESL). Chapter 5 CESL (Defects in consent) adds even further uncertainty. If the seller delivers non-conforming goods, then - apart from the remedies afforded by Art. 106 CESL - the buyer will very often be able to invoke mistake and thus be entitled to avoid the contract under Art. 48 CESL, and to claim damages under Art. 55 CESL. Here again various questions arise regarding the relationship of ‘avoidance’ based on Art. 48 CESL and ‘termination’ according to Art. 106(1)(c) CESL, or damages under Art. 55 CESL and damages regulated in 106(1)(e) CESL.

Finally, the CESL does not give any indication as to what is the relationship of the contractual remedies provided by the CESL to extra-contractual claims based on national law. According to German, Italian and Spanish law the buyer may found his/her claim on the contract and additionally on an extra-contractual basis (“Anspruchskonkurrenz”). With certain limitations this is also possible under Austrian law (“einwirkende Anspruchskonkurrenz”), whereas the French and the Estonian law follow the principle of “*non cumuli*” which excludes resorting to extra-contractual grounds if there is a contract between the parties. It does not need much fantasy to imagine that the same sales contract may be subject to different findings depending on which is the national law applying outside the ambit of the CESL. However, the leading idea of a uniform law is to avoid different results and to clear the way for a uniform assessment. If this outcome is not achieved, the CESL might disappoint the users.

2. THE DELIVERY OF NON-CONFORMING GOODS

Section 3 of Chapter 10 CESL sets out the criteria for the conformity of goods and digital content. Art. 100(g) CESL requires that they possess the qualities and capabilities “as the buyer may expect”. Regarding accessories and instructions, Art. 100(e) CESL refers to what “the buyer may expect to receive”. Thus, first, the relationship between the individual paragraphs of Art. 100 CESL is uncertain, and this uncertainty even enhanced by the use of the copula “and”. Second, focusing on the expectations of the buyer also contrasts with the “new approach” applied in EU product regulations during the last ten years based on the principle that a product put on the market in conformity with the laws existing in that market as a general rule has to be accepted in the other economies as well. The expectations of the buyer are a reasonable landmark in B2C-transactions, but are not suitable in B2B-business not restricted to customers situated in just one specific country. Following the principles underlying Art. 93 CESL and Art. 4(1)(a) Rome I-Regulation the stress in B2B-sales rests with the seller and the legal setting surrounding him/her - and not on the buyer. This should be the general guideline regarding the conformity of the goods in B2B-contracts under the CESL, too. The mere possibility afforded by Art. 99(2) CESL to agree “otherwise” is not sufficient, because an individual agreement will never change the general guideline.

According to Art. 104 CESL the buyer’s actual or implied knowledge of a lack of conformity of the goods to be delivered exempts the seller from liability for the defect. But this rule applies only in contracts between traders. Indeed, unlike commercial parties it seems fair that a consumer should not lose his/her remedies if the seller contends that the buyer “could not have been unaware of the lack” (Art. 104 CESL). However, why should the consumer not be barred from remedies if he/she knew about the lack of conformity and nevertheless accepted the goods with the lack when concluding the contract? Establishing such a rule is clearer and more unequivocal than relegating the parties to an agreement to modify the rules of the CESL on conformity of the goods, in particular bearing in mind that the relationship between the individual paragraphs of Art. 100 CESL is unclear and therefore an all-embracing modification would be required to be on the safe side.

In sales contracts between traders the buyer has to comply with the requirements of examination of the goods (Art. 121 CESL), and of notification of a lack of conformity (Art. 122, Art. 106(2)(b) CESL). Without going into too much detail four aspects deserve a short comment:

- The buyer seems to be obliged to examine the goods also with regard to third party claims or rights referred to in Art. 102 CESL. Such an obligation puts a severe burden on the buyer without this being justified by balancing the interests of both seller and buyer.
- Art. 121(1) CESL states that the period of examination shall not exceed “14 days”. Even though this seems to be a tolerant approach taking into consideration international practice, a rigid limit of 14 days does not fit the needs of business practice. Instead of compelling traders to agree otherwise, Art. 121(1) CESL should stipulate only a reasonable period and leave it to the parties to concretize or limit this period if they deem appropriate.
- The time period during which the notice of lack of conformity has to be given starts to run “when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later” (Art. 122(2) CESL). This provision leads to absurd results and gives the buyer ample possibilities to manipulate the requirement of notification. The moment when the goods are

supplied is of no importance if the buyer is not aware of the lack or could not be expected to have discovered it. In contrast, a reasonable starting point for the period of notification is when the buyer has discovered the lack or ought to have discovered it, but, in contrast to the rule in Art. 122(2) CESL, whichever is earlier should apply.

▪ Art. 122(1) CESL obliges the buyer to give notice without specifying which party bears the risk for the timely conveyance of such notice. According to Art. 10 CESL a notice becomes effective when it reaches the addressee. This rule is acceptable as a general guideline, but is not appropriate for the special situation addressed in Art. 122 CESL. This situation is characterized by the fact that the seller has breached the contract of sale by delivering goods which do not conform to the contract. Therefore, in accordance with Art. 122 CESL the buyer is bound to give notice of the lack of conformity. However, there is no justification why the buyer should shoulder in addition the risk of a timely conveyance of this notice which is caused by the seller's breach.

In sales contracts between traders the seller is to be given the chance to cure the lack of conformity before the buyer is entitled to exercise a remedy (Art. 106(2)(a) CESL). However, there is no convincing argument why the seller in a B2C-transaction should not avail himself/herself of this chance. The legitimate interest of the buyer is to receive goods conforming to the contract. If the seller is in a position to accomplish this by curing the lack of conformity within the limits set up by Art. 109 CESL, the buyer's interests are satisfied more quickly and more conveniently than if he/she is referred to the remedies which require an active exercise and the buyer usually is not familiar with. Furthermore, there is no compelling reason why the 'right to cure' should only come into being after the buyer has notified the seller of the lack of performance. It is in the interest of both parties that the seller, respecting the requirements set out in Art. 109 CESL, cures any lack as soon as he/she realizes his shortcoming, irrespective of whether the buyer is already aware of it or not.

3. TECHNICAL AND LINGUISTIC SHORTCOMINGS

Art. 99(2) CESL sets out certain requirements that the goods have to comply with unless "the parties have agreed otherwise". There are other provisions which expressly exclude any modification by the parties, in particular in contracts between a trader and a consumer. The interesting question now is how those provisions should be dealt with, which - albeit not of a mandatory nature - do not spell out that they only apply unless the parties have agreed otherwise. Art. 1 CESL highlights the freedom of contract and Art. 1(2) CESL permits the parties to exclude the application of any of the provisions of the CESL or to derogate from or vary their effects unless stated otherwise. Bearing this general principle in mind the wording "unless the parties have agreed otherwise" is not only superfluous, but comprises the risk that different levels of freedom of contract may be developed.

The regulating technique sometimes seems to be unnecessarily complicated as may be demonstrated by some examples:

- Art. 104 CESL makes Art. 102(3) CESL dispensable.
- Art. 102(5) repeats in an inconsistent manner the statement of Art. 99(3) CESL.
- Art. 99(4) makes no sense. Art. 99(3) suffices. Otherwise a provision like Art. 99(4) has to be added to other provisions which are similar to Art. 99(3) as well.

Furthermore, linguistic improvements should not be excluded. Just to mention a few:

- The right to cure addressed in Art. 109 CESL grants the seller "a reasonable period of time to effect cure" (Art. 109(5) CESL). On the other hand the buyer may refuse an offer to cure if cure cannot be effected "promptly" under Art. 109(4)(a) CESL. The reader remains confounded. Obviously, "reasonable period" and "promptly" are not identical terms. But what could be the consideration of the lawmaker when using different terms? Or is there no ulterior reason and the different terms have the same meaning?
- Art. 115(1) does not regulate a "delay in delivery", but a non-delivery.
- Instead of speaking of the rights of the buyer in Art. 109(6) CESL it would be more precise to use the term "remedies of the buyer".
- Following international practice the term "avoidance" should be used instead of "termination".

The annotations addressed in this chapter represent just a random selection and are by no means conclusive. A revision of linguistics seems all the more indispensable in order to present a user-friendly set of rules. Upon this occasion the draft proposal should be streamlined and simplified. Much more important than trying to regulate each and every detail - a goal which will not be achieved anyway - is a clear orientation for the daily user regarding the main issues and an unequivocal emphasis of the leading principles so as to give lawyers, judges and arbitrators a guideline to resolve disputed cases. Such an approach is to be recommended all the more as users coming from different legal and cultural backgrounds are invited to use the CESL.

4. SOME GENERAL REMARKS

The German Federal Bar has already expressed its appreciation, through earlier positions, of the intention of the European Parliament and of the European Commission to create a European instrument of contract law. The present proposal for a regulation on a Common European Sales Law for Goods and associated Services is a first step into this direction. However, in order to achieve a true harmonization and simplification of law in the Single Market it is desirable to extend the application of the optional system of contract law also to national contracts, and not to restrict it to cross-border transactions within the EU.

Regarding the B2B-business, the German Federal Bar recommends to include the United Nations Convention on Contracts for the International Sale of Goods (CISG) without any change and to establish European rules for legal questions not covered by the CISG. The CISG is applicable in 23 Member States and due to the Rome I-Regulation is likewise applied automatically to exports from a contracting state to another member state, which has not yet ratified the CISG (Great Britain, Ireland, Malta and Portugal). The inclusion of the CISG gives access to 20 years of experience, embodied in judicial findings (more than 2.500 judgements and arbitral awards, almost all accessible via the internet) and an abundant array of literature, and thus considerably eases the initial legal insecurity otherwise associated with the implementation of a new law. Furthermore, the legal practitioner would have at his/her disposal a multitude of sample contracts and drafts for general business conditions. With the inclusion of the CISG exporting and importing business companies can handle their foreign trade uniformly on the basis of the CISG without having to differentiate between business within the EU and other international business. In other words: in case the proposal is kept in its current version, companies would have to hold available three different sets of forms, one for national business, one for business within the EU and one for business with parties from outside the EU. It is to be expected that many business-users will not be inclined to undertake such an effort and will consequently not opt for the CESL but rather apply the CISG to all non-domestic transactions.

The content of the CESL is to a large extent substantially similar, sometimes even identical to the provisions and principles of the CISG. The experience made with the CISG during the past two decades has not revealed any urgent necessity for a modification of its legal content. An inclusion of the CISG into the CESL is therefore to be supported, particularly as the contractual parties enjoy extensive freedom of contract under the CISG and hence are in a position to adapt the legal framework provided by the CISG to their individual needs and purposes. In addition to the CISG, the reform proposal should offer provisions for the single market regulating legal issues which may be important in practice, but are not covered by the CISG.

The German Federal Bar appreciates that the draft regulation provides a unification of the substantive law for consumer sales. Unlike the current mandatory legal situation, it would allow businesses to offer and sell their products to end-use customers under one uniform law in 27 member states. Customers are looking for well-priced shopping opportunities. The supply from abroad often fails due to the unwillingness of the businesses to be subject to the mandatory consumer protection laws at the customer's residence. Of course, the differences between the legal systems are only one aspect hampering cross-border sales; other aspects like different languages, culture, transportation routes and distances have to be added. The Commission, however, is only able to effect changes in the legal framework. The harmonization of B2C-sales law by way of a single European Sales Law would make cross-border sales much more predictable and less cost-intensive for businesses, induce them to sell abroad and thus enhance the chances of consumers to select between domestic suppliers and suppliers domiciled in another country.

Finally, the German Federal Bar further advocates the possibility for consumers to choose the optional Common European Sales Law also for contracts with other consumers. This area is not addressed in the draft regulation, but in practice forms a segment that should not be neglected. End-use customers do not solely act as buyers, but increasingly offer articles in the internet or other markets which are not restricted to domestic sales.

5. CONCLUSIONS

A revision of the CESL draft proposal is indispensable in order to present a user-friendly set of rules. The revision should concentrate on streamlining and simplifying the draft.

The unification of the substantive law for consumer sales is endorsed and highly appreciated. However, the draft should reflect the situation of the consumer as well as seller.

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