

Right of withdrawal under the CESL in comparison to the Consumer Rights Directive

The CESL between consumer and business demands – a practitioner's perspective

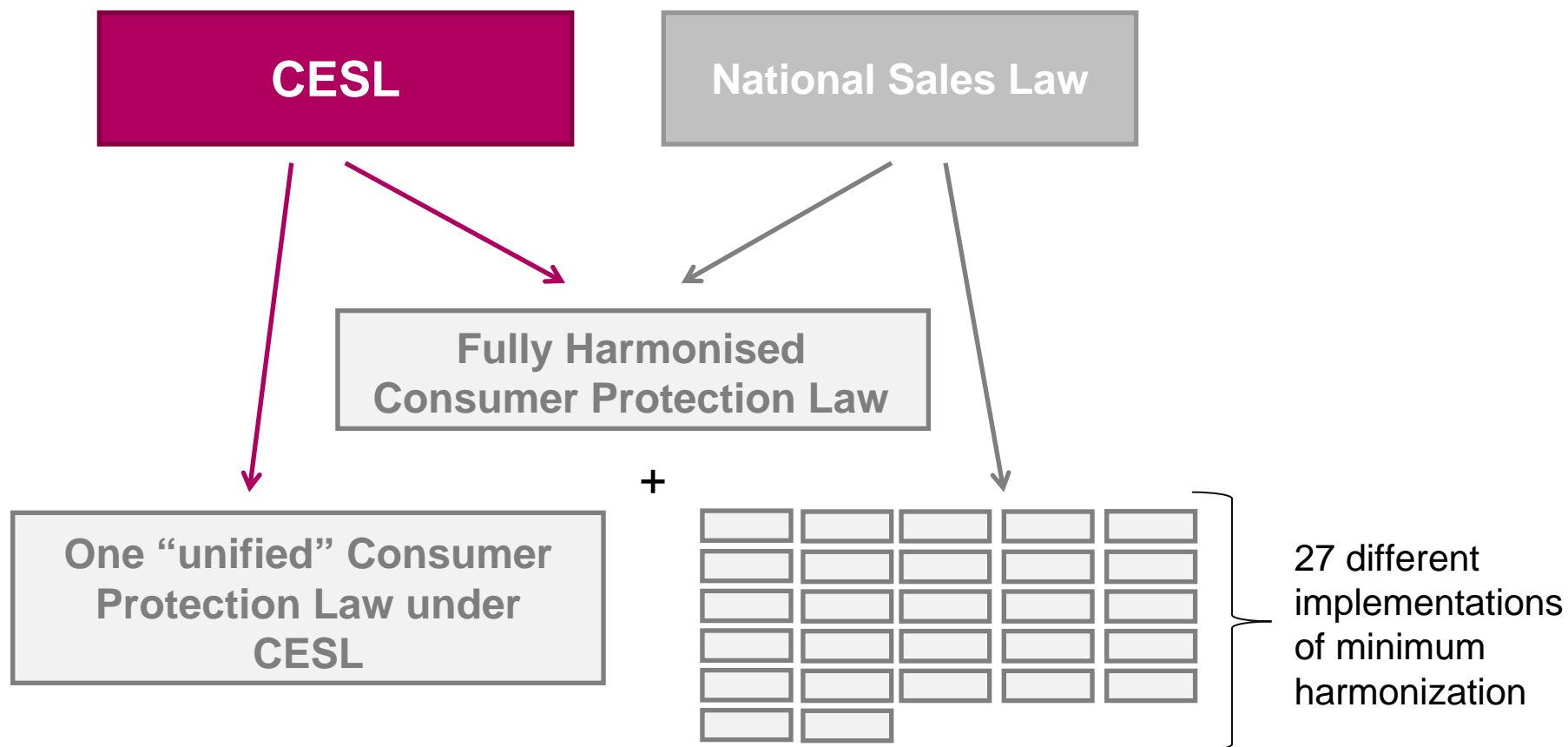
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CESL and National Law: A shared Consumer Protection Regime...



...inconsistently implemented across the EU.



Art. 40 CESL - Right to withdraw

1. During the period provided for in Article 42, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article 45, from:

Art. 9 (1) CRD

- (a) a distance contract;

**Art. 9 (1) CRD
&
Art. 3 (4) CRD**

- (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.

[...]

Art. 40 CESL - Exceptions from the right to withdraw (1)

Common European Sales Law	Consumer Rights Directive
Art. 40 (2) (a) a contract concluded by means of an automatic vending machine or automated commercial premises;	Art. 3 (3) (l) concluded by means of automatic vending machines or automated commercial premises;
Art. 40 (2) (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;	Art. 3 (3) (j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
-	Art. 16 (a) service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent, and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;
Art. 40 (2) (c) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;	Art. 16 (b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;
Art. 40 (2) (d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;	Art. 16 (c) the supply of goods made to the consumer's specifications or clearly personalised;
Art. 40 (2) (e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;	Art. 16 (d) the supply of goods which are liable to deteriorate or expire rapidly;
Art. 40 (2) (f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;	Art. 16 (g) the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
Art. 40 (2) (g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;	Art. 16 (j) the supply of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;

Art. 40 CESL - Exceptions from the right to withdraw (2)

Common European Sales Law	Consumer Rights Directive
Art. 40 (2) (h) a contract concluded at a public auction; and	Art. 16 (k) contracts concluded at a public auction;
Art. 40 (2) (i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.	Art. 16 (l) the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance;
Art. 40 (3) (a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;	Art. 16 (e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;
Art. 40 (3) (b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;	Art. 16 (f) the supply of goods which are, after delivery, according to their nature, inseparably mixed with other items;
Art. 40 (3) (c) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed after delivery;	Art. 16 (i) the supply of sealed audio or sealed video recordings or sealed computer software which were unsealed after delivery;
Art. 40 (3) (d) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and with the acknowledgement by the consumer of losing the right to withdraw;	Art. 16 (m) the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal.
Art. 40 (3) (e) the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods.	Art. 16 (h) contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. If, on the occasion of such visit, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in carrying out the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods;

Art. 41 CESL - Exercise of the right to withdraw

Art. 11 (2) CRD	1.	The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.
Art. 11 (1) (a) (b) CRD	2.	The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.
Art. 11 (3) CRD	3.	Where the trader gives the consumer the option to withdraw electronically on its trading website, and the consumer does so, the trader has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.
Art. 11 (1) CRD	4.	A communication of withdrawal is timely if sent before the end of the withdrawal period.
Art. 11 (4) CRD	5.	The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

Art. 42 CESL – Withdrawal Period (1)

(1) The withdrawal period expires after **fourteen days** from:

Common European Sales Law	Consumer Rights Directive
Art. 42 (1) (a) the day on which the consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services;	Art. 9 (2) (b) in the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods or;
Art. 42 (1) (b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately, including a contract under which the seller also agrees to provide related services;	Art. 9 (2) (b) (i) in the case of multiple goods ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last good;
Art. 42 (1) (c) the day on which the consumer has taken delivery of the last lot or piece in the case of a contract where the goods consist of multiple lots or pieces, including a contract under which the seller also agrees to provide related services;	Art. 9 (2) (b) (ii) in the case of delivery of a good consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece;
Art. 42 (1) (d) the day on which the consumer has taken delivery of the first item where the contract is for regular delivery of goods during a defined period of time, including a contract under which the seller also agrees to provide related services;	Art. 9 (2) (b) (iii) in the case of contracts for regular delivery of goods during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first good;
Art. 42 (1) (e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;	Art. 9 (2) (a) in the case of service contracts, the day of the conclusion of the contract;
Art. 42 (1) (f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the supply of digital content where the digital content is supplied on a tangible medium;	Cf. Art. 9 (2) (b) in the case of sales contracts, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods [...];
Art. 42 (1) (g) the day of the conclusion of the contract in the case of a contract where the digital content is not supplied on a tangible medium.	Art. 9 (2) (c) in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract.

Art. 42 CESL – Withdrawal Period (2)

- (2) Where the trader has not provided the consumer with the information referred to in Article 17 (1), the withdrawal period expires:

Art. 10 (1) CRD

- (a) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1; or

Art. 10 (2) CRD

- (b) where the trader provides the consumer with the information required within one year from the end of the withdrawal period as determined in accordance with paragraph 1, after fourteen days from the day the consumer receives the information.

Art. 43 CESL – Effects of withdrawal

Withdrawal terminates the obligations of both parties under the contract:

Art. 12 (a) CRD

(a) to perform the contract; or

Art. 12 (b) CRD

(b) to conclude the contract in cases where an offer was made by the consumer.

Art. 44 CESL – Obligations of the trader in the event of withdrawal

Art. 13 (1) CRD

1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw from the contract in accordance with Article 41. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

Art. 13 (2) CRD

2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.

Art. 13 (3) CRD

3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.

Art. 14 (1) para. 3 CRD

4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

Art. 45 CESL – Obligations of the consumer in the event of withdrawal

Art. 14 (1) para. 1 CRD

1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 41, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.

Art. 14 (1) para. 2 CRD

2. The consumer must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.

Art. 14 (2) CRD

3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 17 (1).

Art. 14 (2) CRD

4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.

Art. 14 (3) CRD

5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.

Art. 45 CESL – Obligations of the consumer in the event of withdrawal

Art. 14 (4) CRD

6. The consumer is not liable for the cost for:
 - (a) the provision of related services, in full or in part, during the withdrawal period, where:
 - (i) the trader has failed to provide information in accordance with Article 17(1) and (3); or
 - (ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);
 - (b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where:
 - (i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);
 - (ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or
 - (iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).

Art. 14 (5) CRD

7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.

Art. 46 CESL – Ancillary contracts

1. Where a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 41 to 45, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in paragraphs 2 and 3. For the purpose of this Article an ancillary contract means a contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.
2. The provisions of Articles 43, 44 and 45 apply accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.
3. For ancillary contracts which are not governed by the Common European Sales Law the applicable law governs the obligations of the parties in the event of withdrawal.



Article 15 CRD – Effects of the exercise of the right of withdrawal on ancillary contracts

1. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (1), if the consumer exercises his right of withdrawal from a distance or an off- premises contract in accordance with Articles 9 to 14 of this Directive, any ancillary contracts shall be automatically terminated, without any costs for the consumer, except as provided for in Article 13(2) and in Article 14 of this Directive.

2. The Member States shall lay down detailed rules on the termination of such contracts.

Art. 47 CESL – **Mandatory nature**

The parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.



Article 25 CRD – **Imperative nature of the Directive**

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.

Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.