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**Remedies for buyers in  
B2C contracts:  
general aspects**

NOTE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**Remedies for buyers in B2C contracts:  
general aspects**

**NOTE**

**Abstract**

This Briefing Paper deals with the remedies open to buyers in sale contracts between businesses and consumers under the Proposal for a Common European Sales Law (CESL). It includes a short overview of the types of remedies and their constituent elements following the structure of art. 106 CESL. The remedies of the CESL are compared, on the one hand, with those of various international instruments in the field and, on the other hand, with particular aspects of the law of the EU Member States. Finally, proposals for improving the current system of remedies under the Proposal are suggested.

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## 1. SCOPE OF THE PAPER

This briefing paper contains critical remarks with regard to the Proposal for Regulation on a Common European Sales Law (CESL). It focuses upon general aspects of the buyer's remedies in B2C relations and the conditions for exercising those remedies. B2C relations are contracts between businesses and consumers. As a result, this paper does not treat consumers' remedies in case of contracts concluded with other consumers (which are outside of the scope of the CESL anyway). Nor does the paper touch upon contracts concluded between two businesses. The scope is narrowed once again by the focus upon the remedies of the buyer, the consumer. Thus, rights of the seller are not touched except to the extent that such rights bear upon the remedies of the buyer. This would, for instance, be the case with the seller's right to cure.

The current discussion on remedies under the CESL is rather vast. Due to limitations of space and the complexity of many issues, this paper limits itself to a general overview of prominent elements. The ad hoc briefing paper is structured in three parts. First, a short description is given of the types of remedies following the structure of art. 106 CESL. The conditions required to exercise these individual remedies are examined. Second, a comparison of the buyer's remedies under the CESL is made, on the one hand, with various international instruments in the field, and, on the other hand, with particular aspects of the law of the EU Member States. Finally, proposals for improving the system of remedies under the Proposal are put forward.

## 2. OVERVIEW OF THE DIFFERENT REMEDIES AVAILABLE TO CONSUMERS

In art. 106, the CESL contains a legislative overview of the buyer's remedies in case of non-performance, in particular lack of conformity. Under this article, the buyer may – under some specific further conditions – do any of the following:

- require performance, which includes specific performance, repair or replacement of the goods or digital content;
- withhold the buyers own performance (i. e. withhold payment of the price);
- terminate the contract and claim the return of any price already paid;
- reduce the price;
- claim damages.

Where the buyer is a consumer, these remedies are mandatory (cf. art. 108 CESL, 'Mandatory nature').

The core innovation of the CESL is the basic principle of a free choice of remedies for the consumer. In particular, in contrast to the vast majority of the national laws, the consumer's remedies in case of a (not insignificant) lack of conformity are not limited to repair, or replacement, and withholding of the payment of the price. The CESL offers the consumer a very comfortable position, since it allows the consumer to terminate the contract immediately in case of a non-insignificant lack of conformity. This puts the seller under a relatively high risk when defective goods or digital content are being delivered. Since the freedom to choice between the different remedies is mandatory in favour of a consumer, the consumer is much better off under the CESL than under any legal system of the Member States. No other Member State gives a mandatory free choice of remedies. In particular, the seller has, in principle, no right to cure against the consumer. Moreover, consumers do not need to notify sellers of any lack of conformity within a short period (as it is the case in many Member states' laws) nor do they lose their right to terminate the contract, if termination is not exercised within a relatively short period (as it is in English Law where consumers can reject the goods and require their money back provided they complain within "a reasonable time", which is usually a short period).

## **3. CONDITIONS FOR EXERCISING DIFFERENT REMEDIES**

### **3.1. Starting point for all remedies: non-performance, in particular lack of conformity**

A condition for any remedy of the consumer is “non-performance” of an obligation of the seller. According to art. 87 CESL, non-performance of an obligation is any failure to perform an obligation and includes two main cases, namely:

- Non-delivery (or delayed delivery) of the goods or the digital content
- Delivery of goods (or supply of digital content) which are not in conformity with the contract.

From art. 116, it follows that an anticipated non-performance gives also rise to remedies of the consumer. This is the case when

- the seller has declared, or it is otherwise clear, that there will be a non-performance.

Any remedy is limited by the self-evident condition that the consumer may not resort to any remedies to the extent that the buyer caused the seller’s non-performance.<sup>1</sup>

The type of remedies available to the consumer depends on the type of non-performance. For instance, a right to require repair of the goods or to reduce the price only makes sense, if a defective good has been delivered to the consumer and not, if nothing has been delivered at all. The remedies of the consumer are therefore different in the three basic situations highlighted in the three bullet points above.

### **3.2. Anticipated non-performance**

Under art. 116 CESL, the buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination. Since this is not the most probable case, the focus of this briefing paper is put on the two other cases in which remedies are available to the consumer.

### **3.3. Remedies in case of non-delivery**

In case of non-delivery, the list of the consumer’s remedies is as follows:

- Right to require performance
- Right to withhold the buyer’s own performance (i.e. payment of the price)
- Right to terminate the contract and to claim the return of any price already paid
- Right to claim damages (also because of delay of delivery)

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<sup>1</sup> Cf. art. 106 (5) CESL.

### 3.3.1. Further conditions of the right to require performance

The right of the consumer to require performance is only subject to the usual, rather strict, limitations. For instance, the consumer may not require performance

- if the seller's non-performance is excused<sup>2</sup>,
- performance would be impossible or has become unlawful; or
- the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.<sup>3</sup>

### 3.3.2. Further conditions of the right to withhold payment

The right to withhold the payment of the price is only applicable either

- where the consumer is to perform at the same time as, or after, the seller performs, or
- where the consumer is to pay before the seller performs, if the consumer reasonably believes that there will be non-performance by the seller when the seller's performance becomes due.<sup>4</sup>

### 3.3.3. Further conditions of the right to terminate in case of non-delivery

The consumer can only terminate the contract if, in addition to the non-delivery of the goods (or the digital content), one of the two following further conditions is fulfilled:

a) The non-performance must be fundamental within the meaning of art. 87 CESL; or

b) In case the delay of delivery is not itself fundamental, the consumer must give notice, fixing an additional period of time of reasonable length for performance. The consumer can only terminate if the seller does not perform within that period (cf. art. 115 CESL).

As a rule, the consumer is required, in a case of delay in delivery, to fix an additional period of reasonable length in order to terminate, if not one of the very rare two other cases, namely a non-delivery which is in itself a fundamental non-performance (e.g. the non-delivery of a wedding dress by the day of the wedding) or if there is a case of anticipated non-performance.

This is nothing new or spectacular. The issue has not been tackled in EU-law, in particular not in the Consumer Sales Directive. The rights of the consumer in these cases are more or less the same as in the national legal systems.

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<sup>2</sup> Cf. art. 106 (4) CESL; see also the proposed amendment under point 5.2. below.

<sup>3</sup> Cf. art. 110 (3) CESL.

<sup>4</sup> Cf. art. 113 CESL.

### 3.3.4. Further conditions of the right to claim damages in case of non-delivery

The right to claim damages for non-performance is a fall-back remedy which can be exercised irrespective of whether the contract has been terminated or not. There are no specific limitations to this right, in particular no requirement of fault.

The main conditions for a claim for damages are

- No excuse of the seller's non-performance,<sup>5</sup>
- Causation,<sup>6</sup>
- Foreseeability.<sup>7</sup>

## 3.4. Remedies in case of lack of conformity

In the other frequent case of a sales contract, where goods or digital content have been delivered to the consumer which are not in conformity with the contract, the consumer has the full list of remedies which are

- to require repair or replacement of the goods or digital content;
- to withhold the payment of the price;
- to terminate the contract and claim the return of any price already paid;
- to reduce the price; and/or
- to claim damages.

### 3.4.1. Protective provisions on establishing a lack of conformity

It should initially be noted that the conditions for establishing a lack of conformity by the consumer are safeguarded under the CESL. Firstly, the CESL includes the presumption that any lack of conformity which becomes apparent within 6 months of the time when risk passed to the buyer, in which case it is presumed to have existed at that time (cf. art. 105 (2) CESL)). Moreover, the general provision on conformity with the contract, art. 99 CESL, contains in its third Paragraph a specific protective provision against agreements between the trader and the consumer on the quality of the goods which derogate, to the detriment of the consumer, from the usual qualities of that type of goods. This is a very strong safeguard against standard terms by which a trader might try to escape from liability for any lack of conformity by inserting a clause in his or her standard terms on the poor quality of the goods being sold.

### 3.4.2. Very generous 10 year prescription period

The remedies of the consumer are subject to a very generous prescription period of 10 years after delivery (and two years after the consumer became aware of the lack of conformity).

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<sup>5</sup> Cf. art 159 CESL.

<sup>6</sup> Cf. art 160 CESL.

<sup>7</sup> Cf. art. 161 CESL.

### 3.4.3. Further conditions of the consumer's right to require repair or replacement

The right to require repair or replacement has the same limits as the right to require performance. Thus, the consumer may not require performance

- if the seller's non-performance is excused<sup>8</sup>,
- performance would be impossible or has become unlawful; or
- the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.<sup>9</sup>

In offering the seller the defence that the non-performance (i.e. the lack of conformity) is excused, the CESL would fall behind the consumer protection standard of the Consumer Sales Directive which does not regulate this limitation. This seems to be an unintended drafting error in art. 106 (4) CESL. The provision needs to be corrected, so that the defence of excuse is only applicable in a case of non-delivery.

Some specific provisions regulate the case in which the consumer chooses repair or replacement. In line with the Consumer Sales Directive, the right of choice between these two remedies is up to the consumer. The limitations of this free choice are the same as in the Consumer Sales Directive. Much more concrete than the Consumer Sales Directive and most of the national legal systems, art. 111 (2) CESL regulates the case that the consumer has exercised his or her right to choose and then, suddenly and without giving the seller a chance to remedy according to the consumer's choice, changes his or her mind and requests another remedy. The CESL obliges the consumer to wait a reasonable time, not exceeding 30 days. In any case, the consumer may withhold payment of the price during the time before which the seller remedies the lack of conformity.

The CESL, moreover, regulates the consequences of the decision of the ECJ in the "Quelle" case.<sup>10</sup> This provision in particular codifies the ruling of the ECJ that the buyer is not liable to pay for any use made of a replaced item in the period prior to the replacement.

### 3.4.4. Further conditions of the consumer's right to terminate in case of lack of conformity

The consumer may terminate the contract under art. 114 (2) CESL simply because the delivery of goods or digital content is not in conformity with the contract, unless the lack of conformity is insignificant. This is, also in comparison with the Consumer Sales Directive and the national legal systems, a very consumer friendly innovation of the CESL.

Moreover, termination is only excluded in cases where the lack of conformity is "insignificant" (and not just "minor" as in the Consumer Sales Directive<sup>11</sup>).

In addition to the general requirements already outlined above, the consumer's right to terminate is not under any further substantial limitation. A very minimalist requirement is that the consumer must exercise termination by notice to the seller. There is, however, no formal requirement for this notice. Any conduct which clearly expresses that the consumer wishes to get out of the contract or to end it will be interpreted under the general rules of interpretation as notice of termination. The consumer is in particular not under any duty to

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<sup>8</sup> Cf. art. 106 (4) CESL.

<sup>9</sup> Cf. art. 110 (3) CESL.

<sup>10</sup> Cf. art 112 CESL

<sup>11</sup> Cf. art 3 (6) Consumer Sales Directive 1999/44/EC.

exercise his or her right of termination within a reasonable time from when the right arose or the buyer became aware of the non-performance. Such loss of the right to terminate applicable under art. 119 CESL for buyers who are not consumers, is not applicable for consumer sales contracts.

#### 3.4.5. Right to reduce price

Instead of terminating the contract, and also in cases where the consumer may not terminate the contract because the lack of conformity is insignificant, the consumer may in any case reduce the price and recover any sum already paid exceeding the reduced price under art. 120.

#### 3.4.6. Right to claim damages

Irrespective of whether the consumer terminated the contract or reduced the price, the consumer can claim all damages caused by the non-performance. The main example of damages resulting from non-performance is the case where the consumer acquires the goods or digital content from another seller at a higher price. In this case the difference may be recovered as damages.

## 4. COMPARATIVE PART

### 4.1. International Instruments

Examples of international instruments which deal with the rights of a buyer (not necessarily a consumer) are the CISG, the DCFR and the Consumer Sales Directive. The system of remedies of the buyer in all these instruments, as well as in the CESL, is based on similar principles. The instruments are closely related to one another. The system of the CISG was, in fact, the main source of inspiration for the later instruments analysed here.

However, the CESL, the DCFR and the CISG provide a full set of remedies and contain a complete system of the rules governing non-performance of the obligation. By contrast, the Consumer Sales Directive contains exclusively rules governing lack of conformity (hence, not other types on non-performance). Moreover, the Consumer Sales Directive does not provide all necessary remedies in case of lack of conformity. The Consumer Sales Directive does not contain autonomous rules on damages. Instead it refers to the national legal systems.

The following lines are focused on consumer contracts (with the exception of the CISG, which may apply to the consumer contracts only exceptionally<sup>12</sup>).

#### 4.1.1. The buyer's remedies in the CISG

Art. 45 sets out the remedies of the buyer in the case of non-performance. According to this provision the buyer may require performance (art. 45 (1)(a) and art. 46 (1)).<sup>13</sup> The CISG also provides a right to replacement (art. 46 (2)) and repair (art. 46 (3)).

The right to repair according to art. 46 (2) requires a fundamental breach of contract. The right to repair is also subject to similar conditions as in the case of termination of the contract (avoidance of the contract in the terminology of the CISG). This restriction concerning the right to replace has not been repeated in any of the other collections of rules examined here. It is, however, justified by the similarity of the interests involved.<sup>14</sup> A buyer's right to replace has for the seller almost the same consequences as the termination of the contract.

The major remedy is the avoidance/termination of the contract according to art. 49 (1). In the case of lack of conformity termination is only possible if the failure in performance amounts to fundamental breach of contract. This restriction serves to protect the interests of the seller. The CISG also contains in art. 48 a right to cure, which nevertheless does not apply in the case of fundamental breach (although the possibility of cure may be taken into consideration for establishing whether the breach of the contract is fundamental).<sup>15</sup>

Art. 50 provides a right to reduce the price, which is linked to the lack of conformity as a special category of breach of contract.

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<sup>12</sup> Huber in: Huber/Mullis, *The CISG. A new textbook for students and practitioners*, Sellier 2007, p. 49

<sup>13</sup> See however the exception of art. 28; Huber in: Huber/Mullis, p. 186 – 187.

<sup>14</sup> Huber in: Huber/Mullis, p. 199.

<sup>15</sup> Schlechtriem, in: Schlechtriem/Schwenzer, *Kommentar zum Einheitlichen UN- Kaufrecht*, C.H. Beck 2004, Art. 25, No. 20, aa).

Art. 45 (1)(b) also mentions the right to claim damages as a remedy.

Art. 79 (1), the parties are not liable for damages, if the non-performance was due to an impediment beyond the non-performing party's control.<sup>16</sup>

#### 4.1.2. The consumer's remedies in the Consumer Sales Directive

Directive 1999/44 is closely related to the system of the CISG. It is an adaptation of the solutions of the Convention related to the lack of conformity and adjusted to the need to enhance consumer protection but also balanced with the rules on the protection of the seller.<sup>17</sup> The seller is protected against premature termination ("rescission", in the language of the Directive) of the contract or price reduction by the sequence of remedies. The consumer must firstly demand repair or replacement under art. 3(3). Only if the seller does not comply within a reasonable time, can the consumer terminate the contract or exercise the price reduction remedy under art. 3(5). The consumer may only forego requesting repair or replacement in case it would be impossible or disproportionate, or in case repair or replace would be significantly inconvenient for the buyer.<sup>18</sup> This is all, of course, subject to the condition that the lack of conformity is not minor under art. 3(6). The right to damages is governed by the national law. This remedy and other remedies not governed by the Directive may be exercised under the national applicable law under art. 8.

#### 4.1.3. The consumer's remedies in the DCFR

The structure of the Draft Common Frame of Reference is more complex than the CISG and the Directive, because the system should be adjusted to all obligations. It is therefore drafted in the style of the codifications. The general provisions on the non-performance of obligations are completed by the particular provisions on sale, and more particularly the provisions applicable to the consumer sale.

The DCFR also creates a more comprehensive system of protection for the debtor/seller by providing for the right to cure (art. III. – 3:201). The nature of the DCFR right to cure differs from that of the CISG. The creditor does not need to bear the attempt to cure if (*inter alia*) the "failure to perform a contractual obligation amounts to a fundamental non-performance". The main difference with the Consumer Sales Directive is the right of the debtor/seller to choose the method of cure under the DCFR.<sup>19</sup>

The general structure of remedies resembles quite closely the system of the CISG. The creditor has a right to enforce performance (art. III.– 3:3:202 (1)), which is also regarded as the remedy and not the "primary obligation" arising from the contract. The remedying of performance is also treated as a sort of right to specific performance (art. III.-3:302 (2)). It does not give the buyer a right to choose between different options of the right to cure. The provisions on sale do not contain an exception to this rule, thus the DCFR deviates from the standard set by the Directive to the detriment of the consumer.

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<sup>16</sup> The scope of art. 79 is controversial – see: Schlechtriem, Internationales UN-Kaufrecht, Mohr-Siebeck 2005, p. 191 – 192.

<sup>17</sup> Grundmann in: Grundmann/Bianca, EU Kaufrecht-Richtlinie. Kommentar, Verlag Dr. Otto Schmidt, 2002, p. 19 – 22.

<sup>18</sup> See however ECJ Joined Cases C-65/09 and C-87/09 (Weber and Putz). J. Luzak, Who should bear the risk of the removal of the non-conforming goods, EUVR 1/2012, p. 35 – 40.

<sup>19</sup> Von Bar/ Clive (Ed.), Principles Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition, Sellier 2009, vol. II, p. 1341.

In contrast to the CISG, the DCFR contains a clear rule on withholding performance (art. III. 3:401).

The DCFR also regulates the right to terminate the contract in detail. Generally, the right to terminate the contract assumes a CISG- like fundamental breach of contract. As for consumer contracts, the DCFR provides an exception, however, in art. IV. A. - 4:201. The consumer may terminate the contract in the case of any lack of conformity, unless the lack of conformity is minor.

The DCFR also provides a right of price reduction (III.-3:601), which is treated as a general remedy not confined to specific contracts.

The right to damages governed by art. III.-3:710 et seq. requires the non-performance not to have been excused within the meaning of art. III. – 3:104 (1), which requires an "impediment beyond the control of the debtor".

#### 4.1.4. The consumer's remedies in the system of the CESL

The CESL has been developed mainly on the basis of the system provided by the DCFR. According to art. 106 (1), the buyer may require the performance, which includes, apart from the right to specific performance, the right to repair or replacement. However, the CESL contains unique rules, making the right to performance dependent on the requirement that the non-performance is not excused by the debtor.<sup>20</sup> The concept of excuse defined in art. 88 (1) follows the DCFR ("impediment beyond the control"), but its application to the right of performance is highly problematic. In the case of consumer contracts it is therefore questionable: if the right to require performance also encompasses the right to repair or replacement, it also means that the right to repair or replacement is dependent on the lack of the impediment beyond control, which has prevented the seller from performing. From this perspective the CESL does not reach the standard of the Consumer Sales Directive.

In consumer contracts the consumer has the right of to choose between repair and replacement (art. 111).<sup>21</sup> The ECJ decision in the joined cases of *Weber and Putz* (C- 65-09 and C-87/09) has not been reflected in the language of the provision.<sup>22</sup> The CESL is more precise than the Directive as to how long the seller has to comply with the request of the consumer to repair or replace the goods – it must happen within a "reasonable time" which may not exceed 30 days (art. 111 (2)).<sup>23</sup>

The most significant difference in comparison to the system of the Directive is a lack of the right to cure of the seller in consumer contracts (art. 106 (3)(a)). The consumer may terminate the contract in case of any lack of conformity without waiting for the cure of the seller. Even in the case of incorrect installation of a good the seller is deprived of the right to cure, although in the case of other services the performance may be cured even in consumer contracts (art. 155 (2) & (3)). The seller in consumer contracts is also not protected by the requirement of fundamental non-performance (which is the general

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<sup>20</sup> It is controversial whether the CISG under art. 79 (1) does not provide a similar effect – Huber in: Huber/Millis, p. 192 – 193. See also Schmidt-Kessel, in: Schmidt –Kessel, Ein einheitliches europäisches Kaufrecht, Sellier 2012, p. 295; Zöchling-Jud, p. 338.

<sup>21</sup> Schopper, p. 129. See the criticism of Faust, in: Schulte-Nölke/Zoll/Jansen/Schulze, Der Entwurf für ein optionales europäisches Kaufrecht, Sellier 2012, p. 258 – 259.

<sup>22</sup> Compare Zöchling-Jud, p. 333 and 335.

<sup>23</sup> Zöchling-Jud, p. 334

requirement for termination in the CESL – art. 114 (1)).<sup>24</sup> The consumer may terminate the contract in the case of lack of conformity, unless this lack of conformity is insignificant (art. 114 (2)). In other cases of non-performance the general requirement of the art. 114 (1) applies. This liberal right of the consumer to terminate applies irrespectively of the nature of the goods or digital content, the feasibility of the possibility of cure and the interest of the seller.<sup>25</sup> Only the good faith requirement of art. 2 may set a limit to the frivolous exercise of this right.

The right to reduce the price (art. 106 (1)(d) and art. 120) is also not dependent on the seller's right to cure.

Following the pattern of the DCFR, the CESL also provides the right to withhold performance (art. 106 (1)(b) and art. 113) and the right to damages (art. 106 (1)(e) and Chapter 16). As in the DCFR, the right to damages also requires that the non-performance has not been excused by the seller (art. 159 (1)).

#### 4.1.5. Comparative summary

All examined sources provide a system of remedies based on similar considerations. The CISG and the DCFR are more seller friendly by limiting the possibility of termination of the contract (requirement of the fundamental non-performance) and by giving the seller a right to choose the manner of cure irrespectively of the buyer's preferences. The Directive also limits the right to terminate and to reduce the price by providing a hierarchy of remedies and giving the seller a clear right to cure. The CESL puts the seller in the most inconvenient position and strengthens the consumer's rights by according the possibility of easy termination and price reduction. The fact that the right to demand repair or replacement can be excluded if the non-performance is excused was probably not intended. If it is not the case, the consumer will in this respect be less protected than in the case of the Directive.

## 4.2. Laws of the Member States

In this section, some key aspects of the buyers' remedies in a B2C contract under the CESL are compared with the corresponding laws of the EU member states.

### 4.2.1. Free choice or hierarchy of remedies

As previously stated, the CESL puts the consumer who received goods or digital content which are not in conformity with the contract in a very comfortable position. Except in the case where the lack of conformity is insignificant, the consumer may choose freely between the remedies, in particular by terminating the contract and claiming damages for non-performance. This is not the case in the vast majority of the Member States, in EU-Law and in the CISG.

The vast majority of the Member States have transposed the hierarchy of remedies regulated in Art. 3 of the Consumer Sales Directive without making use of the minimum

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<sup>24</sup> See the criticism of Zöchling-Jud, p. 345 – 346; also Grädler/Köchel, in: Schmidt –Kessel, Ein einheitliches europäisches Kaufrecht, Sellier 2012, p. 370.

<sup>25</sup> Zoll in: Schulte-Nölke/Zoll/Jansen/Schulze, Der Entwurf für ein optionales europäisches Kaufrecht, Sellier 2012, p. 284.

clause, i.e. without granting a higher level of protection. Among the very few exceptions are Greece and Portugal, where the situation is, in principle, as comfortable for the consumer as under the CESL, since these Member States still have the traditional (Roman law based) right of the buyer to terminate the contract in case of a (non-minor) defect. Other than in the CESL, this right is, however, not mandatory.<sup>26</sup>

In Ireland and the United Kingdom, a consumer can exercise the general right available in all contracts of sale to reject goods that do not comply with the implied terms and terminate the contract, provided that the consumer is not deemed in law to have accepted the goods. Consumers are considered to have accepted goods

- when they tell they have accepted them,
- alter them, or
- keep them for a reasonable length of time - this varies according to the nature of the goods, but is usually a short period.

This right to reject can only be exercised within a very short period thus, not during the whole duration of the 10 years prescription period of the CESL.

### Overview: Hierarchy of remedies in the Member States

Hierarchy following the model of the Consumer Sales Directive	Most of the Member States, including DE, FR, IT, ES, NL, BE, EE, HU
Immediate right to terminate for lack of conformity without hierarchy (non-mandatory)	EL, PT
Right to reject within a "reasonable period"	UK, IE

#### 4.2.2. Prescription

The vast majority of the Member States have simply transposed the two year minimum period of the Consumer Sales Directive. As regards any lack of conformity of the goods, consumers in these Member States are precluded from exercising their rights and remedies, or the rights and remedies are subject to prescription. By contrast, the Common European Sales Law offers a very generous ten year prescription period. This period has been inspired by the example of some Member States which have much longer prescription (or: limitation, preclusion) periods for all sales or at least consumer sales. Examples are the United Kingdom or Ireland which simply apply their general rules on limitation also on consumer remedies under a contract of sale. The consequence is that in England and Wales, Northern Ireland and the Republic of Ireland the prescription period is six years,<sup>27</sup> in Scotland five<sup>28</sup>. On a closer look, also some of the Member States which generally apply a two year period have regulated certain exceptions. One example is Germany, which offers the consumers for building materials a period of five years. The most consumer friendly national systems do not have any fixed period. For instance, in the Netherlands and in Finland the consumer can bring forward remedies for lack of conformity during the whole average life span of the goods sold.<sup>29</sup> For these countries it may indeed happen in very exceptional cases that a consumer is worse off than under the Common European Sales

<sup>26</sup> Schulte-Nölke, et al., EC Consumer Law Compendium, Sellier 2007, p. 444.

<sup>27</sup> s. 5, Limitation Act 1980 (England and Wales); s. 11, Statute of Limitations 1957 (Republic of Ireland); s. 4, The Limitation (Northern Ireland) Order 1989

<sup>28</sup> s. 6 and sch. 1, Prescription and Limitation (Scotland) Act 1973

<sup>29</sup> Schulte-Nölke, et al., EC Consumer Law Compendium, Sellier 2007, p.445

Law (e.g. when a defect, which was already present when risk passed, only appears more than ten years after this point of time and for goods which had an average life span longer than ten years). The CESL could have avoided this by also applying a flexible life span limitation period. For the sake of legal certainty, it seemed, however, more advantageous to regulate a very general ten year period. The risk that consumers are actually deprived of their rights in comparison with Dutch or Finnish Law should be very low. Moreover, due to the free choice of remedies (instead of the hierarchy of remedies applicable in the Netherlands and in Finland) the level of consumer protection of the CESL seems nevertheless in other respects higher than even in the Netherlands or Finland.

#### **Overview: Prescription of consumer remedies in the Member States**

Most Member States	2 years (with some exceptions, e.g. 5 years in DE [building materials] or FR [vice cache])
England and Wales, Northern Ireland and the Republic of Ireland	6 years
Scotland	5 years
FI, NL	Average life-span of the goods

## 5. PROPOSALS FOR AMENDMENTS

As noted above, the scope of this paper is limited to the buyer's remedies in B2C contracts in general terms. Thus this section is not intended to be comprehensive or treat possible improvements in great detail. Moreover, due to the rather limited space at hand which can be attributed to improvements in the effectiveness of the system of remedies under the CESL, focus shall be made on one prominent area for improvement. This is the case of exceptions from the right to terminate and in particular the distinction between automatic termination and termination subject to the right of the seller to cure.

### 5.1. An overly extensive right to terminate

The main issue of the system of remedies of the Consumer European Sales Law (CESL)<sup>30</sup> where reconsideration may be needed is the demarcation line between the cases where the consumer can immediately terminate a contract for (a non-insignificant) lack of conformity and those cases where the seller still has a right a cure as a defence against termination. In the CESL, as it currently stands, the consumer has the right of immediate termination in all cases of a sale of goods or the supply of digital content. By contrast, the consumer has no immediate right to terminate for lack of conformity and must allow the seller/supplier cure where the contract contains a service element. This demarcation line of the cases where the consumer can immediately terminate and where he or she must allow cure is not very well adapted to some other provisions of the CESL. For example, in a contract for a tailor-made suit the consumer would have a right to immediately terminate when the seller/supplier delivers the suit with a (non-insignificant) lack of conformity which can easily be remedied (e.g. the seller/supplier forgot to fix all buttons). In this case the suit would be totally useless for the seller if returned after termination. Therefore all cases which fall under the system of the CESL into chapter 4 on sales, but which in fact also contain a service element, should be excluded from the consumer's right to immediately terminate and made subject to a right of the seller to cure. These cases are:

- a) Goods or digital content which are made to the consumer's specifications, or are clearly personalised, c.f. Art. 40 (2) (d) CESL
- b) Unsealed audio/video recordings and software, c.f. Art. 40 (3) (c) CESL
- c) Digital content not supplied on a tangible medium, c.f. Art.40 (3) (d) CESL
- d) or, preferably, (instead of (b) and (c) above): all cases where digital content is being supplied (cf. Art.5(b))

Such an amendment would not substantially lower the level of consumer protection in comparison with the member states (in the very most member states not all). It would make the CESL much more attractive for sellers/suppliers who distribute such goods, digital content or services.

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<sup>30</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635

In order to implement this amendment (only the preferred option, i.e. letters (a) and (d)), art. 106(3) CESL could read (amendments highlighted):

*"If the buyer is a consumer:*

*(a) the buyer's rights are not subject to cure by the seller, except where they relate - to goods which are made to the consumer's specifications or are clearly personalised, or - to digital content; and*  
*(b) ...*

## 5.2. Wrong exclusion of repair or replacement in case of excuse

Under art. 106(1)(a) CESL, the consumer may *inter alia* "require performance, which includes specific performance, repair or replacement of the goods or digital content". However, under paragraph (4) of the same article, the consumer may not require performance, if the seller's non-performance is excused. Since the term "performance" is construed under art. 106(1)(a) CESL as a generic term, which includes repair or replacement, the exclusion of remedies regulated in paragraph (4) seems to apply also to the request for repair and replacement in case of an excuse of the non-performance.

This seems to be a drafting error, since the consumer protection level under the CESL would fall behind the minimum standard set by the Consumer Sales Directive,<sup>31</sup> if the seller could refuse repair or replacement in the case that the delivery of non-conforming goods is excused (but repair or replacement would nonetheless be feasible). Moreover, since requiring repair and replacement is treated as a subset of requiring performance, it may be questionable whether requiring performance in general should be subject to the defence of excuse. A more general solution would be to exempt requiring performance generally from the defence of excuse. This solution would avoid a complicated structure of exception and counter-exception in art. 106(4) CESL. Although, under this solution, the seller would, in principle, be obliged to perform the obligations of the contract even in a case where his or her non-performance is excused, there would be no additional burden, since the defence of art. 110(3) CESL would remain in place and sufficiently protect the seller in all cases where performance would be impossible, unlawful or inappropriately burdensome. The restriction of the defence of excuse to the claim for damages would also avoid a rather unclear duplication of defences against the claim for performance as it is now in the CESL, where the seller who is required to perform can invoke both art. 106(3) CESL (i.e. excuse) and art. 110(3) CESL (i.e. impossibility, unlawfulness or burdensomeness).

Art. 106 (4) CESL thus needs to be redrafted in order to clarify the issue.

(a) The minimalist option (not preferred) would be to just exempting repair and replacement from the defence that the lack of conformity was excused. It could read (deletions crossed out, amendments highlighted):

*"If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in Paragraph 1 except ~~requiring performance and damages.~~ The buyer may also*

<sup>31</sup> Cf. art. 3(5) of the Consumer Sales Directive, which does not provide the seller with the defence of excuse in such case.

*not require performance except the repair or replacement of goods or digital content which have been delivered or supplied and which are not in conformity with the contract.”*

This option would be rather complicated. It could also be considered to be inconsistent since the differentiation between the general claim for performance (which would be subject to the defence of excuse) and the claim for repair and replacement (which would not be subject to the defence of excuse) is rather arbitrary.

(b) The general option (preferred) would be to exempt the duty to perform generally from the defence that the non-performance was (or would be) excused

Art. 106 (4) CESL could read then (deletions crossed out):

*“If the seller’s non-performance is excused, the buyer may resort to any of the remedies referred to in Paragraph 1 except ~~requiring performance and damages~~”.*<sup>32</sup>

### **5.3. Remedies for digital content not supplied in exchange for a price, but for another counter-performance**

If the supply of digital content has not been rendered in exchange for a price, Art. 107 CESL aims to restrict the remedies of the “buyer”. The only remedies available to the buyer are on the basis of damage to the property of the buyer caused by the lack of conformity (except any gain). The underlying idea of this provision is clear: in case of freeware, the supplier’s liability should be much more limited in comparison to non-gratuitous contracts. According to art. 2(i) RegCESL, ‘price’ means money that is due in exchange for goods sold, digital content supplied or a related service provided. The CESL covers, however, also contracts for the supply of digital content which are for value, although the client does not need to pay any price (see: art. 5 (b) RegCESL). For instance, in order to get access to a certain digital content, the buyer must transfer any copy rights relating to his or her own content or must provide personal data or perform services (e.g. testing and reporting). In such situations, the application of art. 107 CESL is inappropriate, since the provision is drafted for gratuitous contracts. In a case where the buyer does not pay any money price, but is actually obliged to make a counter-performance, the buyer may need more protection than granted under art. 107 CESL. The interests of the parties are comparable to a contract which obliges the buyer to pay a price. Thus, the scope of application of art. 107 CESL should be reduced to contracts which are actually gratuitous for the buyer. In order to meet this concern, art. 107 CESL could be amended as follows (amended part highlighted):

#### ***Limitation of remedies for digital content supplied for free***

*Where digital content is **supplied for free**, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1). The buyer may only claim damages under point (e) of Article 106 (1) for loss or damage caused to the buyer’s property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.*

The wording “supplied for free” would allow the court some discretion in assessing whether counter-performances or any other consideration is of such value that the digital content is not supplied for free.

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<sup>32</sup> In case this option is chosen, art. 131(2) CESL relating to the remedies of the seller needs to be amended accordingly.

## REFERENCES

### Primary legislation

- Consumer Sales Directive 1999/44/EC
- The Limitation (Northern Ireland) Order 1989
- Limitation Act 1980 (England and Wales)
- Prescription and Limitation (Scotland) Act 1973
- Statute of Limitations 1957 (Republic of Ireland)

### Case law

- ECJ Joined Cases C-65/09 and C-87/09 (Weber and Putz)

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