

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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



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**Proposal for a Regulation on a
Common European Sales Law:
Making the Proposal simpler
and more certain**

NOTE



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

LEGAL AFFAIRS

**Proposal for a Regulation on a Common
European Sales Law: Making the
Proposal simpler and more certain**

BRIEFING NOTE

Abstract

This briefing note summarises the observations and recommendations set out in the European Law Institute's Statement on the CESL. It is divided into two parts. The first deals with the content of the proposed Regulation. The second deals with measures relating to effective implementation.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

- ADR** Alternative Dispute Resolution
- B2B** Business-to-Business
- B2C** Business-to-Consumer
- CJEU** Court of Justice of the European Union
- CESL** Common European Sales Law
- ELI** European Law Institute
- ODR** Online Dispute Resolution
- SIN** Standard Information Notice
- SME** Small or Medium Sized Enterprise
- UCP** Unfair Commercial Practices

EXECUTIVE SUMMARY

I welcome this opportunity to provide a briefing note to the European Parliament to assist it in its consideration of the Commission Proposal for a Common European Sales Law (COM(2011) 635 final) (the CESL). I do so as the chairman of the European Law Institute's working party on the CESL. The working party approached the Commission's Proposal purely on the basis that if it was to be implemented what improvements could be made to it. The working party deliberately did not consider the political questions which arise in respect of the Proposal.

This briefing note summarises the observations and recommendations set out in the European Law Institute's Statement on the CESL¹. It is divided into two parts.

The first deals with the content of the proposed Regulation. The Proposal is intended to introduce a Common European Sales Law. This law is to be optional, in the sense that contract parties (consumers and businesses) will have to choose to use it, and must do so in preference to their domestic law or, in the case of businessmen, some other system of law or CISG. As such it will be necessary for the proposed law to be as clear and simple as possible, to provide effective consumer protection, and be of clear utility to potential users: to be user-friendly. In order to increase this feature of the CESL, a number of revisions could be made to the proposed Regulation, as set out in part 1.

Those proposed revisions call:

- for the Proposal to be consolidated into a single instrument with properly collated definitions and simplified, consistent, terminology for sellers and buyers of goods, services and digital content;
- for the restriction to SMEs to be abandoned, while it should be extended to apply to non-profit making entities;
- for the cross-border requirements to be revised to, for instance, abandon the minimum EU link in B2B contracts; ensure that the CESL is not rendered unavailable where elements outside its scope are in the contract;
- to remove the exclusions from the substantive scope rules;
- to make it easier to opt-in in B2C contracts;
- to replace the Standard Information Notice with a more effective information mechanism;
- to ensure the mandatory rules cannot be derogated in B2B contracts through partially choosing the CESL;
- to ensure the pre-contractual information duties apply effectively during the pre-contractual stage; restructure the rules derived from Directive 2011/83/EU;

¹ *ELI Statement on the Proposal for a Regulation on a Common European Sales Law*
<http://www.europeanlawinstitute.eu/news/news-contd/article/eli-statement-of-the-european-law-institute-on-the-proposal-for-a-regulation-on-a-common-european-sa/?tx_ttnews%5BbackPid%5D=126342&cHash=09d9d734ba7e73f49c539ac4c2091b4f>

- to restructure CESL Parts IV to VI so that it properly follows the life cycle of a contract;
- to completely revise the termination rules and revise the approach to restitution; revise the balance between consumer rights and legal certainty;
- to revise the rules on digital content; clarify good faith;
- to introduce payment protectors and early confirmation and acknowledgement of receipt in e-commerce; provide better consumer protection in related service contracts and where contract terms are individually negotiated; and
- clarify the relationship to Directive 2005/29/EC.

The second part deals with measures relating to effective implementation. Any new European sales law instrument will need to be supported by specific, practical, implementation measures. Such measures will need to be all the more effective in respect of any optional instrument.

Measures will need to be introduced which will encourage use of the CESL by both businesses and consumers. Those measures will need to ensure that, in practice, the CESL will be certain in its meaning and predictable in its effect; that there will be effective means to secure efficient and economic dispute resolution; and that there are effective means to secure predictable enforcement.

These measures are all the more important as the CESL is to apply across the 27 EU Member States and will sit alongside their well-established domestic contract law regimes and cultures, yet will have to be interpreted autonomously.

These measures call for the establishment of an Advisory Body and Official Commentary; the creation of a systematised database and regular digest of important decisions and guidance issued by the Advisory Body; further measures to foster judicial co-operation to ensure a uniform interpretation and application across the EU; and the development of effective Alternative and Online Dispute Resolution measure.

1. THE PROPOSED REGULATION - CONTENT

1.1. A Single Instrument to replace the proposed Regulation and Annex

- (1) The Proposal could be rendered more user-friendly if it were consolidated into a single Instrument. The proposal that it be split into a Regulation and an Annex, containing the substantive sales law rules, is unnecessarily complex, leads to duplication across the Article numbers and is a source of confusion and otherwise avoidable error by users. It also produces the situation where some provisions are placed in the Regulation where they should properly be placed in the Annex e.g., the definitions.
- (2) These issues could be resolved, the Proposal simplified, and rendered more user-friendly and consistent with *acquis*, if the Regulation and Annex were consolidated into a single Instrument. If such a revision were to take place it would increase the prospect of contract parties opting to use the CESL.

1.2. Revisions to Scope

Removal of Restriction to SME

- (3) The CESL can be used for both business-to-consumer (B2C) contracts and business-to-business (B2B) contracts. In the latter case it can only be used where one party is a small or medium sized enterprise (SME). This requirement is, it appears, unprecedented in such an instrument as the CESL. It is also liable to render the CESL too complex and uncertain to use in B2B contracts. This may then undermine its utility and the prospect that businesses will opt to use it.
- (4) The SME requirement's complexity arises due to the criteria specified in Article 7 of the Regulation and reliance, under Recital 21, on Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). The effect of this is to: i) require a large enterprise to take steps before entering into a B2B CESL contract to ensure that the other contract party is an SME; ii) the criteria for determining whether the contract party is an SME is complex and will place an unnecessary and costly burden on the party to provide sufficient information to establish that it is an SME. Whether the requirement is satisfied is likely to remain uncertain, calling into question the validity of any B2B CESL contract entered into. In the circumstances, businesses may simply choose not to use the CESL.
- (5) This problem could be resolved through removing the formal SME requirement; a requirement which in any event is difficult to justify as necessary when over 90% of businesses in the EU are SMEs.

Extension to non-profit making entities

- (6) The Regulation as presently drafted effectively excludes non-profit making entities from using the CESL². The present exclusion means that charities, associations and public institutions could not use the CESL. It also requires a business to investigate

² See Article 2(e) and 2(f) of the Regulation.

whether someone with whom it is trading is a non-profit or profit entity. This again leads to unnecessary complexity and uncertainty on the part of potential users, undermining the CESL's utility, especially in cross-border situations and in respect of mass contracts. The Proposal's utility could therefore be increased, were it to be extended to enable non-profit making entities to use it.

1.3. Revisions to Scope – Territorial Scope

- (7) There are valid reasons for restricting the CESL's territorial scope to cross-border contracts and creating an option for Member States to apply the CESL to domestic contracts.
- (8) The CESL's utility could be improved however if the present advantage which it gives to large enterprises over SMEs were removed. The advantage arises as a large enterprise, established in more than one country, can easily redirect contracts to another Member State, thus securing a cross-border element and enabling it to take advantage of a single contract form in trading throughout the EU/EEA. An SME based in one Member State could only operate under a single regime if that Member State extended the CESL to apply to its domestic law. A similar two regime problem arises in respect of sellers based within the EU/EEA in contrast to sellers based outside the EU/EEA.
- (9) Consideration should also be given to whether the minimum EU link set out in the Proposal is justified³. This prevents traders based outside the EU, who choose the domestic law of a Member State in B2B contracts, from using the CESL. In so far as B2C contracts are concerned, the Proposal requires the consumer's residential, billing or delivery address to be in a Member State. Again this restricts the ability of traders using the CESL, when they trade outside the EU/EEA. These restrictions reduce the CESL's utility and thereby decrease the prospects that it will be used by businesses.

1.4. Revisions to Scope – Substantive Scope

- (10) The Proposal's utility could be increased through revision to its substantive scope.
- (11) Article 6(1) & (2) of the Regulation renders the CESL unavailable to any contract which contains an element which falls outside its substantive scope i.e., lease of goods, transport services, training, gratuities such as support hotlines, welcome gifts and, arguably, delivery services, as well as where consumer credit in the form of a deferred payment is made available.
- (12) It will not always be clear from the outset whether a contract contains such an element, thus reducing the prospect that a business will use the CESL, as it would not be sure that the contract would at a later point be held to fall under the relevant national law. Equally, where a business wishes to include such an element in a B2C contract, it will not be able to use the CESL.
- (13) The CESL's utility could be improved by removing these restrictions while also providing that the CESL should not become unavailable where excluded elements fall within the contract.

³ Article 4 CESL.

1.5. Choosing the CESL

- (14) The basis on which parties can opt-in to the CESL in the context of B2C contracts is complex. It requires at least two separate agreements: one for the CESL to apply and another for the individual sale itself. This is apt to discourage consumers.
- (15) Matters are further complicated by the proposed Standard Information Notice (SIN), set out in Annex II of the Regulation. It is intended to be a rough and ready guide to the CESL. Unfortunately it is not entirely accurate and is apt to confuse and mislead consumers e.g., it suggests that in most cases there is a right to withdraw, whereas in reality there may well not be. It is also difficult to conceive that consumers will be well aware of their comparable rights under national law.
- (16) The Proposal could be improved by removing these two features for B2C contracts. The SIN ought to be replaced with a web-link to an official website which explains, concisely, the main differences between their national law and the CESL.
- (17) In the context of B2B contracts the CESL needs to be clarified to make it clear that parties cannot, by partially choosing the CESL under Article 8(3) of the Regulation, escape its mandatory rules (see Article 1(1) CESL).

1.6. Application of Pre-contractual duties

- (18) Article 11 of the Regulation provides that the pre-contractual information duties only apply retrospectively i.e., once a contract is concluded. If a contract is not concluded, national law applies. As such it is not possible to know which law applies during the negotiating stage of a contractual relationship. This will result in traders complying with two sets of pre-contractual duties, thus depriving them of the benefit of using the CESL. The Proposal would benefit therefore from a revision rendering its pre-contractual duties applicable during that part of the relationship where the trader indicates that the CESL is the potentially applicable regime.

1.7. Increasing the CESL's user-friendliness

- (19) In its Statement on the CESL the ELI makes a series of suggestions for revising the Regulation and CESL to increase its clarity, reduce its complexity and render it more user-friendly. These suggestions are summarised in the Statement and presented in detail in the form of revised draft Articles which could serve as a tool-box for policy-makers as they consider the Proposal. The main suggestions for reform can be summarised as follows:

- (a) **Collate the definitions within the Regulation and CESL (Annex) definitions:** The definitions set out in Article 2 of the Regulation are problematic; some are superfluous as they refer to terms which only occur once in the CESL or are not used ('standard contract term' is used in the definitions, whereas 'individually negotiated term' is used in the CESL), some are vague ('loss of quality of life'), others are missing ('express' is not defined), some ought properly to be in Article 5, as they refer to the CESL's material scope. It is also not clear why the definitions are in the regulation when they ought properly to be in the CESL itself, as they refer to the terms used in the CESL. To increase utility, the definitions should be revised and assembled in one place within the CESL.

- (b) **Simplify the terminology:** To make the CESL shorter, simpler and more user-friendly the parties should be referred to as 'seller' and 'buyer' with regard to goods, digital content and services, and the supply of digital content should be referred to as 'sale'.
- (c) **Rearrange rules derived from Directive 2011/83/EU (Consumer Rights Directive):** A number of rules within the CESL are derived from Directive 2011/83/EU. These rules should be restructured in a more rational and logical manner.
- (d) **Restructure CESL Parts IV to VI:** To ensure the CESL follows the life cycle of a contract, Part IV should be divided into a part on the rights and obligations of parties and a part on remedies for non-performance. The rules on modalities of performance and remedies for non-performance should be restructured so as to avoid repetition, uncertainty and unnecessary gaps.
- (e) **Improve the rules on termination:** The rules on termination are dispersed throughout the CESL. This is confusing and renders the CESL difficult to use. The rules on termination ought to be fundamentally revised to increase their coherence and comprehensibility and remove significant inconsistencies.
- (f) **Revise the Chapter on restitution:** The present approach to restitution in the CESL leads to inconsistent results, e.g., where a car is stolen or destroyed, the rules require a buyer to give restitution to provide the full monetary value of the car, whereas a buyer only needs to return the car if it is wrecked in a crash. A buyer also has to give restitution of the natural or legal fruits of any product bought, whereas a seller only has to pay interest. The rules also fail to resolve important and controversial issues, such as who is responsible for bearing the cost of restitution. The approach to restitution therefore needs to be fundamentally revised in order to render it workable, to remove inconsistencies and ensure it does not, as at present, produce unacceptable results.
- (g) **Rethink the balance of consumer rights and legal certainty:** The CESL affords the consumer very far-reaching rights, which it then renders subject to limitation by very vague general clauses. This ought to be revised so as to avoid excessive divergence of results within the EU/EEA and not to deter consumers from exercising their rights.
- (h) **Face the challenges posed by digital content:** The rules on digital content in the CESL ought to be more in line with the specific challenges posed by digital products. This is an area which deserves much more detailed and radical consideration.
- (i) **Revise good faith provisions:** The general duty to act in good faith is capable of multiple interpretations, given the legal history and differing legal cultures of the Member States. It ought therefore to be revised to render its proper interpretation and application clearer. At the very least, it should ensure that a breach of the duty to act in good faith does not give rise directly to remedies for non-performance of an obligation.

1.8. Improve Consumer Protection

- (20) The CESL to a large extent follows the consumer protection provisions set out in Directive 2011/83/EU. Unlike the Directive, however, the CESL may not be supplemented by national law, as the Directive can be in certain circumstances. There is a danger then that this approach to consumer protection in the CESL will lead to the ossification, and perpetuation, of lacunae and deficiencies in consumer protection.
- (21) In order to enhance consumer protection in the CESL the following suggestions are therefore made, which if implemented would particularly improve consumer protection in cross-border E-Commerce:
- (a) **Protection of advance payment:** To improve consumer confidence in cross-border trade, and thereby increase the prospect that the CESL will be used by consumers, traders should be required to provide protection of advance payments through e.g., accredited escrow accounts, insurance companies or similar schemes. Traders should be allowed to offer consumers the chance to opt-out of such protection, in order to reduce the burden on SMEs of providing such protection.
 - (b) **Early confirmation and acknowledgment of receipt in E-commerce:** Internet traders should be required to send a confirmation of the conclusion of a contract and of the estimated time of delivery, or of the rejection of the consumer's offer without undue delay after receipt of any consumer order. Failure to do so should result in the consumer not being bound by the contract. Such a revision will enable consumers to enter into internet contracts confident that they know where they stand as to whether the trader can fulfil the order and when delivery will be made. It will thus remove a present feature of internet trade which deters consumers from entering into such contracts.
 - (c) **Better protection in respect of related services:** There is insufficient consumer protection in respect of related services in the CESL. By way of example, where traders only offer separate options (e.g. the supply and installation of a new washing machine, or simply the supply of a washing machine) and it is not clear to the consumer which of those options is sufficient to achieve the result which the consumer desires e.g., because the consumer also wants to have their old washing machine removed and disposed of in addition to the supply and installation of the new one. This is particularly problematic where the cost of removal of the old washing machine is not included in the price and will cost as much as the delivery and installation of the new one. This defect in the CESL could be cured by: i) the introduction of a qualification to the pre-contractual information duty on price, i.e. that the trader must give an estimate of the quantum of time, materials or similar factors required to fulfil the trader's obligations where the total price depends on that quantum and that quantum is not yet determined in advance; ii) adding a rule according to which the trader is only entitled to a price exceeding the estimate given to the consumer before the conclusion of the contract where the increase is due to an impediment within the consumer's control and the trader could not be expected to take the possibility of such an impediment into account when making the estimate and (iii) modifying the rule on the trader's obligations so that the trader must achieve the specific result envisaged by the consumer at the time of the conclusion of the contract where the result envisaged was one which the consumer could reasonably be expected to have envisaged and the consumer

had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

- (d) **Better protection against individually negotiated terms:** In B2C contracts the CESL protects consumers from those contract terms which are not individually negotiated and which are unfair. There is, however, no real protection for consumers in respect of individually negotiated terms, except in limited circumstances for unfair exploitation (see Article 51). To increase consumer protection, and the prospect that consumers would choose the CESL, the Proposal could beneficially be revised to extend the application of consumer protection against unfair exploitation.
- (e) **Unfair Consumer Practices:** In developing the Proposal, further consideration should be given to clarifying the relationship between the CESL and Directive 2005/29/EC on unfair commercial practices (UCP), and national law which implements the Directive. Clarification is particularly necessary in respect of the relationship between contractual sanctions under the UCP and the CESL.

2. THE PROPOSED REGULATION – EFFECTIVE IMPLEMENTATION

2.1. Official Commentary and Advisory Body

- (22) The Commission Proposal to produce an official commentary on the CESL should be welcomed⁴. Clear guidance on the intended meaning and application of the CESL's provisions will be needed from the date of its introduction, if consumers and businesses are to have sufficient confidence to opt-in to its regime. Equally, such guidance is necessary for lawyers and courts, as they cannot rely on their domestic law to guide their interpretation of the CESL's provisions.
- (23) Such a commentary is all the more necessary as reliance on court proceedings as the primary mechanism to clarify the meaning of the CESL's provisions is likely to prove problematic. Such proceedings are not only slow, time-consuming and expensive, but they run the risk, in the absence of clear prior guidance, of producing differing interpretations of the CESL's provisions in the Member States. That in turn runs the risk of time-consuming and expensive litigation before the Court of Justice of the European Union (CJEU).
- (24) In order to reduce the possibility of uncertainty and unpredictability, which would undermine use of the CESL, an official commentary provides a measure of clarity and non-binding guidance. Such guidance would be without prejudice to the CJEU's role, but would be highly persuasive, obviate the need for litigation and provide a sure foundation for consumers and businesses to choose the CESL.
- (25) To render such a commentary as efficacious as possible it should have two aspects. First, and most obviously, it should provide a clear and comprehensive exegesis of the CESL's articles. Secondly, it should provide a clear explanation of the policy choices which underpin the articles. Such an explanation will enable courts across the Member States to interpret and apply the CESL properly, and more consistently than they might otherwise do in the absence of such guidance.
- (26) An official commentary is not however a complete solution. It will not be capable of providing guidance on all potential issues of interpretation and application. It could usefully be supplemented by an official Advisory Body, which might usefully be modelled on other such bodies e.g., DOCDEX⁵ or the CISG Advisory Council⁶. An official Advisory Body could provide persuasive guidance on specific matters of interpretation and application of the CESL. It could act of its own motion where, for instance, it became aware of inconsistent application or interpretation of provisions in the CESL across the Member States.
- (27) To ensure consistency between the Official Commentary and the Advisory Body, as they are intended to be complementary mechanisms, it might be sensible to draw, at least initially, the Advisory Body's membership from amongst those responsible for drawing up the commentary. It would however be beneficial for the Advisory Body to have a wider membership, to ensure that it was able to draw on the experience of practitioners and judges.

⁴ Recital (34).

⁵ A body of experts which provide persuasive guidance in respect of disputes arising under the ICC DOCDEX Rules.

⁶ A body of experts which provide persuasive guidance on the interpretation of the United Nations Convention on Contracts for the International Sale of Goods. See <<http://www.cisgac.com/>>

2.2. A Case Law and Judgment Summary Database and Digest

- (28) While the CJEU is responsible for providing the definitive interpretation of the CESL, the vast majority of court proceedings will be relatively low-value consumer claims and will take place in the Member States. It is unlikely therefore that a body of CJEU case law will develop in the short to medium term. As such there will be a need to disseminate quickly and easily authoritative national decisions amongst the Member States in order to achieve a common understanding by consumers, businesses, lawyers and courts across the EU of the CESL.
- (29) The Commission's proposal to facilitate this through the creation of a central database of national decisions is thus to be welcomed⁷. To optimise the utility of such a database it should be: a) fully systematised and easily searchable⁸; and b) translated into a number of the EU's official languages.
- (30) The database should not just include judgments. To facilitate ease of understanding, all judgments on the database should be accompanied by a model standard-form judgment summary, which should be succinct and therefore easily and cost-effectively translatable. To facilitate accessibility, the summary should be divided into five sections and be no more than two – three pages in length. The sections should set out: (i) the issue and the relevant CESL article(s); (ii) a brief summary of the facts; (iii) a short summary of the main arguments; (iv) the decision; and (v) the reasons for the decision, clearly stating the principle decided.
- (31) To facilitate further dissemination of decisions interpreting the CESL, the database should be supplemented by the publication of a regular digest. It could also contain any opinions issued by the Advisory Body, which had been published since the previous digest had been published.
- (32) It furthermore seems beneficial to place responsibility for the database content and preparation of the digest in the hands of the Advisory Body. Such an approach will ensure consistency in the information on the CESL's application which is disseminated. It will also ensure that only properly authoritative decisions are placed on the database and reported in the digest. Oversight of the database and digest by the Advisory Body will ensure that the latter receives early notice of any divergence in interpretation across the Member States, thereby enabling it to consider the issue and give an advisory opinion. Finally, and from a practical perspective, such an approach will enable the creation of a single website containing all relevant details concerning the CESL, its commentary, its Advisory Body, the case law database, digest and advisory opinions.

2.3. Improved Judicial Co-operation and Training

- (33) To increase, over the longer term, judicial understanding of the meaning and application of the CESL's substantive provisions, the existing Commission programme focused on improving judicial co-operation could be built on and supplemented. This could include facilitating the development of:
- (a) judicial and legal training in respect of the preparation of judgment summaries (see above); and

⁷ Recital (24).

⁸ See for instance, the Venice Commission's database.

<<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>>

- (b) training programmes by national judicial training bodies in respect of the CESL. This could include the design and delivery of course materials by those bodies with judges from other Member States in order to develop an effective cross-border, uniform training approach and help foster the European judicial culture.
- (34) To develop further a consistent approach to court interpretation of the CESL, Member States' judiciaries could be asked to ensure that CESL cases are only heard by the same designated divisions or chambers of courts, and to nominate a judge or judges to have responsibility for liaising with the Advisory Body, in order to ensure that the digest and any significant decisions from other Member States are brought to the attention of the judges and other practitioners. Such a nominated judge could then ensure that any issues concerning interpretation, and any relevant and significant cases, are brought to the Advisory Body's attention and to the attention of judges within their Member State.

2.4. Alternatives to Court Processes

- (35) The CESL will, to a large degree, be used by consumers and businesses in low value consumer claims, often conducted over the internet. As such it is essential that effective, quick and inexpensive dispute resolution mechanisms are developed as alternatives to court proceedings. It will be of great importance therefore for the approach set out in the Commission's recent proposals concerning Alternative Dispute Resolution (ADR)⁹ and Online Dispute Resolution (ODR)¹⁰ to be developed in respect of the CESL. Such developments should take account of the needs of both consumers and businesses in B2C contracts and businesses engaged in B2B contracts. In developing ODR detailed consideration should be given to existing, successful, ODR mechanisms such as those used for low value, internet-based, consumer disputes e.g., eBay's SquareTrade online dispute resolution system¹¹.
- (36) Contract parties could, for instance, be required actively to consider resort to ADR or ODR prior to issuing and during court proceedings. Consideration should however also be given to the fact that such mechanisms are not suitable for all cases and need to be developed so that they are cost-effective and efficient; that the smaller the claim the more important it is that ADR or ODR is cost effective and that the cost of ADR is included within any court fee payable to initiate court proceedings; that any third party used is experienced and trained; the use and cost of ADR is carefully controlled by the parties and, where appropriate, the court.
- (37) The promotion of ADR and ODR should however be balanced against the need to develop a body of authoritative interpretation of the CESL. Genuine and informed settlement, which is fair to all parties, takes place in the shadow of law. In the absence of clear law to guide settlement negotiations, there is a risk that any settlement might not be just.

⁹ Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2011) 793, final 2011/0373 (COD)).

¹⁰ Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) (COM(2011) 794, final 2011/0374 (COD)).

¹¹ See Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford) (2010) at 219 for a discussion.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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

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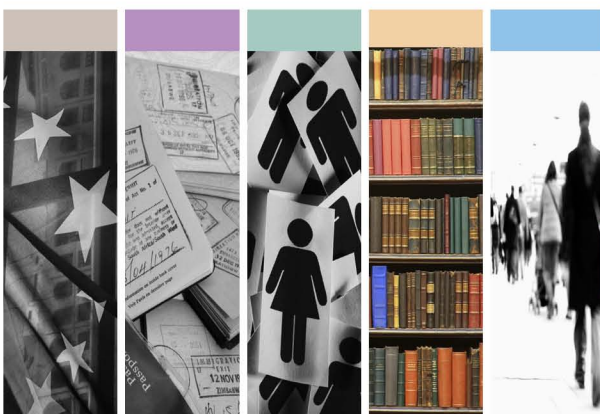
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