The proposal for a Common European Sales Law: the way forward
WORKSHOP
with the participation of
EU National Parliaments
Wednesday, 10 July 2013 - JAN 4 Q 1

COMPILATION OF BRIEFING NOTES
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>Art</td>
<td>Article</td>
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<td>B2B</td>
<td>Business-to-business transaction(s)</td>
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<td>B2C</td>
<td>Business-to-consumer transaction(s)</td>
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<td>CESL</td>
<td>Commission Proposal for a Regulation on Common European Sales Law</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<tr>
<td>DCFR</td>
<td>Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference</td>
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<tr>
<td>ECOSOC</td>
<td>Economic and Social Committee</td>
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<td>ELI</td>
<td>European Law Institute</td>
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<td>JURI</td>
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<td>ODR</td>
<td>Online Dispute Resolution</td>
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<td>PECL</td>
<td>Principles of European Contract Law</td>
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<td>PICC</td>
<td>UNIDROIT Principles 2010 of International Commercial Contracts</td>
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<td>RegCESL</td>
<td>Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final</td>
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<td>SME</td>
<td>Small and Medium Enterprises</td>
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A national judge's perspective on the proposal for a CESL
Pauliine Koskelo, President, Supreme Court of Finland

ABSTRACT
The paper deals with the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. It gives an individual national judge’s perspective on the proposal.

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EXECUTIVE SUMMARY
Initial remarks
The present paper has been drafted at the request of the European Parliament in my personal capacity as a national judge. The views expressed cannot be regarded as, nor assimilated with, the official positions of either the Supreme Court in which I serve, or any other courts or judges in any of the EU Member States.

Although I have in my earlier career been involved in drafting general sale of goods legislation as well as consumer protection legislation, the present paper is drafted from a judicial perspective. This means that I will not focus or comment on the substantive details of the proposed rules, but limit my views on the general scheme of the proposal for a Regulation on a Common European Sales Law from the point of view of dispute resolution.

Main points
1. The objective of the Common European Sales Law, i.e. making available a self-standing uniform set of contract law rules, including provisions to protect consumers, for cross-border dealings, in the form of a second contract law regime within the each Member State’s legal order is a positive one, so long as it contains a combination of balanced rules, applies to a wide geographical scope, increases transparency and improves legal certainty.

2. Especially in consumer transactions and smaller B2B transactions, and in particular in cross-border contexts, lack of clarity or uncertainty regarding the applicable rules are often likely to lead to situations where no redress is obtained or even sought. The availability of an instrument such as the CESL would in this regard be a step forward, provided that it becomes a living instrument in practice.

3. As the application of the CESL would depend on the agreed choice of the parties to a contract, a high level of consumer protection is necessary not only from the point of view of the general policy and acceptability of the CESL but also from the point of view of reducing disputes and problems relating to the assessment of the validity of the choice in individual cases.
4. A comprehensive set of mandatory rules providing a high level of consumer protection therefore appears as a prerequisite for the viability of the CESL. The need for a set of well-balanced norms is, however, not limited to consumer transactions. SME’s are often in a relatively weak position as well, and susceptible to become targets of unsound business practices.

5. Especially in consumer transactions and smaller B2B transactions it is important that contractual disputes can normally be resolved – and properly resolved – extrajudicially. In order to facilitate redress and the settlement of disputes without recourse to the court system, the applicable rules need to be sufficiently clear and precise. Meeting this objective entails, as a downside, that the rules become comprehensive, as is the case with the proposed CESL. The complicated appearance of the rules may in turn hamper their attractiveness. This is an “insoluble dilemma”.

6. From the point of view of uniform application and interpretation – especially in an EU-wide context – it is likewise of importance that the rules are not formulated in vague and general terms but are made sufficiently clear and precise. The above-mentioned “insoluble dilemma” presents itself also in this regard.

7. The availability of more easily understandable information regarding the contents of the CESL, either through European or national sources, would appear to be necessary in order to complement the actual statutory text. This is important in order to promote informed choices regarding the use and application of the CESL.

8. The availability of easily accessible, low threshold and low cost ADR mechanisms with reliable quality would remain a major factor in facilitating access to justice within the foreseen sphere of application of the CESL.

9. Without entering into any detailed substantive analysis of the proposed CESL, the general quality of the provisions seems to be of such a standard that one would not expect, from the point of view of the courts that might be called upon to resolve disputes arising under it, that national jurisdictions would be likely to encounter particular difficulties in applying the provisions.

10. Civil disputes on contractual matters where minor financial interests are at stake are relatively rarely resolved through the courts, and even more rarely do they reach the highest courts. Therefore, the generation of case-law with a precedential interpretative character tends to be rather weak and slow. Dissemination of case-law is not the only problem that would require attention. Consideration should also be given to possible ways and means of ensuring that case-law on the interpretation of the CESL can be developed, in order to facilitate the application of the CESL and the resolution of disputes outside the court system. For instance, the availability of legal aid or other forms of financial or professional support could be useful in order to make sure that some significant cases can be brought through the court system and result in precedents and guidance for the resolution of other similar cases.

1. A NATIONAL JUDGE’S PERSPECTIVE ON THE CESL

1.1 Initial remarks

The present paper has been drafted at the request of the European Parliament in order to give a national judge’s perspective on the proposal for a Regulation on a Common European Sales Law (CESL). The views presented are given in my personal capacity as one single individual among all the national judges in the EU. I have no claim to represent any other judge than myself, and even less any court as an institution. This reservation may be obvious but should nevertheless be expressly stated. The views expressed cannot be regarded as, nor assimilated with, the official positions of either the Supreme Court in which I serve, or any other courts or judges in any of the EU Member States.

Earlier in my career, prior to becoming a judge, I have served several years in the Finnish civil service, at the Ministry of Justice, and been involved in drafting general sale of goods
legislation as well as consumer protection legislation. Although that experience has given me a background in the substantive area of law that is addressed by the CESL, the present paper is drafted mainly from a judicial perspective. This means that I will not focus or comment on the substantive details of the proposed rules, but limit my views on the general scheme of the proposal for a Regulation on a Common European Sales Law from the point of view of dispute resolution.

2. COMMENTS ON THE CESL

2.1 The objective of the CESL

The objective of the CESL, namely to make available a self-standing uniform set of contract law rules, including provisions to protect consumers, for cross-border dealings, in the form of a second contract law regime within the each Member State’s legal order is a positive one. The disparity of contract law regimes in the Member States is in itself a source of difficulties for parties interested in cross-border transactions, and the difficulties are magnified by the fact that it is complicated for such parties to even find out what the relevant legal rules are. Language barriers make such complications even harder to overcome.

These difficulties in the current legal situation are both inevitable and real. They are inevitable as long as harmonization of the national contract law systems remains an unrealistic option. The approach adopted in the CESL has many merits as a possible solution, because it offers an alternative but does not aspire to replace the national contract law regimes as such. The potential merits of this kind of an instrument are relevant both in respect of “B to C” and in “B to B” transactions.

Provided that the CESL contains a comprehensive set of balanced rules, it can increase transparency and improve legal certainty in cross-border transactions throughout the EU. Thus, it can help build up and sustain confidence in parties interested in such transactions.

2.2 The merits of “best” versus “known rules”

National lawyers and policymakers often tend to prefer their own legal systems, in part because that is what they are familiar with. For the parties to a transaction, however, the main problem, and the most serious problem, may well be the difficulty of knowing which rules are applicable in the first place. Especially in consumer transactions and smaller B2B transactions, and in particular in cross-border contexts, uncertainty regarding applicable rules is often likely to lead to situations where no redress is obtained or even sought.

Known rules are easier to invoke than rules which perhaps might be “ideal” in some sense but remain obscure to the party who faces a problem in a contractual relationship. In practice, ignorance of what applies in a given situation is often a worse problem than the details of the law. A lack of transparency of the legal situation creates barriers that may inhibit parties from pursuing their rights altogether, or from being successful, regardless of what the merits of their case would be in theory. Known rules are more likely to result in problems being resolved, whereas an obscure legal situation may easily discourage parties from seeking redress or persisting with their claims.

The availability of an instrument such as the CESL would in this regard be a step forward, provided that it becomes a living instrument in practice. By offering, as an alternative, a common set of rules, the CESL would make it easier for interested parties to know their law. In cross-border transactions, a common set of balanced rules would make it simpler for the parties to find out which are the rules governing a given situation. Issues or problems that arise are generally easier to resolve when the relevant rules are known.

2.3 The need for a high level of consumer protection

The CESL would be an option for the parties to a contract, and its application would depend on the agreed choice of the parties. Such an instrument must provide a high level of consumer protection in order to be acceptable and viable.
This is not only a question of the general policy of the EU. Nor is it just a question of the confidence that the instrument should enjoy in order to be successful.

A high level of protection is necessary and important also from the point of view of reducing disputes and problems that might otherwise arise when it comes to an assessment of the validity of the choice in individual cases. If the level of protection is not adequate, disputes may arise as to whether the choice of the CESL as the governing set of rules can be regarded as valid and binding. In this regard, the only issue is not whether the applicability of individual CESL rules might be contested (e.g. the “Rome I issue”). The risk that the choice of the CESL might be contested altogether is higher if it can be argued that the consumer has been dragged to trade in rules that are inferior in relation to the otherwise applicable law.

2.4 The scope and modalities of protection

For the reasons above, a comprehensive set of mandatory rules providing a high level of consumer protection appears as a prerequisite for the viability of the CESL.

The need for a set of well-balanced norms is, however, not limited to consumer transactions. SME’s are often in a relatively weak position as well, and susceptible to becoming targets of unsound business practices. While extensive mandatory protection may not be on the agenda in respect of SME’s, the availability of a comprehensive, well-balanced and transparent set of norms for B to B transactions would seem desirable. It is important that the CESL is not only an instrument for consumer transactions or consumer protection.

2.5 The need for clarity – and the resulting dilemma

It is important in general but especially in consumer transactions and smaller B2B transactions that contractual disputes should end up being resolved – and properly resolved – extra-judicially. Having to seek redress through the courts is in most cases not a good option. Quite often it is no realistic option at all.

In order to facilitate redress and the settlement of disputes without recourse to the court system, the applicable rules need to be sufficiently clear and precise. Rules that are vague or otherwise formulated in general terms leave plenty of room for different interpretations. Such rules are generally not a good or sufficient basis on which the parties to a dispute can reach a solution without recourse to some independent body.

The need for sufficiently clear and precise rules carries with it the downside that the rules, being rather detailed and comprehensive, also become numerous and seemingly complicated. The CESL is one example of this dilemma, known to anyone involved in legislative activity.

The voluminous and rather complicated appearance of the CESL is a consequence of the necessary ambition of providing a clear and precise set of rules that broadly covers the range of issues that may arise in a contractual relationship. While the degree of coverage and detail is both intended and needed in order to ensure the usefulness of the rules, the impression of volume and intricacy in the CESL may also hamper its attractiveness among users.

While everyone’s dream is a statute that is short, exhaustive and clear, it is no more than a dream. It is not uncommon for interested parties to complain that a draft statute is too long and too complicated, and then to proceed by making suggestions on points that are missing and need to be addressed. The conflict between clarity and simplicity is a kind of “insoluble dilemma” in modern legislation, and I am certainly not able to offer any magic solution to it. It is always easy to criticize a legislative instrument by pointing out its length, detail and complexity, but very difficult to actually find the right balance between clarity and volume.
2.6 The need for uniform application and interpretation

Since the CESL is a European instrument, intended to provide a self-standing set of rules for use throughout the EU and applicable as an alternative across all the different national legal surroundings, it is obvious that the need for clarity, coverage and detail is a particularly important consideration. The disparities in the underlying legal systems must be compensated for by providing a relatively high degree of clarity and detail.

Against this background, and from the point of view of uniform application and interpretation, it is important that the rules are not formulated in vague and general terms but are made sufficiently clear and precise. Only a sufficient degree of detail can bring about coherent practices in application and interpretation in different legal environments.

At the same time, the inevitable downside is that the instrument is not very easy to digest and will require some effort, even from people trained in the field, to become familiar with. The above-mentioned “insoluble dilemma” presents itself also in this regard: what is a necessary degree of detail for the sake of clarity entails also a burden that may reflect negatively on the perception and reception of the instrument. Again, there is hardly any way out of this dilemma.

2.7 The need for simplified information on the CESL

The inevitable volume and complexity of a legal instrument such as the CESL makes it rather difficult to approach for those who are intended to use the rules in their contracts. In order to make the instrument attractive to users, the CESL as such should not remain the only, and perhaps not even the primary source of information regarding its purpose and contents.

Most of the intended users of the CESL are non-lawyers and will not be familiar with or even inclined to reading extensive and detailed statutory texts. From the users’ and potential users’ point of view, the essential and the less essential elements are not ideally laid out in a statutory text, which is composed in the light of a systematic legal point of view. A legislative text as such is, on the one hand, not likely to convey the most important information in the best way and may on the other hand put off people not used to studying legal texts.

It would seem necessary to ensure that other forms of information are made available in order to present and explain the rules in a manner that is more digestible, more useful and also more attractive than the CESL as such. Both European and national bodies and sources should be involved in such information efforts.

The availability of good information materials to complement the legislative test is important not only as a “marketing tool” but in order to promote informed choices regarding the use and application of the CESL. Electronic means of communication would be an ideal way of providing understandable and easily accessible information materials about the CESL.

2.8 Dispute resolution mechanisms

In consumer transactions as well as smaller scale B to B transactions, the actual level of legal protection in cases of dispute depends, inter alia, on whether the applicable rules are of such a clarity and quality that they are capable of assisting the parties to reach amicable solutions (this has been addressed above). Apart from that, the actual level of legal protection depends largely on the availability and successful functioning of dispute resolutions mechanisms other than litigation through the courts.

This will also be true in regard to transactions under the CESL. While court proceedings must be and will be a possibility, they cannot be the main alternative for resolving disputes in minor cases. The costs and risks of costs arising for parties in case of court proceedings that require recourse to lawyers will easily exceed the economic interest involved in substance of the dispute itself.
The availability of easily accessible, low threshold and low cost ADR mechanisms with reliable quality will be a major factor in terms of access to justice within the foreseen sphere of application of the CESL. In order to ensure a success for this instrument, it would seem important to also focus on the development of extra-judicial dispute resolution mechanisms that would be adapted to and capable of dealing with the kind of cross-border transactions for which the CESL is envisaged.

2.9 The substance of the CESL

As indicated in the initial remarks above, I have not considered that it would be part of my role as a national judge to undertake any detailed substantive analysis of the CESL and offer comments of criticisms on the various provisions included in it. Such a task is more appropriate for other participants in the legislative process. Therefore, I refrain from entering into that kind of an exercise.

From the perspective of a broader overview of the legislative proposal, I have already referred to the inevitable conflict between the need for clarity and coverage of relevant issues on the one hand and the desire to avoid excessive length and complexity in the regulation.

From the point of view of legal professionals, including judges, who would be called upon to apply the rules in order to resolve disputes arising under its scope, it is clear that there will always be various points and issues of interpretation where uncertainties and deficiencies may be encountered. The general quality of the provisions, however, seems to be of such a standard that one would not expect any particular or extraordinary difficulties in the application and interpretation of the CESL.

Leaving aside individual points of controversy, the proposal reflects the fact that it is the result of a thorough and lengthy preparatory process and the input of experts from various backgrounds and legal systems. The overall quality of the product does not in my view give rise to any particular concerns in terms of the possibility of the courts to cope with the issues arising in the context of the application of the CESL.

2.10 The need for case-law

Civil disputes on contractual matters where minor interests, financially or otherwise, are at stake are relatively rarely resolved through the courts. Even more rarely do they reach the highest courts. Because of this, the generation of case-law with a precedential interpretative character tends to be rather weak and slow.

This problem is likely to affect the CESL as well. Although the proposed regulation is quite elaborate and detailed, there will always be many points giving rise to questions of interpretation. And even if the courts cannot and should not be the main avenue for resolving disputes in connection with such an instrument, there will be a need for case-law to settle and clarify various issues of interpretation. The existence of case-law plays an important role in helping the subsequent resolution of similar situations without litigation.

In this regard, the dissemination of case-law is not the only problem that would require attention. Consideration might also have to be given to possible ways and means of ensuring that case-law on the interpretation of the CESL can be developed, so that the application and the resolution of disputes outside the court system are facilitated.

For instance, the availability of legal aid or other forms of financial or professional support could be useful in order to make sure that some significant cases can be brought through the court system and result in precedents on issues that are likely to arise more or less frequently in practice. Such case-law would then offer guidance for the resolution of other similar cases.

Of course, it would also be helpful to ensure that important case-law from different dispute resolution bodies or jurisdictions could be collected and made available not just in the original language but in translation of at least the key elements.
Increasing the legal certainty and attractiveness of CESL: a comparative perspective
Professor Schulte-Nölke, University of Osnabrück

ABSTRACT
This note assesses some important proposals for amendment of CESL made by the Legal Affairs Committee draft report. In particular, it hints at issues where the consumer protection level may become lower than under some Member States laws and where proposals may need some fine-tuning in order to make the provisions of the CESL fit together smoothly. In some cases the note makes proposals for further amendment of the CESL.

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**EXECUTIVE SUMMARY**

**Background**

When assessing the draft Regulation on a Common European Sales Law (CESL), which is meant to become an optional law, the following two main distinguishing features from ordinary (non-optional) EU regulations always have to be borne in mind:

- The CESL competes with the otherwise applicable law, that means it must be more attractive for both businesses and their customers (be they consumers or not) to make use of the CESL than to use the Member State contract law(s) applicable to their contract under the Rules of private international law.

- The CESL does not, unlike an ordinary regulation, set aside the laws of the Member States and, therefore, does not disintegrate the national contract law, in particular the law of sales which forms in the civil law countries the core piece of the civil law codifications. The CESL and the Member State law can co-exist and be developed autonomously.

**Main Findings**

**Reduction of scope to distance selling, including cloud-computing** (amendment 1, 56 and others).

From an internal market perspective, the restriction to distance contracts (and the extension to certain forms of cloud computing) can easily be justified, since distance-selling, in particular online, is the most dynamic and also most promising sector of the internal market. Hence, one would not lose much potential, if the scope were restricted just to distance sales.

However, the new scope may cause some demarcation problems, since it may sometimes not be easy to distinguish distance contracts from other contracts.

Moreover, it is at least questionable, whether distance contracts, which are not concluded online, form a substantial portion of the internal market or have the same dynamic as online sales. A more natural demarcation could therefore be to limit the scope of the CESL only to online contracts, thus excluding contracts concluded via all other means of distance communication such as mail orders or orders via telephone.

This scope would also have the advantage, that the provisions on the conclusion of contracts and the incorporation of standard terms could very much be simplified. The disadvantage of such a limitation would be, however, that the CESL would be less functional as a European model for contract law.

**Clarification of notion of consumer in dual-use cases** (amendments 5, 30)

The proposed amendment of the definition of consumer for the case of dual purpose contracts (amendment 30) solves one of the serious consumer protection gaps of the original Commission proposal, since many Member States' laws protect as a consumer any person concluding a contract with a dual purpose, where the business purpose is not preponderant. It is therefore recommended that these amendments should be adopted.

**Consumer protection in the case of an invalid agreement to use CESL or when the standard information notice is lacking** (amendments 12, 65).

Amendment 12 seeks to solve the problem of what happens to the main contract, when the agreement of the parties to use the CESL is invalid or when the requirements to provide the standard information notice are not fulfilled. This issue is rather unclear in the original CESL proposal. The suggested solution in amendment 65 with the clarification to be inserted in the recitals (amendment 12) clarifies that the issue of whether a contract has been concluded, and on what terms, should be determined by the applicable national law. This solution is better than no solution, but it includes some consumer protection dangers. In comparison to the vast majority of Member States' laws the provisions of the CESL are far more advantageous for the consumer than the otherwise applicable national law. The
application of CESL, in conjunction with the national law, should therefore not lead to the absurd outcome that protective rules of the CESL, if infringed by the trader, lead as a result to a lower protection of the consumer than she or he would have had under the CESL. Therefore, the CESL will have to ensure that, even if it is not applicable due to the trader’s infringement of protective provisions, the consumer is granted at least the protection he or she would have had, should the CESL have been normally applicable. The CESL needs therefore to be supplemented by a provision saying that the application of the national law in these cases may not have the result of depriving the consumer of the protection afforded to him or her by provisions of the CESL.

**Regulating the effects of retention of title clauses** (amendments 21, 135)

The original proposal of the CESL is lacking a provision on retention of title clauses. From a consumer protection perspective, this could have the disadvantage that the CESL sets an incentive for advance payments, which may not always be in the interest of consumers. It is therefore recommended that this proposal for amendment should be adopted.

**Extension of the inclusion of cloud-computing services into CESL** (amendments 8, 10, 41)

The draft report intends to clarify that related cloud-computing services can also fall under the CESL. One core element is amendment 41, which inserts “storage” into the definition of related services. Whereas generally the inclusion of cloud-computing services into the draft is to be welcomed, it must be borne in mind that the set of remedies offered under the CESL does not fit such cloud-computing services which take the form of contracts of long duration more akin to a lease contract than a sale. In the example of a computer sold together with a cloud-computing service (e.g. web space for voluminous data such as family pictures and videos), the remedies under the CESL do not really help the buyer when access to the web space is denied or, even worse, when the pictures and videos are lost. This is particularly true, if it is a free service (even without providing personal data as counter-performance). Any extension to “storage-like” cloud-computing services would require an adaptation of the corresponding remedies.

**Broadening (and narrowing) the right of avoidance** (amendments 94, 97)

The suggested amendment brings the right of the avoidance more in line with national laws by dropping the requirement of co-responsibility of the other party for the mistake. This amendment should be adopted therefore. However, the deletion of the right to avoid a contract in case both parties made the same mistake (amendment 97) may cause a gap in protection.

**Adjustment of the right to immediately terminate** (amendment 142).

This amendment seeks to improve the distinction between cases where the trader should have a right to cure and where not. For goods, or digital content, which are manufactured, produced or modified according to the consumer’s specifications or which are clearly personalised, the seller shall now have a right to cure also in a consumer sales contract. This amendment should be adopted. One could even wonder whether the right to immediately terminate should be further adjusted to the right to withdraw, in particular to the exceptions to the right to withdraw.

**Alternative proposals for restrictions to the consumer’s right to immediately terminate** (amendments 143, 150, 183, 186)

The draft report proposes – alternatively – three options to slightly limit the consumer’s right to immediately terminate.

The first alternative is the introduction of a deadline of six months starting from when the risk passes to the buyer, after which the consumer would have to accept cure (amendment 143). This proposal is a rather innovative one. However, it would introduce into the relation between traders and consumers a new and, perhaps for the consumer, surprising deadline.

The second alternative is a provision according to which the consumer must give notice of termination within a reasonable time after he first became aware of the non-performance
Afterwards, the right of termination would be lost. The suggested provision creates great uncertainty. Firstly, the business would have to prove when the consumer first became aware of the non-performance. The consumer can therefore simply lie about when the non-performance occurred and businesses will often have difficulty proving that the consumer is lying. Moreover, the requirement of a reasonable time in this context may be difficult to apply for both parties to the contract. This provision is likely to cause unnecessary disputes and it will not solve any problems.

The third alternative is to introduce an obligation for the consumer to pay for use in cases where he/she terminates the contract (amendment 183). The advantage of this alternative is that it would leave the consumer a free choice of remedies. If redrafted along these lines, on condition that some safeguards against excessive cost of use are built into the system, this alternative seems to be preferable and very much in line with most of the national laws (except seemingly the Dutch one). If the Legal Affairs Committee were to adopt one of these alternatives, the third alternative seems preferable, followed by the first. The second should not be adopted.

A consumer’s right to specific performance in case of excuse (amendment 144).

This proposal is difficult to understand, since excuse means by definition that there is a very severe obstacle to perform and that the seller is therefore excused (cf. Art. 88 CESL). The provision therefore says something rather contradictory, namely that the seller, albeit excused and thus not obliged to perform, is obliged to perform. It is admitted that the proposal nevertheless may have an important function in a general sales law. It is, however, questionable whether this justifies the more complex regulation which amendment 144 would lead to. At least for an instrument which only covers distance contracts, it does not seem recommendable to adopt amendment 144.

Long prescription period reduced to six years (amendment 193).

A six year longstop prescription period is longer than the periods of nearly all Member States (most of them two years, France five years, Scotland five years, England six years). However, consumers from those countries, which have no express limitation period for the rights of the consumer when buying goods or apply an open-textured period calculated according to the average lifetime of the product sold (e.g. Finland, the Netherlands) would be worse off. If a political compromise is necessary for the adoption of the CESL, it makes no great difference whether the long stop period is six years or ten years, because it is rather unlikely that a lack of conformity which is present at the time of delivery becomes apparent after six but before ten years.

1 BACKGROUND

When assessing the draft Regulation on a Common European Sales Law (CESL), which is meant to become an optional law, the following two main distinguishing features from ordinary (non-optional) EU regulations always have to be borne in mind:

- The CESL competes with the otherwise applicable law, which means that it must be more attractive for both businesses and their customers (be they consumers or not) to make use of the CESL than to use the Member State contract law(s) applicable to their contract under the Rules of private international law.
- The CESL does not, unlike an ordinary regulation, set aside the laws of the Member States and, therefore, does not disintegrate the national contract law, in particular the law of sales which forms the core piece of the private law codifications in the civil law countries. The CESL and the Member State law can co-exist and be developed autonomously.

This note therefore gives a comparative law perspective on different outstanding issues of the draft Regulation on a Common European Sales law, notably under the Annex I to the Commission’s original proposal, and including issues addressed by the Legal Affairs Committee draft report, and tabled amendments.
This note has been drafted on the basis of

- Draft Report on the Proposal for Regulation of the European Parliament and of the Council on a Common European Sales Law by the Committee on Legal Affairs of 18 February 2013 (PE 505.998v01-00)
- Amendments 206-531 to this Draft Report, Document of 3 May 2013 (PE 510.560v01-00)

Remarks are limited to short commentaries on some core issues, referred to under the number of the proposed amendments in the two aforementioned documents.

2 REDUCTION OF SCOPE TO DISTANCE SELLING, (AMENDMENT 1, 55, 56 AND OTHERS)

The draft report proposes in amendments 1, 55, 56 and others to limit the scope of CESL to distance contracts only. The term "distance contracts" refers to Art. 2 (p) CESL Reg. (which incorporates similar definitions from earlier pieces of the acquis). The draft report states that (although “distance contracts” also encompass traditional mail order) the main area targeted is the rapidly growing internet sales sector.

The main proposals read:

**Amendment 55: Article 5 (1) CESL Reg.**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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</thead>
<tbody>
<tr>
<td>The Common European Sales Law may be used for:</td>
<td>1. The Common European Sales Law may be used for <strong>distance contracts</strong>, <strong>including online contracts, which are:</strong></td>
</tr>
</tbody>
</table>

**Amendment 56: Article 5 (new 1a) CESL Reg.**

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<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td></td>
<td><strong>1a. The Common European Sales Law may also be used for contracts referred to in points (a), (b) and (c) of paragraph 1 where the parties conducted negotiations or took other preparatory steps with a view to the conclusion of the contract, using for all those steps exclusively means of distance communication, but where the contract itself was not concluded by means of distance communication.</strong></td>
</tr>
</tbody>
</table>

**Assessment:**

From an internal market perspective, the restriction to distance contracts can easily be justified, since distance-selling, in particular online, is the most dynamic and also most promising sector of the internal market. Hence, one would not lose much potential, if the scope were restricted just to distance sales.

However, the new scope may cause some demarcation problems, since it may sometimes not be easy to distinguish distance contracts from other contracts. The draft report seeks to
take this into account in amendment 56 which tries to make the CESL also applicable to contracts not concluded by means of distance communication where all the preparatory steps were taken via such means (case 1). This is a rather complex rule. Moreover, it does not cover the opposite case, that some preparatory steps have been taken while both parties were simultaneously present, but the contract has been concluded via means of distance communication (e.g.: the customer visits a high street shop, makes some inquiries about the goods he or she is interested in, but then goes home and buys the goods via the online shop of the trader = case 2).

It is at least questionable, whether distance contracts, which are not concluded online, form a substantial portion of the internal market or have the same dynamic as online sales. A more natural demarcation could therefore be to limit the scope of the CESL only to online contracts, thus excluding contracts concluded via all other means of distance communication such as mail orders or orders via telephone. The limitation of the CESL just to online contacts (irrespective of the earlier history of the contract) would avoid such demarcation problems: case 1 would be out, case 2 would be in.

This scope would also have the advantage, that the provisions on the conclusion of contracts and the incorporation of standard terms could very much be simplified. The disadvantage of such a limitation would be, however, that the CESL would be less functional as a European model for contract law. Moreover, if, at a later stage, the scope were to be extended, the provisions on conclusion of contract and incorporation of standard terms would have then to be restored. It is a political decision to what extent the current legislation shall be drafted with a view of later extension and therefore already now contain provisions which are of little use for the moment but which make the legislation expandable and thereby future-proof.

Since under the currently proposed scope limited to distance contracts the main field of application will be online sales in web shops via the internet, it would be very useful for the application of CESL to insert some specific provisions for online contracts (and a definition). A definition of “online contract” could replace the rather dysfunctional definition of “contracts concluded by electronic means” in Art. 24 (1) CESL. A tentative draft would combine elements from Art. 2 (p) CESL Reg. and Art. 24 (1) CESL. It could read:

‘online contract’ means any contract under an organised net-based online sales scheme concluded without the simultaneous physical presence of the parties [or, in case one of them is a legal person, a natural person representing it], in particular a contract concluded via an online shop on a website; a contract concluded by the exclusive exchange of electronic mail or other individual communication is not an online contract.

Such a definition would allow some specific provisions which clarify for the most common case when an online contract is concluded and whether standard terms have been validly incorporated. Such specific provisions for the most common case would be very useful, since the rather general provisions on the conclusion of a contract (Art. 30-39 CESL) and the incorporation of standard terms (Art. 70 CESL) are not focussed on online contracts and therefore do not give a straightforward answer to such basic issues.

The following provisions are tentative drafts (which will need further elaboration) on how such specific provisions could read:

**Art 31 new proposed para (4)**

4. Activating a button or a similar function of an e-shop labelled with the words "order with obligation to pay" or similar unambiguous wording in the sense of Article 25 (2) amounts to an offer for an online contract if it has sufficient content and certainty for there to be a contract.
Art. 70 new proposed para (2a):

2a. In an online contract traders may only invoke contract terms supplied by them and not individually negotiated within the meaning of Article 7 against the buyer [customer] if

a) such contract terms are clear and visible to the customer close to the order button or through a similar function of the trader’s e-shop, and

b) the customer has been given the easily accessible opportunity to read the whole content of the contract terms

Needless to say that the new scope limited to distance sales will require further adaptation of numerous provisions which will have to be done during the ongoing legislative process. Since the blueprint of the CESL has been drafted by a Commission expert group (of which the author of this note was a member), it might be advisable to consult some members of this expert group - eventually together with members of the European Law Institute, which delivered the most comprehensive statement on CESL. This might help to ensure overall coherency of the CESL.

3 CLARIFICATION OF NOTION OF CONSUMER IN DUAL-USE CASES (AMENDMENTS 5, 30)

In amendment 30 the draft report proposes to insert the wording of recital 17 of the Consumer Rights Directive 2011/83/EU into the definition of ‘consumer’. The proposal reads:

Amendment 30: Article 2 (f) CESL Reg.

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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(f) ‘consumer’ means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession;</td>
<td>(f) ‘consumer’ means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession; in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person shall also be considered as a consumer;</td>
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</table>

Assessment:

The proposed amendment of the definition of consumer for the case of dual purpose contracts (amendment 30) solves one of the serious consumer protection gaps of the original Commission proposal, since several Member States’ laws protect a person who concludes a contract with a dual purpose where the business purpose is not preponderant, such as a consumer.

Before the transposition of the Consumer Rights Directive the Member States applied different solutions for classifying dual purpose transactions. In Denmark, Finland and Sweden, consumer legislation expressly stated that in case of a dual use the preponderant purpose prevails. The same is applicable in Germany due to case law. Also in Italy, case-
law tends towards the same direction, since a small tobacconist was found to be a consumer when concluding a contract for the hiring of a vehicle which was for both private and business use. However, it is not clear whether the private use must be predominant. In Austria and Belgium, on the other hand, only contracts concluded exclusively for private purposes fell under the notion of consumer.

<table>
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<tr>
<th>“Dual use” Transactions as Consumer Contract</th>
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<tbody>
<tr>
<td>Preponderant purpose prevails</td>
</tr>
<tr>
<td>Dual use cases included – unclear whether private purpose must preponderate</td>
</tr>
<tr>
<td>No clear rule on dual use transactions discernible</td>
</tr>
<tr>
<td>Only purely private purpose</td>
</tr>
</tbody>
</table>


This situation will probably change in the course of the transposition of the Consumer Rights Directive 2011/83/EU, since recital 17 of this Directive expressly clarifies that that in the case of a dual use contract a party does not qualify as a consumer if the trade purpose is predominant.

Under the original proposal of CESL, a party which concludes a dual purpose contract, with an even non-preponderant trade purpose would most probably not be considered a consumer but a trader. The practical result would be that a person considered to be a consumer under national law and under Directive 2011/83/EU would not be treated as a consumer under the CESL; or, even worse, he/she would be considered a trader. This person would not therefore only lose all consumer protection, but would also become subject to the rules specifically applicable to traders. This is a clear shortcoming of the original CESL proposal, which could be remedied by amendments 5 and 30. It is therefore recommended that these amendments should be adopted.

4 CONSUMER PROTECTION IN THE CASE OF AN INVALID AGREEMENT TO USE CESL OR WHEN THE STANDARD INFORMATION NOTICE IS LACKING (AMENDMENTS 12, 65)

Amendments 12 and 65 seek to solve the problem of what happens to the main contract, when the agreement of the parties to use the CESL is invalid or when the requirements to provide the standard information notice are not fulfilled. This issue is rather unclear in the original CESL proposal. The proposed amendments read:
Amendment 12: Recital 23 a (new)

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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td></td>
<td>(23a) Where the agreement of the parties to the use of the Common European Sales Law is invalid or where the requirements to provide the standard information notice are not fulfilled, issues as to whether a contract is concluded and on what terms should be determined by the respective national law which is applicable pursuant to the relevant conflict of law rules.</td>
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</table>

Amendment 65: Article 8 (2) CESL Reg.

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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.</td>
<td>2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract and if the requirements under Article 9 are fulfilled. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.</td>
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Assessment:

The suggested solution in amendment 65 with the clarification to be inserted in the new recital 32a (amendment 12) clarifies that the issue of whether a contract has been concluded, and on what terms, should be determined by the applicable national law. This solution is better than no solution, but it includes some consumer protection dangers. In comparison to the vast majority of Member States’ laws the provisions of the CESL are far more advantageous for the consumer than the otherwise applicable national law. This has impressively been confirmed in a recent study for the European Parliament’s Committee on Legal Affairs:

“... there is no solution in the CESL that is less protective than that selected in all the Member States. Although sensitive points remain, it should be recognised that the CESL is very often more protective than most of the Member States.”

If the agreement to use the CESL is invalid or the required consumer information is lacking, and the applicable national law considers the concluded main contract valid and subject to national law, the consumer would lose protection he/she would have had under the CESL.

This consequence is dysfunctional, since the provisions on the validity of the agreement to use the CESL and, of course, also the consumer information duties have the purpose of protecting consumers. The application of the CESL, in conjunction with the national law, should therefore not lead to the absurd outcome that protective rules of the CESL, if infringed by the trader, lead as a result to a lower protection of the consumer than she or he would have had under the CESL. Therefore, the CESL would have to ensure, that even if it is not applicable because some protective provisions have not been adhered to, the consumer is granted at least the protection he or she would have had under the CESL. Otherwise, traders would benefit from not having properly applied the provisions of CESL which are protective of consumers. The proper solution must therefore be a combination between the national law and the consumer protection standard of CESL. The CESL needs therefore to be supplemented by a provision saying that the application of the national law in these cases may not, however, have the result of depriving the consumer of the protection afforded to him or her by provisions of the CESL. This should be expressly regulated in the CESL. It would be advisable also to turn the proposed new recital 23a (amendment 12) into a new Article 8a (or 9a), which could read

**Proposed new Art. 8a CESL Reg.:**

1. Where the agreement of the parties to the use of the Common European Sales Law is invalid or where the requirements to provide the standard information notice are not fulfilled, issues as to whether a contract is concluded and on what terms should be determined by the respective national law which is applicable pursuant to the relevant conflict of law rules.

2. The application of the national law may not, however, have the result of depriving the consumer of the protection afforded to him by provisions of the CESL that cannot be derogated from by agreement of the parties.

5  

REGULATING THE OBLIGATIONAL EFFECTS OF RETENTION OF TITLE CLAUSES (AMENDMENTS 21, 135)

The original proposal of CESL is lacking a provision on retention of title clauses. The draft report proposes to insert the following new Article:

**Amendment 135: Article 91 a (new) CESL**

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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment proposed by JURI</th>
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<tbody>
<tr>
<td>If a retention of title clause has been agreed, the seller shall not be obliged to transfer ownership of the goods until the buyer has fulfilled the obligation to pay the price as agreed in that clause.</td>
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</tbody>
</table>

**Assessment:**

The first and main function of this new article is to clarify that under CESL retention of title clauses can be agreed on and that the obligational effects of such a clause are covered by the CESL. From a consumer protection perspective, this could have the disadvantage that the CESL otherwise would set an incentive for advance payments, which may not always be in the interest of consumers. Moreover, since there is already some European regulation of
retention of title clauses in the area of late payments (cf. Directive 2011/7/EU), the proposed amendments simply bring the CESL in line with other EU Law. It is therefore recommended that this proposal for amendment be adopted.

6 EXTENSION OF THE INCLUSION OF CLOUD-COMPUTING SERVICES INTO CESL (AMENDMENTS 8, 10, 41)

The draft report intends to clarify that related cloud-computing services can also fall under the CESL. One core element is amendment 41, which inserts “storage” into the definition of related services:

Amendment 41: Article 2 (m) CESL Reg.

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(m) ‘related service’ means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:</td>
<td>(m) ‘related service’ means any service related to goods or digital content, such as installation, maintenance, repair, storage or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:</td>
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</table>

Assessment:

Whereas generally the inclusion of cloud-computing services into the draft is to be welcomed, it must be borne in mind that the set of remedies offered under the CESL does not fit such cloud-computing services which take the form of contracts of long duration more akin to a lease contract than a sale. In the example of a computer sold together with a cloud-computing service (e.g. web space for voluminous data such as family pictures and videos) the remedies under the CESL do not really help the buyer when access to the web space is denied or, even worse, where the pictures and videos are lost. This is particularly true, if it is a free service (even without giving personal data as counter-performance). Any extension to “storage-like” cloud-computing services would require an adaptation of the corresponding remedies, in particular a claim for immaterial damages or a lump sum due when data which only has a personal but no commercial value, is lost.

7 BROADENING (AND NARROWING) THE RIGHT OF AVOIDANCE (AMENDMENTS 94, 97)

There has been a lot of criticism particularly about the scope of the right of the consumer to avoid a contract on grounds of mistake, namely that this is narrower than under, at least some, national laws. Consumers who would be entitled to avoidance under national law would then be worse off under the CESL. The draft report seems, at least partially, to acknowledge this in suggesting amendment 94.
Amendment 94: Article 48 (1) (a) CESL

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms <strong>and the other party knew or could be expected to have known this; and</strong></td>
<td>(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms</td>
</tr>
</tbody>
</table>

Amendment: Article 48 (1) (b) (iv) CESL

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td><em>(iv) made the same mistake.</em></td>
<td>deleted</td>
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</table>

Assessment:

The suggested amendment brings the right of avoidance more in line with national laws by dropping the requirement of co-responsibility of the other party for the mistake. This amendment should therefore be adopted. However, the deletion of the right to avoid a contract in case both parties made the same mistake (amendment 97) may cause a gap in protection. This is in particular true for English law where avoidance on grounds of a mistake common to both parties is an important reason for granting termination.

8 ADJUSTMENT OF THE RIGHT TO IMMEDIATELY TERMINATE (AMENDMENT 142)

What the original proposal for a CESL certainly got wrong was the necessary carve-outs from the right to immediately terminate. Amendment 142 seeks to cure this defect:

Amendment 142: Article 106 (3) (a) (new point i) CESL

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(a) the buyer's rights are not subject to cure by the seller; <strong>and</strong></td>
<td>(a) the buyer's rights are not subject to cure by the seller, <strong>except where</strong></td>
</tr>
<tr>
<td><em>(i) they relate to goods or digital content which are manufactured, produced or modified according to the consumer's specifications or which are clearly personalised; or</em>*</td>
<td></td>
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</tbody>
</table>

Assessment:

This proposed amendment draws the distinction now much better than the original draft. For goods, or digital content, which are manufactured, produced or modified according to the consumer’s specifications or which are clearly personalised, the seller shall now have a right to cure also in a consumers sales contract. This amendment should be adopted. One
could even wonder whether the right to immediately terminate should be further adjusted to the right to withdraw, in particular to the exceptions to the right to withdraw. Particularly for goods for which the price depends on fluctuations in the financial market and for sealed audio or video recordings or computer software (which have been unsealed by the consumer) one could also introduce a right of the seller to cure. Otherwise, a right of immediate termination could be too harsh for the trader and leave the consumer with an undeserved advantage.

9 ALTERNATIVE PROPOSALS FOR RESTRICTIONS TO THE CONSUMER’S RIGHT TO IMMEDIATELY TERMINATE (AMENDMENTS 143, 150, 183, 186)

The draft report proposes – alternatively – three options to slightly limit the consumer’s right to immediately terminate. They read:

**Amendment 143: Article 106 (3) (a) (new point ii) CESL**

<table>
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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>Alternative 1 [Alternative amendment to amendments on Article 119 and Article 174 (1) to (1b)]</td>
<td>(ii) the consumer notifies the trader of the lack of conformity more than six months after risk has passed to the consumer.</td>
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</table>

**Amendment 150: Article 119 (1) (2) CESL**

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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>Alternative 2 [Alternative amendment to amendments for Article 106 (3)(a)(ii) and Article 174 (1) to (1b)]</td>
<td>1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.</td>
</tr>
</tbody>
</table>

1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later. If the buyer is a trader that buyer could be expected to have become, aware of the non-performance, whichever is later.

2. Paragraph 1 does not apply:

- (a) where the buyer is a consumer; or

2. Paragraph 1 does not apply where no performance at all has been rendered.
(b) where no performance at all has been rendered

**Amendment 465: Article 119 (1) CESL**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.</td>
<td>1. The buyer loses the right to terminate under this Section if notice of termination is not given within <strong>30 days</strong> from when the right arose or the buyer became, or, <strong>if the buyer is a trader that buyer</strong> could be expected to have become, aware of the non-performance, whichever is later.</td>
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</table>

**Amendment 183:Article 174 (1) (new 1a) (new 1b) CESL**

<table>
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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:</td>
<td><strong>Alternative 3 [Alternative amendment to Amendments for Article 106 (1)(3)(a)(ii) and Article 119]</strong></td>
</tr>
<tr>
<td>(a) the recipient caused the ground for avoidance or <strong>termination</strong>;</td>
<td>(a) the recipient caused the ground for avoidance; <strong>or</strong></td>
</tr>
<tr>
<td>(b) the recipient, prior to the start of that period, was aware of the ground for avoidance <strong>or termination</strong>; <strong>or</strong></td>
<td>(b) the recipient, prior to the start of that period, was aware of the ground for avoidance.</td>
</tr>
<tr>
<td><strong>(c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.</strong></td>
<td><strong>1a. Where a contract is terminated, a recipient who has made use of goods, digital content or their fruits shall pay the other party the monetary value of that use. The recipient may deduct</strong></td>
</tr>
</tbody>
</table>
the cost of returning the goods, digital content or their fruits from the payment for use.

1b. The monetary value of the use is the amount the recipient saved by making use of the goods, the digital content or their fruits.

**Amendment 186: Article 174 (new 3b) CESL**

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<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tr>
<td>3b. The payment for use or diminished value shall not exceed the price agreed for the goods or the digital content.</td>
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</table>

**Assessment:**

The first alternative is the introduction of a deadline of six months starting from when the risk passes to the buyer, after which the consumer would have to accept cure (amendment 143). It has to be admitted that this proposal is a rather innovative one. It has some similarities to the current situation under English Law, where the buyer has the right to immediately reject the goods sold for a rather short period. Six months would be much longer. This proposal, however, would introduce into the relation between trader and consumer a new and, perhaps for the consumer, surprising deadline. The choice of the six month period (which seems to have its model in the rule on burden of proof under the Consumer Sales Directive 99/44/EC) seems, moreover, somewhat arbitrary.

The second alternative is a provision according to which the consumer must give notice of termination within a reasonable time after he first became aware of the non-performance (amendment 150). Afterwards, the right of termination would be lost. This amendment resembles provisions designed for commercial contracts such as Art. 49 of the United Nations Convention on the International Sale of Goods. It is therefore no surprise that this provision may fall behind the level of protection in some Member States. The Consumer Sales Directive allows Member States – as an option – in Art. 5 (2) to require a consumer to notify the seller of a lack of conformity within a period of two months from the date on which the consumer detected the lack of conformity. At least 10 Member States² have not made use of this option. This alternative would therefore take away from the consumer, at least in some countries, rights he or she now has under the current legislation.

Moreover, the suggested provision creates great uncertainty. Firstly, the business would have to prove when the consumer first became aware of the non-performance. The consumer can therefore simply lie about when the non-performance occurred and businesses will often have difficulty proving that the consumer is lying. In fact, the business will often only be able to prove the time of detection if the consumer complained. A cunning consumer might therefore simply not complain, but continue to use the defective good and terminate later. The amendment therefore sets the wrong incentive because it favours the dishonest and not the honest consumer.

Secondly, the requirement of a reasonable time in this context may be difficult to apply for both parties to the contract. This seems to have been acknowledged by amendment 465

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which proposes a fixed deadline of 30 days, which would, however, still be shorter than the two months period of the Consumer Sales Directive. If one were to consider a fixed period, the example of Dutch law could be seen as commendable, under which the general rule that a consumer must notify the seller within a reasonable time is supplemented by a provision that 2 months is reasonable in any case (Book 7, Art. 23 (1) Dutch Civil Code).

Thirdly, even a fixed (minimum) period for termination is problematic since the trader is (other than with regard to a withdrawal period) not obliged to inform the consumer about the ‘termination period’. Traders may even develop a strategy to give the consumer the run-around by meaningless communication until the period expires. Courts and ODR schemes would then have to struggle with such strategies.

Although it has to be admitted that a reasonable consumer should terminate within a reasonable time after he/she became aware of the non-performance, this rule of good morals should not be turned into a legal rule because it is likely to cause unnecessary disputes and it will not solve any problems.

The third alternative is to introduce an obligation for the consumer to pay for use in cases where he/she terminates the contract (amendment 183). The advantage of this alternative is that it would leave the consumer a free choice of remedies. If redrafted along these lines on condition that some safeguards against excessive cost of use are built into the system, this alternative seems to be preferable and very much in line with most of the national laws (except seemingly the Dutch one). The proposed limitations for the pay-for-use alternative, i.e. the calculation of the monetary value of the use as the amount the recipient saved by making use of the goods (amendment 183) and a maximum cap being the price of the goods sold (amendment 186), would sufficiently protect the consumer. If the Committee of Legal Affairs were to adopt one of these alternatives, the third alternative seems preferable, followed by the first. The second should not be adopted.

10 A CONSUMER’S RIGHT TO SPECIFIC PERFORMANCE IN CASE OF EXCUSE (AMENDMENT 144)

Amendment 144: Article 106 (4) CESL

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
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<tbody>
<tr>
<td>4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.</td>
<td>4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except damages.</td>
</tr>
</tbody>
</table>

Assessment:

This provision deals with the consequences of “excuse” in the sense of Art. 88 CESL. Excuse means by definition a severe impediment to perform and that the seller is therefore excused (cf. Art. 88 CESL). The international instruments vary in respect to the issue of whether excuse merely excludes a claim for damages against the seller or also excludes the buyer’s right to performance. For instance, the Hague Convention relating to a Uniform Law on the International Sale of Goods of 1964 excluded both a right of performance and a claim for damages in Art. 74. The United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980, however, only excludes in Art. 79 (5) a right for damages. The Commission proposal of the CESL followed the older tradition of the 1964 Uniform Sales Law, whereas amendment 144 of the draft report of the Legal Affairs Committee again proposes to only exclude damages.

Both solutions have their virtues and disadvantages which can best be seen in the example of the buyer’s right to have a defective good replaced or repaired by the seller. The
question is whether the buyer should be entitled to replacement or repair if the seller’s non-conforming performance is excused (e.g. in a case where the good had been sold from a certain stock and the whole stock had been damaged by water). If excuse leads to both the exclusion of damages and performance (as the Commission proposal of CESL suggests), the buyer can only terminate or reduce the price, but cannot claim replacement or repair. Under amendment 144, however, the buyer can, in principle, also claim replacement or repair. The seller then can only rely on the defence of Art. 110(3) CESL which protects the seller in all cases where performance would be impossible, unlawful or inappropriately burdensome. In the example given, it would be rather unfair for the trader (who only wanted to sell a certain stock) if he, although excused, now would be obliged to browse the world market in order to find the same goods again. Most courts would therefore probably come to the result that the buyer cannot usually request replacement where the seller’s performance is excused. This may be different for repair, if repair is possible and not too burdensome. In a general law of sale, the wording of amendment 144 allows for a more differentiated solution which has its main practical meaning with regard to a buyer’s claim for repair.

If, however, as the draft report of the Legal Affairs Committee proposes, the scope of the instrument is limited to distance sales, it may be wondered whether such a differentiated (and complicated) solution is appropriate. It can be assumed that for many of the goods sold at a distance, in particular to consumers, repair is either impossible or very burdensome for the trader (e.g. in the case of books, consumer electronics, household goods) – sometimes simply because of the geographical distance between trader and consumer. In these cases the trader would have the defence of Art. 110 (3) CESL and – as a result – would not be obliged to repair anyway. If ODR schemes were envisaged rather than recourse to the courts, the much easier and clear cut solution of the Commission proposal (i.e. in a case of excuse the buyer can only terminate or reduce the price, but in no way claim repair or replacement) would be the more appropriate rule. It is at least questionable whether a rather small increase in buyer and consumer protection (mainly, in some rather rare cases, a claim for repair) justifies the more complex regulation which amendment 144 would lead to. At least for an instrument which only covers distance contracts, it does not seem recommendable to adopt amendment 144.

Moreover, amendment 144 would make the provision capable of being easily misunderstood (in particular by neutrals in an ODR scheme), because, at first sight, the provision would say something rather contradictory, namely that the seller, albeit excused and seemingly thus not obliged to perform, is obliged to perform. It is thus recommended that this amendment should not be adopted.

### 11 LONG PRESCRIPTION PERIOD REDUCED TO SIX YEARS (AMENDMENT 193)

**Amendment 193: Article 179 (2) CESL**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>2. The long period of prescription is <strong>ten</strong> years or, in the case of a right to damages for personal injuries, thirty years.</td>
<td>2. The long period of prescription is <strong>six</strong> years or, in the case of a right to damages for personal injuries, thirty years.</td>
</tr>
</tbody>
</table>

**Assessment:**

It has to be admitted that a six year longstop prescription period is longer than the periods of nearly all Member States (most of them two years, France five years, Scotland five years, England six years). Only consumers from those countries which have no express limitation period for the rights of the consumer when buying goods or apply an open-
textured period calculated according to the average lifetime of the product sold (e.g. Finland, the Netherlands) would be worse off. If a political compromise is necessary for the adoption of the CESL, it makes no great difference whether the long stop period is six years or ten years, because it is rather unlikely that a lack of conformity which is present at the time of delivery becomes apparent after six but before ten years. On the other hand, since the economic importance of a six year or ten year period is anyway low, there is no reason not to maintain the ten-year period, since this might (although economically usually not significant) increase consumer confidence in the new system.
Increasing the legal certainty and attractiveness of CESL: outstanding issues

Sir John Thomas, President of the Queen’s Bench Division
and
Dr Christiane Wendehorst, LL.M. (Cambridge),
Professor of Law, University of Vienna

ABSTRACT
In the event that the substantive scope of the CESL is restricted to distance contracts Chapter 2 would have to be fundamentally redrafted and a range of new rules on language, on means of distance communication, on internet auctions and on the use of personal data would need to be introduced. A focus on distance trade, in particular online trade, could also imply that digital content not supplied on a tangible medium becomes ever more relevant under the CESL. In this context, it would be desirable that the sale of digital content is construed in a way parallel to the sale of goods, explicitly mentioning a licence allowing use of the digital content for an unlimited period. It would also be desirable to clarify availability of the CESL where digital content is stored in the seller’s cloud, and to adapt the CESL’s rules to this case, as well as to add a limited number of specific information duties. Among the issues not related to a potential restriction of the substantive scope but that would in any case need to be addressed are the abolishment of several other restrictions of the CESL’s scope, the approach to contracts with an alien element and to linked contracts, the rules on termination, and the chapter on restitution.

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EXECUTIVE SUMMARY
Since its publication in October 2011, discussion of the Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final has appeared to have focused on its development as an instrument limited to distance contracts, and particularly online contracts. It is essential therefore that any changes to the Proposal, which may become necessary or at least desirable, in the light of any new focus on distance marketing are identified.

If the instrument is restricted to distance sales it will not be simply sufficient to rely on the current draft. A limited number of measures will need to be taken in order to make the instrument work better in the distance sales field.
Proposed Revisions

Chapter 2 on pre-contractual information will need to be substantively reformulated. It will need to be revised in order to combine, in a more coherent manner the pre-contractual information and related duties that have their origin in Directive 2011/83/EU on consumer rights, the requirements coming from Directive 2000/31/EC on electronic commerce, some general information duties under the 'Services' Directive (2006/123/EC), and the requirements that have to be met in order to make terms which are not individually negotiated part of the contract. Such revision may also need to be accompanied by a paradigm shift away from the terms and principles underlying the Consumer Rights Directive to those underlying the Electronic Commerce Directive.

Additionally, a number of further rules will necessarily have to be incorporated into the Proposal. Those rules will not build on a tradition found in the acquis or in Member States’ laws. Without their incorporation into the text, however, a European instrument specifically tailored for distance sales will lack sufficient credibility and attractiveness to businesses and consumers. These rules should address, in particular,

- the language to be used for communications between the parties;
- the means of distance communication that may be used;
- the need for traders to ensure that distance communication with buyers is straightforward and easily accessible;
- internet auctions;
- a prohibition of the use of the buyer’s personal data after withdrawal, avoidance or termination.

Furthermore, as digital products take an ever increasing share in distance marketing, detailed consideration will need to be given to the addition of further rules and clarifications concerning, amongst other things,

- the role of the licence agreement;
- to what extent the CESL is available for contracts involving cloud computing;
- the buyer’s right to multiple downloads and/or updates.

If, as would be anticipated, the growth of digital sales continues to increase, at least, at the rate it has done over recent years, such revisions are highly advisable, in order for the CESL to be as attractive an instrument as possible, with maximum utility.

Finally, the authors will make some observations on selected issues in the JURI draft report, in particular,

- exclusions from the scope;
- contracts with an alien element;
- approach to linked and mixed contracts;
- fundamental revision of the rules on termination and restitution.

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3 Sir John Thomas is chair of the CESL Working Group of the European Law Institute (ELI), and Christiane Wendehorst is a member of this Working Group and its redaction committee. The views expressed in this Briefing Note reflect tentative conclusions of the ELI Working Group. However, these are still in the course of being developed and do not yet constitute the official position of the ELI.
1. CONSEQUENCES OF A POSSIBLE RESTRICTION TO DISTANCE CONTRACTS

**KEY FINDINGS**

- If the CESL is going to be restricted to distance contracts the scope should include only contracts where offer and acceptance were made exclusively by means of distance communication. Contracts where only the negotiations occurred via distance communication (cf. Amendment 56 of the draft JURI report) should remain outside the scope. One might consider including contracts where there has been some face-to-face communication before the contract was actually concluded.

- If the scope of the CESL is restricted to distance communication, this will, in practice, mean a focus on online trade. This implies a certain paradigm shift from principles underlying Directive 2011/83/EU on consumer rights to those underlying Directive 2000/31/EC on electronic commerce and, to a certain extent, a differentiation between mass communication and individual communication. At the same time, Chapter 2 on pre-contractual information and related duties should be re-drafted so as to combine, in a coherent manner, the requirements having their origin in both Directives mentioned and the requirements that must be met in order to make not individually negotiated clauses part of the contract.

- In an instrument specifically tailored to meet the requirements of distance trade there must be rules on the language and on the means of distance communication to be used for communications relating to the contract. In essence, this means that, in particular the trader, may only use a language and a means of distance communication to which the other party has agreed.

- There should be some basic requirements of fairness for sellers who offer to conclude a contract by means of distance communication which are entirely under their control, such as trading websites. In particular, a trader who offers specific means of communication for placing an order must offer the same means of communication, and a similar level of convenience, for communications that are solely in the buyer’s interest, such as the exercise of a right or remedy. Similarly, the seller should be under a general duty to provide a confirmation of receipt, which displays the content of the communication, where the means of distance communication offered does not allow the buyer to store a copy.

- For an instrument with a focus on online trade it would also be advisable to have a rule on internet auctions, in particular on the formation of the contract and on revocability of the auction offer.

- In distance marketing, buyers, in particular consumers, provide sellers with their personal data, which nowadays constitute a value in themselves, and which are often used, or abused, by the seller. Even though it may not be wise to incorporate genuine features of data protection law, as the latter is in the flux, there should be a rule on the effects which withdrawal, avoidance or termination have on the further use of the customer’s personal data for purposes other than required for keeping record of the concrete contractual relationship.

The authors note that there appears to be an emerging view that the scope of the instrument should be restricted to distance contracts, the vast majority of which will, in practice, be online contracts. The definition of a distance contract would be in line with the definitions in Directives 97/7/EC and 2011/83/EU but would include contracts between traders.

1.1. A restriction to distance and ‘semi-distance contracts’?

The authors will refrain from any comments on the decision to restrict the CESL’s scope to distance contracts as such. However, they would like to point out that the *inclusion of contracts ... where the parties conducted negotiations or took other preparatory*
steps with a view to the conclusion of the contract, using for all those steps exclusively means of distance communication, but where the contract itself was not concluded by means of distance communication\(^4\) (referred to as ‘semi-distance contracts’) brings with it serious difficulties and should be abandoned.

The first reason why the inclusion of ‘semi-distance contracts’ is problematic is that it will be impossible to draw a line between cases where only the bare conclusion of the contract was made other than by means of distance communication and cases where some, albeit very insignificant, ‘preparatory steps’ or even ‘negotiations’ have taken place on the occasion of the conclusion of the contract in a face-to-face situation. The parties therefore cannot rely on the application of the CESL, as a court might later detect some kind of ‘preparatory step’ or qualify the face-to-face discussion on the exact time and modalities of delivery as part of the ‘negotiations’ and thus refuse to apply the CESL.

The second reason why the inclusion of ‘semi-distance contracts’ seems to be inadvisable is that, by leaving them within the scope, it is impossible to free the instrument from a number of rules which specifically apply to off-premises and on-premises contracts even though the CESL will hardly play any role at all in relation to these contracts. Distance sellers, however, would find an instrument which, already at first sight, contains many rules obviously irrelevant for distance trade, less attractive or appealing.

On the other hand, one might consider broadening the definition of distance contracts so that it includes every contract where offer and acceptance are exchanged exclusively by means of distance communication but where there has been some face-to-face contact in the preparatory phase.

1.2. Paradigm shift in the drafting of Chapter 2

At first sight, a restriction to distance contracts seems to imply no more than a deletion of rules which are applicable exclusively to off-premises and on-premises contracts. Such rules currently exist in Chapters 2 and 4 of Annex I in the Commission Proposal COM(2011) 635 final. On a closer look, however, it becomes clear that a focus on distance contracts, and in particular online contracts, really entails a more far-reaching paradigm shift for the rules governing the pre-contractual phase and the conclusion of the contract.

The CISG, while designed mainly for distance contracts, dates from the pre-electronic era; it therefore does not take modern communication technology into account. The PECL, the DCFR and Directive 2011/83/EU as three of the main sources of inspiration for the rules in the CESL Proposal take on-premises contracts between parties of equal bargaining power as the conceptual starting point and add specific protection for consumer contracts in general and distance and off-premises contracts in particular. Thus, the all-dominating dividing line is that between b2c and b2b contracts; electronic contracts are treated as an anomaly rather than as the paradigm case. A look at instruments specifically tailored to meet the needs of online trade, such as Article 10(4) of Directive 2000/31/EC on electronic commerce, indicate however that another major dividing line is that between mass communication contracts on the one hand and contracts concluded by individual communication on the other. The authors therefore suggest to insert a definition of ‘mass communication contract’, which means a contract where offer and acceptance are electronic and do not involve the exclusive exchange of individual communications - a communication is not individual merely because a party has made a selection among pre-formulated options or was able to add remarks in a box provided for that purpose.

Furthermore, the authors recommend restructuring Chapter 2 of the Proposal so as to take better account of the difference between mass communication and individual communications. By doing so, it is also possible to produce a more coherent and comprehensive draft of Chapter 2, more or less merging pre-contractual information and related duties which have their origin in Directive 2011/83/EU, requirements coming from Directive 2000/31/EC, and the requirements that have

\(^4\) Cf. Amendment 56 of the draft JURI report of 18 February 2013.
to be met in order to make terms which are not individually negotiated part of the contract. As the amount of information to be provided, in particular, on a website, does not lead to an increase in costs to be borne by sellers, it seems to be also advisable to integrate the general information duties under Directive 2006/123/EC on services in the internal market.

1.3. Language of the contract

So far, the determination of the language to be used has been outside the scope of the Instrument. JURI further underlines this in Amendment 70 by including the list of subject matters which are outside the scope of the CESL in the text of the Instrument itself. The authors believe, however, that in an instrument specifically tailored to meet the requirements of distance trade, in particular online trade, freedom to select a language is a prerequisite, if the CESL is to be a success. They suggest clarifying in the rule on freedom of contract that this principle includes the freedom of language:

Article …
Freedom of contract

Parties are free to conclude a contract and to determine its contents and language, subject to any applicable mandatory rules.

In relations between traders parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

However, as consumers need protection against communications being imposed on them in a foreign language, there would have to be additional rules. At present, consumers who shop online often find themselves confronted with a whole range of different languages, some of which they have never accepted for use, and do not understand. In part, different languages are used by the sellers themselves, in part they are used by payment service providers or logistics providers to whom the consumer is referred in the course of the ordering process. In order to change this unfortunate situation there should be an additional rule along the lines of the following:

Article …
Language

For communications relating to the conclusion of a contract or the rights or obligations arising from it, a party must use a language the use of which has been accepted by the other party, such as by entering into negotiations or initiating an ordering process in this language.

Where a trader is dealing with a consumer and in mass communication contracts the trader must, for all communications relating to the conclusion of a contract or the rights or obligations arising from it, use or offer to use a language that was used for the initial communication between the parties, such as through the trader’s website, and the use of which has been accepted by the other party. The trader may use another language at a later point in time where the other party has given explicit consent to the use of that other language before the contract was concluded or has previously opened a customer account in that other language.

Communications within the meaning of this Article include communications by a third party, such as a payment service provider, to which one party has referred the other party in relation to the contract or the rights or obligations arising from it.

A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in [damages] apply with appropriate adaptations.
In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

In order to make sure the seller cannot rely on having made a communication that was not made in a language accepted by the other party, the authors recommend adding another safeguard in the Article on ‘Notice’ (infra p. 35).

1.4. Means of distance communication

Similar issues arise concerning the means of distance communication to be used by the parties. If the CESL is to be an instrument specifically tailored to meet the requirements of distance trade there must be a rule as to the means of distance communication which may be used by sellers. The authors recommend introducing a very similar rule as the one concerning language (supra p. 33) and thus imposing a duty on the seller to use only such means of distance communication as have been accepted by the other party. This could mean a rule along the lines of the following:

Article ...

Means of distance communication

For communications relating to a contract or the rights or obligations arising from it a party must use a means of distance communication the use of which has been accepted by the other party, such as by entering into negotiations or initiating an ordering process using that means of distance communication, or by indicating to the first party a number or address relating to that specific means of distance communication. The mere indication by a consumer of a number or address does not amount to acceptance unless it was given or confirmed by the consumer with relation to that particular contract; and after the trader had, by appropriate means, drawn the consumer’s attention to the fact that it could be used for communications relating to the contract.

Paragraph 1 applies accordingly in relation to the specific address or similar code used for distance communication, such as a postal or e-mail address or a phone number.

Where an address or similar code, such as a mobile phone number, may be used for different types of distance communication, or where accessibility depends on further technical equipment, such as particular hardware or software, paragraph 1 applies accordingly to the specific type of distance communication unless the other party could, in all likelihood, be expected to use or have access to that specific type.

A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in [damages] apply with appropriate adaptations.

In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

In order to provide for a more effective sanction against the use of means of distance communication the other party was not prepared to use, the authors recommend an amendment of the Article on Notice, which could, at the same time, also take into account
the desirability of bringing the CESL in line with Article 12 of the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts:

**Article ...**

**Notice**

Without prejudice to Articles [language] and [means of distance communication] and notwithstanding any provision to the contrary, a notice may be given by any means, including conduct, which is appropriate to the circumstances. Notice includes communications generated by means of a computer programme or other automated means without review or intervention by a natural person each time an action is initiated or a response is generated by the system.

A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.

A party who fails to comply with the rules under Articles [language] or [means of distance communication] may not rely on having given the notice in question, or on its taking effect at a particular time, unless that party shows that, and when, the other party has

in the case of Article [language] properly understood the notice;

in the case of Article [means of distance communication] actually become aware of the notice.

In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

**1.5. Support in distance communication**

However, protection against the unsolicited use of distance communication is not the only issue that arises in this context. The authors recommend introducing a requirement that the seller who provides to the other party the possibility of placing an order via distance communication must also provide an appropriate, effective and accessible means for giving any kind of subsequent notice relating to that contract (in particular for exercising a right of withdrawal) by using the same means of distance communication. It is already often difficult for consumers to use different means of distance communication, e.g. when a seller offers to conclude a contract electronically on a trading website but then fails to provide the necessary means for the consumer to exercise the right of withdrawal on the same trading website or by clicking on a link provided in the email confirming the purchase. Instead, consumers are often confronted with the standard withdrawal form, which they have to print out, fill in and send by post. In the digital age, this is proving to be an obstacle which fewer and fewer consumers are prepared to overcome. The authors therefore suggest a rule along the lines of the following (see paragraph 1), which should be re-inforced by a more specific rule in the context of pre-contractual duties concerning withdrawal and also a specific sanction, such as prolongation of the withdrawal period, where the trader fails to provide appropriate, effective and accessible means to exercise the right of withdrawal by the same means as were used for placing the order. The rule suggested by JURI in Amendment 89 could, in the same context, be formulated in a more general way (see paragraph 2)

**Article ...**

**Support in distance communication**

Where a seller provides to the other party the possibility of placing an order using a particular means of distance communication, the seller must provide to the other party appropriate, effective and accessible means for giving any kind of subsequent notice relating to that contract, in
particular for exercising a right of withdrawal or remedy for non-performance, by using the same means of distance communication.

Where a seller provides to the other party the possibility of giving a notice by a means of distance communication which does not allow the other party to store a copy (in particular where an order is placed or a right of withdrawal or remedy for non-performance is exercised electronically on a trading website) the seller has a duty to communicate to the other party an acknowledgement of receipt, which must display the notice itself or its content, on a durable medium without undue delay. Where several related notices are given consecutively in the course of an ordering process, such as confirmations of various kinds, only one combined acknowledgement of receipt must be given.

A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in damages apply with appropriate adaptations.

In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

1.6. Internet auctions

Among the consequences that should be drawn from the restriction to distance, and in particular online contracts, there is also the introduction of a rule on auctions, which could, for example, be as follows:

Article ...

Auctions

A contract under the Common European Sales Law may be concluded in the way that the seller tenders goods, digital content or related services to the public or to several persons by way of fixing a starting price and inviting bids (‘auction’).

Every bid constitutes an offer. Without prejudice to other rules under this Section, an offer lapses when a higher bid is placed.

Where the seller provides the means for concluding a mass communication contract and fixes a time limit for making bids, and unless otherwise indicated by the seller,

- the auction proposal constitutes an anticipated acceptance of the highest offer which fulfils the conditions stipulated in the auction proposal;
- the auction proposal may no longer be revoked once the first bid which fulfils the conditions stipulated in the auction proposal has been placed;
- the contract is concluded when the auction has reached its time limit.

1.7. Use of personal data

With a stronger focus on distance contracts (and, in particular, electronic contracts), storage and use of the buyer’s personal data should receive more attention. It is important to consider to what extent issues relating to the use of personal data (such as pre-contractual information) and to the buyer’s consent to the use of the data should be included in the CESL. The authors consider that, in general, sales law on the one hand and data protection law on the other should be kept apart, in particular in order to avoid inconsistencies. However, sales law can play an important role in underpinning the buyer’s
right to withdraw consent to the use of personal data, in particular by making sure that the
seller no longer uses the buyer’s personal data after the buyer has exercised a right of
withdrawal, avoidance or termination. This could mean an Amendment along the lines of:

Article …
Effects of withdrawal

Withdrawal terminates the obligations of both parties:

- to perform the contract; or
- to conclude the contract in cases where an offer was made by the consumer.

After withdrawal, both parties are obliged to make restitution of what they have received in accordance with Articles … and …. The obligation to make restitution includes a duty to refrain from using what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.

A similar rule should be inserted in the Chapter on Restitution. This would mean a modification of Amendment 169 in the draft JURI report along the lines of the following, which would make Amendment 177 superfluous:

Article …
Restitution in case of avoidance, termination or invalidity

Where a contract or part of a contract is avoided or terminated by either party or is invalid or not binding for reasons other than avoidance or termination, each party is obliged to return what that party ("the recipient") has received from the other party under the contract or affected part thereof. The obligation to make restitution includes a duty to refrain from using what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.

1.8. Taking delivery

In distance contracts, delivery of goods normally takes place only some time after the contract has been concluded. Buyers, in particular consumers, are often faced with the problem that the seller makes an attempt to deliver at a point in time when the buyer is physically absent. It is therefore useful to clarify that physical absence as such normally does not amount to non-performance of the obligation to take delivery:

Article …
Taking delivery

...
2 CLOUD COMPUTING AND OTHER ISSUES RELATING TO DIGITAL CONTENT

KEY FINDINGS

- The concept of sales and sales law has been developed with regard to tangible items, in particular goods. With contracts for the supply of digital content, the issue arises where to draw the dividing line between sales and services. This is a difficult issue which needs further debate about whether a more radical solution is needed as those buying from the cloud will not make the traditional distinctions between sales and services in what they are buying. The better view is probably that the distinctions should be maintained and CESL should be made available, but only where a contract for the supply of digital content is sufficiently similar to a classical sale in respect of the attendant concepts of, for instance, delivery, risk, and remedies for non-performance.

- If delivery and transfer of ownership are the elements that make a contract for the supply of goods a contract for the sale of goods, supply and provision of a licence allowing, at least, use of the digital content for an unlimited period of time are the elements that make a contract for the supply of digital content a contract for the sale of digital content. Where the licence is only for a limited period, or where no licence at all is granted, the better view is probably that a contract should not be within the scope of a sales law regime.

- As regards the case where digital content is not downloaded onto the buyer’s hardware or other storage facility operated by a party that is not the seller, but remains stored in the seller’s cloud, it is the absence of physical control on the part of the buyer that makes it questionable whether the contract is a sales contract. The CESL, including its rules on passing of risk, is probably only an appropriate legal regime where storage may be construed as a related service contract. This is because such an agreement carries the implication that the seller is under an obligation to transfer the attendant physical possession or control of the digital content to the buyer upon the buyer’s request, and in any case when the related storage contract comes to an end, by enabling the transfer of a usable version of the digital content to another storage facility.

- The digital world is changing rapidly, and so are the expectations on the part of the buyer and the range of what should appropriately be included in the notion of ‘digital ownership’. One should therefore be hesitant to interfere too much with freedom of contract. However, as regards the right to multiple downloads, the right to re-sell the digital content, and the right to receive updates, the seller should be under a pre-contractual duty to inform the buyer where such right is excluded or not granted.

2.1. The role of the licence agreement

The authors recommend that the definitions both of sale of goods and of digital content be revised, not least after the decision of the CJEU in UsedSoft (Case C-128/11, [2012] CJEU C-128/11). The CJEU decision fully supported the view taken by the ELI in the 2012 Statement that the supply of digital content can and should, as far as contracts addressed in the CESL are concerned, be construed as contracts for the sale of digital content even where the digital content is not supplied on a tangible medium. This is not only imperative for the sake of conceptual clarity and coherence, but would also significantly help to simplify the terminology used throughout the CESL. The CJEU went even one step further and described the entitlement of the buyer of digital content not supplied on a tangible medium under a licence permitting use of the copy for an unlimited period as a right of ownership in the copy (ibid at 44 to 47).

The authors do not take a position on the UsedSoft decision as such. However, the decision serves to illustrate that entitlement in the digital world can and should, as far as ever
possible, be construed in a way that is parallel to the treatment of entitlement in the tangible world. In the CESL Proposal, the definitions of the sale of goods on the one hand and of the supply of digital content on the other are so far not aligned in a parallel way. Rather, the definition of sale of goods exclusively focuses on the transfer of ownership, without mentioning the more factual aspect of the seller's obligation to deliver the goods, whereas the definition of supply of digital content exclusively focuses on the factual aspect of the making available of the digital content, without mentioning the licence agreement. The authors recommend that both delivery and transfer of ownership be mentioned in the definition of sale of goods, and both supply and provision of a licence which makes the customer's legal position equivalent to ownership be mentioned in the definition of sale (supply) of digital content. This could mean a rule summarising the substantive scope of the CESL in a comprehensive manner along the lines of the following:  

Article ...

Contracts covered by the Common European Sales Law

1. The Common European Sales Law applies, subject to an agreement of the parties to that effect, to distance contracts which are

   (a) contracts for the sale of goods, which means any contract under which a trader ('the seller') delivers goods and transfers the ownership of these goods, or undertakes to do so, to another person ('the buyer'); it includes a contract for the supply of goods to be manufactured or produced;

   (b) contracts for the sale of digital content, which means any contract under which a trader ('the seller') supplies digital content, whether or not on a tangible medium, to another person ('the buyer') and grants or transfers a licence under which the buyer can, as a minimum, re-use the digital content for an unlimited period, or undertakes to do so; it includes a contract for the supply of digital content designed according to the buyer's specifications;

   (c) contracts for the provision of any related service, excluding financial services, linked to goods or digital content sold under the Common European Sales Law, such as installation, maintenance, repair or any other processing, or storage, provided by the seller of the goods or digital content to the buyer.

2. Provided that the seller was acting in pursuit of economic interests, the Common European Sales Law shall apply irrespective of whether a price was agreed for the goods, digital content or related service.

Accordingly, Amendment 134 should be revised along the lines of the following:

Article ...

Main obligations of the seller

The seller of goods or of digital content must:

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5 This should not exclude the possibility that the copy itself has a limited lifespan and becomes unusable after, eg, one month, or ten viewings, as it is likewise possible to sell goods which are for one-way use only or which deteriorate quickly. Neither should it exclude that the copy is usable only in combination with other hardware or software, as also tangible equipment sold may depend on specific other equipment or even on continuous supply from the same seller (eg coffee capsules).

6 It should be noted that this suggestion deliberately does not take up the exclusion of goods not given in exchange for a price and the exclusion of transport, telecommunication services, and training, for reasons already explained in the 2012 ELI Statement. Also, it seeks to redraft the substantive scope in a coherent and comprehensive manner: it is extremely confusing for the user and will provoke inadvertent error to have the definition of 'sales contract' (including the important information that it includes the supply of goods to be manufactured or produced) hidden away in Article 2(k), the description of the services that are included or excluded hidden away in Article 2(m), while the fact that no price is required for the services is in Article 5(c) and details on the supply of digital content are in Article 5(b).
deliver the goods or supply the digital content;
transfer or undertake to transfer the ownership of the goods, including the tangible medium on which the digital content is supplied, or grant or transfer a licence under which the buyer can re-use the digital content for an unlimited period;
ensure that the goods or the digital content are in conformity with the contract;
ensure that the buyer has the right to use the goods or the digital content in accordance with the contract; and
deliver such documents representing or relating to the goods or digital content as may be required by the contract.

The provisions relating to delivery apply accordingly to the supply of digital content.

Another reason why the authors believe the licence agreement must be included in the definition is that, only by doing so, is it possible to draw a line between contracts which amount to a sale of digital content and for which the CESL contains an appropriate legal regime, and contracts (often made tacitly by mere conduct of the parties) about the factual access to and use of digital content operated by the supplier under a licence held by the supplier and not transferred to the customer. The latter would be the case with a plethora of digital content accessible online, such as websites, search engines, or electronic platforms, which can potentially be accessed and used an unlimited number of times, but where the user does not acquire any licence in the narrower sense of the term from the respective rightholders to do so. Contracts for the access to and use of such digital content should be outside the scope of a sales law instrument.

2.2 Cloud computing

In the light of JURI’s suggestion that the Proposal’s relevance to cloud computing is clarified and of the European Commission’s Communication on Unleashing the Potential of Cloud Computing in Europe (COM(2012) 529 final) it is important to consider what textual revisions to the CESL may be necessary if it is to operate fully effectively as a distance-contract instrument that is able to take account of developments in cloud computing. Cloud computing is notoriously difficult to define. At its simplest it refers to the use, processing and storage of data or digital content on remote servers accessed via the Internet. 7 This can cover a wide range of matters, including for instance:

(i) the mere provision by a trader of a data storage facility, eg Dropbox, where the customer can upload personal digital content, including digital content supplied later by other traders, and consequently access it an unlimited number of times over the duration of the storage contract: this is the provision of a pure service which is not and should not be covered by the CESL;

(ii) the supply of digital content which is downloaded from the trader’s cloud to the customer’s hardware; or the supply of digital content other than on a tangible medium where the content is directly transferred to cloud storage space provided to the customer by another trader under an existing service contract: this is clearly covered by the CESL already now and does not call for any extra treatment;

(iii) the provision of access by a trader to digital content such as music, video or software which is stored in that trader’s cloud with no attendant permanent download onto a customer’s hardware, or where the content downloaded onto the customer’s hardware remains usable only while being connected with the trader’s cloud: this is a borderline case so far not properly dealt with by the CESL Proposal.

7 Cf the definition given by COM(2012) 529 final (at 2).
If some or even all of the situations under (iii) are to be covered, probably the simplest analysis of this under the CESL is that of a contract for the sale (supply) of digital content not supplied on a tangible medium combined with a storage agreement as a related service contract. This would mean that the storage space in the supplier’s cloud is, for the purpose of the sales component, treated in the same way as the customer’s hardware or other storage facility. Risk would pass once the digital content is made available to the consumer in the cloud storage space assigned to him, and any problems concerning accessibility of the digital content at a later point in time would amount to a non-performance under the related service (storage) component (cf JURI Amendment 41).

This analysis, as is apparent, uses the classic concepts of a contract of sale. However the authors consider that further discussion of the use of this classical analysis is needed. After all, a consumer ‘buying’ a product on an intangible medium will in practice make no distinction between (1) what he buys and downloads onto his computer or stores in another trader’s cloud and (2) what he buys and downloads when he wants to use it from the seller’s cloud. Provisionally we consider that the better course is probably to continue with the classic analysis, but this would have the consequence of distinguishing between types of transaction which the consumer might not easily understand.

The classic analysis just referred to would mean that a contract for access to digital content in the seller’s cloud can realistically only be treated as a sales contract if it meets certain requirements which make the contract so similar to a classic sales contract that the same basic sales law rules are in fact applicable. Otherwise, where these minimum requirements are not met, the contract is a service contract, for which a separate optional common European regime would have to be designed. The decisive factor, which specifically relates to cloud computing, seems to be the factor of (absence of) physical control on the part of the buyer. The authors therefore tentatively take the view that a sales law regime is an appropriate legal regime only where the customer has the right to request download of a usable copy of the digital content to a suitable storage facility within the customer’s control at no further cost. Where, by contrast, the digital content has to remain in the seller’s cloud, or where it can be downloaded but is usable only while the customer’s device is connected with the seller’s cloud, the contract resembles more a service contract than a sales contract. The authors therefore tentatively recommend adapting Article 148 of the Proposal so as to take account of the buyer’s right to request download of digital content provided in the seller’s cloud:

Where the related service includes the storage of the goods or digital content sold, the seller is under an obligation to transfer the attendant physical possession or control of the goods or digital content to the buyer upon the buyer’s request, and in any case when the contract for storage comes to an end, in particular by enabling the transfer of a usable version of the digital content to another storage facility.

In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 2 and 5 or derogate from or vary their effects.

2.3 Multiple downloads, right to re-sell, and provision of updates

The authors feel that a limited number of customer rights relating to digital content might need some further adjustment. While the authors take the view that the minimum requirement that needs to be fulfilled in order to make a contract for the supply of digital content suitable to be dealt with under a sales law instrument is a licence allowing the use of the digital content for an unlimited period, there are further rights usually associated with ‘ownership’ of a copy of digital content, or further expectations on the part of the customer, which the CESL should address.

2.3.1 Legitimate expectations on the part of the buyer

One of these rights is the buyer’s right to download digital content anew where, for instance, the buyer has acquired new hardware and in particular where the old hardware with the copy of the digital content has been lost. In contrast to tangible goods, digital
content can be reproduced an unlimited number of times at, more or less, no additional cost. There could therefore be a legitimate expectation on the part of the buyer that there is a right to receive a new copy of the digital content as far as the use of the old copy has become impossible.\textsuperscript{8}

A similar problem arises concerning a possible right on the part of the buyer to re-sell digital content. While the CJEU has held in the UsedSoft decision that there is such a right where the original contract is a sales contract, the decision itself is relevant only for digital content that falls under the EU law instruments specifically addressed in the UsedSoft case. Whether there exists a general right to re-sell is still an open question. Yet, there may be a certain expectation on the part of the buyer that such a right exists.

Last but not least there may also be a legitimate expectation on the part of the buyer to receive updates of digital content where such updates are available on the market and where they serve to close security gaps or in any other way to attain or maintain its functionalities which have been agreed upon under the contract.

In the view of the authors, the CESL might address this issue by including, in particular for consumer contracts, an obligation on the part of the seller to provide multiple downloads and updates and to enable the buyer to re-sell the digital content. However, the authors are hesitant to suggest such obligations because it might seem to be a disproportionate restriction on freedom of contract.

2.3.2. Implications for pre-contractual information duties

The authors instead tentatively recommend special pre-contractual duties to inform the buyer where no additional copies (even as far as covered by the licence) will be provided upon the buyer’s request, where the buyer is not entitled to re-sell (providing the absence of such a right is compatible with EU law) or where updates are not provided automatically and free of any extra charge. Where the seller fails to comply with this duty, there is a right on the part of the buyer to receive additional copies, to re-sell and/or to be provided with updates of the digital content. This could mean a rule along the lines of:

\textbf{In a contract for the sale of digital content the seller is under a duty to draw the buyer’s specific attention to terms according to which:}

- future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, will not be made available to the buyer automatically and free of any extra charge;
- the buyer is not entitled to re-sell the copy of the digital content, notwithstanding any right to re-sell that might follow from applicable rules of law; or
- the buyer is not entitled to a new copy or new copies of the digital content where, for whatever reason, the copy or copies originally supplied can no longer be used by the buyer.

\textsuperscript{8} It should be recalled in this context that the CJEU in UsedSoft qualified the customer’s entitlement in the software copy as ‘ownership’ in a situation where, when re-selling the software and transferring that ‘ownership’ to a third party, all the customer really transferred was the licence while the third party had to download a new copy of the software from Oracle’s website under the ‘used’ licence.
3 OBSERVATIONS ON SELECTED ISSUES IN THE JURI DRAFT REPORT

KEY FINDINGS

- While redrafting not only of Chapter 2, but of the whole Proposal would be desirable, this is in reality impracticable given the timeline of the legislative process. It is therefore useful to highlight a number of issues that might endanger the success of the instrument and should therefore be addressed.

- Among these issues is the removal of several exclusions from the CESL's scope. While there may be political considerations behind the reluctance to remove some of these restrictions, there can hardly be any political considerations that would militate against including contracts where the buyer is neither a trader nor a consumer, contracts where goods are supplied by a trader not in exchange for a price, and related contracts concerning transport, telecommunication support, or training.

- The existence of an ‘alien element’ in a contract should not exclude the availability of the CESL, irrespective of whether or not the contract is divisible and a separate price can be apportioned to the element. In any case, the CESL must remain available where alien elements are minor.

- It seems desirable to include a rule on linked contracts where both contracts are governed by the CESL. More important, Amendment 61 may lead to unacceptable results and needs to be revised.

- The rules on termination count among the most problematic parts of the CESL. It would be desirable to effect a fundamental revision, if practicable in the legislative process. As a minimum, Art 172(3) should be deleted, Art 139 revised, and Art 147(2) made obsolete by the introduction of a general rule on linked contracts.

- The revision of the chapter on restitution is warmly welcomed as a considerable improvement. However, it could be made better still if aspects were simplified. Fruits and use should be treated in the same manner, the costs of restitution should normally be borne by the seller, and there should be an obligation to take back what one has received.

The authors would like to express their deep appreciation for the improvements suggested by JURI in its Draft Report of 18 February 2013, which will, if adopted, render the CESL a much better instrument that will serve the needs of traders and consumers in Europe. However, they would like to raise a number of points for further discussion. Many of those points have already been made in the 2012 ELI Statement.

3.1 Exclusions from the scope

In particular against the background of the restriction to distance contracts the authors note with a degree of regret that the JURI has so far not suggested to extend the scope of the CESL in other respects, in particular as concerns the restriction for b2b contracts to contracts where one of the traders is an SME; the restriction to cross-border situations, including the restriction to cases with a minimum EU contact; and the extension of scope to non-profit making entities.

The authors would like to reiterate that a number of the restrictions of scope which have not been removed may prove to be detrimental to the success of the Instrument. While there may be political considerations which have led the European Institutions to retain the SME restriction and the cross-border requirements in their current form, the authors find it difficult to see that there are any similar considerations which would prevent the Institutions from extending the scope to non-profit making entities (cf the situation where a foreign legal entity places an order and the seller would have to find out, before accepting, whether he is dealing with a profit or non-profit making entity). The same holds true for the exclusion of goods delivered other than in exchange for a
price (cf the mobile device at 0 euro or the ‘welcome gift’) and for the exclusion of transport, telecommunication support and training as related services (cf the example of a seller having to comply with the domestic law of the consumer’s country just for a service hotline or a delivery service).

3.2 Contracts with an ‘alien element’

The authors appreciate that JURI has addressed the issue of mixed and linked contracts and sought a new solution. In particular, they welcome JURI’s proposal not to rule out, at least not in principle, contracts which contain an ‘alien element’, ie an element which is not the sale of goods, supply of digital content or provision of related services, from the scope of the CESL. Rather, the ‘alien element’ is to be treated as if agreed under a linked contract (cf Amendments 58 and 62). However, JURI has decided to include only those mixed contracts where the alien element can easily be separated, ie the contract is divisible, and their price can be apportioned. Where these conditions are not met, ie the contract is not divisible or the price of the alien elements cannot be apportioned, the CESL may not be chosen by the parties (Amendments 58 and 63).

While the authors see the rationale behind this approach, they believe the solution proposed in Amendments 58 and 63 fails to solve the main problem, which may jeopardise the success of the CESL as such: Under Article 6(1) of the Regulation, the CESL is not available where a contract includes any alien element not covered by the substantive scope, even if this element is minor. As the existence of even a minor alien element such as a support hotline, transport services, or a ‘welcome gift’, makes the CESL unavailable for use, this has the consequence that the parties can never be sure whether a court will later detect an alien element and refuse to apply the CESL. This will create a degree of uncertainty that will make the CESL less attractive to traders. Quite obviously, this problem exists in particular in those cases where the contract is not divisible and no price can be apportioned to the alien element.

For these reasons the authors suggest deleting the words ‘provided those elements are divisible and their price can be apportioned’ in Amendment 58 and to repeal Amendment 63. Alternatively, if JURI believes the inclusion of contracts where the alien elements are inseparably combined with the sales element would create too many problems, the authors strongly recommend adding at least an exception for minor elements. Amendment 58 could then read ‘... provided those elements are only minor or, where they are not minor, are divisible and their price can be apportioned’. Amendment 63 could read ‘... and those elements, which are not minor, are not divisible or their price cannot be apportioned ...’

3.3 Approach to linked contracts

The authors also welcome JURI’s inclusion of contracts where the seller or a third party grants the consumer credit by way of deferred payment or otherwise (Amendment 64). This will make the CESL significantly more attractive to traders. The authors also welcome the improvement of the rules on linked contracts (Amendments 59 to 61).

3.3.1 The desirability of a general rule

However, in addition to what the ELI has already suggested in the 2012 Statement the authors tend to believe that it might also be beneficial to have a rule on linked contracts for cases where both contracts are governed by the CESL. For instance, a person could buy, under two separate contracts each of which is governed by CESL, a computer and the software which is necessary to run the computer. The software could be provided either by the same trader or by another trader who cooperates with the first trader. Where the contract for the sale of the computer is invalid, there may be a need to free the buyer also from the other contract. The authors therefore recommend including a rule on linked contracts where both contracts are governed by CESL. This rule could be formulated along the lines of the following:
Linked and mixed contracts

Where two contracts governed by the Common European Sales Law are related to each other they shall, for the purpose of exercising a right, remedy or defence that has arisen in the context of one of the contracts, or where one of the contracts is invalid or not binding, and unless otherwise provided, be treated as if they were one contract where

at least one of the parties to the other contract would reasonably not have concluded that contract but for the contract in the context of which the right, remedy or defence has arisen or which is invalid or not binding, and the other party was aware or could be expected to be aware of this fact; and

the parties to both contracts are the same or, in the case there are parties who are not a party to both contracts, where these parties have cooperated in the conclusion or preparation of the other contract.

It should be noted that a rule of this kind would be beneficial also for cases where there is a sales contract and a related service contract. So far, the effects of the link between a sales contract and a related service contract are reflected only in Article 147(2) according to which, where a sales contract is terminated, any related service contract is also terminated. There is no rule covering the opposite case, ie where it is the related service contract that is terminated in the first place. Nor is there a rule (beyond Article 46 of the Proposal) on the effects which the exercise of any other right, remedy or defence in the context of the sales contract, or the invalidity of the sales contract, has on the related service contract, and vice versa.

3.3.2 Problems with Amendment 61

While the authors greatly welcome the re-drafting of the rules on linked contracts the authors are concerned about the design of Amendment 61 for cases where only one of the contracts is governed by CESL and a party exercises a right, remedy or defence in the context of the non-CESL-contract or where that non-CESL-contract is invalid or not binding. The most important case will be the case where the linked contract is a credit agreement and the buyer who is a consumer exercises his right of withdrawal under the national rules implementing Directive 2008/48/EC. According to Amendment 61, a party to the contract governed by CESL would have a right to terminate the contract where that party would not have concluded the contract but for the linked contract, or would have done so only on fundamentally different terms, and where either of the parties exercises any right, remedy or defence under the linked contract or the linked contract is invalid or not binding.

The first reason why the authors are concerned is that Amendment 61 focuses on the subjective perspective of one of the parties. More importantly, however, the rule would mean that even the exercise of the right or remedy to require performance under the linked contract would give the other party a right to terminate the CESL contract. So if, for example, the bank that has granted credit to the buyer under a linked credit agreement exercises its right to require performance under that credit agreement, the buyer who is in default under the credit agreement would have a right to terminate the CESL contract. The authors take the view that Amendment 61 would lead to unacceptable results and needs to be revised.

The authors still believe that the ‘safest’ way to deal with this situation is to have the rule already proposed in the 2012 ELI Statement. This would mean rephrasing Amendments 60 and 61 along the lines of the following:
Where a contract governed by the Common European Sales Law is linked with another contract not governed by the Common European Sales Law, and unless otherwise provided,

the law applicable to the contract not governed by the Common European Sales Law shall determine the effects which invalidity, lack of binding force or the exercise of any right, remedy or defence under the Common European Sales Law has on that contract;

the national law under which the parties have agreed on the use of the Common European Sales Law shall determine the effects that invalidity, lack of binding force or the exercise of any right, remedy or defence in relation to the other contract has on the contract governed by the Common European Sales Law, including the issue of what counts as sufficient link between the contracts.

However, the authors also recognise that there may be a desire to regulate the effects on the CESL contract in the CESL itself in order to provide more certainty for the parties. In this case, Amendments 60 and 61 could be rephrased as follows:

Where a contract governed by the Common European Sales Law is linked with another contract not governed by the Common European Sales Law, and unless otherwise provided,

the law applicable to the contract not governed by the Common European Sales Law shall determine the effects which invalidity, lack of binding force or the exercise of any right, remedy or defence under the Common European Sales Law has on that contract, including the issue of what counts as sufficient link between the contracts;

paragraph 1 applies accordingly concerning the effects on the contract governed by the Common European Sales Law where a right, remedy or defence is exercised in the context of the contract not governed by the Common European Sales Law or where that contract is invalid or not binding.

Attention should be drawn to the fact, though, that rights, remedies or defences arising under a different legal regime would have to be ‘translated’ into the CESL, which may give rise to some degree of uncertainty. Likewise, attention should be drawn to the fact that withdrawal from a linked credit agreement under national law would mean a consumer’s right to withdrawal from the sales contract under the CESL also where the relevant Member State has taken a different approach and either denied a right of withdrawal from the sales contract or granted such right only with modifications.

3.4 Fundamental revision of the rules on termination

The authors note that JURI has not made any suggestions for improvement concerning the Proposal’s rules on termination. The authors believe that those rules, in their current state, would be difficult to apply by a court in one State, let alone by courts in 28 different Member States.

3.4.1 Problems with the current Proposal

One reason for this is that rules relating to termination are scattered about the whole instrument and that even experts familiar with the CESL have difficulties tracing them and understanding the significance of the relationship between them: Articles 8 in Chapter 1 and 172(3) in Chapter 17 together deal with the effects of termination; Articles 114 to 119 in Chapter 11 contain the bulk of the rules on termination by the buyer, while Article 9(2) to (4) in Chapter 1 deals specifically with the issue of partial or total termination by the buyer in mixed contracts; Articles 134 to 139 deal with
termination by the seller; Article 147(2) deals with the effects termination of a sales contract has on a related service contract; Article 155 contains special rules for termination by the recipient of a related service, and Article 157 is the relevant rule for termination by a service provider. Chapter 17, with the exception of Article 172(3), deals with restitution after termination.

**Article 172(3), which refers to Article 8(2), on the one hand and Articles 9, 117 and 137 on the other cannot be reconciled and follow two equally possible but mutually exclusive approaches to the nature of termination**: while Articles 9, 117 and 137 are based on the concept of partial termination and full restitution for the affected parts of the contract, Article 172(3) relies on the concept of total termination of the contract and partial restitution just for particular parts, and the role of Article 8(2) in this context remains largely unclear. Similarly, **Article 9 for mixed-purpose contracts with a sales component and a services component cannot be reconciled with Article 147(2) for related service contracts**: Whereas termination of only the affected component is the rule and total termination the exception under Article 9, Article 147(2) means that termination of the sales contract always terminates the related service contract, but not vice versa, so that a customer who terminates the service contract cannot get rid of the sales contract. **Article 139, in particular, seems to be unclear in meaning and rationale** and might be a somewhat distorted copy of Article 64 CISG.

### 3.4.2 Minimum measures to be taken

In the 2012 Statement, the ELI submitted a detailed proposal as to how all rules on termination, with the exception of restitution, could be brought together in one Section, how inconsistencies could be removed and how the provisions could be made simpler and more comprehensible. That proposal is embedded in a more comprehensive proposal as to how Parts IV to VI of the Commission Proposal could be restructured. The authors understand that such far-reaching modifications of the Instrument’s structure are not what the European Institutions currently are prepared to envisage. This raises the question how we can effectively contribute to the improvement of the rules on termination while doing so within the overall structure of the Proposal.

**In the eyes of the authors, the most important step to take would be to modify Amendment 170 in a way that the existing Article 172(3) of the Proposal is deleted.** As has just been explained, Article 172(3) of the Proposal seems to be irreconcilable with the approach to termination taken throughout the other parts of the Instrument.

Also, Article 139 is particularly problematic and somewhat difficult to understand. It would benefit from revision. The authors therefore recommend replacing the existing Article 139 of the Proposal by a much simpler rule, which could, for instance, read as follows:

**Article ... Loss of right to terminate**

The seller loses a right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the seller could be expected to have become aware of the non-performance, whichever is later.

Paragraph 1 does not apply where no performance at all has been tendered.

It would also be highly advisable to have a rule on the effect which (a) termination of a related services contract has on the sales contract and (b) termination of a sales contract has on another sales contract linked with the first sales contract. **The authors recommend taking on board a general rule on linked contracts under the CESL along the lines of what is proposed supra.** In this case, the rule in 147(2) would become obsolete and could be deleted.
3.5 Fundamental revision of the Chapter on restitution

The authors warmly welcome the many revisions that have been made in the Chapter on restitution. Those revisions make the CESL rules on restitution more consistent and better equipped to meet the needs of modern distance trade. However, we would like to point out that piecemeal amendment may bring about new gaps and inconsistencies.

3.5.1 Fruits and use

The authors respectfully question the decision that has been made to leave Article 172(2) of the Proposal in place, according to which the obligation to return includes the obligation to return any natural or legal fruits, and to add fruits to the text of the Proposal even where they had so far not been mentioned (cf Amendments 183, 184, 185, 189, 190). Quite apart from the fact that a definition of ‘fruits’ is missing and that, in particular, the notion of what counts as ‘legal fruits’ varies widely among the laws in the Member States, we think it may be difficult to justify treating fruits differently from use. Essentially, the issue of restitution of fruits derived and of use made should be addressed in the same manner. To impose on the buyer an obligation to return fruits might cause unnecessary litigation costs, as the buyer who has avoided or terminated the contract would normally have derived such fruits also if he had bought identical goods or digital content from another seller. Therefore, if that buyer has to return the fruits, he will have to claim damages under Chapter 16 for having been deprived of the fruits he would hypothetically have derived from the other goods.

3.5.2 Costs of restitution and obligation to take back

The same holds true for the decision made in Amendment 171 to impose the cost of returning what was received on the recipient. This rule is appropriate in the context of withdrawal, but not in the context of restitution where it is almost always the seller who has caused the termination or avoidance by way of his non-performance of an obligation or breach of a duty and who should bear the cost of restitution. In this situation, the buyer would, in almost all cases, be forced to raise an additional claim for damages just for the costs of returning the goods. We would add that there should normally also be an obligation on the part of the seller to take back the goods, as otherwise the same problem would arise with the costs of disposal. The authors recommend adding a rule along the lines of the following:

1. The buyer must send back the goods or, in cases covered by ..., the tangible medium, or hand them over to the seller or to a person authorised by the seller. The seller is under an obligation to take the goods back unless the parties agree otherwise.

2. In the case of avoidance or termination by the buyer the seller must bear the cost of returning the goods or, in cases covered by ..., the tangible medium, and the buyer may withhold restitution until the seller has indicated how the buyer can return the goods or tangible medium without having to advance fees.

3.5.3 Simplification of rules on liability

Amendment 173 on the one hand and Amendments 185, 187 and 188 on the other overlap to a great extent, as returning something in a condition of depreciation amounts to a (partial) non-performance of the obligation to return. The important restriction made in Amendment 186 that liability for damages must not exceed the price agreed for the goods or digital content is, however, missing in Amendment 173. It should also be noted that the rule in Amendment 186 already comprises the rules in Amendments 187 and 188 as no damages can be due where the price is Zero. The authors therefore recommend repealing Amendments 174, 185, 186, 187 and 188, and instead modifying Amendment 173 along the lines of the following:

2d. A party is liable under Articles 159 to 163 for not being able to return what has been received, including fruits where relevant, or for any diminished value to the extent that diminishment in value
exceeds depreciation through regular use. Liability shall not exceed the price agreed for what has been received, and there shall be no liability where no price has been agreed.

3.5.4 Personal data

The authors agree with the JURI that the issue of personal data that have been received could, and possibly ought to, be addressed in the Chapter on restitution. However, it believes that Amendments 177, 180, 181, 187 and 188 render the text of the Instrument much more complex, while the same effect could be achieved by way of what has been suggested in the preceding paragraph plus by adding what has been suggested supra p. 37. Everything else follows already from data protection rules. It should also be noted that, for very extraordinary situations, there is still the flexibility clause.

ANNEX: TENTATIVE REDRAFT OF CHAPTER 2

Chapter 2 Pre-contractual information and related duties

SECTION 1 GENERAL PROVISIONS

Article 13 Application

This Chapter applies to the giving of information before or at the time a contract is concluded and to the fulfilment by the trader of related duties. Specifically,

the information duties under Section 2 apply to all contracts concluded under the Common European Sales Law;

the information duties and related duties under Section 3 apply to contracts between a trader and a consumer; and

mass communication contracts.

The information provided under this Chapter forms an integral part of the contract. The rules in this Chapter shall however be without prejudice to any further requirements that must be met in order to make a binding agreement under the rules of Chapter 3 or to introduce a particular term into the contract under the rules of Chapter 7.

In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Article 14 How and when information duties are to be fulfilled

Without prejudice to Articles [notice] and [support in distance communication] and any more specific requirements, any information required under this Chapter must be provided to the buyer in a clear and comprehensible manner, using plain and intelligible language;

in a way that is appropriate to the nature of the information and the means of distance communication used; and

as early as reasonably possible before the contract is concluded or the buyer is bound by any offer as enables the buyer to make an informed decision.

The trader must provide the buyer with confirmation of the information required under Sections 2 and 3 on a durable medium unless it has already been given to the buyer on a durable medium prior to the conclusion of the contract. The seller must do so in reasonable time after the conclusion of the contract, and in any event no later than the time of delivery of the goods or the commencement of the supply of digital content or of the provision of the related service.
At the buyer’s request, the trader must provide the following additional information at any time before or after the conclusion of the contract and without undue delay after the buyer has made the request:

- the existence and, where applicable, the conditions of the trader’s after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy;
- whether the seller is subject to relevant codes of conduct, the denomination of such codes and how copies of them can be obtained; and
- the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and, where applicable, the methods for having access to it.

**SECTION 2  GENERAL PRE-CONTRACTUAL INFORMATION DUTIES**

**Article 15**

Disclosed of information about what is supplied

The seller has a duty to disclose by any appropriate means to the other party any information which the seller has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party concerning the main characteristics of the goods, digital content or related services to be supplied.

In determining whether paragraph 1 requires the seller to disclose any information, and how that information is to be disclosed, regard is to be had to all the circumstances, including:

- the nature of the goods, digital content or related services and the medium of communication;
- the nature of the information and its likely importance to the buyer;
- whether the seller could be expected to have special expertise;
- the cost to the seller of acquiring the relevant information;
- whether the buyer could be expected to have that information or to acquire it by other means; and
- good commercial practice and a high level of consumer protection in the situation concerned.

In the case of digital content, the information to be provided under point (a) of paragraph 1 normally includes, and in any case where the buyer is a consumer, where applicable, the functionality, including applicable technical protection measures of digital content;

- any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of; and
- the terms of any licence agreement the buyer has to accept in order to use digital content.

**SECTION 3  PRE-CONTRACTUAL INFORMATION DUTIES AND RELATED DUTIES IN CONSUMER AND MASS COMMUNICATION CONTRACTS**

**Article 16**

Identity of the seller

The seller has a duty to provide to the other party sufficient information on his identity. This information must include:
the seller’s trading name, his legal status and form and the geographic address at which he is established;

the seller’s telephone number, fax number, e-mail address and website, where available, to enable the other party to contact the seller quickly and communicate with him efficiently, in particular for addressing complaints;

where the seller is registered in a commercial or similar public register, the denomination of that register, the seller’s registration number or equivalent means of identification in that register;

where the activity is subject to VAT the seller’s VAT identification number.

Where the trader who communicates with the buyer is different from the seller, the information under paragraph 1 must be given also with regard to that trader.

Article 17
Price and additional charges and costs

The seller must provide information about the total price including any additional charges and costs. This information must include, where applicable:

the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;

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;

any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable; and

the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.

In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price. Where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided.

Where the seller has not complied with the duties under this Article the buyer is not liable to pay any charges or other costs, or to pay or provide deposits or other financial guarantees, not duly informed about. The buyer may claim reimbursement of any payments made and which were not due under this paragraph.

Article 18
Contract terms

The seller must make available to the buyer the terms on the basis of which the seller is prepared to conclude the contract and take reasonable steps to draw the buyer’s attention to contract terms that are not individually negotiated. In a contract between a trader and a consumer, such terms are not sufficiently brought to the consumer’s attention unless they are presented in a way which is suitable to attract the attention of the consumer to their existence; and given or made available to the consumer by a trader in a manner which provides the consumer with an opportunity to comprehend them before the contract is concluded.
In any case, the seller must provide information about the following, whether or not the terms are supplied by the seller:

- the arrangements for payment, in particular which means of payment are accepted, including the functioning of any payment protector provided under Article 21;
- the arrangements for delivery of the goods, supply of the digital content or performance of the related services, including the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services; and
- in the case of a long-term contract the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.

In a contract for the sale of digital content the seller has a duty to draw the buyer's specific attention to terms according to which

- future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, will not be made available to the buyer automatically and free of any extra charge;
- the buyer is not entitled to re-sell the copy of the digital content, notwithstanding any right to re-sell that might follow from applicable rules of law; or
- the buyer is not entitled to a new copy or new copies of the digital content where, for whatever reason, the copy or copies originally supplied can no longer be used by the buyer.

Where the seller has not complied with the duties under this Article the seller may not invoke contract terms supplied by him against the buyer. The buyer may insist on having the contract performed on the basis that the information provided was correct and complete.

*Article 19
Consumer rights*

Where the buyer is a consumer the trader has a duty to provide information about whether or not the consumer has a right of withdrawal and, where applicable, the circumstances under which the consumer loses the right of withdrawal. Where the consumer has a right of withdrawal under Chapter 4 the trader must also provide

- information about the conditions, time limit and procedures for exercising that right;
- information about whether the consumer will have to bear the cost of returning the goods or tangible medium in case of withdrawal and, where applicable, the approximate amount of this cost if the goods by their nature cannot normally be returned by post; and
- appropriate, effective and accessible means for exercising that right by using the same means of distance communication as was used for the conclusion of the contract as well as the model withdrawal form set out in Appendix 2.

Where the parties intend that either the supply of digital content which is not supplied on a tangible medium or the provision of a related service is to begin during the withdrawal period, the trader must, within his obligations under paragraph 1, seek the consumer's prior express consent and acknowledgement that the consumer will

- in the case of digital content, thereby lose the right to withdraw; or
- in the case of related services be liable to pay the trader the amount referred to in Article 45(5) and, where the service is completed, lose the right to withdraw.
There is no such duty where no price has been agreed or in the case of a minor part of the contract to which no price can be apportioned and in relation to which the trader would not raise any claims against the consumer in the event that the consumer exercises a right of withdrawal.

The trader has a duty to inform the consumer that further information within the meaning of Article 19(3) concerning after-sales consumer rights, relevant codes of conduct and availability of Alternative Dispute Resolution will be given at the consumer’s request, and how the consumer can make this request.

The information duties under paragraphs 1 to 3 may be fulfilled by supplying the Model instructions on consumer rights set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled the information requirements if he has supplied these instructions to the consumer correctly filled in.

Where the trader has not complied with the duties under paragraphs 1 or 2 of this Article the withdrawal period is prolonged in accordance with Article 42(2). Where the trader has not complied with the duties under paragraph 2 the consumer retains a right of withdrawal in accordance with Article 40(3)(d) even where the supply of digital content not supplied on a tangible medium has begun and does not have to pay for supply of digital content or provision of services in accordance with Article 45(6) and (7).

Article 20
Steps towards a binding agreement in mass communication contracts

In mass communication contracts, the seller must indicate by appropriate means and no later than the start of the ordering process, where not already apparent from the context:

- which languages are offered for the conclusion of the contract;
- which technical steps must be taken in order to conclude the contract, and which means of distance communication will be used during the ordering process;
- the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; and
- whether any delivery restrictions apply.

The seller must make available to the other party appropriate and effective technical means for identifying and correcting input errors, and must provide adequate information about these means, before the other party makes or accepts an offer.

Where a contract would oblige the buyer to make a payment, the seller must

- make the buyer aware of the information required by Article 17 immediately before the buyer places the order, irrespective of whether the information has already been given earlier, and do so in a clear and prominent manner;
- ensure that the buyer, when placing the order, explicitly acknowledges that the order implies an obligation to pay; where placing an order entails activating a button or a similar function on a trading website the button or similar function must be labelled in an easily legible manner only with ‘order with obligation to pay’ or similar unambiguous wording.

Where the seller has not complied with this paragraph the buyer is not bound by the contract or order and may claim reimbursement of any payments made.

In the acknowledgment required under Article [support in distance communication] the trader must indicate in highlighted form whether or not a contract has already been concluded and, where applicable, which further steps are necessary in this regard. Where a contract has not yet been concluded the seller must, without undue delay and in any case within 72 hours after receipt of any order from the buyer, send the buyer...
confirmation of the conclusion of the contract and of the estimated time of performance; or

confirmation of the fact that the buyer’s offer has been rejected, possibly combined with a new offer by the trader to conclude a contract on different terms such as with a later time of delivery.

Where the seller fails to comply with this duty the buyer shall not be bound by its order and may reject any performance tendered by the seller as well as claim reimbursement of any advance payments made.

Article 21
Securing advance payment by a consumer

In contracts between a trader and a consumer the seller is only entitled to ask for payment of the price by the consumer before having fulfilled its main obligations under Article 91 if it offers sufficient protection for the refund of the total price, additional charges and costs in case of withdrawal, avoidance or termination by the consumer. Sufficient protection is provided by accredited escrow services, insurance companies or similar schemes (“payment protectors”).

A trader is prohibited from charging consumers, in respect of the use of a payment protector, fees that exceed the cost borne by the trader for the service.

The trader is allowed to grant the consumer the right to choose whether the advance payment shall be protected according to paragraph 1 or not. The two options must be presented in a similar, non-discriminatory way.

SECTION 4 BREACH OF INFORMATION AND RELATED DUTIES

Article 22
Consequences of breach

Where a seller fails to comply with any duty imposed by this Chapter, in particular where information fails to be given or is incorrect or misleading, that seller is liable for any loss caused to the other party by such failure. The claim for damages shall be subject to the provisions in Chapter 16 with appropriate adaptations.

The claim for damages under paragraph 1 is without prejudice to any specific remedy, right or defence which may be available under this Chapter, Article 39(2), or Article 45(3) and (6);

a right of the other party to avoid the contract under Chapter 5; or remedies for non-performance of an obligation under the contract.

In relations between a trader and a consumer the trader bears the burden of proof that it has fulfilled the duties required by this Chapter.
Increasing the legal certainty and attractiveness of CESL: a consumer law expert’s perspective
Professor Elise Poillot, University of Luxembourg

ABSTRACT
The Common European Sales Law has been criticised for its lack of legal certainty and attractiveness. This note proposes some key ideas in order to overcome this criticism from a substantive and procedural point of view and suggests also some accompanying measures.

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EXECUTIVE SUMMARY
Background
Cross border transactions are the core of the development and the smooth functioning of the single market. As such, they should represent an important part of commerce within the EU. Regrettably this is not the case, or at least they are not as important as they could be. Amongst the reasons for this situation, some are of legal origin. The relatively small number of cross border transactions is said to stem principally from the fact that traders refrain from engaging in cross border commerce because of differences in national contract laws, and more specifically consumer contract laws, when the target client is a consumer. Furthermore, according to European surveys, consumers prefer to shop domestically, as they feel more comfortable about their rights in a national context, even if doubts have been expressed about the awareness of a consumer of the legal context when he/she shops.

Although approximation of legislations has significantly developed in the field of consumer protection, the legal context seems to be insufficiently adapted for cross border commerce. The fact is that the legislation merely takes the form of directives, most of them containing


a minimum harmonisation clause. As a result, national legislation reached a certain degree of similarity in the field of consumer protection. But there are still some important discrepancies which certainly contribute to maintaining a compartmentalisation of national markets rather than encouraging businesses and consumers to deal at European level. In this context, the European Commission with the support of the European Parliament, engaged in a reflection, which ultimately led to the launch of a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses and the proposal for a Draft on a Common Frame of References.

The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL), aimed principally at regulating cross borders sale contracts and, to some extent, some services contracts, constitutes the last stage of this reflection. Its scope and its content could make of this legal instrument a useful legal support for cross borders contracts and cross border consumer protection, a decisive step towards a more unified contract law at a European level as well as a real incentive for cross borders commerce for businesses and consumers.

**Aim**

The aim of the present note is to analyse the nature and the content of the CESL from a consumer law perspective with regard to its legal certainty and attractiveness, as well as to put forward recommendations in order to improve it. Since the CESL has already been comprehensively commented, the following briefing note will focus on two major issues in consumer law: efficiency and effectiveness of legal provisions.

As a matter of fact, these two requirements should underpin any legal instrument. In consumer law disputes however, where the amount of money at stake is rather low, these two requirements should be reflected in law in a particular manner, namely by paying specific attention to procedural rights and “paralegal” issues.

In this respect, the method used to analyse the CESL and its draft report in the frame of this briefing note is founded on a selective examination of provisions regarded as requiring improvements based on the testing of the efficiency of the CESL provisions from a substantive law viewpoint and their effectiveness in the context of cross border transactions. For the purpose of this note, all points could not be discussed, especially as to the merit. Observations will thus focus on the issues we believe to be the most important with regard to legal certainty and attractiveness. If some provisions, such as the definition of consumers for example, are considered as sufficiently satisfactory from a consumer protection perspective, some others could still be importantly improved. In such hypothesis, we will simply mention our doubts by referring to studies which have already been carried out.

The requirements of efficiency and effectiveness are the cornerstones of the principle of legal certainty that guides the drafting of all kinds of legislation. It is also a prerequisite to the attractiveness of any legal system. The two issues will accordingly be considered in separated chapters analysing the provisions of the CESL in order to recommend the following improvements to the text: to highlight the importance of consumer protection by making all B2C provisions mandatory, to integrate in the CESL specific sanctions where they are lacking, to back up substantive law with some provisions on procedural consumer rights and to improve the accompanying measures already envisaged, in order to promote their application to B2C relationships.

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General information

**KEY FINDINGS**

- The **level of protection granted to consumers** in the CESL is not only consistent with the requirements of the Treaty and the Charter on fundamental rights but it is also **satisfactory** from a comparative legal point of view even if some **adjustments** could be made to bring it into line with the most protective legal systems within the EU.

- The **main recommendations** will insist on the **lack of efficient sanctions and remedies in some chapters as well as the relative absence of procedural provisions** supporting the legal frame offered by the CESL, exception made for the articles on prescription.

- Some **paralegal issues or flanking measures** will also be considered in order to render the CESL more attractive to consumers such as **instruments aimed at facilitating the access of consumers to justice** and policies of **communication and advertising on its existence and content**.

Amongst the weaknesses of the CESL, the most important certainly lies in its optional nature. As this is undoubtedly an issue that could hardly be challenged for political reasons, we would just like to highlight our doubts about the possibility for consumers to convince businesses to choose CESL for their contractual relationships. This would mean that consumers are aware of the legal implications of cross border transactions, of the existence of such an instrument and are moreover capable of influencing the trader with regard to the law applicable to the contract. Therefore, we strongly support the view that the Regulation on a Common European Sales Law should not be an optional instrument but rather a “classical” one, binding to the Member States as to its application within its scope and imposed for cross borders contracts. If this appears impossible for all cross borders transactions, one could limit its scope to e-commerce relationships.

If the scope of the CESL remains as it is, we believe that the efforts to increase its attractiveness in B2C contracts should mainly be addressed to businesses. They should realise that the high standard of consumer protection provided by the CESL is an advantage for them. This is of course out of the scope of our note. We would, however, like to briefly insist on this issue and highlight the fact that proposing the application of CESL to consumers would encourage them to contract with businesses, facilitate B2C contractual relationships, as well as give a positive image of traders’ companies.

Whatever the final decision might be, the following remarks are adapted to the optional nature of the regulation, some of them being sufficiently general to apply to it even if it takes the form of a “classic” regulation. As mentioned before, our remarks aim at improving the content of the CESL by proposing means to develop its efficiency and effectiveness. Because the legal certainty of a legal instrument is a prerequisite for its attractiveness, we will first consider the ways to improve it, before examining the recommended actions for rendering it more attractive from a consumer’s point of view.
1 IMPROVING LEGAL CERTAINTY

KEY FINDINGS

- Weakness of consumers in a B2C relationship requires restoring the balance between the rights and obligations of each party to the contract. In order not to reach a dead end, this balancing shall rely on mandatory provisions flanked by efficient sanctions or remedies.

- Consumers are also vulnerable when it comes to claiming their rights and suing traders because the amount of money at stake is low. Specific procedural rules for consumers’ disputes should always back up substantive law so as to render it effective.

1.1 Generalising the mandatory nature of provisions regarding B2C contractual relationships

Not all provisions ruling B2C contracts are declared mandatory. We believe this generalisation would guarantee a legal certainty profitable to consumers. While it would not be acceptable to impose general provisions of the CESL as mandatory – with some exceptions –, declaring the mandatory nature of all provisions specifically drafted for B2C relationships does not appear unreasonable, as there are some convincing reasons and technical advantages for it.

1.1.1 Why generalise?

The main reason for imposing a mandatory nature to provisions ruling B2C relationships is that it allows consumers to know exactly what their rights are when the rules at stake are identified as a B2C provision. It is also the best way to guarantee "a minimum standard of statutory protection" and a "high level of transparency" with regard to the nature of the CESL, not to mention the efficiency and effectiveness of the rules protecting consumers.

The cross border context also authorizes a specific approach of contractual autonomy. Moreover, the provisions of the CESL on consumer protection are in line with the acquis and those of the 2011/83/EU directive on consumer rights. Now, most of the acquis rules in the field of consumer protection are mandatory. Thus, traders could not be considered to lose out from the choice to consider all B2C rules as mandatory. Besides, it would guarantee them a fair competition, as all of them would be bound by the same rules in their commercial relationships with consumers. This would be a great advantage for SMEs, which are facing serious difficulties in drafting contractual terms, unlike big companies that can rely on their legal departments.

To extend the mandatory nature to all B2C provisions would not modify the substance of the text. Traders would not lose out from such a choice. Besides, there are few B2C rules that are not of mandatory nature in the CESL, and we do not believe there are any significant reasons not to make them mandatory.

For example, Chapter 12 of the CESL on buyer’s obligations deals with an issue particularly important in the field of consumer contracts, especially when it comes to online contracts. Its article 124 § 4 provides that "In a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means". Why should this provision

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13 Ibid.
14 On the Relationship between the two legal instruments E. POILLOT, Le rapport entre la directive et le règlement pour un droit commun européen de la vente, Revue des Affaires Européennes, 2012/3, pp. 569-580. Some discrepancies have been identified but are dealt with by the DRCESL.
not be mandatory? Would it be unacceptable in this context that a trader may not impose extra costs on consumers?

Another example could be taken from article 130 § 3, 4 and 5 dealing with the delivery of a wrong quantity that provides:

“3. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.

4. If the buyer retains the excess quantity, it is treated as having been supplied under the contract and must be paid for at the contractual rate.

5. In a consumer sales contract paragraph 4 does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered”.

The delivery of a wrong quantity is a common unfair commercial practice. If the consumer pays under the threat to be sued by the trader, it will then be difficult for him/her to be refunded. There is no reason to let the trader have the possibility to derogate from the effects of § 5.

Some general obligations could also be declared mandatory in the frame of B2C relationships, such as article 152, concerning the obligation to warn of unexpected or uneconomic cost. This type of obligation proves to be very useful in consumer contracts, especially, again, in the context of online contracts regarding the sale of computer products. Unexpected costs related to hardware or software products of which consumers are not aware are not unusual. Should the option of an “all mandatory set of consumer protection’s rules” not be adopted, we recommend that the provisions above (article 130 § 3, 4 and 5 and article 152) would be transformed in mandatory rules.

The extension of mandatory nature to B2C and some general provisions would also be a good argument to convince consumers of the interest and utility of the application of the regulation.

1.1.2 Technical reasons for generalisation

There are some convincing technical reasons for rendering all B2C provisions mandatory.

First of all, it would facilitate the understanding of contractual terms by consumers who most of the time do not read them, and when they do, do not understand them15. The mandatory nature of B2C rules would lead businesses to integrate a greater amount of CESL provisions in their contracts and make them clearer.

Secondly, it would also facilitate the resolution of disputes in the frame of an ADR process – which we will also recommend mandatory, see infra – as the ADR entities would immediately know the rules applicable to the dispute without needing to take into consideration the possible derogations embedded in the trader’s contractual terms.

Should the ADR process not be mandatory, or should it not lead to a resolution of the dispute between the consumer and the trader, and therefore, should the case arrive before national judges, the mandatory nature of B2C provisions would also allow judges to raise on their own motion the provisions of the CESL. Indeed, the mandatory nature of a provision is a commonly spread criterion amongst Member States with regard to judges’ power to raise rules ex officio. As pointed out by the CJEU, this ex officio raising power is an important instrument of consumer protection (see infra). We will come back to this crucial issue in the frame of consumer protection when dealing with specific procedural rules for consumer disputes.

The mandatory nature of consumer protection legislation is only one step towards ensuring its efficiency and effectiveness. To this direction, it is also important that sanctions and remedies are also efficient and effective.

15 D. STAUDENMAYER, The Common European Sales Law – Why do we Need it and how should it be Designed?, op. cit., p. 29.
1.2 Improving sanctions and remedies

Because the sums involved in B2C contractual relationships are not sufficiently high to persuade consumers to sue traders, very few legal actions are brought against businesses in breach of consumer legislation. Who would go in front of a court because he/she was not refunded of a 6€ delivery cost when withdrawing from a contract regarding a Hello Kitty alarm clock worth 29,95€? To our knowledge there are no surveys evaluating the measure of this phenomenon but a very simple way to control it is to look at contract terms for online contracts. A lot of them, even those of well known companies, contain illegal and unfair terms, which means that no legal action, individual or collective, by means of an injunction or else, have been sought.

Identified critical areas as to this problem are:

- Duty of information and its breach
- Unfair contract terms
- Non-performance (lack of conformity)
- Damages
- Restitution

For time and space reasons, non-performance, damages and restitution will only be briefly considered.

1.2.1 Duty of information and its breach

Duty of information is a central piece of consumer protection within all EU legal instruments. It nevertheless remains a sensitive issue in consumer law. Where information to be provided consists of a rather long list of items, “it can be doubted whether such catalogues lead to effective consumer protection instead of simply overloading the consumer with more information than he can make use of sensibly”\(^{16}\). There is, however, a need to inform the consumer in the case of specific cross borders contracts, especially distance and off premises ones. We believe one additional duty of information should be added to the list already provided by article 13: the availability of stocks. One learns from practice that the lack of information about stock availability leading to extremely late delivery is the most common consumers’ claim for non-conformity\(^{17}\). Usually consumers could obtain the good expected through another trader but they do not, as they have already paid for it. It seem that in most cases they would not have ordered the good, had they been informed that it was not available. Such an information requirement would, however, go unheeded, should the applicable sanction not be satisfactory.

Except for specific sanctions applying to the breach of the right to withdrawal and payment costs (articles 10 and 14 § 1 (i) of the 2011/83/EU directive and 14, 17 (2) and 29 of the CESL), in current EU consumer protection legislation sanctions in case of breaches are left to domestic legislation. National regulations usually provide a right to damages of contractual or tortious nature, depending on each legal system\(^{18}\). This is also the case in the CESL, where Section 5 (remedies for breach of information duties) of Chapter 2 (pre-contractual information) provides for liability for any loss caused by failure to comply with the duty imposed.

Amendment 90, which clarifies the regime of loss and damages applicable to the breach of information duties by referring to the rules of Chapter 16 of the CESL is very welcome. However, even if it is now unambiguous that this regime is not a matter for national legislations to rule, the sanction still appears unsatisfactory.

\(^{16}\) Ibid., p. 279
\(^{17}\) As observed by the French public administration in charge of consumer protection, (Direction départementale de la protection des populations de la Moselle), Source: personal inquiry.
But if the sanction is ineffective, there will not be any incentive for traders to comply with this duty. If it only consists in a compensation for damages, there might be problems. How will the damage be evaluated, how long will it take to have a Court deciding the case? Does it make sense to award 15 € damages?

If it is certainly a good thing that the CESL “starts to address remedies connected to the breach of the information duties”\(^\text{19}\), we strongly support the view that other sanctions should be considered.

One possibility would be to extend the deadline for the exercise of the right of withdrawal to one year instead of 14 days, as is provided under article 42 (2) (a). Should the information be considered substantial, the consumer should not be liable for the cost, as provided by article 45 (6) (a) (ii).

Another possibility would be to impose a fine on the trader, which should contribute to the financing of ADR entities in charge of disputes under the CESL.

This would be acceptable under EU legislation, as fines are already imposed in competition law\(^\text{20}\). Information duties are strongly connected to the smooth functioning of the single market and can as such also be considered as competition law measures. It would also bring into line EU legislation with national regulations that already impose criminal sanctions for such infringements\(^\text{21}\) and with the more advanced legislation such as Luxemburg law, where a notice to comply with the obligation under the threat to pay an administrative fine can be addressed to businesses found in breach of information duties\(^\text{22}\).

\subsection{1.2.2 Unfair contract terms}

From a general point of view, the assessing and sanctioning of unfair contract terms under the CESL is satisfactory.

One point that could be clarified is how to connect article 74 on unilateral determination by a party (located in Chapter 7 on Content and effects) and articles 79, 80 and 83 (located in Chapter 8 on unfair contract terms) in contracts between a trader and a consumer.

These articles respectively provide:

\textbf{Article 74}

Unilateral determination by a party

1. Where the price or any other contract term is to be determined by one party and that party’s determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.

2. The parties may not exclude the application of this Article or derogate from or vary its effects.

\textbf{Article 79}

Effects of unfair contract terms

1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.

2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

\(^{19}\) G. HOWELLS on Precontractual information in R. SCHULZE (ed.), \textit{op. cit.}, p. 179.

\(^{20}\) See for example Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

\(^{21}\) For distance selling contracts this is the case in Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malta, Portugal, Slovakia, Slovenia and Sweden. Source: \textit{EC Consumer Law Compendium. The Consumer Acquis and its Transposition in the Member States, op. cit.}, esp. p. 339.

\(^{22}\) Article L. 112-9 (2) \textit{Code de la consommation} (Luxemburg).
Article 80
Exclusions from unfairness test

1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.

2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.

3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

Article 83
Meaning of "unfair" in contracts between a trader and a consumer

1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.

(...) 

In our opinion, the grossly unreasonable determination of a term by a party could perfectly render a term unfair as it could cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Take the example of a term relating to interest for late payment. If this term, determined by only one party, is grossly unreasonable,23 it certainly falls under the scope of article 74. As such, it could be substituted by a reasonable term always according to article 74. But it could also fall under the scope of article 83 because it undoubtedly could cause a significant imbalance in the parties' rights and obligations arising under the contract. As a consequence it should be considered as non-binding on the other party.

In that case, which sanction will be applicable knowing that all the articles at stake are mandatory?

Such an overlapping should be avoided, as it certainly goes against legal certainty especially in respect of the CJEU jurisprudence. The latter clearly stated, in a case dealing with a term relating to interest for late payment, that the sanction for an unfair term is its non-binding effect and that a national legislation which allows its redrafting (i.e. substitution) is contrary to EU law.24

Yet, the principle of autonomous interpretation laid down in article 4 of the proposed regulation could justify such a discrepancy. Divergences between the consumer acquis and the CESL should in our opinion, however, be avoided.

In this specific context, we believe that the sanction of unfairness is more appropriate in consumer contracts as it leads to the eradication of the unfair term. As a consequence, the consumer will not pay any interest for late payment.

We support the view that article 74 should therefore be redrafted. In B2C relationships, substitution should only be possible where the price is to be determined by one party and that party’s determination is grossly unreasonable.

23 A remark as to the meaning of the expression “grossly unreasonable” was made in the Opinion of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final – 2011/0284 (COD) and the Communication from the Commission to the European Parliament , the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to facilitate cross-border transaction in the single market COM(2011) 636 final, INT/600 Common European Sales Law, point 5.2.3.

24 ECJ, 14/06/2012, Banco Español de Credito v Joaquín Calderón Camino, Case C-618/10.
There are other inconsistencies with the 93/3/EC directive on unfair terms in consumer contracts, such as for example the existence of a black list, while the list annexed to the directive is only a grey one. This is, however, not to be criticized, as the CESL is more protective of consumers than the directive.

Scholars also pointed out the fact that unlike the directive, which implicitly acknowledges a duty of transparency in contract terms by imposing, “where there is doubt about the meaning of a term, [that] the interpretation most favourable to the consumer shall prevail”25, the CESL, whose article 82 expressly refers to a “duty of transparency in contract terms not individually negotiated” does not provide a specific sanction for breaches of this particular duty26. The CESL could certainly be amended in that direction.

The “in favorem interpretation” proves to be very useful where the meaning of a clause is unclear. However, the existing sanction as provided by article 79 (1), i.e. the non-binding nature of any unfair term supplied by one party, should also be maintained for “non transparent terms” since, as we will see, it is sometimes the only possible sanction for some types of unclear terms.

Standard terms are often drafted in font sizes and colours rendering them illegible27. In this hypothesis the “in favorem” interpretation proves not to be very useful. As a consequence, the other sanction, namely rendering the term non binding, should also be provided for.

An article dealing with the specific issue of “non transparent” terms could be added after article 85.

Article [XX]

“Where the trader has not complied with the duty of transparency set out in article 82 and the contractual term is, as a result, unclear, illegible or unintelligible, the term should be interpreted in the most favourable way to the consumer. If such an interpretation is impossible, it should not be binding on the other party”.

In order to take into account the particular issue of “non transparency” of terms resulting from their illegibility, article 82 of the CESL should be slightly amended. We believe this could improve the protection of consumers and thus the legal certainty of the CESL.

Article 82 should thus be amended as follow:

Duty of transparency in contract terms not individually negotiated

“Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, legible and intelligible language”.

With regard to the lists of unfair terms of articles 84 and 85, we agree that some terms “might therefore be superfluous and some terms may be redundant”28 and that it is questionable “why some terms are in the grey and not in the black list, e.g. terms, which shift the burden of proof or impact on the admission of evidence”29.

Always with regard to the sanctions, and in order to render the provisions on unfair terms effective by forcing traders to eradicate unfair terms from standard contracts as well as individual ones, fines should be imposed on the trader, following the model of the sanctions for the breach of the duty of information (see supra). This should be the case at least where the unfair term at stake is in the black list. Such fines would not only serve the legal certainty by guaranteeing consumers the absence of unfair

25 Directive 93/13/EC on unfair terms in consumer contracts, article 5.
27 For an example of an illegible term assessed unfair and thus non-binding under the French legislation implementing the 93/13/EC directive, see the Cofidis case, ECJ 21.11.2002, Cofidis SA v Jean-Louis Fredout, Case C-473/00.
28 D. MAZEAUD, N. SAUPHANOR-BROUILLAUD on article 85, op. cit. pp. 392-393.
29 Ibid.
terms in standard contracts but also **bring into line the CESL with the most advanced legislation in this field**, i.e. the Luxembourg consumer code. With regard to the effectiveness of consumer protection, the action for injunction provided by Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests should have its scope of application extended by the CESL so that such injunctions could also be issued by some legal persons, such as ADR entities for example.

We believe that there is a lot to **learn from the ADR and jurisdictional practices on unfair terms**. We therefore strongly support the view that the **list of unfair terms in the CESL should be kept open** in order to integrate terms assessed as unfair by ADR entities and courts. A **Committee on unfair terms**, foreseen by the first draft of the directive on consumer rights but subsequently rejected, could be the right form for gathering the information on unfair terms at European level.

Eventually, we strongly support the view that the CESL should integrate the obligation for national judges to raise ex officio the issue of the unfairness of a term in accordance with the jurisprudence of the CJEU.

**An article on this issue should be added after article 85**

“**National judges shall, in the frame of a jurisdictional proceeding, determine of their own motion whether a term is unfair under Sections 2 and 3 of this Chapter.”**

This would however be of no interest if there was a general duty for national judges to raise ex officio any violation of provisions of the CESL (see our observations infra on a basic procedural frame of rules for consumer contractual rights).

**1.2.3 Non-performance in the light of non-conformity in consumer contracts**

As we have neither the time, nor the space in this briefing note to make extensive remarks on the merit of the provisions dealing with non-performance, we will limit our observations to some crucial points.

One of the most feared problems by consumers when buying a product is non-conformity. **In our opinion, the main problem of the CESL in this field is the complexity of the regime of remedies in case of non-conformity.** Despite the redrafting operated in the DRCESL, which simplified the wording and the presentation of the regime, we believe it is still very difficult for consumers to understand what their rights are. When looking at the table of contents, the consumer will only find one section dealing with conformity (Section 3 of Chapter 10). In order to understand what are the remedies in case of non-conformity of the goods or the digital content, the consumer has to go through Chapter 11 on buyer’s remedies and find his way through remedies applying to B2B and B2C. Moreover, the text, even redrafted, is not very clear on what the consumer can do. For example it is difficult to understand whether or not there is a hierarchy of remedies, as it is the case in the directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

Article 106 CESL certainly gives a choice to consumers by allowing them to opt for “any of the following” remedies (i.e. performance, withholding of the buyer’s own performance, termination of contract, reduction of price and damages) but then article 110 does not allow them to require performance under certain circumstances and article 111 limits

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30 Article L. 211-4 code de la consommation (Luxemburg), article L. 132-2 of the code de la consommation (France) as it could be amended by the article 54 of the Projet de loi relatif à la consommation, http://www.assemblee-nationale.fr/14/projets/pl1015.asp


32 ECJ 26/10/2006, Elisa María Mostaza Claro v Centro Móvil Milenium SL., Case C-168/05.


consumer's choice between repair and replacement. As a result, there is no real choice for the consumers.

In order to improve the intelligibility of the CESL we suggest that the limits to consumers choices as to the remedies they have against the business be immediately and explicitly mentioned in article 106.

We however strongly support the view that a special chapter should be dedicated to non-conformity in consumer contracts, where a real choice – no limitation being imposed - would be given to consumers to opt for specific performance, repair or replacement, termination of the contract or reduction of the price without prejudice of the possibility to claim damages.

One final remark should be made about Amendment 142 of the DRCESL. This generalizes the right to cure of the seller in B2C relationships by extending it to contracts which also contain a service element, such as the sale of customised or personalised goods or digital content. In the CESL, in B2C relationships the right to cure is only tolerated in case of a related service contract. The justification for this amendment is to give consistency to the regime of non-performance. We take the view that in B2C contracts, the more appropriate manner to avoid incoherencies would be to totally exclude the right to cure of the seller.

1.2.4 Damages

The regime of damages in the CESL was criticised\textsuperscript{35}. We will not present observations on this issue, as it is more a matter of general contract law and also because we believe damages are not the most appropriate remedy in consumer contract law. The award of damages might be very different from a jurisdiction to another. Unlike specific performance, refunding or fines, damages are ineffective in preventing traders from complying with legal requirements only in individual cases and continuing their illegal practices. But we are of the opinion that clarifications on certain points and redrafting of others are welcome according to already existing proposals\textsuperscript{36}.

1.2.5 Restitution

As for the non-conformity regime, we believe that the Chapter on restitution is hardly accessible to any consumer. It should be redrafted in order to simplify its understanding. We are aware of the technical nature of such provisions but believe that some improvements could be made with particular regard to articles 173 and 175. We nonetheless appreciate the amendments made by the Rapporteurs, which improved the regime of restitution by better balancing the interests of the parties without disadvantaging the consumer.

We regret however that amendment 191 gives the possibility to the parties to derogate or vary the effects of Chapter 17 on restitution in B2C contracts. Since we support the view that all B2C provisions of the CESL could reasonably be mandatory, this possibility is not acceptable in our view. Even if they might not be regarded as such, the rules on restitution established by the CESL are sufficiently equitable for traders.

The justification that derogation from provisions of Chapter 17 on restitution could hinder the parties from reaching an amicable settlement is not really convincing.

But all these observations as to the merit of the CESL provisions could be aimless, should they not be backed by certain procedural guarantees.

\textsuperscript{35} On this issue see F. ZOLL, op. cit. pp. 396 and ff.

1.3 Creating a basic procedural frame of rules for consumer contractual rights

As for now, the CESL already contains some specific provisions of procedural nature in a broad sense, adapted to consumer contracts. They are related to the burden of proof and prescription. We have no particular observations on these provisions or on their amendments by the Rapporteurs. We would just like to underline that the presence of such provisions asserts the fact that procedural autonomy of Member States could not be considered an obstacle to setting up such a basic procedural frame, as this so called principle does not exclude Union competence on procedural matters, where Treaty requirements would be met. The basic tenet of pre-emption in the division of powers within the field of shared competences is that the Member States shall exercise their competence to the extent that the Union has not exercised its competence\(^37\).

Our main concern as to the legal certainty of the CESL from that point of view is its effective application. Consumer protection is based on the observation that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This weakness should not be underestimated in the frame of legal proceedings, which most of the time are not brought by consumers but by traders. Consumers do not appropriately defend themselves because of their lack of knowledge as to their rights. When consumers seek a legal action against traders, most of the time they do it without the assistance of a lawyer because of the small sum at stake. As a consequence, their claims are based on facts rather than on the legal rights they benefit from in the various consumer legislations.

These difficulties are certainly even more important in a cross border context where contract parties do not use the same language. As highlighted by the CJEU, "such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract"\(^38\). This is why the Court established in an activist jurisprudence an obligation to raise ex officio the issue of the unfairness of a term\(^39\).

These observations lead us to two proposals:

- The necessity to back up the CESL instrument with an ADR process
- The integration of a provision on the power of judges to raise CESL provisions ex officio in the frame of B2C relationships

1.3.1 Setting up of a compulsory ADR process

The DRCESL redrafted article 186 b in its amendment 200 so as to encourage parties "to consider submitting disputes arising from a contract for which they have agreed to use the Common European Sales Law to an Alternative Dispute Resolution Entity as defined in Article 4(e) of [Directive on consumer ADR]".

This amendment is more than welcome but we trust a compulsory ADR process would be far better as consumers could not be threatened by the business to be taken to a Court. Such a threat can refrain them from contesting the trader’s requirements even when he/she does not respect consumer rights. As for traders, especially SMEs, it would protect them from abusive consumers counting on the fact that the cost of a trial would dissuade traders to claim their rights. Out-of-court dispute resolution is a very efficient way to approach disputes involving consumers, if organized in a fair and objective manner. Traders, especially SMEs, also benefit, since they do not need support from a legal council.

In our opinion, there are no real obstacles to requiring a compulsory “ADR step”. For example, directive 2002/22/EC of the European Parliament and of the Council of 7 March

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\(^37\) On this issue see I. DELIÇOSTOPOULOS, “Towards European procedural primacy in national legal systems”, (2003) 9 European Law Journal 9, 599-613, arguing that “the European legal order has moved, as a praxis, from national procedural autonomy to a combination of national procedural competence and European procedural primacy”.

\(^38\) ECJ, 27/02/2000, joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores, § 27.

\(^39\) ECJ 26/10/2006, Elisa María Mostaza Claro v Centro Móvil Milenium SL, Case C-168/05.
2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), already requires Member States in its article 34 to “ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive. Member States shall adopt measures to ensure that such procedures enable disputes to be settled fairly and promptly and may, where warranted, adopt a system of reimbursement and/or compensation.”

The compulsory nature of an ADR with regard to the CESL would ensure that all disputes go through it before any jurisdictional actions be brought by the trader. It would thus give the possibility to consumers to understand the traders’ claim, to be informed in a pedagogical manner. As underlined by the 2002/22/EC Directive, in the EU, ADR procedures are transparent, simple and inexpensive when well managed. In France, for example, the annual reports of the various existing “mediators” prove how useful they are.

**European Consumer Centres could be in charge of such procedures.** The fines that could be imposed on traders would contribute to their financing. These fines would however only be pronounced by Courts, in the hypothesis of the failure of the ADR process, so as to guarantee a fair dealing in the frame of the ADR procedure.

1.3.2 Creation of an ex officio power for national judges to consider CESL provisions

As mentioned before, the power of judges to raise issues *ex officio* in consumer protection legislation is not a novelty, as there is some relevant jurisprudence of the Court on this issue.

In our opinion, giving judges such a power is by far the best way to render consumer protection effective. This option has been retained by the French legislator in article L. 141-4 of the *code de la consommation* under which “the judge has the faculty to raise on its own motion any provisions of the code with regard to disputes falling under its scope.” Obviously, the most efficient measure is to impose a duty of *ex officio* application of CESL provisions. This is why we believe **all B2C provisions of the CESL should be raised *ex officio* by national judges** when they are examining a dispute arising from a contract for which the parties have agreed to use the CESL. Therefore, there should be a provision in the CESL establishing a **duty to raise *ex officio* all B2C rules**. This would be more easily justified should the proposal impose their mandatory nature.

One could take the view that the CJEU only imposes such a duty when it comes to unfair terms, considering that for the rest, it is a faculty. But the cross border context implied by the application of the CESL justifies an extension of the compulsory *ex officio* consideration. Otherwise, its application would depend on the Member State’s law, where this issue can be handled in a very different manner. Such an extension would give consumers the assurance of the effective application of the CESL as the judge would be the guardian of their rights. Moreover, the interpretation of the CESL regulation is regarded as autonomous and can justify extending the duty to raise issues *ex officio* even where the Court considers it as a faculty, as it is the case for distance contracts.

**If the creation of a compulsory ADR process is not envisaged, the duty to raise B2C provisions of the CESL would be even more necessary**, as consumers would not have been given a first possibility to understand the “whys and wherefores” of the dispute.

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40 The obligation to go through an ADR process would lead to some substantial amendments of the CESL provisions.
41 See all the annual reports of public mediators on http://www.clubdesmediateurs.fr/edito/2012-12-10.
If the ADR process is compulsory, a faculty to raise *ex officio* the CESL provisions could be considered as sufficient with the exception of unfair terms, in order to be in line with the consumer *acquis* (see *supra*). The *Projet de loi relatif à la consommation* now discussed at the French *Assemblée nationale* opted for this approach\(^{44}\).

Last but not least, the acknowledgement of a duty to raise *ex officio* B2C provisions of the CESL would encourage – not to say oblige – national judges to get familiar with CESL.

## 2 IMPROVING ATTRACTIVENESS

### Key Findings
- Attractiveness is the ability to attract, to be pleasing in appearance. Even in consumer legislation, appearance is the key point of attractiveness. In order to be attractive, the CESL should be visible and therefore advertised.
- Visibility is however not sufficient if the consumer has no guarantee as to its applicability in a simple and “consumer friendly” context.

A consumer would very rarely inquire about the content of legislation before deciding to contract. But he/she would certainly be pleased to know that the **probability of a dispute is low**, that a **specific set of rules exists** should he have a problem with a trader in the context of a cross border contract and that, in that case, he will be able to **have it quickly resolved in a simple and transparent manner**.

All these issues are fundamental and should be implemented through **flanking measures** dedicated to the **visibility** of the CESL and to its **applicability in a simplified context**.

These suggestions are aimed at completing the flanking measures already envisaged in the DRCESL, which we fully support.

### 2.1.1 Flanking measures regarding the CESL’s visibility

They concern
- The naming of the CESL
- The use of a logo
- Communications’ campaign on its existence

**Naming of the CESL:**

In countries where consumer legislation was codified, the claimed advantage of such a process is the ease of access that this choice offers to consumers as to the knowledge of their rights\(^{45}\). In that regard, the **reference to a “Code” could contribute to the visibility of the CESL**. This would be a mere formal measure but we suggest having a thought about it. The existence of the Code of European Sales Law would be easier to advertise than that of a Common European Sales Law.

**Creation and use of a logo:**

Visible also means **identifiable**. We trust that the creation of a logo to be displayed on all pre contractual and contractual documents, as well as web pages and web sites, would contribute to the attractiveness of the CESL, especially if, as proposed by consumers organisations and mentioned in the ECOSOC opinion, some **model contracts adapted to the CESL** are available simultaneously with the publication of the Common European Sales

\(^{44}\) Article 28 of the *Projet de loi relatif à la consommation* amends article L. 141-4 of the French *code de la consommation* as follow : “After hearing the parties, the judge dismisses on its motion a term ruled as unfair”, [http://www.assemblee-nationale.fr/14/projets/pl1015.asp](http://www.assemblee-nationale.fr/14/projets/pl1015.asp)

Law and when it becomes effective\textsuperscript{46}. As a matter of fact, the Parliament envisaged the creation of such model contracts in its amendment 201.

**The CESL logo would also be a guarantee of fair legal treatment and easy access to justice**, should the proposed procedural back up be adopted.

**Communication campaigns** on the existence of CESL as well as the existence of the announced database on judgments applying it\textsuperscript{47} should also be launched and conferences with the legal world organized, associating institutions, universities and practitioners.

With regard to **communications directed at consumers**, a particular emphasis should be made on the fact that the CESL addresses the consumer contract as whole. This is not the case in many Member States where contract law and consumer contract legislation are in different contents (in most civil law countries contract law is dealt with by the civil code whereas consumer contract law takes the form of a special legislation or a code).

More specifically **in the context of Belgian, French and Luxemburg law, one of the main advantages of the CESL in this respect is that it covers the process of formation of contract**. In all these three legislations, the rules governing this important aspect of the law of contract have been created by the Courts and do not therefore appear expressly in the civil codes. The different approach of the CESL allows consumers to access more easily this important moment of contractual life.

Other interesting examples could be found in Member States legislations that could be fruitfully used in communications campaigns adapted to different national environments.

2.1.2 **Flanking measures in favour of CESL’s application in a simplified context**

As we previously explained, **attractiveness of the CESL is merely depending on the context of legal certainty surrounding it**. In that perspective, several issues presented as necessary to ensure the legal certainty of the CESL can also be considered flanking measures in favour of its application in a simplified context:

- The mandatory nature of all B2C provisions,
- \textit{Ex officio} power of raising its B2C provisions given to national judges,
- Existence of ADR processes, may they be mandatory or not.

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\textsuperscript{47} As provided by article 14 of the Regulation.
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Increasing the legal certainty and attractiveness of CESL: UK Law Commission’s perspective
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ABSTRACT
This paper sets out the views of those involved in the CESL project at the UK’s law reform body. It summarises their earlier advice to the government, comments on the merits of certain of the JURI rapporteurs’ amendments and sets out the case for a business-to-consumer distance sales code specifically targeted at internet sales; finally, it makes recommendations for the CESL’s future.

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EXECUTIVE SUMMARY
Background and structure of this paper
The Law Commission and the Scottish Law Commission are the two main statutory bodies responsible for reviewing the law of the United Kingdom and advising the British Government on law reform more generally. In 2011, the Ministry of Justice and the Department for Business, Innovation and Skills requested that the Law Commission advise them on the potential advantages of and problems with an optional system of European contract law. We published that advice in November 2011 and called for an optional instrument targeted specifically at the business-to-consumer internet sales market.48

Since then, the authors have continued to participate in the UK’s domestic debate surrounding the proposed sales law and in March 2012 the two Law Commissioners responsible for the advice attended a special meeting of this committee.

This paper is divided into three chapters. The first sets out our original position on the CESL in summary form; the second contains a response to the draft JURI report published on 6th March 2013 both from a policy and a drafting perspective; the final part sets out what the authors believe the next steps ought to be for this initiative.

48 http://lawcommission.justice.gov.uk/areas/1702.htm
Our 2011 view (Chapter 1)

### KEY FINDINGS

- **The major barriers to cross-border trade are practical issues** such as businesses not selling online, payment or delivery problems beyond the traders’ control, language issues, and perceived difficulties in obtaining redress.

- **The market for cross-border sales is already functioning well** in its natural environment (where the price differential justifies the risk of the unknown or in border regions).

- **The internet is where the greatest growth in business-to-consumer sales will be felt** and, as there is no lex internet, there is room to develop a bespoke legal system for this key market.

- **Duality of laws is a problem for businesses.** Any proposal should be available for use in both domestic and cross-border sales.

Our observations on the JURI report (Chapter 2)

### KEY FINDINGS

- **We commend the rapporteurs** for their steps to reduce the scope of the CESL to an internet sales code. The focus must however remain fixed on this - steps to include on-premises sales are not sensible nor justified.

- **So far as politically possible, any initiative must be a comprehensive instrument.** Where issues fall outside its scope, this should be highlighted and further details on the national law be dealt with in authoritative explanatory notes.

- **There is no need to be so restrictive on the provision of services alongside goods** through complex notions of related or linked contracts.

- **Modest damages for loss of amenity and enjoyment ought to be available.**

- **The justification for the use of the CESL in business-to-business sales has not been made out.**

Our recommendations for the future of the CESL (Chapter 3)

### KEY FINDINGS

- **The scope of the CESL should be limited to business-to-consumer internet sales of goods** (and services, so long as the predominant element of the contract is the sale of goods), and digital content.

- These should be in **two separate instruments**: one focused on the sale of goods, the other on digital content, and the digital content instrument ought to include intellectual property issues (this is already highly harmonised in the Community acquis). The sale of goods instrument should be dealt with first, with the digital content instrument to follow after.

- We recognise that the rapporteurs envisaged further work to the detail once this principle had been accepted; however, we believe that the work is more fundamental than that. The **CESL ought to be rethought from the ground up following a fresh consultation with stakeholders in the business-to-consumer internet sales market.**
The resulting instrument should be short and cover the specific requirements of sales by internet, including compliance with description, mistake, delivery and passing of title.

1 THE ROLE OF THE LAW COMMISSION IN THE CESL PROJECT

1.1 Background

The Law Commission is the statutory body responsible for law reform in England and Wales. As part of this role, it provides advice to the UK Government on law reform issues. In May 2011, the Law Commission and Scottish Law Commission were asked to advise the UK Government on the potential advantages and problems of an optional system of European contract law.

The Law Commissions’ Advice was published in November 2011, one month after the European Commission’s proposal for a Common European Sales Law (CESL). After examining the rationale and content of the CESL in detail, it concluded that there was a case for a new optional code to cover consumer distance sales across Europe. However, the code needed a more specific focus on the practical problems which arise in internet sales.

In March 2012 David Hertzell and Professor Hector McQueen of the Scottish Law Commission addressed JURI and explained why we thought that the CESL’s future was as a specific business-to-consumer online sales code rather than as a general instrument of contract law.

This background note is written jointly by David Hertzell and Colin Moore of the Law Commission. Where the views expressed go beyond those in the Advice, they are those of the authors only - and not those of the Law Commission or Scottish Law Commission.

The structure of this paper

This paper is presented in three sections. The first summarises the Law Commissions’ 2011 Advice. The second responds to the draft JURI report of February 2013. Finally, we set out possible next steps for this initiative.

1.2 Our 2011 recommendations (summary)

The following chapter summarises our position on the CESL by way of background information.

The European Commission has identified one of the problems in buying online across borders. Although the Rome I Regulation provides good protection to consumers, it means that traders who sell to consumers across borders need to find out about foreign contract law and to comply with the different consumer protection rules.

This does not appear to be a problem for shop sales. If a trader decides to establish a shop in a different country, it must comply with foreign laws in all its operations: taking premises, employing staff, paying tax. The need to comply with the domestic consumer protection law is a lesser issue in comparison. On the other hand, it appears to be a problem for distance sales. Around one in ten traders who sell (or wish to sell) across border described differences in contract law as a major obstacle, and just over half said that it has at least a minimal impact on them.

The Law Commissions concluded that there was a need for a short, accessible code to cover consumer distance sales with a particular focus on the internet. The draft CESL grew out of general contract law principles, and we thought that it should be refocused to deal with this sector’s problems.

1.2.1 A focus on consumer distance sales

Although most cross border sales are now concluded over the internet, we concluded that the CESL should concentrate on distance selling more widely. Distance selling is a concept already widely used in the consumer acquis, which also includes telephone, text and postal sales. We thought that the inclusion of telephone sales was important, as many traders selling high value or complex goods over the internet also include a telephone option. The law should be the same whether the final element of the transaction is concluded by phone or online.

The Law Commissions identified three main problems with the 2011 proposed text.

- It was not always easy to understand. It would be a more accessible document if:
  - There were separate codes for business-to-consumer contracts and business-to-business contracts.
  - Notes and internal references were provided.
  - It was accompanied by an authoritative guide.

From the trader’s perspective, the proposal was limited in the following ways:

- Unless member states exercise an option to extend the CESL to domestic sales, traders must use one contract law system for domestic sales and one for cross-border sales.
- It is cumbersome to use for telephone sales. This is a problem where traders use both online and telephone sales alongside each other.
- Traders must still find out and comply with the linguistic requirements of any member state to which they direct activities.
- The CESL provides consumers with an extended right to reject for up to two years from the date that the consumer could be expected to be aware of the fault. This would discourage many traders from using the CESL at all.

From the consumer’s perspective:

- The uncertainty of the provisions on allowance for use may lead to difficult arguments which could disadvantage consumers.
- The lack of damages for distress and inconvenience may reduce the level of consumer protection in some circumstances.

1.3 Areas to explore with online retailers and consumer groups

We proposed further discussions with retailers and consumers on the following issues.

1.3.1 Should the CESL be confined to cross-border sales?

Most internet traders wish to use only one system of law for all their sales. If the CESL is confined to cross-border sales, they will need to use two: one for domestic sales, and one for cross-border sales. Article 4 of the proposed Regulation provides that the CESL may only be used for cross-border contracts. However, under Article 13, member states may also decide to make the CESL available for domestic sales if they wish.

If the CESL is adopted, and becomes successful, we thought that it should be extended to domestic sales. We expressed concern, however, that this had the potential to undermine a member state’s ability to respond to specific abuses in problematic areas, such as doorstep selling (explored below). This is a strong reason to confine CESL to distance sales.

1.3.2 Language

Difficult questions arise about how far traders who sell across the EU should be obliged to translate information into the language of the different states. The CESL, like the Consumer Rights Directive, leaves the issue of language to the discretion of the member state. If a
state wishes, it may require that contractual information is given in a particular language. For example, French law currently requires that certain contractual information be in French.

This protects consumers but severely limits the utility of the CESL for business. Even if an internet trader uses the CESL, it must still comply with each member state’s linguistic requirements. A small business trading across borders must find out what language requirements are imposed in the 27 member states. Where language requirements exist, it must either comply with them or ensure that it does not direct its activities to that state. We thought this required further debate.

1.3.3 When is an internet trader bound by the contract?

A difficult issue raised by internet sales is when the trader becomes bound to deliver the goods. We explained that internet traders do not wish to be bound to supply goods if they are out-of-stock. They are also worried about possible mispricing: where, for example, an internet trader mistakenly offers a €999 laptop for €9.99 and receives thousands of orders within the hour. If the trader were obliged to fulfil all the orders at that price it would make a substantial loss.

We believe that the CESL would not bind traders to supply the goods until they write explicitly to accept the consumer’s offer but felt that the issue should be clarified.

1.3.4 The current law on the right to terminate for faulty goods

The current EU Consumer Sales Directive sets out minimum remedies for faulty goods. The Directive provides a fairly low level of protection. Where goods are faulty, consumers must first ask for a repair or replacement. Consumers are only entitled to rescind the contract if a repair or replacement cannot be provided without unreasonable delay or significant inconvenience. Where consumers do rescind the contract, traders may retain a proportion of the price to allow for the use the consumer has had from the product.

Member states may add to this minimum level of protection. In the UK, the consumer also has a long-established “right to reject”. The consumer may require the seller to take the goods back and return the price straight away (without first seeking repair or replacement), provided rejection is made within “a reasonable time”.

In 2009 the two Law Commissions published a report on remedies for faulty goods. We concluded that this right to reject was particularly valuable to consumers. However, we thought that the right should be time-limited: in normal circumstances the consumer should only be able to exercise the right to reject for 30 days following the sale. After 30 days, if the goods proved to be faulty, the consumer should start by seeking a repair or replacement.

We argued that, where consumers did reject goods, they should receive their money back in full. The allowance for use was extremely unpopular: consumers felt that no reputable trader should sell them a faulty product, fail to repair it, and then require them to pay for whatever use they may have had from it.

1.3.5 The right to terminate in the CESL

Under the CESL, consumers have a right to terminate. At first sight, this is similar to the right to reject. The consumers may return the faulty goods and receive their money back, without first asking for a repair or replacement.

Unlike the UK position, however, this right is not time-limited. At first sight, the only time limit is the prescription period. The consumer must act within two years from the time they knew or could be expected to know of the fault, or within ten years of the sale, if this is a shorter period.

That said, it is possible that prolonged delay by a consumer may constitute a lack of good faith. A consumer may also have to give an allowance for use if they were "aware of the

ground for avoidance or termination” but delayed taking action, or if “it would be inequitable to allow the recipient the free use” of the goods.

We welcomed the inclusion of this “right to reject”, but had two concerns about how the right operates:

- The time period is too long. Retailers may be discouraged from using the CESL for fear that such an extended right could be abused.
- It is too uncertain. Consumers and traders (particularly small internet traders) need quick, simple solutions to resolve problems. Too much scope for argument may disadvantage the weaker party, who is often the consumer. The CESL gives too much scope to argue over whether the consumer has acted in good faith or should give an allowance for their use of the product.

1.3.6 Damages for distress and inconvenience

In English and Scots law, damages for distress and inconvenience are allowed only in exceptional circumstances. One exception is where the main purpose of the contract is to provide pleasure or to avoid distress. We gave an example of a faulty wedding dress which ruins the wedding day. Damages are also available where the consumer has suffered some physical inconvenience, such as where they have been prevented from using their home for a prolonged period. An example would be a faulty washing machine which causes a flood, depriving the consumer of the use of their kitchen for several months.

Under the CESL, damages for “non-economic loss” such as distress and inconvenience are not allowed in any circumstances. This represents a reduction in consumer protection in some cases.

1.3.7 Trader insolvency after payment but before delivery

The main legal risk of buying online is that the trader will become insolvent before the goods are delivered. The CESL does not deal with insolvency, so the priority given to the consumer’s claim will continue to be governed by the law of the business’s home state. Often consumers are given relatively little protection: they may rank as general creditors, below the claims of tax authorities, employees or secured creditors such as banks.

In the UK context, consumers’ main protection is provided by section 75 of the Consumer Credit Act 1974. Where a consumer buys goods worth between £100 and £30,000 on a credit card, they have a claim against the credit card company for any breach of contract or misrepresentation by the supplier. From the consumer’s point of view, section 75 is an extremely valuable right. So long as the goods are within the price range, the UK consumer may make a cross-border purchase using a credit card, knowing that if the goods are not delivered, or turn out to be faulty, they have a claim against the credit card company in the UK courts. This may partially explain why UK consumers are particularly confident internet users.

Under EU law, consumers have a similar right under Article 15 of the Consumer Credit Directive 2008, but it applies only to “linked credit agreements” rather than credit cards in general. We suggested that extending Article 15 to include credit cards would be a powerful way of increasing consumer confidence across the EU.

Most of the problems of trader insolvency cannot be solved by the CESL, but there is one way in which the CESL could provide greater consumer protection. As a general principle, goods stored in the trader’s warehouse will be considered to be the trader’s property. However, questions arise about goods which have been packed and labelled with the consumer’s address. At the moment of insolvency they may be waiting in the post-room or on the way to the consumer in the delivery van. We thought these should be seen as the consumer’s property and should be delivered to them.

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51 The same provisions would also apply against any other “connected lender”.
1.3.8 Telephone selling

As presently drafted, the CESL is difficult to use for quick telephone sales. This may cause difficulties for website traders who offer online and telephone sales alongside each other.

1.3.9 Doorstep selling

Doorstep selling can be particularly problematic. Our work on aggressive trade practices revealed many examples where elderly, infirm and vulnerable consumers had been bullied in their homes into buying expensive products they did not really want. We thought that member states should retain the right to curb these abuses, without traders being able to circumvent domestic requirements by using the CESL.

If the CESL were introduced for doorstep selling, additional protections would be needed. Article 50 (on threats) should be clarified to include aggressive practices within the meaning of the Unfair Commercial Practices Directive. We also called for a clear remedy where Article 50 is breached; and the inclusion of negotiated terms within unfair terms protection.

1.3.10 Business-to-business contracts

At present, for business contracts, the Rome I Regulation allows a free choice of law. Parties to a commercial contract may choose any of the legal systems in the EU, or a national legal system outside the EU (such as New York law).

For most businesses within the EU, the default regime for international sales contracts is the UN Convention on Contracts for the International Sale of Goods (CISG), also known as the “Vienna Convention”. This has been ratified by 76 countries, including most EU member states. Where parties have places of business in two different states, and both states have ratified the CISG, the CISG becomes the default regime for international sales of goods contracts.

The main problem appears to be that businesses have too much choice. It is difficult for small and medium enterprises to find out about different legal systems, as this usually involves expensive legal advice. Businesses tend to favour their own legal system, making it difficult to negotiate on choice of law with businesses from other states.

The CESL would provide another possible choice. If the CESL provides such obvious benefits that everyone would agree to use it without difficult negotiations, it would remove a source of business stress. On the other hand, if the CESL is just one more choice, it would add to the current complexity.

We concluded that the CESL did not offer such obvious advantages over the CISG that it would reach the critical mass it needed to become the “always used” system. We did not see it as a priority for the Commission and thought that efforts would be better spent on developing a consumer distance selling code.

1.3.11 Digital content

In the time available, we were not able to consider the provisions of digital content. We do however offer some limited comments in Chapters 2 and 3 by way of general advice and assistance based on stakeholders’ reaction in the UK.

2 THE JURI REPORT

This chapter contains our thoughts on selected JURI amendments. We support the efforts that JURI have made to target the CESL to distance contracts. However, if the instrument is to meet the needs of those involved in internet retailing, we think (as the rapporteurs allude to) that a more fundamental redrafting exercise is needed. There needs to be greater discussion with retailers and consumers about the practical problems raised by distance selling, to produce a short and targeted reform code of real practical value.

54 The exceptions are the UK, Malta, Portugal and the Republic of Ireland.
2.1 Consideration of the amendments

2.1.1 Amendments 13 and 70 [topics outside the scope of the CESL]

This recital shows just how many issues fall outside the scope of the CESL. We think some additional issues need to be included. As we have outlined above, we think that the code should include provisions to ensure that labelled goods can be delivered to consumers on the trader's insolvency. Discussions should also be held about whether capacity issues are a real problem in practice. For example, are provisions needed where a child has bought online using their parent's credit card? This may be a particular problem for digital downloads.

Issues of language also need to be addressed. We fear that additional national provisions to require information to be in particular languages may deprive consumers of access to foreign websites.

If political agreement cannot be reached on such issues then authoritative explanatory notes should highlight the material features of national laws. Possessing sufficient accurate information is crucial to encouraging both traders and consumers to enter into cross-border sales.

In the context of digital content, efforts ought to be made to incorporate the EU intellectual property acquis, but only after due consideration to the overlap between contractual law and intellectual property issues.

2.1.2 Amendments 16 and 77 [clarification of the role of good faith]

This amendment adds clarity to the definition of good faith and fair dealing and rightly signals that breach of this duty should not give rise to a free-standing claim for damages. Nevertheless, we have concerns about the appropriateness of such a principle in a consumer distance sales code targeted at internet trading.

Traders in this field are particularly unlikely to be familiar with such legal concepts (in fact the smallest rarely give consideration to issues of contract law) and instead we feel that this interpretive principle would be best incorporated into the philosophy underpinning specific protective provisions of the CESL. Certainty was placed at the centre of the CESL by the Commission and this Committee; however, as it stands, the meaning of this phrase is uncertain and this risks dissuading adoption of the CESL.

2.1.3 Amendment 17 [database of decisions]

While we support a database of judgments, along the lines that exists for the CISG, we have some concerns about its operation. It would appear that this database would only contain the judgments of final courts of appeal and the CJEU; however, litigating such disputes to these levels is very expensive and we have strong doubts that many cases would reach this stage – particularly once the scope is confined to consumer internet sales. We also note that previous Commission funded databases have later suffered from budget cuts and disappeared.

Focus must therefore be placed on improving the certainty of the CESL and guiding the judiciary to a uniform interpretation through the CESL’s provisions.55

2.1.4 Amendment 18 [explanatory notes]

We support the provision of a detailed and authoritative guide to the CESL which should be freely available to all. To be authoritative though, the document probably ought to be annexed to the legislative proposals and approved by the European legislative institutions.

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55 See, for example, the concerns of Mr Justice Hamblen in his paper "The Common European Sales Law: a judicial perspective"
2.1.5 Amendment 19 [dispute resolution]
The cost of litigation is a key concern of ours and we support the reference to the ODR initiative. Reference should, however, also be made to the European Small Claims mechanism and recent efforts to improve its effectiveness.

2.1.6 Amendment 37 [damages]
We remain concerned that damages for loss of amenity and enjoyment are excluded from the CESL. As explained in Chapter 1, modest damages are available in English law in a defined set of circumstances and we believe that they should also be present in the CESL.

2.1.7 Amendment 44 [definition of a distance sale]
We feel that initially the CESL should be focused specifically on business-to-consumer sales. The CISG already provides a default common law for most business-to-business transactions in Europe and under Rome I businesses are permitted a free choice of law. We believe that there is already sufficient choice of law and that a further optional instrument should not be a priority.

Furthermore, whilst many complex business contracts are negotiated face to face and completed by email/phone, the needs of these sophisticated contracting parties are very different from the needs of consumers buying online. The need to make provision for complex business contracts threatens to undermine the simplicity and usefulness of a targeted code.

2.1.8 Amendments 55 and 56 [contracts negotiated at a distance]
We are on record as calling for a consumer distance sales code focussed on internet retailing and amendment 55 is a significant step in that direction which we welcome. We disagree with amendment 56 however. The rapporteurs state that “it appears random to exclude these cases from the use of the CESL”. We feel that the Committee and Commission must focus on where the instrument can make a marked difference to cross-border trade (distance and internet sales) and the specific requirements of that sector.

The justifications for intervention in each market sector must be considered before extending the CESL to them. In a distance sales environment such as the internet, consumers need particular protection because they cannot see or examine the goods that they will be sent. This does not apply to on-premises face-to-face sales, where the consumer can examine the goods and decided whether or not to commit to the contract or not.

Furthermore, amendment 56 contradicts Recitals 8 and 35. Recital 8 would, if adopted, state that the "parties should have the possibility to agree that contracts they conclude at a distance, and in particular online, should be governed by [the CESL]." In the circumstances envisaged by amendment 56, the contract has not been concluded at a distance – merely discussed or negotiated at a distance. We would therefore recommend its deletion.

2.1.9 Amendments 57 to 59 [linked contracts]
We agree that the CESL was unduly restrictive in the inclusion of service content within its scope. However, the amendment introduces a further complicating concept of linked contracts which is not adequately defined. It also requires the business to operate two contract law regimes in parallel: one for the sale of goods, the other for the linked contract.

This would be a burden to traders and a disincentive against using the CESL. Instead we feel that the instrument would be much simplified if the focus was moved towards permitting the use of the CESL for all contracts concluded at a distance involving the sale of goods and services, provided that the sale of goods was the primary or dominant element of the contract. This would allow for a clear dividing line between contracts that are either inside or outside the scope of the CESL.
2.1.10 Amendment 68 [application to pre-contractual discussions]

The CESL concept has always been predicated on a clear choice to opt-out of the domestic contract law regime via the “blue-button” or similar. Where a consumer enters pre-contractual negotiations, there may be problems in applying CESL standards retrospectively.

2.1.11 Amendment 100 [liability for third parties]

We had understood that the law of agency was excluded from the remit of the CESL (though the matter should be put beyond doubt – the reference to “representation” in Recital 27 is ambiguous). We do not think that it is appropriate to bring this issue within the scope of the CESL as presently drafted.

Agency is a detailed area of law that no-doubt varies from member state to member state within the EU. Again, including agency adds substantially to the complexity of the instrument. In particular, the court would have to consider the extent to which this provision supplants domestic law. We are also concerned at the inclusion of liability for a third party’s acts, even though a party is not responsible for their actions and has no authority to interfere with the transaction, if that person could have been objectively expected to have known of the fraud or threats. We would therefore counsel against the adoption of this amendment.

3 OUR RECOMMENDATIONS ON THE FUTURE OF THE CESL

3.1 Barriers to cross-border trade

Internet retailing has been placed at the centre of the Commission’s case for the CESL and we believe that this is where barriers to cross-border trade are most likely to occur. It is clear, however, that contract law issues are just one aspect of the cross-border selling equation.

We observed that consumers will be happy to purchase from an unknown business where the “benefits in terms of price and quality outweigh the risks that the retailer will fail to deliver or the product will not be as promised... Consumers may make small purchases, where they are prepared to lose the purchase price – or make large purchases where there are significant savings”. This view is supported by the many British motorists who imported vehicles direct from the continent in the 1990s to undercut the premium prices charged by UK garages.

We also commented that “from the consumer’s point of view, [initiatives to assist the consumers enforce their rights across border] are more important than changes in the applicable law”. Consideration may usefully be focused on practical steps that can be taken to further expand this market.

3.2 Why the internet?

Studies have shown that EU citizens who live in border regions already exercise their rights of free movement to shop in neighbouring nations where the choice of goods or price is better than that available domestically. The UK is an island nation and only shares one border with another state (Northern Ireland – Republic of Ireland), nevertheless a recent study of shopping trends in Derry-Londonderry showed that 50% of ROI residents do their main food shopping in NI.\footnote{A net effect of this is that Tesco Ireland has had to reduce prices.}
But only a minority of EU citizens live in a border region.\textsuperscript{57} This suggests that the focus of any instrument should not be on face-to-face cross-border sales but on distance selling – specifically the internet. There are two key reasons for this:

- The internet is the prime medium for cross-border trade and this market will only grow;\textsuperscript{58} and
- There is no “law of the internet”, and therefore there is room to develop a legal system that could fill this space, potentially maturing into a transnational code if well drafted.

A targeted initiative in this field would also tie in with efforts for the digital single market.

3.3 Conclusion

The CESL draws heavily on the Draft Common Frame of Reference both in content and style. Though the Draft Common Frame of Reference was intended as the starting point for a European law of obligations, it was first and foremost an academic text.\textsuperscript{59} This has two consequences: first, it was designed for a different, broader purpose; second it is somewhat cumbersome and far from user-friendly. Even as experienced lawyers, we sometimes had difficulty in navigating and applying the CESL to given factual scenarios.

In our 2011 Advice, we commented that:

“A code to deal with the specific problems of internet selling, however, would be very different from a set of principles of European contract or general sales law. Principles of contract law need to be general, comprehensive, fluid and flexible. Contract law provides a framework by which the parties may write their own rules, often supplemented by specific industry practices, and interpreted and developed through court decisions. By contrast, an internet code needs to be simple, certain and specific. Consumer disputes rarely go to court, and almost never to the appeal courts. Cross-border disputes are even less likely to end in court decisions. Thus it is often better to have a clear (if arbitrary) time limit, rather than an open, flexible test.

General principles are relatively policy neutral: they do no more than provide the framework under which the parties can make their own decisions. Drafting a general code is often a technical exercise, best done by experts, with comment and input from a panel of users. An internet code, on the other hand, encapsulates policy decisions. The most difficult element is to find the appropriate balance between the needs of businesses and consumers, which means that at its core it must reflect policy trade-offs.”\textsuperscript{60}

That statement remains our view. For any CESL to be attractive to businesses and consumers it must be tailored to the market. If, as we recommend, the European institutions limit the scope of the CESL to business-to-consumer internet sales, then that will require an appreciation of the particular requirements of that sector of the market. These include:

- Consumers have limited time available to process the large quantity of information available on retailers’ websites and are often unable to separate the relevant from the irrelevant. This is even more marked when they buy through smartphones.
- Many businesses will be small, have limited resources and keep minimal stock.

\textsuperscript{57} The perception and definition of cross-border sales may also be relevant. If a UK consumer purchases a DVD from Amazon Sarl via their UK site, there is a good chance that it is actually fulfilled by a company based in the Channel Islands and processed via a website and computer system based in America. The website is wholly UK facing yet this is the only aspect of the transaction (aside from delivery) that could be said to appear domestic.

\textsuperscript{58} See for example The Economist Intelligence Unit’s report \textit{Retail 2022} (2012). This quotes a study by Forrester, a US-based market research company, which anticipates that between 2011 and 2017 the value of mobile retail transactions will rise eleven-fold across Europe.

\textsuperscript{59} Draft Common Frame of Reference (outline edition), p 7.

\textsuperscript{60} Para 4.174 and 4.175.
Identifying the cross-border nature of the contract may be difficult – the seller, supplier, and computerised order system can easily be located in different locations. We think a response to these needs requires the following:

- A short, simple and easy to navigate contract code, with links to independent advice on their rights and entitlements under the contract, as well as how to resolve disputes.
- Simple, certain remedies which can be applied without difficult argument or the need for external advice.
- No cross-border requirement; it is overly complex in an internet sales context and an additional cost to business.
- Authoritative explanatory notes.

We wish to keep the code short and suggest removing all business provisions. However, we think that there is a case for including provisions about the following issues:

- Passing of title – this is especially important where the trader becomes insolvent after the consumer has paid the contract price. To provide some limited protection, the code should provide that title passes when the goods are labelled.
- Language and its specific application to the rules of the CESL which require information to be provided.
- Capacity – this issue is particularly important in light of the fact that in the digital marketplace passwords and credit card details are often stored, and so it is easy for a child (for example) to purchase things through their parents’ accounts.

3.3.1 Digital content

As we explained in the first chapter, the two Law Commissions did not comment on digital content in their 2011 Advice. The comments which follow are intended however to give an indication of the reaction of stakeholders in the UK to the proposal as regards digital content.

There is greater support for action in the field of digital content than there is for the CESL as a whole. There has been recognition that many legal systems have yet to fully take account of the increasing digitalisation of products, and that a legislative initiative could usefully clarify issues – codification of the Court of Justice’s decision in Usedsoft (Case C-128/11) would be one such benefit.

There has been concern, however, that the drafters have failed to appreciate the way in which the digital market works and, in relation to the JURI rapporteurs’ proposals, have added another new technology (cloud computing) without consideration whether the CESL is suitable for it.

Action in this area must inevitably consider the overlap and interplay with the law of intellectual property, in light of the fact that many providers of digital content consider themselves to be merely licensing their intellectual property rights rather than selling a good. The law must respond and dictate a new balance for both sides.

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61 For example, the original Sale of Goods Act in the UK consisted of just 20 pages of text and codified most of the common law on this topic. It was so successful that 88 years after it was passed in 1893, just two extra pages of text were added.

62 In our 2011 Advice, we discussed the problem in the following terms (para 4.25): “For example, under Article 70 a trader may need to take reasonable steps to bring a contract term to the consumer’s attention. Could a trader comply with this requirement if it has not translated the term into the consumer’s own language? Again, under Article 100, the goods must possess the qualities that the buyer reasonably expects. A similar question arises: does one look at the reasonable expectations of a consumer who read and understood the full description, or at the reasonable expectations of a consumer who did not understand the language used? The CESL does not give an answer to these questions.”

63 The UK Government, however, intends to introduce legislation in the next year covering this issue.
3.3.2 Next steps

We think that the internal market could benefit from an optional instrument of contract law focused on consumer distance sales. As presently drafted, however, the CESL risks being too complex and inaccessible for non-lawyers. Some measures (such as the extended right to terminate) may deter retailers from using it; while others (such as the exclusion of damages for distress) may lead to a loss of consumer confidence.64 It would be regrettable if the CESL were not used. We therefore recommend that the European institutions reconsider the issue from the ground up, taking on board the feedback from national governments, Parliaments and stakeholders. A round of effective consultation should then take place to identify the particular problems which arise in distance selling, with a view to providing clear, simple legal rules to cover these issues. We recommend that this is done in two phases: the first focusing on goods, and the second on digital content, as different issues will arise for each topic.

We are grateful for the opportunity to take part in this debate. We welcome the decision to focus the CESL on internet and distance trading. We are certain that this is where the greatest benefits can be found. However, it is vital that specific problems are correctly identified before legal solutions are proposed. We are happy to provide any further assistance that may be required.

64 This was recognised by the Commission in their Green Paper, which stated: “By its nature an optional instrument could only constitute a sensible solution to the problems stemming from regulatory differences if it is sufficiently clear to the average user and provides legal certainty. These are preconditions for building the confidence of the contracting parties in the instrument...”
EXECUTIVE SUMMARY

The publication of the draft report (Lehne / Berlinguer PE505.998v01-00) and the subsequent amendments to it demonstrate that the debate on CESL is now fully engaged. The important issue now confronting the European Legislature is to produce a form of CESL that will be both attractive and effective for use by contracting parties. It is the possible elements that could comprise such an attractive and practical CESL upon which this report will concentrate. In doing so many of the suggestions made relate more to the practical and user friendly ways in which such a final product might evolve perhaps encouraging a need to engage practical citizen focused research slightly outside the normal legislative process.

1 A HIGH LEVEL OF CONSUMER PROTECTION

There clearly remain key stakeholders who are concerned that CESL is not the right choice for consumers, however if CESL is to be successful the answer must be to convert these concerns as far as possible into tangible and reassuring changes to the format and content of the instrument. It has always been underlined by all involved, and specifically, by the European Parliament that this instrument must have a very high level of consumer protection. That needs to continue to be demonstrated at every stage of the on-going legislative process. If consumers and their representatives do not have confidence in CESL; then as an optional instrument it is unlikely to enjoy success.

2 LIMITATION OF SCOPE TO ON-LINE AND OTHER DISTANCE CONTRACTS

The choice has been made by Parliament’s Rapporters to suggest a limitation to the scope of application of the CESL to distance contracts and particularly those on-line. This limitation has been an idea that has long been discussed and seems rightly to combine the possibilities of confining CESL to the synergies of the borderless areas of both the Internal Market and the Internet. It represents the chance perhaps to trial CESL in the medium to which it is most likely to be suited. However great care will have to be taken in defining which contracts are potentially able to use CESL; parties should not be left in any doubt. Any limitation of scope, whilst welcome entails problems of clear definition of that scope.

3 MIXING B TO C AND B TO B

In terms of other issues relating to scope there appears to be still a concern in some quarters about the mixing of B to C contracts and B to B contracts. There are those that argue that CESL should be seen as a further development of consumer law, however this is not the only need it has to serve. It is as the Commissioner has observed a “Justice for Growth” proposal. The CESL arises out of the on-going debates about the fear of traders, particularly SMEs to engage in the Internal Market as a result of the differing national legal regimes. Rome 1 rightly gives the consumer the benefit of his or her national law, on the other hand it offers no comfort to the SME, but rather the prospect of a insurmountable legal cost in the search for certainty in cross border trade. This scenario in turn leads to a reduced offer for European consumers and a consequent loss of trade and revenue. It is interesting looking at one Member State alone, the UK; whilst the overall need for CESL is challenged, two important stakeholders, the Federations of Small Businesses and the British Retail Consortium are positive. This should not be surprising as this is the sector at which the proposal is aimed in terms of supplying a legal instrument which can to a large extent answer SMEs problems as presented in Rome 1 yet without a reduction in consumer
protection. So in a sense a CESL that was reduced to a B to C instrument only would be missing the point and indeed missing the perhaps the central attraction of what is intended. Likewise, the position of the weaker party in a B to B contract is deserving of attention and the concept of ‘good faith’ in the expert draft of CESL could be of assistance in this regard and should not be lightly abandoned. This particularly given the recent decision in the Yam Seng Pte Ltd v. Int. Trade Corp. case before the London courts, this was a case where neither business party had been legally advised at the time of entering the contract, and without the proposition being pleaded before him the judge was willing to infer a duty of ‘good faith’ as existing in English law. This was done in a very similar manner to that which appears, to be undertaken rather more frequently in civil law jurisdictions, where low value B to B cases in which parties have made their own contractual arrangements, without legal advice more frequently reach the courts. So again the CESL has the opportunity to offer certainty but also fairness to SMEs who wish to brave the Internal Market; much will depend on the final drafting.

4 ROME I AND NATIONAL MANDATORY RULES

It is clear from the amendments submitted to the latest parliamentary report that there is a concern about consumers potential loss of mandatory protections under Rome1 and some would prefer to take a different route and re-formulate the current proposal into a consumers rights directive which builds on the current aquis. That is of course a valid perspective but for the reasons set out above ignores the point of the CESL to encourage all parties, businesses and consumers to take advantage of the Internal Market. Accordingly care must be taken to deal with the relationship with Rome 1 and the potential loss of national mandatory rights. The Commission has previously argue that such loss would be slight based on its original proposal and has clearly expended some time on studying this area. A transparent exercise needs to be done; carefully enumerating exactly what rights might be lost by consumers in each individual Member State, so that it is absolutely clear exactly what is at issue during the current legislative process. An agreed list would be helpful to all concerned to understand the exact nature of the problem. Then to see if any further of these potentially ‘lost’ rights can be incorporated into CESL and where not a method considered as to how the consumer could be informed or put on notice. Such information would allow the consumer to make a considered and informed choice about the use of CESL. The problems and risks posed by Rome 1 will not go away entirely for either consumers or businesses; the question is how far can they be minimised and still leave a CESL that is attractive for all parties to use.

5 STANDARD TERMS AND CONDITIONS

One aspect where there does seem to be consensus, although at the moment leading to possibly differing conclusions is with regard to the formulation and use of standard terms and conditions for contractual relations. The difference of opinion is whether they should be produced in the current legal context of European Consumer and Sales law ( or an enhanced version thereof ) or written specifically for use with CESL. The point is that all well written terms and conditions have to contain a choice of law clause, a choice of national law. With CESL the bulk of the contract and terms can be written s against CESL, there will be a residue left to national law and this is an area that needs to be clarified.

The Commission originally indicated that the writing or designing of standard terms and conditions would be an exercise left to the so-called flanking measures, to happen sometime after the legislative process was completed. Given the consensus on the importance of this element it seems right that this exercise should be commenced at an earlier stage. There is indeed a compelling argument that the process of writing and testing such standard terms against CESL could actually assist the crafting and amending of the legislation because it may well throw up or crystallise both practical and legal issues. It would also, if done in an appropriate and collaborative way, have the benefit of drawing potential end-users of the CESL into the process. There is also no reason why at the same time some effort should not be made to scope the possibilities of writing standard terms as against the existing relevant aquis, with the caveat that this is likely to be much more complex exercise. The fact is the attempt at the exercise may reveal the more clearly the
nature of the task faced. All this could hugely inform the current debate around the legislation and produce practical results.

6 INTEGRAL ADR & ODR

The other element, which seems to attract almost complete consensus is the use of ADR. This is important following on from the adoption of the new Directive on ADR and the Regulation on ODR. These are now subject to the building of the ODR platform and the implementation of the Directive by Member States. It is obvious that all these elements should be complimentary to the use of CESL. There should be no choice, if the parties use CESL, ADR should as far as is appropriate and consistent within the constraints of not ousting the jurisdiction of the courts nor offending against basic rules on access to justice, obligatory. In other words a trader who wishes to use CESL must be signed up with an authorised and approved ADR entity within the meaning of the Directive. ADR or ODR conducted against the background or CESL should again be more straightforward, as dispute resolution professionals no less than courts still have to have regard to choice of law and conflict of law issues, again this will be simplified by CESL.

Given a limited scope of CESL to on-line only one could also envisage an insistence on a fully on-line dispute resolution service in relation to disputes arising out of CESL contracts. If the parties have contracted on line it seems to argue in favour of a proposition that normally both parties would be equally comfortable with an ODR system, although possibly some exceptions might have to be allowed. This integral complementary and potential to increase the use of ODR through the Regulation by use of CESL should be appreciated and taken into account during the continuing development of the ODR platform and ADR Directive implementation. These elements taken together have enormous potential for the future of European E-justice and accordingly increased access to justice.

7 CESL AS THE GOLD STANDARD CONTRACT

All the elements identified above lead to a version of CESL that should be a form of contract that is of the highest quality and certainty for the parties. This should be CESL’s value and selling point. A trader should want to do business on the basis of CESL not only because it affords greater legal certainty to the business but because it is a demonstration of a good intent or a high level of care; using CESL should be a competitive advantage. That should be the goal. The blue flag on the computer screen that has for so-long been talked about should really mean something so all parties; it should become a valued trust mark.

8 TEST DRIVING AN ON-LINE CESL – SEEING HOW IT MIGHT LOOK

Now that the proposal seems likely to be limited to on-line and distance contracts another possibility emerges that could be utilised in relation to on-line. That is to test the process by perhaps designing a web-site with the appropriate contractual stages re-created. It would surely be useful to all involved along with the formulation of standard terms in multi lingual versions to see how the process would look, how the computer screen would look to the parties during a CESL transaction.

During the many debates on the Consumer Rights Directive this was something that was often lacking. A clear understanding of the key points in an on-line CESL transaction worked through on a computer screen or even images of a computer screen would do much to enhance understanding. It might even be possible to convince some of the existing large on-line business to assist with such an experiment. Again stakeholder involvement and engagement across the board would be helpful. One could imagine that it would be useful to test the system especially (but of course not only) on young consumers, say students for example, those above the age of contractual capacity to see their reactions and suggestions.

If CESL is to be practical then as far as is possible we need to see how it will look in practice and test it on those who will use it or not. In short there needs to be practical research so as to deliver a practical optional instrument.
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