Abstract

The rules on prescription in Part VIII, Chapter 18, of the CESL need clarification in order to ascertain whether they only apply to provisions on rights and claims resulting from a sale contract, or whether they are also applicable to any other (related?) right or claim, regardless of its contractual or non-contractual origin. One of the most problematic issues concerns general prescription periods. Furthermore, interpretation problems arise also because of missing definitions, or because the definitions are ambiguous or defective. The systematic approach demands clarification, too.
CONTENTS

LIST OF ABBREVIATIONS 4

EXECUTIVE SUMMARY 5

1. INTRODUCTION 6

2. FROM THE GENERAL CHARACTER OF SOFT LAW (PECL AND DCFR) TO THE SPECIAL CHARACTER OF HARD LAW (CESL): INFLUENCE ON THE LEGAL REGIME OF PRESCRIPTION 7

3. SUBJECT-MATTER OF PRESCRIPTION 9

4. PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT 11

5. EXTENSION OF PERIODS OF PRESCRIPTION 12
   5.1. Suspension 12
   5.2. Postponement of expiry 14
   5.3. Maximum Length of Period 14

6. RENEWAL OF PERIODS OF PRESCRIPTION 16

7. EFFECTS OF PRESCRIPTION 18

8. PARTY AUTONOMY CONCERNING PRESCRIPTION 20

9. CONCLUSIONS 21

REFERENCES 22
LIST OF ABBREVIATIONS

B2B  Business to Business
BGB  Bürgerliches Gesetzbuch
CC   Civil Code
CESL Common European Sales Law
DCFR Draft Common Frame of Reference
PECL Principles of European Contract Law
PICC Principles of International Commercial Contracts
EXECUTIVE SUMMARY

The rules on prescription in Part VIII, Chapter 18, of the Proposal for a Common European Sales Law (CESL) follow the provisions of the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), which, generally speaking, deserve favourable comments. Yet, a number of rules contained in those texts have been omitted. Clarification is needed in order to ascertain whether the CESL rules only apply to provisions on rights and claims resulting from a sales contract, or whether they are also applicable to any other right or claim, regardless of its contractual or non-contractual origin. If this is the case, there is no good reason why the entire regulation of PECL or DCFR (which is substantially identical) is not incorporated into CESL. One of the most problematic issues concerns general prescription periods. Firstly, because there are two apparent general periods, a short one and a long one, without any specification about the claims or rights covered by each one of them. Secondly, because neither period is suitable in case of non-conformity. There are also some interpretation problems due to missing, ambiguous or defective definitions. The systematic approach demands clarification too.
1. INTRODUCTION

CESL does not only rule the typical legal regime of sales (parties’ obligations and remedies, conformity, passing of risk, etc.). While regulating sales, the legislator uses the opportunity to regulate also other issues, such as formation and interpretation of contracts, unfair terms, vices of consent and the like. CESL is thus a compendium of legal rules that a national lawyer would find suitable not only for special contracts (sale being the paradigm) but also for general contract law (general part of the law of obligations, general part of contract law, *Rechtsgeschäftslehre*). However, even if such a general part could be applicable to contracts other than those ruled by CESL (sale and related services), the scope of CESL is restricted to sale and related services. The legal regime of prescription (Chapter 18) is affected by this ambivalent approach. It is unfortunately not clear whether the provisions on prescription only apply to seller and buyer’s claims or rights or, by contrast, whether they have a vocation for general application. We will deal with that point under section 2. In the following sections we will analyze the rules on prescription provided in Chapter 18, mainly the subject-matter of prescription (section 3), periods of prescription and their commencement (section 4), extension of periods of prescription (section 5), renewal (section 6), effects of prescription (section 7) and party autonomy concerning prescription (section 8). After a short description of the respective provisions in each Chapter, we will compare them with the Principles of European Contract Law (PECL) 1 and the Draft Common Frame of Reference (DCFR) 2 rules and other EU Legislation 3 and, when necessary, with the relevant international instruments 4 and national laws. Comments will highlight possible gaps and inconsistencies in CESL, aiming at improving the balance between business certainty and parties’ protection, in particular when a consumer is a party to the contract. Some concluding remarks will summarize the main problems (section 9).

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2. FROM THE GENERAL CHARACTER OF SOFT LAW (PECL AND DCFR) TO THE SPECIAL CHARACTER OF HARD LAW (CESL): INFLUENCE ON THE LEGAL REGIME OF PRESCRIPTION

Extinctive prescription typically refers to the effect of lapse of time on a right to enforce an obligation, due to the creditor inactivity (articles 178 and 180(3) CESL).

In general, it does not matter whether the obligation has a contractual origin. This becomes evident in PECL, where Chapter 14 is placed among the chapters devoted to the general part of the law of obligations. The same is valid for DCFR, since extinctive prescription is ruled in Chapter VII of Book III (“Obligations and corresponding rights”), and Book III goes before specific contracts (Book IV), benevolent intervention in another’s affaire (Book V), non-contractual liability (Book VI) or unjustified enrichment (Book VII).

Opposite to PECL, where no specific contract is ruled, and DCFR, where besides a general part of the law of obligations - contracts other than sale are also regulated, CESL essentially only deals with sale. The structure and at least part of CESL contents resemble CISG - although CESL regulates prescription and CISG does not. Hence, from a systematic point of view, one could say that prescription in CESL only refers to buyer and seller's claims. However, no provision in Part VIII, Chapter 18, of CESL speaks of “buyer” or “seller” but of “creditor” and “debtor” (articles 184, 185 CESL), “parties” (articles 182, 186), or “person” (article 183)\(^6\). Such a neutral terminology could maybe rest on the fact that, in addition to prescription of claims resulting from sale of goods and digital content, CESL also deals with prescription of claims resulting from related services, even if it is not absolutely clear that such services might be the object of an autonomous type of contract. Yet, it does not give a proper answer to why prescription of the right to damages for personal injuries is also covered (article 179(2) CESL), bearing in mind that such damages do not necessarily stem from a contract. Although article 120(3) CESL refers to damages resulting from non—performance of a contract, article 179(2) CESL apparently is not restricted to such damages, but speaks in general terms of “damages for personal injuries”, this is any personal injury stemming either from a contract or any other act.

CESL rules on extinctive prescription follow the provisions of PECL and DCFR; in fact, there are only minor differences between PECL and DCFR. Yet, a number of rules contained in PECL and DCFR have been omitted. Sometimes, changes are explained by the Expert Group, arguing that certain topics are “outside the scope of the instrument”. An example is the period of prescription for a right established by legal proceedings (articles 14:202 PECL and III.-7:202 DCFR)\(^7\). On that basis, articles 14:203(3) and III.-7:203(3) DCFR

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\(^5\) Lando et alii, Principles, p. xvi, p. xviii: “the source of the obligation to perform does not matter. It might, for example, be a contract or a rule of law giving right to damages (for example, non-performance of a contract or for harm caused by another in a non-contractual situation) or a rule of law on unjustified enrichment”. Vid. also comment to art. 14:101 PECL, pp. 158—159.


\(^7\) See the synthesis of the of the tenth meeting on 17 and 18 February 2011, where the rules of Part VIII on prescriptions were passed: “The Group decided to delete Article 7:202,
(commencement of the period of prescription when the judgment or arbitral award obtains the effect of *res judicata*) have not been incorporated into CESL either. Other rules have been rejected without any explanation, although intuition says that they have probably been considered superfluous in the context of sales. Thus, the rule on postponement of expiry by a claim held by or against an heir or by or against a representative of the estate\(^8\). Certainly, CESL does not deal with issues of legal capacity of persons\(^9\), yet the rule on postponement of expiry in case of incapacity has been kept (article 183 CESL; compare with articles 14:305 PECL and III.-7: 305 DCFR), albeit modified. By contrast, there is no provision on suspension because of an impediment beyond creditor’s control (arts. 14:303 PECL and III.–7:303 DCFR), despite the fact that this ground is considered in order to excuse non-performance (article 88 CESL)\(^10\). The picture is one of an incomplete regulation\(^11\).

In conclusion, clarification on some key aspects of the regulation of prescription in Chapter 18 CESL would be very welcome in the future legislative process concerning the Proposal. Essentially, it must be discussed whether those rules apply only to provisions on rights and claims resulting from a sale contract (or related services contracts) or, by contrast, they apply to any other right or claim, irrespective of their contractual or non-contractual origin. Should the European legislator opt for the latter solution, there is no good reason why the entire regulation of PECL or DCFR is not incorporated into CESL.

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\(^9\) See “A European Contract Law for Consumers and Business: Publication of the Results of the feasibility Study carried out by the Expert Group on European Contract Law for Stakeholders’ and Legal’ Practitioners Feedback” (http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf), p. 6: “[...] Certain topics which would be less relevant for cross-border contracts —such as rules on capacity, representation or assignment— were not covered by the Expert Group Work”. See now Whereas 27 of the CESL.

\(^10\) See also subsection 5.1

3. SUBJECT-MATTER OF PRESCRIPTION

Article 14:102 PECL resorted to the word “claim” to identify the object of prescription. Claim was defined as “the right to performance of an obligation”, a translation of the German word “Anspruch” (§ 194 BGB; “pretensió” in article 121-1 Civil Code of Catalonia). Without using the word claim, the same idea is to be found in DCFR when article III.-7:101 lays down that “a right to performance of an obligation is subject to prescription”. The same happens in CESL when article 178 establishes that the object of prescription is “a right to enforce performance of an obligation”. It must be taken into account that “enforce” evokes the idea of “execution”, although no provision in CESL refers to prescription of rights acknowledged by an executive title12. Therefore, “enforce” is meant to be used in the most general sense.

Article 178 CSEL also mentions prescription of “any ancillary right”, yet it does not define “ancillary right”. Two interpretations are possible:

a) “Ancillary right” means also a “right to enforce performance of an obligation”, since this is the only accepted object of prescription. It would then cover obligations ancillary to a principal obligation, such as the obligation to pay interest (articles 184, 185.3 CESL). But then, article 178 CESL would be redundant.

b) “Ancillary right” is tantamount to any other right different from a “right to enforce performance of an obligation”. It would cover the buyer’s remedies to withholding performance, price reduction and termination, as well as the seller’s remedies to withholding performance and termination13.

However, if we leave aside withholding performance, which is not affected by prescription of the debtor’s claim in accordance with article 185.1 CESL, price reduction may be considered as a buyer’s right to enforce performance too (a right to recover the price excess from the seller, article 120(2) CESL), which becomes effective once the seller claims payment while the buyer has still not paid14. It is worth to stress that article 120 CESL does not require that the buyer declares or gives notice to the seller of his/her intention to reduce the price in a reasonable time. Consequently, it can be argued that this remedy does not prescribe.

In some cases, the right to terminate a contractual relationship is lost if a notice is not given within a reasonable time (articles 119(1), 139(1) and 2 CESL). It should be then considered whether this "reasonable time" is the period of prescription of two or of ten years (article 179 CESL). In other cases where notice is not required and, in particular, where a consumer contract is at stake (articles 119(2)(b), 139(3) CESL), the right to terminate only disappears if the debtor’s obligation has prescribed because, logically, once it has prescribed it becomes unenforceable (article 178(1) CESL; § 218 BGB). Consequently, if non-performance is unconceivable, the creditor loses all remedies for non-performance (article 185(1) CESL).

In conclusion, either the reference to prescription of an “ancillary right” is spare, because it means the same as the “right to perform an obligation”, or it must be clarified that the right to terminate the contract (and perhaps other remedies) has to be treated in the same way as a “right to perform an obligation”. In fact, it may be considered whether article 178

12 See also subsection 5.1.


14 Lando et alii, Principles, p. 158.
CESL should be suppressed, because of the existence of article 185(1) CESL. Furthermore, the outcome of linking the definitions in article 178 and 2(y) CESL is a bit awkward. Provided that 'obligation' “means a duty to perform which one party to a legal relationship owes to another party” (article 2(y) CESL), article 178 CESL turns into “a right to enforce performance of a duty to perform”.
4. PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT

Contrary to articles 14:201 PECL and III.-7:201 DCFR, where there is one general period of prescription of three years, article 179 CESL establishes two general periods of prescription and one specific period for rights to damages for personal injuries. Concerning general periods, there is one short period of two years (which means the general period of PECL and DCFR is reduced from three to two years - article 179(1) CESL) and one long period of ten years (article 179(2) CESL). Their respective commencement (\textit{dies a quo}) is different. The commencement of the short period is subjective ("[...] when the creditor has become or could be expected to have become, aware of the facts as a result of which the right can be exercised"); instead, that of the long period is objective ("[...] when the debtor has to perform [...]’).

The Proposal does not express which claims or rights are covered by either rule. One conclusion is self-evident: both periods cannot be general. Provided that the general period is in PECL and DCFR the short one, one could presume that the general period in CESL is the two-year period. If this idea is accepted, the logical consequence is that the ten-year period is not a general period but a special one, despite the fact that it is unknown to which claims or rights it applies. Since this is not convincing at all, another option can still be proposed: the ten-year period (as well as the thirty-year-period) is not a period of prescription, but a long-stop rule. We will come back to that issue\(^\text{15}\).

It must be considered whether these periods are too short or too long in case of lack of conformity. The long period of prescription appears as excessive from the very beginning if we consider it as a real period of prescription, for it may seriously affect the seller's interest, since the later the defect becomes apparent the less likely it is that it results from lack of conformity. As far as the short period is concerned, due to the fact that it begins when the creditor becomes aware –or should become aware– of the facts, the consequence is that the buyer could sue the seller many years after the conclusion of the contract. This is equally unconvincing. The rule which makes prescription dependent on knowledge could cause problems of evidence: it may be very difficult to prove if the buyer has or not the right, i.e. if she was or should have been aware, or if she lacks of good faith (article 2(2) CESL). As a result, sellers would increase prices in order to reduce losses or, alternatively, they would avoid making use of CESL.

In conclusion, the application of the general periods of prescription to remedies for lack of conformity is not useful. A single period after delivery or passing of risk favours certainty and promotes the efficient development of the sales contract in Europe. The solution provided in article 5(1) Directive 99/44 (a single and minimum period of two years after delivery) seems more adequate. In case of personal injuries, a longer period whose commencement depends on knowledge may be necessary, but thirty years seems unreasonable and probably not appropriate in the context of sales\(^\text{16}\).

\(^\text{15}\) See subsection 5.3.

\(^\text{16}\) It must be remembered that the cases to which the thirty-year period of article 14:307 PECL applies are very serious and not necessarily linked to contracts: medical malpractice, asbestosis or sexual abuse of children (Lando \textit{et alii}, \textit{Principles}, p. 193).
5. EXTENSION OF PERIODS OF PRESCRIPTION

Section 3 of Chapter 18 reads "Extension of Periods of Prescription". Extension in terms of suspension implies neither a lengthening nor a prorogation of the period; the period of prescription is the same, the only thing is that the period during which prescription is suspended due to a certain event is not counted in calculating the period of prescription legally established.

CESL follows mainly the lines of PECL and DFCR. Hence, suspension and postponement of expiry are distinguished. However, only one ground of suspension and two of postponement are listed.

5.1. Suspension

For PECL (article 14:301) and DCFR (article III.-7:301), the first ground for suspension is ignorance of the identity of the debtor or of the facts giving rise to the right. This discoverability criterion is still more essential in CESL because the short period of prescription is reduced to two years. But CESL has modified the systematic approach of PECL, since ignorance is no more a ground for suspension. CESL distinguishes two basic periods, the short of two years and the long of ten years, and establishes a different commencement for each one. The short period commences when the creditor becomes aware of the facts as a result of which the right can be exercised (article 180(1) CESL). The practical result is the same, as if the period begins to run from the time when the debtor has to effect performance, but is suspended as long as the creditor does not know (or could reasonably not know) about the relevant facts, which is the perspective adopted in articles 14:301 PECL and III.-703(1) DCFR.

The beginning of judicial proceedings is deemed to be a ground for suspension in CESL. However, article 181(1) CESL neither conceptualizes "judicial proceeding" nor specifies when a judicial proceeding has begun. If that had been done, the long list of § 204(1) BGB would be unnecessary, but because it has not been done, some cases envisaged in § 204(1) BGB are not covered by CESL. Since a common concept of “beginning of judicial proceedings” is really difficult to find, an alternative solution is to leave the question to national laws (cfr. articles 10.5 Principles of International Commercial Contracts (PICC), 13 New York Convention on the Limitation Period in the International Sale of Goods). On the other hand, article 181(3) CESL introduces a reference to proceedings “to avoid” insolvency which is missing in articles 14:302 PECL and III.-7:302 DCFR. It comes from article 10.5(1)(b) PICC, where insolvency proceedings are also deemed to be judicial proceedings. Nevertheless, CESL does not mention “insolvency proceedings” in general, but only those addressed to “avoid insolvency”. According to article 1(1) Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, "(t)his Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator"\(^\text{17}\). If insolvency has not been avoided and liquidation brings a company to the end, are insolvency proceedings not affected by suspension?

Most European legal systems consider the beginning of judicial proceedings as a ground for renewal and not for suspension\(^\text{18}\). Only in Germany, England, Ireland and Estonia is prescription suspended. Yet this solution seems to have turned into an international trend: see article 13 New York Convention on the Limitation Period in the International Sale of


\(^{18}\) See the references in note II.2 to article III.-7:302 in DCFR Full Edition, pp. 1170-1171; and article 121-11(a) and (b) Civil Code of Catalonia. Article 2241 French Civil Code passed in 2008 keeps judicial proceedings as a ground for interruption too.
Goods (speaking of “cessation” of prescription). This is also the solution adopted in articles 14:302(1) and (2) PECL and III.-7:302(1) and (2) DCFR. There are some convincing arguments to state that suspension gives a balanced protection both to creditor and debtor, especially in cases where the claim has not been properly filed\(^\text{19}\), but it is disputable whether all judicial proceedings should lead only to suspension of the running of prescription. Execution proceedings which presuppose that the right has previously been judicially asserted and that the party obtained a favourable decision, or that the party is provided with an executive title, should interrupt prescription, for the creditor has obtained a judgment that officially acknowledges his/her right. It must be stressed that CESL neither provides specific rules on postponement of prescription in case of execution proceedings, nor gives a special prescription period for claims established by judgement (cfr. articles 14:202 PECL and III.- 7: 202 DCFR; § 201 BGB).

Similarly, suspension lasts until a “final decision” has been made. Maybe a clearer expression would be the one used in PECL: “a decision which has the effect of res judicata”.

Article 181(2) CESL lays down that, where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended. This provision is probably too broad. According to CESL, the plaintiff that abandons his/her action has nevertheless six extra months until the right prescribes. This is probably an excessive advantage\(^\text{20}\). Irrespective of whether the beginning of judicial proceedings is shaped as a ground for interruption or for suspension, the creditor's mere passivity should not deserve the same treatment as a claim filed before an incompetent court. Furthermore, it can be disputed whether article 181(2) CESL regulates a case of suspension or of postponement of expiry; it looks like postponement, because the plaintiff gets “six extra months”. If this opinion is right, it should be moved to a provision dealing with postponement and not with suspension, for the sake of systematic consistency.

Arbitration proceedings and mediation are treated in the same way as judicial proceedings in relation to the suspensive effect. Article 181(4) CESL offers a concept of mediation. This definition is a reiteration of article 3(1) Directive 2008/52/CE on mediation, and therefore it is not necessary. Furthermore, it raises the question why other concepts are not defined in CESL, such as “beginning of proceedings” (article 181 (1) CESL) or “acknowledgment” (article 184 CESL). Despite the broad wording of article 181(3) CESL, the explicit mention of consumer arbitration would be welcome.

There is a missing ground for suspension: an impediment beyond creditor's control. It is to be found in article 14:303 PECL as well as in article III.-7:303 DCFR. Several national laws acknowledge this ground for suspension: Germany (§ 206 BGB), France (article 2234 French Civil Code), Catalonia (art. 121-15 Civil Code), Portugal, Greece, Poland or Austria\(^\text{21}\). Even if this ground for suspension is unforeseen in other legal systems, it should be included in CESL. If an impediment beyond the party’s control excuses non-performance (article 88(1) CESL), there is no reason why it should not suspend prescription.


\(^{20}\) Müller, “Verjährung”, p. 15.

\(^{21}\) See notes to article 7:303 *DCFR Full Edition*, pp. 1176-1177.
5.2. Postponement of expiry

Postponement means that, although the period of prescription runs its course, it is completed only after the expiry of a certain extra period. Following partially PECL and DCFR, there are two grounds for postponement in CESL: negotiations and incapacity.

As far as negotiations are concerned, the wording of article 182 CESL copies PECL and DCFR but for the last sentence. This last sentence builds an alternative: “neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations”. The communication to the other party that the communicating party does not wish to pursue the negotiations is also a “communication made in the negotiations”, and in all likelihood it would be the “last communication”. Therefore, in fact the second part of the abovementioned provisions does not constitute an alternative but the reiteration of the same idea. Along the same lines of PECL and DCFR, the term “negotiations” is not defined and no formalities are required, therefore national courts will have broad discretion and consequently the risk of divergent national solutions is vivid. In any case, extension for one year looks excessive (compare with an extension of three months in § 203 BGB), in particular because postponement is linked, in the first alternative, to a “last communication” and not to a communication bringing to an end the negotiations and therefore creates too much uncertainty. Furthermore, this ground for extension should be considered in relation to agreements on prescription under article 186 CESL: the explicit admission of agreements on the length of the period of prescription and eventually on the grounds for suspension could be an easier way to approach this issue.

Article 183 CSL deals with postponement of expiry in case of incapacity, although this is probably not very consequent with the fact that CESL does not cover issues of capacity of persons, as has already been said. The provision deals with this question in a very simplified manner in comparison to PECL and DCFR. These soft law texts distinguish claims between a person subject to an incapacity and another person, and claims between that person and his/her representatives. Moreover, claims by or against that person are affected. Conversely, article 183 CESL states that “(i)f a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed”. There is no postponement when the claim is against the person and his/her representative since the provision only speaks of a “a right held by that person [cc. without a representative]”. The consequence of the unilateral character of the provision is that rights against that person are affected neither by suspension nor by postponement. It is unreasonable that the provision is not bilateral. CESL only protects persons under a legal incapacity in case they are creditors. Again, it is disputable if one year of postponement is an excessive period.

There is a third case of postponement in PECL (article 14:306) and DCFR (article III.-7:306) that has rightly not been considered by CESL: the deceased’s estate. The case is parallel to that of incapacity: the party –creditor or debtor– dies and the estate has no representative.

5.3. Maximum Length of Period

There is no specific rule on maximum length of period (long-stop), opposite to article 14:307 PECL and III.-7:307 DCFR. Since the commencement of the short period of

22 See section 2.

23 Nevertheless, it must be taken into account the synthesis of the tenth meeting on 17 and 18 February 2011 of the Experts Group (see supra, note 9) according to which: “The
prescription hinges on reasonable discoverability, and there are some cases of suspension of the running of the period, prescription could be postponed for too long a period, or even indefinitely. The long-stop period tries to avoid such an inconvenience.

Since the two periods of prescription to be found in article 179 CESL are apparently general, the outcome would be that the same claim or right could be subject to the two-year and to the ten-year period. But somehow both periods must interact, and one could wonder whether the long prescription period limits the short one. Effectively, if the buyer discovers non-conformity, for instance, twenty years after delivery, it would not be reasonable to give him/her two more years to sue the seller (article 180(1) CESL). In order to preserve efficiency in trade and business and promote security in transactions, the ten-year period should act as a long-stop period. This means that any incident must be treated as definitely closed, even if the creditor is not aware of the facts as a result of which the right might be exercised. The same holds true for the thirty-year period in case of claims for personal injuries: it should constitute a limit to the shorter period of prescription of two years.

However, as has already been said, this is not made clear in CESL. Article 179 does not state that a right is prescribed as soon as one of the two periods is completed; this would clarify the issue. The necessity of a long-stop rule in a subjective system of commencement of prescription is confirmed by Whereas 26 CESL, because there a distinction is drawn between “prescription and preclusion of rights”. Nevertheless, article 179 CESL uses the same term “prescription” to indistinctly refer to genuine prescription periods (which can be suspended and interrupted) and to long-stop periods, which instead have to be treated as preclusion ones. Surprisingly, the distinction made in Whereas 26 CESL has not been incorporated into the provisions. Definitively, it would have been much clearer if article 179 CESL had provided for a general prescription period of two years and a long-stop period of ten years (or thirty years in case of personal injuries), resembling more articles 14:307 PECL and III.-7:307 DCFR.

There are strong arguments to sustain that there are two periods of prescription and none of preclusion. Article 181.2 CESL refers to “both” periods; articles 182 and 183 CESL to “neither period”; article 185(1) CESL to “the relevant period”; and, finally, article 186 CESL allows to shorten or lengthen the two of them, which would not be possible if the ten-year period was a true long-stop period.

Therefore, a long-stop rule along the lines of PECL and DCFR should be introduced into CESL.

Rapporteur explained that there were basically two possible systems which both take the moment of knowledge of the claim as a starting point but are elaborated in different manner. The first system contains only one period, which runs from when the cause of action arose, but the running of prescription is suspended until the debtor knows of the claim, up to a maximum of ten years. The second system contains two periods (1) the “short stop period”, which runs from the date of knowledge and (2) the “long stop period”, which runs from when the cause arose whether or not the creditor knew about it”. Following discussion the Group agreed to adopt the second system which contains two periods: (a) a “short stop period” which is three years running from the date of substantiated knowledge of the claim and (2) a “long stop period” which is running from 10 years from the date the claim arises”. It is really odd to speak of a two maximum periods of length and in fact the confusion between period of prescription and long-stop is quite evident.
6. RENEWAL OF PRESCRIPTION PERIODS

Article 184 CESL foresees only one ground for renewal of prescription: acknowledgment by the debtor. According to it, “(i)f the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run”. The article follows essentially articles 14:101 PECL and III.-7:401(1) DCFR, yet it points out that a “new short period” begins to run. The main consequence of renewal is that the time which has elapsed before the interrupting event is not taken into account and a new period has to run.

Acknowledgment of the creditor's right is generally considered a ground for renewal of prescription periods\(^{24}\). What is “acknowledgment” is not defined in CESL. Although article 4 CESL advocates for an autonomous interpretation of CESL, the concrete acts resulting in acknowledgment are going to be determined by national laws as a consequence of a missing European concept of “acknowledgment”. This opens the door to different constructions of the term and, since it is the only ground for renewal, this is not a minor point. It is true that the article lists some acts which are usually considered to interrupt prescription, such as part payment, payment of interest, giving security and set-off, but as other acts can also have the same effect, the article adds “or in any other manner”. In general, any act of the debtor accepting the existence of the debt may lead to renewal, yet national courts will enjoy discretion to assess the relevant facts of each case.

Article 184 CESL requires that the acknowledgment is “vis-à-vis the creditor”. Consequently, any act that may lead to renewal which is addressed to a third party has no interruptive effect. It must be understood that agents stand for creditor and debtor.

Acknowledgment requires no formalities, along the lines of PECL and DCFR. Most of European legal systems do not require formalities, but England Limitation Act 1980 sect. 30 (“an acknowledgment must be in writing and signed by the person making it”) does.

The novelty of the article is the fact that renewal amounts to the beginning of a new short period of prescription, irrespective of the length of the initial period which is affected by renewal. This is also the solution established in PECL, but for one point. Article 14:402(2) PECL (special period for a right established by legal proceedings) sets out that “this Article does not operate so as to shorten the ten year period”; article III.-7:401(2) DCFR opts for the same wording. Under PECL, when the ten year period is renewed, the new period does not affect the original period of ten years; time already elapsed before interruption and time of the new period cannot be less than ten years. This is not so clear under CESL. Literally, renewal implies that a short period begins to run regardless of whether the original period was a long or a short period. Therefore, renewal never amounts to a longer period of prescription but may entail a reduction of the period. This result favours debtors, probably too much. PECL’s approach is probably more balanced. On the other hand, according to article 180(1) CESL, commencement of short periods of prescription is subjective, depending on being aware of the facts, yet article 184 CESL presupposes an objective commencement resulting from acknowledgment. In conclusion, the solution proposed by PECL seems more coherent. Since we have argued that the ten-year period is a real period of prescription and not a long-stop\(^{25}\), it is questionable that renewal amounts always to a short period of prescription irrespective of the length of the interrupted period.


\(^{25}\) See subsection 5.3.
It must also be considered whether new grounds for renewal should be introduced. Article 14:402 PECL lays down that the ten-year period begins to run again with each reasonable attempt at execution undertaken by the creditor. The same is stated by article III.-7:402 DCFR. Similar provisions are to be found in § 212(1) BGB and article 2244 French Civil Code. The reason for opting for renewal and for that longer new period is that the creditor has expressed his/her interest in the right or claim. Here again, the provisions in PECL and DCFR seem more balanced. The use of the word “reasonable” in both soft law texts embraces the cases where cancellation or revocation of the act of execution prevents recommencement of the prescription period, which are expressly considered in § 212(2) and (3) BGB.

Whether some cases of judicial proceeding should lead to renewal instead of suspension or not has been already been dealt with under section 5.1.
7. EFFECTS OF PRESCRIPTION

Article 185 CESL deals with the effects of prescription. Article 185(1) CESL mixes the weak and the strong effect of prescription, depending of the character of the right (claim to enforce performance / other remedies for nor performance). As it has already been said\textsuperscript{26}, the wording of this article is not coherent with the wording of article 178 CESL, where prescription refers to rights and other “ancillary rights”, provided that this last expression covers the “remedies for non-performance” mentioned in article 185(1) CESL. In this case, remedies are “extinguished” after the expiry of the relevant period of prescription (either the short or the longer one, depending on the case). This approach is consequent with the fact that a prescribed obligation is not enforceable anymore and therefore can no longer be “non-performed”. The exception is the possibility for the creditor to withhold performance (articles 106(1)(b), 113, 131(1)(b), 133 CESL): the creditor can withhold performance of his/her own obligation, although his/her right to enforce the debtor’s obligation is prescribed, in order to preserve the contractual balance\textsuperscript{27}.

Contrary to the automatic extinction of remedies which are not “the right to enforce an obligation”\textsuperscript{28}, article 185(1) CESL makes clear that the debtor is entitled to refuse performance of the obligation. Therefore, prescription of the right to enforce an obligation is not automatic: it has to be invoked by the debtor (see also, articles 14:501 PECL and III-7:501(1) DCFR). Furthermore, prescription has a weak effect, i.e. despite prescription the creditor’s right continues to exist, because prescription only affects enforceability\textsuperscript{29}. Consequently, whatever has been voluntarily paid or transferred by the debtor in performance of the prescribed obligation extinguishes the obligation and cannot be treated as donation. It is a due payment (article 185(2) CESL). This approach is followed in most European law systems and has been expressly adopted by articles 14:501(2) PECL and III.–7:501.2 DCFR\textsuperscript{30}. Spontaneity of the payment is not specifically required, but since article 185(2) CESL establishes that performance cannot be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out (cfr. article 2249 French Civil Code), it may open the door to reclaim if payment has not been spontaneous, along the lines of some national laws (cfr. article 304(2) Portuguese CC; article 2940 Italian CC)\textsuperscript{31}. On the contrary, ignorance or mistake about the fact of prescription is irrelevant, like in many national laws (cfr. article 272.2 Greek Civil Code; article 121-9 Civil Code of Catalonia)\textsuperscript{32} and in art. 26 of the New York Convention on the Limitation Period in the International Sale of Goods.

\textsuperscript{26} See section 3.

\textsuperscript{27} Müller, Die Verjährung”, p. 19.

\textsuperscript{28} Such a consequence is not automatic in other legal systems, see for example § 218(1) BGB: “prescription of the obligation has to be alleged in order to avoid termination”. It would be the same in Spanish or Catalan Law.


\textsuperscript{30} Lando et alii, Principles, pp. 202-203.

\textsuperscript{31} See also, in Germany, Peters/Staudinger, § 214 BGB, I, Berlin, 2004, Rn 35, p. 735. However, it is not so obvious in Spain. See Luis Díez-Picazo, La prescripción extintiva en el Código civil y en la jurisprudencia del Tribunal Supremo, Madrid, 2003, p. 98.

\textsuperscript{32} See also § 214(2) BGB, article 304(2) Portuguese Civil Code.
There is another consequence resulting from the fact that the unenforceable claim still exists: the debtor can set off his/her prescribed obligation with the creditor’s claim (articles 14:503 PECL, III-7:503 DCFR and, with different requirements, 25(2)(b) of the New York Convention on the Limitation Period in the International Sale of Goods). Set-off of prescribed rights was also taken into account by the Expert Group in the Feasibility Study (art. 188(2)), but it was suppressed in the CESL, probably due to the fact that neither is set-off regulated\textsuperscript{33}, nor do legal systems admit unconditionally set-off of prescribed claims.\textsuperscript{34} Therefore, this issue is left to national legislations.

Periods of prescription of ancillary rights (in the sense of claim to enforce performance of an obligation) do not expire later than the main right to enforce obligation (article 185(3) CESL), but obviously expiry may happen before. The rule corresponds to a common trend (cfr. \S 217 BGB, article 274 Greek Civil Code)\textsuperscript{35}. Article 185.3 CESL is borrowed from articles 14:502 PECL and III-7:502 DCFR. As an example of ancillary claims, article 185(3) CESL mentions “the right to payment interests”. It is doubtful whether it only refers to interests for delayed payment (articles 131(1)(d) and 166 ff CESL) or it also covers remuneratory interests. In this latter case, it would not be so obvious that the obligation of interest has to be considered ancillary from a juridical point of view, because it represents the “counter-performance” for the lending of capital and, consequently, payment can also be considered a main obligation. Furthermore, the provision raises the question whether security rights have to be considered ancillary claims in the context of CESL, since article IX.–6:103 DCFR on prescription of the secured right has not been incorporated, probably on the assumption that CESL does not deal with property law\textsuperscript{36}. Security rights are nevertheless mentioned in art. 184 CESL as a form of acknowledge of the right.

\textsuperscript{33} Whereas 27 CESL.


\textsuperscript{35} See also articles 133 Swiss Code of Obligations and art. 27 New York Convention on the Limitation Period in the International Sale of Goods.

\textsuperscript{36} Whereas 27 CESL.
8. PARTY AUTONOMY CONCERNING PRESCRIPTION

Article 186 CESL is devoted to the agreements concerning prescription, an issue on which national laws are quite divergent. The first rule states that the rules of Chapter 18 may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription. The wording follows that of articles 14:601 PECL and III.-7:601 DCFR. However, it must be taken into account that a series of rules contained in the soft law texts has not been incorporated into CESL. It is doubtful, then, what exactly means “in particular”. If these words mean that shortening or lengthening are but examples of the autonomy that enjoy the parties, the question arises whether the parties can provide for other grounds for suspension than those enshrined in articles 181 and 182 CESL or new grounds for postponement of expiry, transform grounds for suspension into grounds for renewal, etc. In other words, there are no clear limits to party autonomy.

The first limit is that the short period of prescription may not be reduced to less than one year or extended to more than ten years. Parties are thus not allowed to extend the short prescription period beyond the long prescription period; and they cannot shorten it by more than half. This maximal shortening is particularly negative in case of B2B contracts. Nevertheless, it must be remembered that there is no long-stop rule in CESL, so that in fact the situation may lead hypothetically to a prescription period commencing once the agreed long period would have expired. It must be assumed that the parties cannot reach this forbidden result by other means such as providing for a subjective commencement of prescription.

The second limit is that the long period of prescription may not be reduced to less than one year or extended to more than thirty years. This provision makes evident that the parties are free to reduce significantly the periods. The minimum –one year– is the same, irrespective of the length of the legal period. By contrast, the short period can only be lengthened to ten years and the long period to thirty years. A reminder to the reflection on the absence of a long-stop period must be done here.

A third limit concerns consumers, and has thus a protective aim. “In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer”. It is questionable if the article can be applied to the detriment of any party, be that a consumer or not, once there are some insuperable limits, those of subsections (2) and (3). Moreover, this rule comes after subsection (4) which, as said, emphasizes party autonomy, since the only imperative provisions are those dealing with the length of the periods. It is especially relevant that article 186(4) CESL establishes that “(t)he parties may not exclude the application of this Article or derogate from or vary its effects”. Attention must be paid to the fact that the provision refers to the “article” and not to some specific subsection of the article, mainly those that contains real limits to party autonomy (sections 2 and 3). In this sense, the article needs reordering and clarification. On the other hand, the policy of this norm is not very clear: why a consumer claim could prescribe 40 years after conclusion of the contract?

Anyway, these are not the only limits. Of course, the principle of good faith plays its role (article 2), as well as the control of unfair terms (article 7 and Chapter 8 CESL).

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38 See subsection 5.3.
9. CONCLUSIONS

- It must be clarified whether CESL rules on Prescription apply only to provisions on rights and claims resulting from a sale contract or, by contrast, they apply to any other right or claim, irrespective of their contractual or non-contractual origin. Should the European legislator opt for the latter solution, there is no good reason why the entire regulation of PECL or DCFR is not incorporated into CESL.

- It is not clear in CESL whether the two general periods of prescription interact and if the long prescription period should limit the short one, acting as a long-stop period. If it is not the case, as we think, a long-stop rule, along the lines of PECL and DCFR, should be introduced into CESL.

- In case of rights or remedies for lack of conformity, a single period after delivery or passing of risk is recommended. The solution provided in art. 5.1 Directive 99/44 (a single and minimum period of two years after delivery) seems adequate.

- In case of personal injuries, a longer period which commencement depends on knowledge may be necessary, but thirty years is excessive and not very appropriate in the context of sale contracts.

- CESL should define concepts such as “any ancillary right”, “beginning of proceedings”, “acknowledge”, “negotiations” and “final decision” in order to avoid divergent interpretations. By contrast, other definitions to be found in CESL, like “mediation”, are not necessary.

- CESL neither provides specific postponement or renewal rules in case of execution proceedings, nor does it give a specific prescription period for claims established by judgement.

- It may be considered if a period of one year of postponement in case of negotiations is too long. It may prompt opportunistic behaviour to open negotiations when the period of prescription is close to being completed. Additionally, the broad wording of article 186 CESL may make unnecessary article 182 CESL.

- Article 183 CESL unreasonably only protects persons subject to an incapacity, and not their creditors. Furthermore, prescription should be postponed between a person subject to an incapacity and that person’s representative.

- The wording of “in particular” in article 186 CESL raises the question if it means “in concreto” or “as an example”. Depending on its meaning, party autonomy could be more or less reduced. The rule protecting consumers needs concretion to avoid excessive protection.

- The maximal lengthening of thirty years by agreement appears excessive, whilst there is no good reason to prevent businesses, in B2B relations, to agree on periods shorter than one year.
REFERENCES


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