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Committee on Legal Affairs

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*****I**

DRAFT REPORT

on the proposal for a regulation of the European Parliament and of the Council
on a Common European Sales Law
(COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))

Committee on Legal Affairs

Co-rapporteurs: Klaus-Heiner Lehne, Luigi Berlinguer

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Consumer Protection

(*) Associated committee – Rule 50 of the Rules of Procedure

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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(*) Associated committee – Rule 50 of the Rules of Procedure

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council on a
Common European Sales Law
(COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0635),
 - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0329/2011),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of 29 March 2012¹,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0000/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 8

Text proposed by the Commission

(8) To overcome these contract-law-related barriers, parties should have the possibility to agree that their contracts should be governed by a single uniform set of

Amendment

(8) Contract-law-related barriers prevent consumers and traders from fully exploiting the potential of the internal market and are particularly relevant in

¹ OJ C 181, 21.6.2012, p. 75.

contract law rules with the same meaning and interpretation in all Member States, a Common Sales Law. The Common European Sales Law should represent an additional option increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade. It should become the basis of a contractual relationship only where parties jointly decide to use it.

the area of distance selling which should be one of the tangible results of the internal market. In particular, the digital dimension of the internal market is becoming vital for both consumers and traders as consumers increasingly make purchases over the internet and an increasing number of traders sell online. Given that communication and information technology means are constantly developing and becoming increasingly accessible, the growth potential of internet sales is very high. Against this background, and to overcome such contract-law-related barriers, parties should have the possibility to agree that contracts they conclude at a distance, and, in particular, online, should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common European Sales Law. That Common European Sales Law should represent an additional option for distance and, in particular, internet trade, increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade. It should become the basis of a contractual relationship only where parties jointly decide to use it.

Or. en

Justification

The changes to the recital mirror the proposed changes to the substantive scope of CESL. CESL, as one set of EU-wide rules, is the ideal tool for distance, in particular online trade which is a rapidly growing area within the internal market.

Amendment 2 **Proposal for a regulation** **Recital 9**

Text proposed by the Commission

(9) This Regulation establishes a Common European Sales Law. It *harmonises* the contract laws of the Member States not by requiring amendments to the *pre-existing* national contract law, but by creating *within each Member State's national law* a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.

Amendment

(9) This Regulation establishes a Common European Sales Law *for distance contracts and in particular for online contracts*. It *approximates* the contract laws of the Member States not by requiring amendments to the *first* national contract law *regime*, but by creating a second contract law regime for contracts within its scope. This *directly applicable* second regime *should be an integral part of the legal order applicable in the territory of the Member States. In so far as its scope allows and where parties have validly agreed to use it, the Common European Sales Law should apply instead of the first national contract law regime within that legal order*. It should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.

Or. en

Justification

The changes to the recital are aimed at clarifying the relationship between the Common European Sales Law and the Rome I Regulation.

Amendment 3
Proposal for a regulation
Recital 10

Text proposed by the Commission

(10) The agreement to use the Common European Sales Law should be a choice exercised within the *scope of the* respective national *law* which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual

Amendment

(10) The agreement to use the Common European Sales Law should be a choice exercised within the respective national *legal order* which is *determined as the applicable law* pursuant to Regulation (EC) No 593/2008 or, in relation to pre-

information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law *should* therefore not amount to, and not be confused with, a choice *of the applicable law* within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law *results from a choice between two different regimes within the same national legal order. This choice* therefore *does* not amount to, and *should* not be confused with, a choice *between two national legal orders* within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules *such as those contained in Regulation (EC) No 593/2008*.

Or. en

Justification

The changes to the recital are aimed at clarifying the relationship between the Common European Sales Law and the Rome I Regulation.

Amendment 4 **Proposal for a regulation** **Recital 11**

Text proposed by the Commission

(11) The Common European Sales Law should comprise of a **complete** set of **fully harmonised** mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that

Amendment

(11) The Common European Sales Law should comprise of a **comprehensive** set of **uniform** mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that

consumers enjoy under Union consumer law.

consumers enjoy under Union consumer law.

Or. en

Amendment 5
Proposal for a regulation
Recital 11 a (new)

Text proposed by the Commission

Amendment

(11a) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside a person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.

Or. en

(See the wording of recital 17 of Directive 2011/83/EU)

Amendment 6
Proposal for a regulation
Recital 12

Text proposed by the Commission

Amendment

(12) Since the Common European Sales Law contains a **complete** set of **fully** harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States,

(12) Once there is a valid agreement to use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope. Since the Common European Sales Law contains a **comprehensive** set of **uniform** harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law.

has no practical *importance* for the issues covered by the Common European Sales Law.

Consequently, Article 6(2) of Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical *relevance* for the issues covered by the Common European Sales Law *as it would amount to a comparison between the mandatory provisions of two identical second contract law regimes.*

Or. en

Justification

The changes to the recital are aimed at clarifying the relationship between the Common European Sales Law and the Rome I Regulation.

Amendment 7 **Proposal for a regulation** **Recital 13**

Text proposed by the Commission

(13) The Common European Sales Law should be available for cross-border contracts, because it is in that context that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships. The cross-border nature of a contract should be assessed on the basis of the habitual residence of the parties in business-to-business contracts. In a business-to-consumer contract the cross-border requirement should be met where either the general address indicated by the consumer, the delivery address for the goods or the billing address indicated by the consumer are located in a Member State, but outside the State where the trader has its habitual residence.

Amendment

(13) The Common European Sales Law should be available for cross-border contracts, because it is in that context that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships *and that distance trade, in particular trade online has a high potential.* The cross-border nature of a contract should be assessed on the basis of the habitual residence of the parties in business-to-business contracts. In a business-to-consumer contract the cross-border requirement should be met where either the general address indicated by the consumer, the delivery address for the goods or the billing address indicated by the consumer are located in a Member State, but outside the State where the trader has its habitual residence.

Or. en

Amendment 8
Proposal for a regulation
Recital 17 a (new)

Text proposed by the Commission

Amendment

(17a) Cloud computing is developing rapidly and has great potential for growth. The Common European Sales Law provides a coherent set of rules adapted to the distance supply and in particular supply online of digital content and related services. It should be possible for those rules to also apply when digital content or related services are provided using a cloud, in particular when digital content can be downloaded from the seller's cloud or temporarily stored in the provider's cloud.

Or. en

Justification

The new recital is proposed to clarify which cloud computing contracts are covered by CESL. The Common European Sales Law covers "sales like"-cloud computing contracts as well as some related service contracts, in particular when digital content can be downloaded from the seller's cloud or temporarily stored in the provider's cloud.

Amendment 9
Proposal for a regulation
Recital 18

Text proposed by the Commission

Amendment

(18) Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a

(18) Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a

later stage. In view of this specific market structure and of the fact that defects of the digital content provided may harm the economic interests of consumers irrespective of the conditions under which it has been provided, the availability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.

later stage. In view of this specific market structure and of the fact that defects of the digital content provided may harm the economic interests of consumers irrespective of the conditions under which it has been provided, the availability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.

However, in such cases, the remedies of the buyer should be limited to damages. On the other hand, the buyer should be able to have recourse to the full range of remedies, except price reduction, even if he is not obliged to pay a price for the supply of digital content, provided that his counter-performance, such as the provision of personal data or other utility having commercial value for the supplier, equals the payment of the price, given that in such cases the digital content is not actually supplied for free.

Or. en

Justification

The changes to the recital reflect the proposed changes to the provisions on the supply of digital content not in exchange for the payment of a price. It seems appropriate to allow the buyer who does not pay money, but makes another counter performance, such as the provision of personal data or other benefit, to have recourse to the full range of remedies, except for price reduction (which is not applicable as no price has been paid).

Amendment 10 Proposal for a regulation Recital 19

Text proposed by the Commission

(19) With a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law,

Amendment

(19) With a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law,

and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content.

and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content *or temporary storage of digital content in the provider's cloud.*

Or. en

Justification

The addition to the recital clarifies the relevance of CESL for cloud computing, in particular that related services include storage services.

Amendment 11 **Proposal for a regulation** **Recital 22**

Text proposed by the Commission

(22) The agreement of the parties to a contract is indispensable for the application of the Common European Sales Law. That agreement should be subject to strict requirements in business-to-consumer transactions. Since, in practice, it will usually be the trader who proposes the use of the Common European Sales Law, consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. Therefore, the consumer's consent to use the Common European Sales Law should be admissible only in the form of an explicit statement separate from the statement indicating the agreement to the conclusion of the contract. It should therefore not be possible to offer the use of the Common European Sales Law as a term of the contract to be concluded, particularly as an element of the trader's standard terms and conditions. The trader should provide the consumer with a confirmation of the agreement to use the Common European Sales Law on a durable medium.

Amendment

(22) The agreement of the parties to a contract *to the use of the Common European Sales Law* is indispensable for the application of the Common European Sales Law. That agreement should be subject to strict requirements in business-to-consumer transactions. Since, in practice, it will usually be the trader who proposes the use of the Common European Sales Law, consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. Therefore, the consumer's consent to use the Common European Sales Law should be admissible only in the form of an explicit statement separate from the statement indicating the agreement to the conclusion of the contract. It should therefore not be possible to offer the use of the Common European Sales Law as a term of the contract to be concluded, particularly as an element of the trader's standard terms and conditions. The trader should provide the consumer with a confirmation of the agreement to use the Common European Sales Law on a durable

medium.

Or. en

Amendment 12
Proposal for a regulation
Recital 23 a (new)

Text proposed by the Commission

Amendment

(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, questions 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.

Or. en

Justification

The new recital serves clarification purposes as the question has been raised what happens in case the agreement of the parties to use the Common European Sales Law is not valid or the standard information notice has not adequately been provided.

Amendment 13
Proposal for a regulation
Recital 27

Text proposed by the Commission

Amendment

(27) All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a

(27) All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a

contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law **and** the law of torts. **Furthermore**, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together **falls outside the scope of the Common European Sales Law**.

contract arising from lack of capacity, illegality or immorality **unless the reasons for illegality or immorality are addressed in the Common European Sales Law**, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law the law of torts **and** the issue of whether concurrent contractual and non-contractual liability claims can be pursued together. **In the interest of clarity and legal certainty, the Common European Sales Law should clearly refer to the issues which are and those which are not addressed therein.**

Or. en

Amendment 14
Proposal for a regulation
Recital 27 a (new)

Text proposed by the Commission

Amendment

(27a) The unfair commercial practices referred to in Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')¹ would be covered by the Common European Sales Law insofar as they overlap with rules on contract law including in particular those relating to unfair commercial practices that can lead to avoidance of a contract due to mistake, fraud, threat or unfair exploitation or to remedies for breach of information duties. Unfair commercial practices other than those that overlap with rules on contract law should fall outside the scope of the

Justification

The new recital clarifies the relationship between the Directive 2005/29/EC and CESL: For instance, unfair commercial practices can lead to a mistake of the consumer or constitute even fraud, threat or unfair exploitation, in other cases unfair commercial practices result in the breach of information requirements, for instance concerning the final price. These cases should be covered by CESL. Other unfair commercial practices fall outside the scope, especially if no contract is concluded. The national law to be determined according to general international private law rules applies.

Amendment 15
Proposal for a regulation
Recital 29

Text proposed by the Commission

(29) Once there is a valid agreement to use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope. The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions.

Amendment

(29) The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions.

Justification

Consequential change to change in recital 12; the sentence has been moved there.

Amendment 16 **Proposal for a regulation** **Recital 31**

Text proposed by the Commission

(31) The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context.

Amendment

(31) The **general** principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. The concrete requirements resulting from the **general** principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context. ***Without preventing parties from pursuing their own interests, the general principle of good faith and fair dealing should set a standard of conduct which ensures a honest, transparent and fair relationship. While it precludes a party from exercising or relying on a right, remedy or defence which that party would otherwise have, the principle as such should not give rise to a general claim for damages. Rules of the Common European Sales Law constituting specific manifestations of the general principle of good faith and fair dealing like avoidance for fraud or the non-performance of an obligation created by an implied term can give rise to a right***

to damages, however only in very specific cases.

Or. en

Justification

The additions clarify the scope of the principle of good faith and fair dealing and reflect the changes proposed to the definition of this principle and to Article 2(2).

Amendment 17 **Proposal for a regulation** **Recital 34**

Text proposed by the Commission

(34) In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission.

Amendment

(34) In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission. ***A database should be established which is easily accessible, fully systematised and easily searchable. In order to overcome problems relating to different approaches to judgments within the Union and to enable the database to be operated efficiently and economically, judgments should be communicated on the basis of a standard judgment summary which should accompany the judgment. It should be succinct, thus rendering it easily accessible. It should be divided into five sections which should set out the main elements of the judgment communicated, i.e. the issue and the relevant Common European Sales Law article, a brief summary of the facts, a short summary of the main arguments,***

the decision; and the reasons for the decision, clearly stating the principle decided.

Or. en

Amendment 18
Proposal for a regulation
Recital 34 a (new)

Text proposed by the Commission

Amendment

(34a) A commentary on the Common European Sales Law could be a valuable tool as it would provide clarity and guidance on that law. Such a commentary should provide a clear and comprehensive exegesis of the articles of the Common European Sales Law and it should provide an explanation, where appropriate, of the policy choices which underpin specific articles. A clear explanation of such choices would enable courts across the EU Member States to interpret and apply properly the Common European Sales Law, as well as enabling them to fill any gaps. As such it will facilitate the development of a consistent, uniform application of the Common European Sales Law. The Commission should explore possibilities to provide for such a commentary.

Or. en

Amendment 19
Proposal for a regulation
Recital 34 b (new)

Text proposed by the Commission

Amendment

(34b) An additional obstacle to cross-border trade is the lack of access to efficient and inexpensive redress

mechanisms. Therefore, a consumer and a trader concluding a contract on the basis of the Common European Sales Law should consider submitting disputes arising from that contract to an existing alternative dispute resolution entity as defined in point (e) of Article 4 of Directive [Directive on Consumer ADR]. This should be entirely without prejudice to the possibility for the parties to initiate proceedings before the competent courts without first having recourse to alternative dispute resolution.

Or. en

Amendment 20
Proposal for a regulation
Recital 34 c (new)

Text proposed by the Commission

Amendment

(34c) To help facilitate the use of the Common European Sales Law, the Commission should work towards the development of European model contract terms. Such model contract terms could usefully complement the Common Sales Law rules when describing the specific features of a given contract and take into account the particularities of relevant commercial sectors. They should respond to stakeholders' needs and draw lessons from the initial practical experience of the use of the Common European Sales Law. The model contract terms should be made available to the public as they would provide added value to traders who choose to conclude cross-border contracts using the Common European Sales Law. In order for those model contract terms to effectively accompany the Common European Sales Law, the Commission's work should start as soon as possible.

Or. en

Amendment 21
Proposal for a regulation
Recital 35

Text proposed by the Commission

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to **extend** further **the scope in relation to business-to-business contracts**, market and technological developments in respect of digital content and future developments of the Union acquis.

Amendment

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to **include** further **rules relating to the matter of retention of title clauses**, market and technological developments in respect of digital content and future developments of the Union acquis. **Particular consideration should further be given to whether the limitation to distance contracts, and in particular online contracts, remains appropriate or whether a wider scope, including on-premises contracts, may be feasible.**

Or. en

Justification

Property law currently falls outside the scope of the CESL. As regards retention of title clauses, given their practical importance, a provision clarifying the obligations of the parties is proposed. The proposed amendment takes account of requests to assess, in a future review of the Regulation, the question whether to extend the material scope of the CESL to cover rules relating to the matter of retention of title clauses. A future review should further include considerations as to whether an extension of the scope beyond distance, in particular online contracts, may be feasible.

Amendment 22
Proposal for a regulation
Table of contents

Text proposed by the Commission

Amendment

A table of contents is inserted at the beginning of the operative part. It will be

adapted in order to reflect the content of the instrument.

Or. en

(See amendment deleting the table of contents at the beginning of the Annex).

Justification

A set of amendments is aimed at merging the "chapeau" regulation with the annex. The division into regulation and annex seems to have created confusion and does not appear necessary.

Amendment 23
Proposal for a regulation
Title I (new) – title

Text proposed by the Commission

Amendment

Title I
General provisions

Or. en

Justification

A set of amendments is aimed at merging the "chapeau" regulation with the annex. The division into regulation and annex seems to have created confusion and does not appear necessary.

Amendment 24
Proposal for a regulation
Part -1 (new)

Text proposed by the Commission

Amendment

Part -1: Application of the instrument

Or. en

Justification

A set of amendments is aimed at merging the "chapeau" regulation with the annex. The division into regulation and annex seems to have created confusion and does not appear necessary.

Amendment 25 **Proposal for a regulation** **Article 1 – paragraph 1**

Text proposed by the Commission

1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.

Amendment

1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available ***within the legal order of each Member State*** a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.

Or. en

Justification

The amendment makes clear that the Common European Sales Law qualifies as second regime within the legal order of each Member State. It is part of a set of amendments clarifying the relationship of the Common European Sales Law with the Rome I Regulation.

Amendment 26 **Proposal for a regulation** **Article 1 – paragraph 2**

Text proposed by the Commission

2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.

Amendment

2. This Regulation enables traders, ***in particular small or medium-sized enterprises ('SMEs')***, to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while

providing a high degree of legal certainty.

Or. en

Justification

It appears appropriate to clearly articulate the aim of SME protection in Article 1.

Amendment 27
Proposal for a regulation
Article 2 – point b

Text proposed by the Commission

Amendment

(b) ‘good faith and fair dealing’ means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question; *deleted*

Or. en

(See amendment for new point fe; the text has been amended)

Justification

A set of amendments rearranges the definitions in order to group definitions by categories: persons involved, general contract law terms, types of contracts, terms relating to specific types of contract.

Amendment 28
Proposal for a regulation
Article 2 – point c

Text proposed by the Commission

Amendment

(c) ‘loss’ means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment; *deleted*

Or. en

(See amendment for new point fg)

Amendment 29
Proposal for a regulation
Article 2 – point d

Text proposed by the Commission

Amendment

(d) ‘standard contract terms’ means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law;

deleted

Or. en

(See amendment for new point ff)

Amendment 30
Proposal for a regulation
Article 2 – point f

Text proposed by the Commission

Amendment

(f) ‘consumer’ means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession;

(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;

Or. en

(See the wording of recital 17 of Directive 2011/83/EU)

Justification

The amendment addresses the issue on how to deal with dual purpose contracts which, in the

recitals of the Consumer Rights Directive, has been solved by focussing on the primary purpose for concluding the contract.

Amendment 31
Proposal for a regulation
Article 2 – point f a (new)

Text proposed by the Commission

Amendment

(fa) 'service provider' means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;

Or. en

(See amendment for point n)

Amendment 32
Proposal for a regulation
Article 2 – point f b (new)

Text proposed by the Commission

Amendment

(fb) 'customer' means any person who purchases a related service;

Or. en

(See amendment for point o)

Amendment 33
Proposal for a regulation
Article 2 – point f c (new)

Text proposed by the Commission

Amendment

(fc) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;

(See amendment for point w)

Amendment 34
Proposal for a regulation
Article 2 – point f d (new)

Text proposed by the Commission

Amendment

(fd) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;

Or. en

(See amendment for point x)

Amendment 35
Proposal for a regulation
Article 2 – point f e (new)

Text proposed by the Commission

Amendment

(fe) 'good faith and fair dealing' means a standard of conduct characterised by honesty and openness with regard to the other party to the transaction or relationship in question and excludes an intention the only purpose of which is to harm;

Or. en

(See amendment for point b)

Justification

The former wording ("consideration for the interests") has been read as preventing the parties from driving a hard bargain, which raised concern in particular in B2B contracts. In order to clarify that this is not intended, the new wording stipulates that no party should abuse its rights. The change is also relevant for Article 86 on B2B unfairness controls and should mitigate the related concern that parties to a contract might not be allowed to follow their own interests when they negotiate.

Amendment 36
Proposal for a regulation
Article 2 – point f f (new)

Text proposed by the Commission

Amendment

(ff) 'standard contract terms' means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law;

Or. en

(See amendment for point d)

Amendment 37
Proposal for a regulation
Article 2 – point f g (new)

Text proposed by the Commission

Amendment

(fg) 'loss' means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of quality of life and loss of enjoyment;

Or. en

(See amendment for point c)

Amendment 38
Proposal for a regulation
Article 2 – point g a (new)

Text proposed by the Commission

Amendment

(ga) 'mandatory rule' means any provision the application of which the parties cannot exclude, or derogate from,

or the effect of which they cannot vary;

Or. en

(See amendment for point v)

Amendment 39
Proposal for a regulation
Article 2 – point g b (new)

Text proposed by the Commission

Amendment

(gb) 'obligation' means a duty to perform which one party to a legal relationship owes to another party and which that other party is entitled to enforce as such;

Or. en

(See amendment for point y)

Justification

The addition "and which that other party is entitled to enforce as such" helps to distinguish between obligations and (other) duties.

Amendment 40
Proposal for a regulation
Article 2 – point g c (new)

Text proposed by the Commission

Amendment

(gc) 'express' means with relation to a statement or agreement that it is made separately from other statements or agreements and by way of active and unequivocal conduct, including by ticking a box or activating a button or similar function;

Or. en

Justification

It appears appropriate to add a definition of "express" as this term is used several times throughout the proposal.

Amendment 41
Proposal for a regulation
Article 2 – point m – introductory part

Text proposed by the Commission

(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:

Amendment

(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:

Or. en

Justification

The addition to the definition clarifies the relevance of CESL for cloud computing, in particular that related services include storage services.

Amendment 42
Proposal for a regulation
Article 2 – point n

Text proposed by the Commission

(n) ‘service provider’ means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;

Amendment

deleted

Or. en

(See amendment for point fa)

Amendment 43
Proposal for a regulation
Article 2 – point o

Text proposed by the Commission

Amendment

(o) ‘customer’ means any person who purchases a related service;

deleted

Or. en

(See amendment for point fb)

Amendment 44
Proposal for a regulation
Article 2 – point p

Text proposed by the Commission

Amendment

(p) ‘distance contract’ means any contract between the trader and the consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

(p) ‘distance contract’ means any contract between the trader and the consumer **or another trader** under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer **or the other trader**, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

Or. en

Justification

Consequential change to the limitation of the use of CESL to distance contracts (see amendment for Article 5(1)). The definition of "distance contract" which corresponds to the one used in the acquis should be adapted as regards the personal scope, as CESL should be available to the parties mentioned in Article 7. The substantive characteristics of "distance contract" remain unchanged. If this change is undertaken, it would be advisable to clarify in Chapter 2 and Chapter 4 which follow the Consumer Rights Directive that "distance contract" in that contract means B2C contracts only.

Amendment 45
Proposal for a regulation
Article 2 – point q – point i

Text proposed by the Commission

(i) concluded in the simultaneous physical presence of the trader ***or, where the trader is a legal person, the natural person representing the trader*** and the consumer in a place which is not the ***trader's*** business premises, ***or concluded on the basis of an offer made by the consumer in the same circumstances; or***

Amendment

(i) concluded in the simultaneous physical presence of the trader and the consumer in a place which is not the business premises ***of the trader;***

Or. en

(See wording of Article 2(8)(a) of Directive 2011/83/EU)

Justification

Adaptation to the drafting of the Consumer Rights Directive.

Amendment 46
Proposal for a regulation
Article 2 – point q – point i a (new)

Text proposed by the Commission

(ia) for which an offer was made by the consumer in the same circumstances as referred to in point (i);

Amendment

Or. en

(See wording of Article 2(8)(b) of Directive 2011/83/EU)

Amendment 47
Proposal for a regulation
Article 2 – point q – point ii

Text proposed by the Commission

(ii) concluded on the ***trader's*** business premises or through any means of distance

Amendment

(ii) concluded on the business premises ***of the trader*** or through any means of

communication immediately after the consumer was personally and individually addressed in a place which is not the *trader's* business premises *in the simultaneous physical presence* of the trader *or, where the trader is a legal person, a natural person representing* the trader and the consumer; or

distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises *of the trader, in the simultaneous physical presence of* the trader and the consumer; or

Or. en

(See wording of Article 2(8)(c) of Directive 2011/83/EU)

Amendment 48
Proposal for a regulation
Article 2 – point q – point iii

Text proposed by the Commission

Amendment

(iii) concluded during an excursion organised by the trader *or, where the trader is a legal person, the natural person representing the trader* with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;

(iii) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;

Or. en

(See wording of Article 2(8)(d) of Directive 2011/83/EU)

Amendment 49
Proposal for a regulation
Article 2 – point v

Text proposed by the Commission

Amendment

(v) ‘mandatory rule’ means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary;

deleted

Or. en

(See amendment for point ga)

Amendment 50
Proposal for a regulation
Article 2 – point w

Text proposed by the Commission

Amendment

(w) ‘creditor’ means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor; ***deleted***

Or. en

(See amendment for point fc)

Amendment 51
Proposal for a regulation
Article 2 – point x

Text proposed by the Commission

Amendment

(x) ‘debtor’ means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor; ***deleted***

Or. en

(See amendment for point fd)

Amendment 52
Proposal for a regulation
Article 2 – point y

Text proposed by the Commission

Amendment

(y) ‘obligation’ means a duty to perform which one party to a legal relationship owes to another party. ***deleted***

Or. en

(See amendment for point gb)

Amendment 53
Proposal for a regulation
Article 3

Text proposed by the Commission

The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

Amendment

The parties may agree ***subject to the requirements laid down in Articles 8 and 9*** that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

Or. en

Justification

Clarification.

Amendment 54
Proposal for a regulation
Article 5 – title

Text proposed by the Commission

Contracts for which the Common European Sales Law ***can*** be used

Amendment

Contracts for which the Common European Sales Law ***may*** be used

Or. en

Amendment 55
Proposal for a regulation
Article 5 – paragraph 1 – introductory part

Text proposed by the Commission

The Common European Sales Law may be used for:

Amendment

1. The Common European Sales Law may be used for ***distance contracts, including online contracts, which are:***

Justification

The amendment proposes to offer CESL for distance contracts only. The term "distance contracts" has been proposed as it is already used in the acquis. The main area targeted is the rapidly growing internet sales sector, where the idea of an optional instrument met robust support, even from circles more reluctant towards a broader use of such instrument. The draft report seeks to open up debate on this. It deliberately does not provide for a full adaptation of CESL to distance trade. This would require further work and analysis, the results of which could be fed into the ongoing legislative process.

Amendment 56**Proposal for a regulation****Article 5 – paragraph 1 a (new)***Text proposed by the Commission**Amendment*

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.

Or. en

Justification

This amendment is aimed at allowing the use of the Common European Sales Law where means of distance communication have been used up to, but not including the conclusion of the contract. It appears to be random to exclude these cases from the use of the CESL.

Amendment 57**Proposal for a regulation****Article 6 – title***Text proposed by the Commission**Amendment****Exclusion of mixed-purpose contracts and******Linked contracts and mixed purpose***

Justification

The amendments to Article 6 are aimed at taking account of concerns raised that the Commission proposal limits the use of the Common European Sales Law too much for the cases of linked and mixed purpose contracts, e.g. a sales contract being mixed with a credit or linked with a credit agreement, and allow the application of CESL also in these cases. It appears then necessary to clarify the relationship of a contract governed by CESL with a linked contract and the application of CESL on mixed purpose contracts that include elements that are not governed by CESL.

Amendment 58
Proposal for a regulation
Article 6 – paragraph 1

Text proposed by the Commission

1. The Common European Sales Law may **not** be used **for mixed-purpose contracts including** any elements other than the sale of goods, the supply of digital content **and** the provision of related services within the meaning of Article 5.

Amendment

1. The Common European Sales Law may **also** be used

(a) for cases where a contract governed by the Common European Sales Law is linked to a contract other than a sales contract, a contract for the supply of digital content or a related service contract, or

(b) for cases where a contract includes any elements other than the sale of goods, the supply of digital content or the provision of related services within the meaning of Article 5 provided those elements are divisible and their price can be apportioned.

Justification

The new wording of paragraph 1 clarifies that CESL can be used both for linked contracts and mixed-purpose contracts and describes the situations that are meant. As for mixed purpose contracts, it is important to have recourse to the criterion on whether the elements which do not fall under the Common European Sales Law are divisible and a price can be apportioned, otherwise it is difficult to distinguish the two parts as to the legal consequences (see amendments for paragraphs 1b and 1c). The terms "divisible" and "price that can be apportioned" are also used in Article 9 of the Annex.

Amendment 59

Proposal for a regulation

Article 6 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. In the cases referred to in point (a) of paragraph 1, the linked contract shall be governed by the otherwise applicable law.

Or. en

Justification

The proposed text clarifies that the law applicable to a contract linked to a contract governed by CESL as referred to in paragraph 1(a) shall be determined according to the relevant conflict of laws rules. CESL should not apply to the linked contract.

Amendment 60

Proposal for a regulation

Article 6 – paragraph 1 b – introductory wording and point a (new)

Text proposed by the Commission

Amendment

1b. In the cases referred to in point (a) of paragraph 1, and

(a) where, in the context of the contract governed by the Common European Sales Law, either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding, the national law applicable to the linked contract shall determine the effects on the linked contract;

Justification

If in the context of a contract governed by the Common European Sales Law either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding, the obligations of the parties under the linked contract should be governed by the applicable national law.

Amendment 61**Proposal for a regulation****Article 6 – paragraph 1 b – point b (new)**

Text proposed by the Commission

Amendment

(b) where, in the context of the linked contract, either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding under the national law applicable to that contract, the obligations of the parties under the contract governed by the Common European Sales Law shall be unaffected unless a party would not have concluded that contract governed by the Common European Sales Law but for the linked contract, or would have done so only on fundamentally different contract terms, in which case that party shall be entitled to terminate the contract governed by the Common European Sales Law.

Or. en

Justification

If in the context of a linked contract either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding, this should in principle not affect the obligations of the parties under the contract governed by the Common European Sales Law, unless this cannot be expected from them. In this event, the consumer should have the possibility to terminate also the sales contract. The drafting to describe the latter situation follows the drafting in Article 48(1)(a) on avoidance.

Amendment 62
Proposal for a regulation
Article 6 – paragraph 1 c (new)

Text proposed by the Commission

Amendment

1c. In the cases referred to in point (b) in paragraph 1, the other elements included in the contract shall be considered as being agreed upon under a linked contract.

Or. en

Justification

The proposed text clarifies that where a mixed purpose contract includes an element which does not fall within the scope of the Common European Sales Law, e.g. transport services or a service hotline, this element will be treated as a linked contract.

Amendment 63
Proposal for a regulation
Article 6 – paragraph 1 d (new)

Text proposed by the Commission

Amendment

1d. Where a contract includes any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5 and those elements are not divisible or their price cannot be apportioned, the Common European Sales Law may not be used for that contract.

Or. en

Justification

It appears necessary to clarify that where a mixed purpose contract includes an element that does not fall within the scope of the Common European Sales Law and is not divisible or its price cannot be apportioned, the Common European Sales Law cannot be chosen.

Amendment 64
Proposal for a regulation
Article 6 – paragraph 2

Text proposed by the Commission

2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments.

Amendment

deleted

Or. en

Amendment 65
Proposal for a regulation
Article 8 – paragraph 2

Text proposed by the Commission

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.

Amendment

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.

Or. en

Amendment 66
Proposal for a regulation
Article 8 – paragraph 3

Text proposed by the Commission

3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.

Amendment

3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety. ***In relations between traders, the Common European Sales Law may be chosen partially, provided that exclusion of the respective provisions is not prohibited therein.***

Or. en

Justification

It appears necessary to clarify that the Common European Sales Law can be chosen partially in B2B contracts, but that the parties still cannot escape the mandatory rules of the CESL.

Amendment 67
Proposal for a regulation
Article 11 – paragraph 1

Text proposed by the Commission

Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. ***Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.***

Amendment

1. Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules, ***instead of the contract law regime that would, in the absence of such an agreement, govern the contract within the legal order determined as the applicable law.***

Or. en

Justification

The amendment makes clear that the Common European Sales Law qualifies as second

regime within the legal order of each Member State. It is part of a set of amendments clarifying the relationship of the Common European Sales Law with the Rome I Regulation.

Amendment 68

Proposal for a regulation

Article 11 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

Ia. Where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law, the Common European Sales Law shall also govern compliance with and remedies for failure to comply with the pre-contractual information duties, and other matters that are relevant before the conclusion of a contract.

The application of the Common European Sales Law as referred to in the first subparagraph is without prejudice to the law applicable under the relevant conflict of laws rules, where the trader has also made reference to other legal regimes.

Or. en

Justification

The proposed text stipulates that the CESL should govern the pre-contractual phase from the point where the parties refer to the CESL during negotiations, as opposed to the solution chosen by the Commission proposal according to which pre-contractual information duties contained in the CESL only apply where a contract is actually concluded, i.e. retrospectively. The second subparagraph clarifies that only where a trader leaves open whether it is prepared to contract under the CESL or under the otherwise applicable law, it must comply with both sets of standards.

Amendment 69

Proposal for a regulation

Article 11 a (new) – paragraph 1

Article 11a

Matters covered by the Common European Sales Law

1. The Common European Sales Law addresses in its rules the following matters:

- (a) pre-contractual information duties;***
- (b) the conclusion of a contract including formal requirements;***
- (c) the right of withdrawal and its consequences;***
- (d) avoidance of the contract resulting from mistake, fraud, threat or unfair exploitation and the consequences of such avoidance;***
- (e) interpretation;***
- (f) contents and effects including those of the relevant contract***
- (g) the assessment and the effects of unfairness of contract terms;***
- (h) rights and obligations of the parties;***
- (i) remedies for non-performance;***
- (j) restitution after avoidance, termination or in case of a non-binding contract ;***
- (k) prescription and preclusion of the rights;***
- (l) sanctions available in case of the breach of the obligations and duties arising under its application.***

Or. en

Justification

The newly proposed Article 11a combines a positive list mentioning issues covered in the Common European Sales Law (paragraph 1) with a non-exhaustive negative list on issues not covered that are only mentioned in the COM proposal in recital 27 (paragraph 2). The aim is to provide for maximum clarity on the matters covered the CESL and those covered by

national laws.

Amendment 70

Proposal for a regulation

Article 11 a (new) – paragraph 2

Text proposed by the Commission

Amendment

2. Matters not addressed in the Common European Sales law are governed by the relevant rules of the national law applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. Such matters include

(a) legal personality;

(b) the invalidity of a contract arising from lack of capacity, illegality or immorality except where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law;

(c) the determination of the language of the contract;

(d) matters of non-discrimination;

(e) representation;

(f) plurality of debtors and creditors and change of parties including assignment;

(g) set-off and merger;

(h) property law, including the transfer of ownership;

(i) intellectual property law; and

(j) the law of torts including the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.

Or. en

Justification

The newly proposed Article 11a combines a positive list mentioning issues covered in the Common European Sales Law (paragraph 1) with a non-exhaustive negative list on issues not covered that are only mentioned in the COM proposal in recital 27 (paragraph 2). The aim is to provide for maximum clarity on the matters covered the CESL and those covered by national laws.

Amendment 71

Proposal for a regulation

Article 11 a (new) – paragraph 3

Text proposed by the Commission

Amendment

3. This Article is without prejudice to any mandatory rules of a non-Member State which may be applicable according to the relevant rules of conflict of laws.

Or. en

Amendment 72

Proposal for a regulation

Article 14

Text proposed by the Commission

Amendment

Article 14

deleted

Communication of judgments applying this Regulation

1. Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission.

2. The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgements of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public.

Or. en

(See amendment for Article 186a; the text has been amended)

Amendment 73
Proposal for a regulation
Article 15

Text proposed by the Commission

Amendment

Article 15

deleted

Review

1. By ... [4 years after the date of application of this Regulation], Member States shall provide the Commission with information relating to the application of this Regulation, in particular on the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and on the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.

2. By ... [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

Or. en

(See amendment for Article 186b)

Amendment 74
Proposal for a regulation
Article 16

Text proposed by the Commission

Amendment

Article 16

deleted

Entry into force and application

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

2. It shall apply from [6 months after its the entry into force].

This Regulation shall be binding in its entirety and directly applicable in the Member States.

Or. en

(See amendment for Article 186f)

Amendment 75
Proposal for a regulation
Table of contents

Text proposed by the Commission

Amendment

The table of contents is deleted.

Or. en

(See amendment inserting the table of contents at the beginning of operative part).

Amendment 76
Proposal for a regulation
Title II (new) – title

Text proposed by the Commission

Amendment

Title II

*Provisions of the Common European
Sales Law*

Or. en

Justification

A set of amendments is aimed at merging the "chapeau" regulation with the annex. The division into regulation and annex seems to have created confusion and does not appear necessary.

Amendment 77
Proposal for a regulation
Annex I – Article 2 – paragraph 2

Text proposed by the Commission

2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, *or may make the party liable for any loss thereby caused to the other party.*

Amendment

2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, *but does not give rise directly to remedies for non-performance of an obligation.*

Or. en

Justification

The amendment makes clear that the Common European Sales Law qualifies as second regime within the legal order of each Member State. It is part of a set of amendments clarifying the relationship of the Common European Sales Law with the Rome I Regulation.

Amendment 78
Proposal for a regulation
Annex I – Article 9 – title

Text proposed by the Commission

Mixed-purpose contracts

Amendment

*Contracts including the provision of
related services*

Or. en

Justification

In order to better distinguish between cases falling under this provision and those falling under Article 6 of the proposed CESL Regulation, the title has been changed.

Amendment 79
Proposal for a regulation
Annex I – Article 10 – paragraph 1

Text proposed by the Commission

Amendment

1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

1. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

Or. en

Justification

Simplification of wording. The first sentence does not appear necessary as the general application of the provision can already be derived from the fact that it is situated in the Chapter of general provisions.

Amendment 80
Proposal for a regulation
Annex I – Article 11 – paragraph 1

Text proposed by the Commission

Amendment

1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.

deleted

Or. en

Justification

Simplification. The first paragraph does not appear necessary as the general application of the provision can already be derived from the fact that it is situated in the Chapter of general provisions.

Amendment 81
Proposal for a regulation
Annex I – Article 11 – paragraph 1 a(new)

Text proposed by the Commission

Amendment

1a. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time, the day during which the event occurs, the action takes place or the specified time arrives shall not be considered as falling within the period in question.

Or. en

(See amendment for paragraph 3.)

Justification

It is proposed to change the order of the paragraphs in line with Regulation No (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits, which contains the general rules on computation of time in EU law.

Amendment 82
Proposal for a regulation
Annex I – Article 11 – paragraph 3

Text proposed by the Commission

Amendment

3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.

deleted

Or. en

(See amendment for paragraph 1a.)

Amendment 83
Proposal for a regulation
Annex I – Article 11 – paragraph 6

Text proposed by the Commission

Amendment

6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee. *deleted*

Or. en

(See amendment for paragraph 7a.)

Amendment 84
Proposal for a regulation
Annex I – Article 11 – paragraph 7 a (new)

Text proposed by the Commission

Amendment

7a. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period shall be calculated from the moment the document reaches the addressee.

Or. en

(See amendment for paragraph 6; the text has been amended)

Amendment 85
Proposal for a regulation
Annex I – Article 12 – paragraph 3

Text proposed by the Commission

Amendment

3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention. *deleted*

Or. en

(See amendment for Article 58(3a))

Amendment 86
Proposal for a regulation
Annex I – Article 12 – paragraph 4

Text proposed by the Commission

Amendment

4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention. *deleted*

Or. en

(See amendment for Article -48(2))

Amendment 87
Proposal for a regulation
Annex I – Article 24 – paragraph 3 – point e

Text proposed by the Commission

Amendment

(e) the *contract terms*.

(e) the *terms on the basis of which the trader is prepared to conclude the contract*.

Or. en

Amendment 88
Proposal for a regulation
Annex I – Article 24 – paragraph 4

Text proposed by the Commission

4. The trader must ensure that the **contract** terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

Amendment

4. ***Without prejudice to any stricter requirements for a trader dealing with a consumer under Section 1***, the trader must ensure that the terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

Or. en

Amendment 89
Proposal for a regulation
Annex I – Article 24 – paragraph 5

Text proposed by the Commission

5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.

Amendment

5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party. ***Such acknowledgement shall display the content of the offer or of the acceptance.***

Or. en

Amendment 90
Proposal for a regulation
Annex I – Article 29 – paragraph 1

Text proposed by the Commission

1. A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.

Amendment

1. A party which has failed to comply with any duty imposed by this Chapter is liable ***under Chapter 16*** for any loss caused to the other party by such failure.

Or. en

Amendment 91
Proposal for a regulation
Annex I – Article 30 – paragraph 2

Text proposed by the Commission

2. Agreement is reached by acceptance of an offer. ***Acceptance may be made explicitly or by other statements or conduct.***

Amendment

2. Agreement is reached by acceptance of an offer.

Or. en

Justification

Simplification of wording. Article 34(1) already indicates that acceptance may be made by any form of statement or conduct.

Amendment 92
Proposal for a regulation
Annex I – Article 31 – paragraph 1 – point b

Text proposed by the Commission

(b) it has sufficient content and certainty for there to be a contract.

Amendment

(b) it has sufficient content and certainty for there to be a contract. ***In relations between a trader and a consumer, an offer shall only be considered to have sufficient content and certainty if it contains an object, a quantity or duration, and a price.***

Or. en

Justification

For B2C contracts, it appears appropriate to clarify what is the minimum content of an offer.

Amendment 93
Proposal for a regulation
Annex I – Article -48 (new)

Text proposed by the Commission

Amendment

Article -48

Scope

- 1. This Chapter shall apply to the avoidance of a contract for defects in consent and similar defects.**
- 2. The rules in this Chapter shall apply with appropriate adaptations to the avoidance of an offer, acceptance or other unilateral statement indicating intention, or equivalent conduct.**

Or. en

(For paragraph 2, see amendment for Article 12(4))

Justification

Clarification.

Amendment 94

Proposal for a regulation

Annex I – Article 48 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms ***and the other party knew or could be expected to have known this; and***

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms

Or. en

Justification

It is not appropriate to bind a party to its mistakes, e.g. typographical errors, by requiring co-responsibility of the other party.

Amendment 95
Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point b – point i

Text proposed by the Commission

Amendment

(i) caused the mistake;

(i) caused the mistake; **or**

Or. en

Amendment 96
Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point b – point ii

Text proposed by the Commission

Amendment

(ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;

(ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4; **or**

Or. en

Amendment 97
Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point b – point iv

Text proposed by the Commission

Amendment

(iv) **made the same mistake.**

deleted

Or. en

Justification

Avoidance for common mistake appears to be an alien element in this chapter. A solution of these cases can be found by way of interpretation, or change of circumstances.

Amendment 98
Proposal for a regulation
Annex I – Article 49 – paragraph 3 – introductory part

Text proposed by the Commission

3. In determining whether good faith and fair dealing require a party to disclose particular information, regard **should** be **had** to all the circumstances, including:

Amendment

3. In determining whether good faith and fair dealing require a party to disclose particular information, regard **is to be had** to all the circumstances, including:

Or. en

Justification

The wording is brought in line with Article 23(2) (on disclosure of information about goods and related services) which contains a comparable catalogue.

Amendment 99

Proposal for a regulation

Annex I – Article 49 – paragraph 3 – point e

Text proposed by the Commission

(e) the **apparent** importance of the information to the other party; and

Amendment

(e) the **likely** importance of the information to the other party; and

Or. en

Justification

The wording is brought in line with Article 23(2) (on disclosure of information about goods and related services) which contains a comparable catalogue. There is no reason why the threshold for the importance of the information to the other party should be higher here.

Amendment 100

Proposal for a regulation

Annex I – Article 50 a (new)

Text proposed by the Commission

Amendment

Article 50a

Third parties

1. Where a third party for whose acts a person is responsible or who, with that person's assent, is involved in the making

of a contract:

(a) causes a mistake, or knows of, or could be expected to know of, a mistake, or

(b) is guilty of fraud or threats or unfair exploitation,

remedies under this Chapter shall be available as if the behaviour or knowledge had been that of the person with responsibility or giving assent.

2. Where a third party for whose acts a person is not responsible and who does not have the person's assent to be involved in the making of a contract is guilty of fraud or threats, remedies under this Chapter shall be available if that person knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance did not act in reliance on the contract.

Or. en

Justification

A rule on mistakes, fraud, threats or unfair exploitation committed by third parties was missing.

Amendment 101 Proposal for a regulation Annex I – Article 55

Text proposed by the Commission

A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant

Amendment

A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages ***under Chapter 16*** from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known

circumstances.

of the relevant circumstances.

Or. en

Amendment 102
Proposal for a regulation
Annex I – Article 58 – paragraph 2

Text proposed by the Commission

2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.

Amendment

2. Where one party intended an expression used in the contract ***or equivalent conduct*** to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression ***or equivalent conduct*** is to be interpreted in the way intended by the first party.

Or. en

Amendment 103
Proposal for a regulation
Annex I – Article 58 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Expressions used in a contract shall be interpreted in the light of the contract as a whole.

Or. en

(See amendment for Article 60; the text has been amended)

Justification

A set of amendment is aimed at reshuffling the provisionson interpretation in order to make this chapter easier to read and to handle.

Amendment 104
Proposal for a regulation
Annex I – Article 58 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. The rules in this Chapter shall apply to the interpretation of an offer, acceptance or other unilateral statement indicating intention, or equivalent conduct, with appropriate adaptations.

Or. en

(See amendment for Article 12(3); the text has been amended)

Amendment 105
Proposal for a regulation
Annex I – Article 59 – point a

Text proposed by the Commission

Amendment

(a) the circumstances in which it was concluded, ***including the preliminary negotiations***;

(a) the circumstances in which it was concluded;

Or. en

Amendment 106
Proposal for a regulation
Annex I – Article 59 – point b

Text proposed by the Commission

Amendment

(b) the conduct of the parties, ***even*** subsequent to the conclusion of the contract;

(b) the conduct of the parties, ***prior, during and*** subsequent to the conclusion of the contract;

Or. en

Justification

Clarification of wording.

Amendment 107
Proposal for a regulation
Annex I – Article 59 – point c

Text proposed by the Commission

(c) the interpretation which ***has already been given by the parties*** to expressions which are identical to or similar to those used in the contract;

Amendment

(c) the interpretation which ***the parties have previously given*** to expressions which are identical to or similar to those used in the contract;

Or. en

Justification

Clarification of wording.

Amendment 108
Proposal for a regulation
Annex I – Article 60

Text proposed by the Commission

Article 60

Reference to contract as a whole

Expressions used in a contract are to be interpreted in the light of the contract as a whole.

Amendment

deleted

Or. en

(See amendment for Article 58(3a))

Amendment 109
Proposal for a regulation
Annex I – Article 61 a (new)

Text proposed by the Commission

Amendment

Article 61a

Preference for interpretation which gives

contract terms effect

An interpretation which gives effect to contract terms shall prevail over one which does not.

Or. en

(See amendment for Article 63)

Amendment 110
Proposal for a regulation
Annex I – Article 61 b (new)

Text proposed by the Commission

Amendment

Article 61b

Interpretation in favour of consumers

1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.

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

Or. en

(See amendment for Article 64)

Amendment 111
Proposal for a regulation
Annex I – Article 62 – title

Text proposed by the Commission

Amendment

Preference for individually negotiated contract terms

Not individually negotiated contract terms

Or. en

Amendment 112
Proposal for a regulation
Annex I – Article 62 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Where, in a situation which could not be resolved under Article 61b, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.

Or. en

(See amendment for Article 65)

Justification

Article 65 has been integrated into Article 62 as it appeared clearer and easier to read when all provisions on interpretation of not individually negotiated contract terms are grouped in one Article. The wording has been clarified.

Amendment 113
Proposal for a regulation
Annex I – Article 63

Text proposed by the Commission

Amendment

Article 63

deleted

Preference for interpretation which gives contract terms effect

An interpretation which renders the contract terms effective prevails over one which does not.

Or. en

(See amendment for Article 61a)

Amendment 114
Proposal for a regulation
Annex I – Article 64

Text proposed by the Commission

Amendment

Article 64

deleted

Interpretation in favour of consumers

- 1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.***
- 2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.***

Or. en

(See amendment for Article 61b)

Amendment 115
Proposal for a regulation
Annex I – Article 65

Text proposed by the Commission

Amendment

Article 65

deleted

Interpretation against supplier of a contract term

Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.

Or. en

(See amendment for Article 62(1a))

Amendment 116
Proposal for a regulation
Annex I – Title II – Part III – Chapter 7 – section 1 (new) – title

Text proposed by the Commission

Amendment

Section 1: General provisions

Or. en

Amendment 117
Proposal for a regulation
Annex I – Article 67 – paragraph 3

Text proposed by the Commission

Amendment

3. Usages and practices do not bind the parties to the extent to which they conflict with ***contract terms which have been individually negotiated*** or any mandatory rules of the Common European Sales Law.

3. Usages and practices do not bind the parties to the extent to which they conflict with ***the agreement of the parties*** or any mandatory rules of the Common European Sales Law.

Or. en

Justification

Clarification.

Amendment 118
Proposal for a regulation
Annex I – Article 68 – paragraph 2

Text proposed by the Commission

Amendment

2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, ***had they provided for the matter.***

2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed.

Or. en

Justification

Simplification of wording.

Amendment 119

Proposal for a regulation

Annex I – Article 69 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:

1. Where the trader, ***or a person engaged in advertising or marketing for the trader,*** makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:

Or. en

(See amendment for paragraph 2)

Justification

Paragraph 2 has been integrated in paragraph 1 in order to simplify the structure of the Article.

Amendment 120

Proposal for a regulation

Annex I – Article 69 – paragraph 2

Text proposed by the Commission

Amendment

2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.

deleted

Or. en

(See amendment for paragraph 1)

Amendment 121
Proposal for a regulation
Annex I – Article 70

Text proposed by the Commission

Amendment

Article 70

deleted

Duty to raise awareness of not individually negotiated contract terms

1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.

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

Or. en

(See amendment for paragraph 76a, the text has been amended)

Amendment 122
Proposal for a regulation
Annex I – Article 71

Text proposed by the Commission

Amendment

Article 71

deleted

Additional payments in contracts between a trader and a consumer

1. In a contract between a trader and a consumer, a contract term which obliges

the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.

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

Or. en

(See amendment for paragraph 76b)

Amendment 123
Proposal for a regulation
Annex I – Article 74 – paragraph 2

Text proposed by the Commission

Amendment

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

2. *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.

Or. en

Justification

In order not to overly limit freedom of contract in B2B transaction, Article 74 should be only mandatory in B2C transactions.

Amendment 124
Proposal for a regulation
Annex I – Title II – Part III – Chapter 7 – Section 2 (new)– title

Text proposed by the Commission

Amendment

***Section 2: Specific provisions for
contracts between traders and consumers***

Or. en

**Amendment 125
Proposal for a regulation
Annex I – Article 76 a (new) – title**

Text proposed by the Commission

Amendment

Article 76a

***Duty to raise awareness of not
individually negotiated contract terms***

Or. en

**Amendment 126
Proposal for a regulation
Annex I – Article 76 a – paragraph 1 (new)**

Text proposed by the Commission

Amendment

***1. Contract terms supplied by a trader and
not individually negotiated within the
meaning of Article 7 may be invoked
against a consumer only if the consumer
was aware of them, or if the trader took
reasonable steps to draw the consumer's
attention to them, before or when the
contract was concluded.***

Or. en

(See amendment for paragraph 70(1))

Justification

It appears sufficient to only provide for an obligation to raise awareness of not individually negotiated contract terms in B2C contracts. This takes account of concerns raised for the application of this rule also to B2B.

Amendment 127

Proposal for a regulation

Annex I – Article 76 a – paragraph 2 (new)

Text proposed by the Commission

Amendment

2. For the purposes of this Article, contract terms are not sufficiently brought to the consumer's attention unless they are:

(a) presented in a way which is suitable to attract the attention of a consumer to their existence; and

(b) given or made available to a consumer by a trader in a manner, which provides the consumer with an opportunity to comprehend them before the contract is concluded.

Or. en

(See amendment for paragraph 70(2), the text has been amended)

Justification

It has been criticized that Article 70 (2) only stipulates which behaviour is not sufficient in order to sufficiently bring the contract terms to the consumer's attention. The newly proposed text aims at describing what needs to be done in order to fulfil this duty: a trader who supplies not individually negotiated contract terms can only invoke these terms against the consumer if he has presented them in a way which is suitable to make the consumer aware of their existence, and which allows the consumer to understand them before the conclusion of the contract.

Amendment 128

Proposal for a regulation

Annex I – Article 76 a – paragraph 3 (new)

Text proposed by the Commission

Amendment

3. Contract terms shall not be considered as having been sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.

Or. en

(See amendment for Article 70(2))

Amendment 129
Proposal for a regulation
Annex I – Article 76 a – paragraph 4 (new)

Text proposed by the Commission

Amendment

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

Or. en

Justification

See amendment for paragraph 70(3)

Amendment 130
Proposal for a regulation
Annex I – Article 76 b (new)

Text proposed by the Commission

Amendment

Article 76b

Additional payments in contracts between a trader and a consumer

1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for

the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, shall not be binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer makes the additional payment, the consumer may recover it.

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

Or. en

(See amendment for paragraph 71)

Amendment 131
Proposal for a regulation
Annex I – Article 86 – paragraph 1 – point b

Text proposed by the Commission

(b) it is of such a nature that its use grossly deviates from **good** commercial practice, contrary to good faith and fair dealing.

Amendment

(b) it is of such a nature that its use grossly deviates from **customary** commercial practice, contrary to good faith and fair dealing.

Or. en

Amendment 132
Proposal for a regulation
Annex I – Article 88 – paragraph 3

Text proposed by the Commission

3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without

Amendment

3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without

undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages *under Chapter 16* for any loss resulting from the breach of this duty.

Or. en

Amendment 133
Proposal for a regulation
Annex I – Article 89 – paragraph 3 – point c

Text proposed by the Commission

(c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

Amendment

(c) the aggrieved party, *relying on the change of circumstances*, did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

Or. en

Amendment 134
Proposal for a regulation
Annex I – Article 91 – paragraph 1 – point b

Text proposed by the Commission

(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;

Amendment

(b) *transfer or undertake to* transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;

Or. en

Justification

The addition clarifies, with a view to the newly inserted Article 91a on retention of title, that ownership does not have to be transferred immediately (which would rule out any retention of title).

Amendment 135
Proposal for a regulation
Annex I – Article 91 a (new)

Text proposed by the Commission

Amendment

Article 91a

Retention of title

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.

Or. en

Justification

The addition of a retention-of-title clause follows a practical need. The newly proposed wording clarifies that retention of title clauses can be agreed upon when parties agree to apply CESL to their contract. Similarly to Article 9 of the Late Payments Directive, the proposed text is confined to the obligation side of a retention-of-title clause, while substantive property law remains outside of its scope.

Amendment 136
Proposal for a regulation
Annex I – Article 95 – paragraph 1

Text proposed by the Commission

Amendment

1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered ***without undue delay*** after the ***conclusion of the contract***.

1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered ***within a reasonable time*** after the ***contract was concluded***.

Or. en

Justification

The proposed change aligns the provision with Article 33(c) CISG. The provision for B2C contracts in paragraph 2 which fixes a deadline for delivery of 30 days remains unchanged.

Amendment 137
Proposal for a regulation
Annex I – Article 98

Text proposed by the Commission

Amendment

Article 98

deleted

Effect on passing of risk

The effect of delivery on the passing of risk is regulated by Chapter 14.

Or. en

Justification

The provision states the obvious and is not necessary.

Amendment 138
Proposal for a regulation
Annex I – Article 100 – point g

Text proposed by the Commission

Amendment

(g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content *was* supplied in exchange for the payment of a price.

(g) possess such qualities and performance capabilities as the buyer may expect *in accordance with Article 5(2)*. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content supplied in exchange for the payment of a price *or any counter performance*.

Or. en

Justification

The reference to Article 5 clarifies that it is this provision according to which it is to be defined what the buyer may expect. The reference to "counter performance" is a consequential change to the changes proposed to Article 107.

Amendment 139
Proposal for a regulation
Annex I – Article 102 – paragraphs 3 and 4

Text proposed by the Commission

3. In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.

4. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.

Amendment

3. Paragraph 2 does not apply where

(a) in contracts between traders, the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract;

(b) in contracts between a trader and a consumer, where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.

Or. en

Justification

Simplification of the structure of the Article.

**Amendment 140
Proposal for a regulation
Annex I – Article 103**

Text proposed by the Commission

Article 103

Limitation on conformity of digital content

Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.

Amendment

deleted

Or. en

Justification

The provision tends to mislead rather than clarify. Article 100 is the general provision applicable to determining conformity or non-conformity.

Amendment 141

Proposal for a regulation

Annex I – Article 106 – paragraph 1– introductory part

Text proposed by the Commission

1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:

Amendment

1. In the case of non-performance of an obligation by the seller, the buyer may, ***where the specific requirements for the respective remedies are met***, do any of the following:

Or. en

Justification

Clarification that paragraph 1 is only the general provision listing possibly remedies in the case of non-performance. The specific requirements for the respective remedies apply.

Amendment 142

Proposal for a regulation

Annex I – Article 106 – paragraph 3 – point a – introductory wording and point i (new)

Text proposed by the Commission

(a) the buyer's rights are not subject to cure by the seller; ***and***

Amendment

(a) the buyer's rights are not subject to cure by the seller, ***except where***
(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

Or. en

Justification

As CESL is proposed, the consumer has a right to immediately terminate the contract for a non-insignificant (Article 114(2)) lack of conformity in all cases of a sale of goods or supply

of digital content, but he must allow cure in case of a related service contract (Article 155(2)). It leads to random results not to subject the buyer's right to cure in cases of sales contracts which factually also contain a service element, such as the sale of customised or personalised goods (e.g. a tailor-made suit) or digital content. The proposed change undertakes the necessary adjustment.

Amendment 143

Proposal for a regulation

Annex I – Article 106 – paragraph 3 – point a – point ii (new)

Text proposed by the Commission

Amendment

Alternative 1 [Alternative amendment to amendments on Article 119 and Article 174 (1) to (1b)]

(ii) the consumer notifies the trader of the lack of conformity more than six months after risk has passed to the consumer.

Or. en

Justification

This amendment belongs to a set of amendments concerning several alternatives the rapporteurs wish to put to discussion regarding adjustments as regards the balance between the buyer's right to termination and the seller's right to cure. The rapporteurs wish to underline that these options are proposed alternatively and by no means cumulatively. The present amendment introduces a deadline of 6 months after risk has passed to the buyer, after the expiry of which the buyer would have to accept cure.

Amendment 144

Proposal for a regulation

Annex I – Article 106 – paragraph 4

Text proposed by the Commission

Amendment

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.

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.

Or. en

Justification

The consumer protection level under CESL should not fall behind the minimum standard of the Consumer Sales Directive (Article 3(5)), which would be the case if the seller could refuse repair or replacement in the case that the delivery of non-conforming goods is excused.

Amendment 145 **Proposal for a regulation** **Annex I – Article 107**

Text proposed by the Commission

Limitation of remedies for digital content not supplied in exchange for a price

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

Amendment

Limitation of remedies for digital content not supplied in exchange for *payment of a price or any other counter performance*

- 1. Where digital content is supplied in exchange for a counter performance other than the payment of a price the buyer may resort to any of the remedies referred to in Article 106 (1) except for price reduction under point (d).

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

Or. en

Justification

CESL also covers cases where digital content is not supplied for the payment of a price (Article 5(b)). Article 107 as proposed, however, limits the remedies of the buyer too much and does not take account of cases where the buyer does not pay money but still has to make a counter performance, such as the provision of personal data. Paragraph 1 allows recourse in these cases to all remedies under CESL, except for price reduction (as no money has been paid). Paragraph 2 maintains the limitation of the remedies to damages, but only for cases where digital content was supplied really for free.

Amendment 146
Proposal for a regulation
Annex I – Article 109 – paragraph 4 – point -a (new)

Text proposed by the Commission

Amendment

(-a) if the buyer is a consumer, the buyer's remedies are not subject to cure by the seller under point (a) of Article 106(3);

Or. en

(Consequential change to the amendment of Article 106(3)(a).)

Amendment 147
Proposal for a regulation
Annex I – Article 109 – paragraph 5

Text proposed by the Commission

Amendment

5. The seller has a reasonable period of time to effect cure.

5. The seller has a reasonable period of time to effect cure. ***In contracts between a trader and a consumer, the reasonable period shall not exceed 30 days.***

Or. en

Justification

It appears appropriate to fix a deadline for cure in B2C contracts. The period of 30 days corresponds to the period foreseen for delivery in B2C contracts (Article 95(2)).

Amendment 148
Proposal for a regulation
Annex I – Article 109 – paragraph 7

Text proposed by the Commission

Amendment

7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

7. Notwithstanding cure, the buyer retains the right to claim damages ***under Chapter 16*** for delay as well as for any harm caused or not prevented by the cure.

Amendment 149
Proposal for a regulation
Annex I – Article 110 – paragraphs 1 and 2

Text proposed by the Commission

1. The buyer is entitled to require performance of the seller's obligations.

2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.

Amendment

1. The buyer is entitled to require performance of the seller's obligations, ***which includes the remedying, free of charge, of a performance which is not in conformity with the contract.***

Justification

Simplification of the structure of the provision.

Amendment 150
Proposal for a regulation
Annex I – Article 119 – paragraphs 1 and 2

Text proposed by the Commission

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.

2. Paragraph 1 does not apply:

Amendment

Alternative 2 [Alternative amendment to amendments for Article 106 (3)(a)(ii) and Article 174 (1) to (1b)]

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, ***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 where no performance at all has been rendered.

- (a) *where the buyer is a consumer; or*
(b) where no performance at all has been rendered

Or. en

Justification

This amendment belongs to a set of amendments concerning several alternatives the rapporteurs wish to put to discussion regarding adjustments as regards the balance between the buyer's right to termination and the seller's right to cure. The rapporteurs wish to underline that these options are proposed alternatively and by no means cumulatively. The present amendment extends the requirement that notice of termination must be given within reasonable time after the buyer became aware of non-performance to B2C contracts (whereas expected knowledge remains relevant for B2B contracts only).

Amendment 151
Proposal for a regulation
Annex I – Article 120 – paragraph 3

Text proposed by the Commission

3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Amendment

3. A buyer who reduces the price cannot also recover damages ***under Chapter 16*** for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Or. en

Amendment 152
Proposal for a regulation
Annex I – Article 121 – paragraph 1

Text proposed by the Commission

1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.

Amendment

1. In a contract between traders the buyer is expected to examine the goods ***or digital content***, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.

Amendment 153
Proposal for a regulation
Annex I – Article 122 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity.

Amendment

1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity. ***However, the buyer may still reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.***

Or. en

Justification

The addition corresponds to Article 44 CISG.

Amendment 154
Proposal for a regulation
Annex I – Article 123 – paragraph 2

Text proposed by the Commission

2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

Amendment

2. For contracts for the supply of digital content

(a) point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price;

(b) point (b) of paragraph 1 does not apply where the digital content is not supplied on a tangible medium.

Justification

It appears appropriate to provide for an exception from the buyer's obligation to take delivery in cases of digital content not supplied on a tangible medium. Such digital content might cause harm to the buyer; and the seller does not incur any storage costs. Thus the buyer should not be obliged to take delivery.

Amendment 155
Proposal for a regulation
Annex I – Article 127 – paragraph 4

Text proposed by the Commission

4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.

Amendment

4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer ***under Chapter 16*** for any loss caused by that acceptance.

Or. en

Amendment 156
Proposal for a regulation
Annex I – Article 131 – paragraph 1 – introductory part

Text proposed by the Commission

1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:

Amendment

1. In the case of a non-performance of an obligation by the buyer, the seller may, ***where the specific requirements for the respective remedies are met***, do any of the following:

Or. en

Amendment 157
Proposal for a regulation
Annex I – Article 131 – paragraph 2

Text proposed by the Commission

2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except ***requiring performance and*** damages.

Amendment

2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except damages.

Or. en

Justification

The change mirrors the adaptation made to Article 106(4).

Amendment 158
Proposal for a regulation
Annex I – Article 143 – title

Text proposed by the Commission

Time when risk passes

Amendment

Passing of risk in contracts between traders

Or. en

Amendment 159
Proposal for a regulation
Annex I – Article 143 – paragraph 2

Text proposed by the Commission

2. Paragraph 1 is subject to Articles 144, 145 and 146.

Amendment

2. If the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 113.

If the goods or the digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the

goods or digital content are placed at the buyer's disposal at that place.

Or. en

(See amendment for Article 144)

Justification

The provisions of section 3 have been merged into one Article in the interest of simplification.

Amendment 160

Proposal for a regulation

Annex I – Article 143 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. In a contract of sale which involves carriage of goods, regardless of whether the seller is authorised to retain documents controlling the disposition of the goods:

(a) if the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract;

(b) if the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

Or. en

(See amendment for Article 145; structure has been changed)

Amendment 161

Proposal for a regulation

Annex I – Article 143 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. Where goods are sold in transit the risk passes to the buyer as from the time the goods were handed over to the first carrier or when the contract is concluded, depending on the circumstances. Risk does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew, or could be expected to have known, that the goods had been lost or damaged and did not disclose this to the buyer.

Or. en

(See amendment for Article 146; text has been amended)

Amendment 162
Proposal for a regulation
Annex I – Article 144

Text proposed by the Commission

Amendment

Article 144

deleted

Goods placed at buyer's disposal

1. If the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 113.

2. If the goods or the digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods or digital content are placed at the buyer's disposal at that place.

Or. en

(See amendment for Article 143(2))

Amendment 163
Proposal for a regulation
Annex I – Article 145

Text proposed by the Commission

Amendment

Article 145

deleted

Carriage of the goods

- 1. This Article applies to a contract of sale which involves carriage of goods.***
- 2. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.***
- 3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.***
- 4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.***

Or. en

(See amendment for Article 143(3))

Amendment 164
Proposal for a regulation
Annex I – Article 146

Text proposed by the Commission

Amendment

Article 146

deleted

Goods sold in transit

- 1. This Article applies to a contract of sale which involves goods sold in transit.***

2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.

3. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Or. en

(See amendment for Article 143(4))

**Amendment 165
Proposal for a regulation
Annex I – Article 155 – paragraph 1 – point e**

Text proposed by the Commission

Amendment

(e) to claim damages.

(e) to claim damages ***under Chapter 16.***

Or. en

**Amendment 166
Proposal for a regulation
Annex I – Article 155 – paragraph 5 – point a**

Text proposed by the Commission

Amendment

(a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;

deleted

Or. en

Justification

The period for cure in B2C contracts can be deleted if it is added in the general provision on cure in sales contracts, Article 109(5).

Amendment 167
Proposal for a regulation
Annex I – Article 157 – paragraph 1 – point d

Text proposed by the Commission

Amendment

(d) to claim interest on the price or damages.

(d) to claim interest on the price or damages ***under Chapter 16.***

Or. en

Amendment 168
Proposal for a regulation
Annex I – Article 172 – title

Text proposed by the Commission

Amendment

Restitution ***on*** avoidance ***or termination***

Restitution ***in case of*** avoidance, ***termination or invalidity***

Or. en

Justification

A set of amendments is aimed at redrafting the restitution chapter as a number of shortcomings have been identified. The proposals aim at achieving more consistent and balanced results and at completing and clarifying the provisions as well as providing practical solutions for the supply of digital content, in particular where it has been supplied against a counter performance other than the payment of a price.

Amendment 169
Proposal for a regulation
Annex I – Article 172 – paragraph 1

Text proposed by the Commission

Amendment

1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party ('the

1. Where a contract ***or part of a contract*** is avoided or terminated by either party ***or is invalid or not binding for reasons other***

recipient') has received from the other party.

than avoidance or termination, each party is obliged to return what that party ("the recipient") has received from the other party ***under the contract affected or part thereof***.

Or. en

Justification

Clarifications for partial avoidance or termination (cf. Article 117) and for cases in which a contract is invalid or not binding because the seller has not complied with a certain obligation or a specific requirement was not fulfilled (e.g. Articles 19(4), 25(2), 71(1), 72(3), 79(2), 167(3) and 170(1)).

Amendment 170
Proposal for a regulation
Annex I – Article 172 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Restitution shall be made without undue delay and in any event not later than fourteen days from the notice of avoidance or termination. Where the recipient is a consumer, this deadline shall be considered met if the consumer takes the necessary steps before the period of fourteen days has expired.

Or. en

Justification

Clarification as regards time of restitution. The proposed solution corresponds to the provisions on the exercise of a right of withdrawal (Article 44(1) and 45(1), in line with the Consumer Rights Directive).

Amendment 171
Proposal for a regulation
Annex I – Article 172 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. The recipient bears the cost of returning what was received.

Or. en

Justification

Clarification as regards cost of restitution. The proposed solution corresponds to the provisions on the exercise of a right of withdrawal (Article 44(2), in line with the Consumer Rights Directive).

Amendment 172

Proposal for a regulation

Annex I – Article 172 – paragraph 2 c (new)

Text proposed by the Commission

Amendment

2c. A party may withhold the performance of an obligation to return, where that party has a legitimate interest in doing so, for instance where this is necessary to ascertain the existence of a lack of conformity.

Or. en

Justification

Clarification.

Amendment 173

Proposal for a regulation

Annex I – Article 172 – paragraph 2 d (new)

Text proposed by the Commission

Amendment

2d. In the case of non-performance of an obligation to return or to pay under this Chapter by one party, the other party may claim damages under Articles 159 to 163.

Justification

Clarification.

Amendment 174
Proposal for a regulation
Annex I – Article 172 a (new) – title

Text proposed by the Commission

Amendment

Article 172a

***Returning digital content and returning
the counter performance in case of supply
of digital content***

Or. en

Amendment 175
Proposal for a regulation
Annex I – Article 172 a (new) – paragraph 1

Text proposed by the Commission

Amendment

***1. Digital content shall only be considered
returnable where:***

***(a) the digital content was supplied on a
tangible medium and the medium is still
sealed or the seller did not seal it before
delivery;***

***(b) it is otherwise clear that the recipient
who sends back a tangible medium cannot
have retained a usable copy of the digital
content; or***

***(c) the seller can, without significant
effort or expense, prevent any further use
of the digital content on the part of the
recipient, for instance by deleting the
recipient's user account.***

Or. en

Justification

Digital content should be considered as returnable where it cannot be further used on the part of the buyer, including cases where a tangible medium is still sealed, where the buyer could not have retained a usable copy (e.g. content still blocked through a technical protection measure or delivered with a defect making it impossible to use it) or where the seller can, without significant effort or expense, prevent any further use of the digital content by the buyer (e.g. by deleting the recipient's user account). In all these cases the buyer should not have to pay for the monetary value.

Amendment 176

Proposal for a regulation

Annex I – Article 172 a (new) – paragraph 2

Text proposed by the Commission

Amendment

2. The recipient of digital content supplied on a tangible medium which is returnable in accordance with paragraph 1 (a) and (b) shall be considered to have fulfilled the obligation to return by sending back the tangible medium.

Or. en

Justification

Clarification what the recipient of returnable digital content supplied on a tangible medium has to do in order to fulfil his obligation for restitution (e.g. send back the CD).

Amendment 177

Proposal for a regulation

Annex I – Article 172 a (new) – paragraph 3

Text proposed by the Commission

Amendment

3. Where digital content is supplied in exchange for a counter performance other than the payment of a price such as the provision of personal data, and that counter performance cannot be returned, the recipient of the counter performance shall refrain from further use of what was received, for instance by deleting received personal data.

Justification

For cases where the digital content is supplied in exchange for a counter performance other than payment of price it is important to clarify what the seller has to do in a restitution case: usually he obtains personal data, other information related to the buyer or benefits from buyer's use of the digital product, i.e. what he has obtained is not returnable. He should however be obliged to refrain from further use of what was obtained (e.g. the personal data) once the contract is avoided or terminated.

Amendment 178
Proposal for a regulation
Annex I – Article 173 – paragraph 1

Text proposed by the Commission

1. Where what was received, including fruits where relevant, cannot be returned, ***or, in a case of digital content whether or not it was supplied on a tangible medium,*** the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.

Amendment

1. Where what was received, including fruits where relevant, cannot be returned, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.

Justification

The deleted part of the provision is not necessary if the new Article 172a is introduced.

Amendment 179
Proposal for a regulation
Annex I – Article 173 – paragraph 5

Text proposed by the Commission

5. Where the recipient has obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for

Amendment

deleted

avoidance or termination, the other party may choose to claim the substitute or the monetary value of the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods or digital content when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute.

Or. en

Justification

Paragraph 5 is deleted as it leads to random results if a buyer who cannot return the goods (e.g. they were stolen, given away as a gift or totally destroyed) has to pay the full monetary value of the goods (paragraph 1) whereas a the buyer who has sold the goods faith below market value only has to return the proceeds of the sale (paragraph 5). In both cases the buyer should have to pay the monetary value.

Amendment 180
Proposal for a regulation
Annex I – Article 173 – paragraph 6

Text proposed by the Commission

6. *In the case of* digital content *which* is not supplied in exchange for the payment of a price, *no restitution will be made.*

Amendment

6. *Where the* digital content is not supplied in exchange for the payment of a price, *but for a counter performance other than the payment of a price or without counter performance, and the digital content cannot be considered as returnable under Article 172a(1), the recipient of the digital content shall not have to pay its monetary value.*

Or. en

Justification

Necessary clarification. If a buyer has obtained digital content without having paid a money price he should, in a restitution situation, not be obliged to pay its monetary value now.

Amendment 181
Proposal for a regulation
Annex I – Article 173 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

6a. Where the digital content is supplied in exchange for a counter performance other than the payment of a price and this counter performance cannot be returned, the recipient of the counter performance shall not have to pay its monetary value. This is without prejudice to Article 172a(3).

Or. en

Justification

Necessary clarification. Very often it is not possible to return what was received in exchange for digital content and it is also difficult, sometimes impossible, to establish the monetary value of the counter-performance. In such a case the most appropriate solution for balancing the rights of the parties is that no party to the contract has to pay monetary value of what it has received. This should be obviously without prejudice to the obligation of the recipient of the counter-performance under Article 172a(3) to refrain from further using what he has obtained (e.g. the personal data).

Amendment 182
Proposal for a regulation
Annex I – Article 174 – title

Text proposed by the Commission

Amendment

Payment for use and interest on money
received

Payment for use and interest on money
received ***and diminished value***

Or. en

Amendment 183
Proposal for a regulation
Annex I – Article 174 – paragraphs 1 to 1b

Text proposed by the Commission

Amendment

Alternative 3 [Alternative amendment to Amendments for Article 106 (1)(3)(a)(ii) and Article 119]

1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:

- (a) the recipient caused the ground for avoidance or ***termination***;
- (b) the recipient, prior to the start of that period, was aware of the ground for avoidance ***or termination***; or
- (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.***

1. ***Where a contract is avoided***, a recipient who has made use of goods, ***the digital content or the fruits*** must pay the other party the monetary value of that use for any period where:

- (a) the recipient caused the ground for avoidance; ***or***
- (b) the recipient, prior to the start of that period, was aware of the ground for avoidance.

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 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.

Or. en

Justification

This amendment belongs to a set of amendments concerning several alternatives the rapporteurs wish to put to discussion regarding adjustments as regards the balance between the buyer's right to termination and the seller's right to cure. The rapporteurs wish to underline that these options are proposed alternatively and by no means cumulatively. The present amendment allows the seller to claim payment for the use of the goods if the buyer decides to terminate the contract instead of invoking his less extensive rights, i.e. replacement

or repair. Paragraphs 1a and 1b add necessary clarifications.

Amendment 184
Proposal for a regulation
Annex I – Article 174 – paragraph 3

Text proposed by the Commission

3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods **received** or interest on money received in any circumstances other than those set out in paragraphs 1 and 2.

Amendment

3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods, **digital content or their fruits** or interest on money received in any circumstances other than those set out in paragraphs 1, **1a** and 2.

Or. en

Amendment 185
Proposal for a regulation
Annex I – Article 174 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. The recipient is liable under Articles 159 to 163 for any diminished value of the goods, the digital content or their fruits to the extent that the diminishment in value exceeds depreciation through regular use.

Or. en

Justification

This provision is proposed as it leads to random results if a buyer who cannot return the goods – e.g. because they were stolen, given away as a gift or totally destroyed – has to pay the full monetary value of the goods (Article 173(1)), whereas where the goods are severely damaged and therefore significantly diminished in value but nevertheless returnable, the buyer needs only to return the damaged goods (Article 172(1) and (2)). The buyer should have to pay damages also in the latter case.

Amendment 186
Proposal for a regulation
Annex I – Article 174 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. The payment for use or diminished value shall not exceed the price agreed for the goods or the digital content.

Or. en

Justification

As no party should benefit from restitution, payment for use or diminished value are restricted to the price agreed for the goods or the digital content.

Amendment 187
Proposal for a regulation
Annex I – Article 174 – paragraph 3 c (new)

Text proposed by the Commission

Amendment

3c. Where the digital content is not supplied in exchange for the payment of a price, but for a counter performance other than the payment of a price or without any counter performance, the recipient of the digital content does not have to pay for use or diminished value.

Or. en

Justification

Necessary clarification. When digital content was supplied not in exchange for a price, it could not be expected from a recipient to pay for use or diminished value.

Amendment 188
Proposal for a regulation
Annex I – Article 174 – paragraph 3 d (new)

Text proposed by the Commission

Amendment

3d. Where the digital content is supplied in exchange for a counter performance other than the payment of a price, the recipient of the counter performance shall not have to pay for use or diminished value of what was received. This is without prejudice to Article 172a(3).

Or. en

Justification

Necessary clarification. The proposed provision strikes a balance between the interests on the seller and the buyer. Where the buyer is not obliged to pay for use or for diminished value, the seller should also not be obliged to do so. This should be obviously without prejudice to the obligation of the recipient of the counter-performance under Article 172a(3) to refrain from further using what he has obtained (e.g. the personal data).

Amendment 189
Proposal for a regulation
Annex I – Article 175 – paragraph 1

Text proposed by the Commission

Amendment

1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.

1. Where a recipient has incurred expenditure on goods or digital content ***or their fruits***, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.

Or. en

Justification

Clarification.

Amendment 190
Proposal for a regulation
Annex I – Article 175 – paragraph 2

Text proposed by the Commission

2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

Amendment

2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content, ***or their fruits***, from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

Or. en

Justification

Clarification.

Amendment 191
Proposal for a regulation
Annex I – Article 177

Text proposed by the Commission

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.

Amendment

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, ***before notice of avoidance or termination is given.***

Or. en

Justification

Parties should be allowed to derogate from the restitution rules after the notice of avoidance or termination is given. This could be important for them in order to reach an amicable settlement.

Amendment 192
Proposal for a regulation
Annex I – Article 178

Text proposed by the Commission

A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.

Amendment

A right to enforce performance of an obligation, and any right ancillary to such a right, ***including any remedy for non-performance except withholding performance***, is subject to prescription by the expiry of a period of time in accordance with this Chapter.

Or. en

Justification

Clarification that remedies for non-performance are subject to prescription. The wording is in line with Article 185 which however only regulates the effects of prescription. The rules on prescription do not concern commercial guarantees as defined in Article 2(s).

Amendment 193
Proposal for a regulation
Annex I – Article 179 – paragraph 2

Text proposed by the Commission

2. The long period of prescription is ***ten*** years or, in the case of a right to damages for personal injuries, thirty years.

Amendment

2. The long period of prescription is ***six*** years or, in the case of a right to damages for personal injuries, thirty years.

Or. en

Justification

The 10-year prescription period has triggered critical reactions, whereas others, including the Commission, explain that its practical relevance is limited. In order to mitigate concerns, and agreeing that the practical effects for the long period are limited, the rapporteurs propose a 6-year period, which they believe to be an adequate solution in the light of the existing long prescription periods in the Member States.

Amendment 194
Proposal for a regulation
Annex I – Article 179 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Prescription takes effect when either of the two periods has expired, whichever is the earlier.

Or. en

Justification

Clarification of the relationship between the two periods of prescription.

Amendment 195
Proposal for a regulation
Annex I – Article 183 a (new)

Text proposed by the Commission

Amendment

Article 183a

Suspension in case of force majeure

1. The running of the short period of prescription shall be suspended for the period during which the creditor is prevented from pursuing proceedings to assert the right by an impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome.

2. Paragraph 1 shall apply only if the impediment arises, or subsists, within the last six months of the prescription period.

3. Where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run after the suspension comes to an end, the period of prescription shall not expire before six months have passed after the impediment was removed.

Or. en

Justification

Addition of a general force majeure rule in line with Article III.-7.303 DCFR. Article 183 (Creditor's incapacity) and the general principle of good faith and fair dealing do not appear sufficient to avoid unreasonably harsh results of impediments preventing the timely initiation of proceedings under Article 181. As the provision is only applicable to the short period of prescription, the effect on legal certainty is limited.

Amendment 196
Proposal for a regulation
Title III (new) – title

Text proposed by the Commission

Amendment

Title III
Flanking measures

Or. en

Amendment 197
Proposal for a regulation
Annex I – Article 186 a (new) – paragraph 1

Text proposed by the Commission

Amendment

Article 186a
Communication of judgments applying
this Regulation
1. Member States shall ensure that final
judgments of their courts applying the
rules of this Regulation are
communicated without undue delay to the
Commission.

Or. en

Amendment 198
Proposal for a regulation
Annex I – Article 186 a (new) – paragraph 2

Text proposed by the Commission

Amendment

2. The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgements of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public. It shall be fully systematised and easily searchable.

Or. en

Justification

The database is an important tool to promote a common understanding an application of the CESL. Recourse to it should therefore be easy and user-friendly.

Amendment 199

Proposal for a regulation

Annex I – Article 186 a (new) – paragraph 3

Text proposed by the Commission

Amendment

3. Judgments which are communicated under paragraph 1 shall be accompanied by a standard judgment summary comprising the following sections:

(a) the issue and the relevant Common European Sales Law article(s);

(b) a brief summary of the facts;

(c) a short summary of the main arguments;

(d) the decision; and

(e) the reasons for the decision, clearly stating the principle decided.

Or. en

Justification

In order to overcome the different approaches to judgments from across the EU and to enable

the database to be operated efficiently and with economy, a model standard judgment summary should be introduced which can then be incorporated into the database with minimal editing. This summary should accompany the judgment. It should be succinct, thus rendering it easily accessible and minimising translation costs, and should have the content as proposed.

Amendment 200
Proposal for a regulation
Annex I – Article 186 b (new)

Text proposed by the Commission

Amendment

Article 186b

Alternative Dispute Resolution

1. In contracts between a consumer and a trader, parties are encouraged 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].

2. This Article shall not exclude or restrict the parties' right to refer their case at any moment to court instead of submitting their dispute to an Alternative Dispute Resolution entity.

Or. en

Justification

An additional obstacle to cross-border trade consists in the lack of access to efficient and inexpensive redress mechanisms. The new Directive on consumer ADR laudably ensures EU-wide coverage of ADR. When using the Common European Sales Law, in particular traders should consider to commit to resolving disputes arising from that contract through an existing alternative dispute resolution entity as defined in Article 4(e) of the Directive on consumer ADR. This should be without prejudice to the parties' access to justice.

Amendment 201
Proposal for a regulation
Annex I – Article 186 c (new)

Text proposed by the Commission

Amendment

Article 186c

Development of 'European model contract terms'

- 1. As soon as possible and at the latest within three months of the entry into force of this Regulation, the Commission shall set up an expert group to assist it in developing 'European model contract terms' based on, and complementary to, the Common European Sales Law, as well as to foster its practical application.**
- 2. The Commission shall endeavour, with the assistance of the Expert Group, to present first European model contract terms within [xxx] of the entry into force of this Regulation.**
- 3. The Expert Group referred to in paragraph 1 shall comprise members representing in particular the interests of the users of the Common Sales Law for the European Union. It may decide to set up specialist sub-groups for separate areas of commercial activity.**

Or. en

Justification

The need to produce EU-wide standard model contracts in parallel to the CESL must be reiterated. Standard model contracts – in particular owing to Article 6(2) of the Rome I Regulation – would not work in the current legal setting. The rapporteurs are convinced that such model contracts, available off-the-shelf, will be crucial for the success of the CESL, and urge the Commission to start working on them as soon as possible and in parallel to the ongoing legislative process. They believe that an express reference thereto is needed in the operative text.

Amendment 202
Proposal for a regulation
Title IV (new) – title

Text proposed by the Commission

Amendment

Title IV

Final provisions

Or. en

Amendment 203
Proposal for a regulation
Annex I – Article 186 d (new)

Text proposed by the Commission

Amendment

Article 186d

Review

1. By ... [4 years after the date of application of this Regulation], Member States shall provide the Commission with information relating to the application of this Regulation, in particular on the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and on the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.

2. By ... [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content

and future developments of the Union acquis. Particular consideration shall further be given to whether the limitation to distance and in particular online contracts remains appropriate or whether a wider scope, including on-premises contracts, may be feasible.

Or. en

(See amendment for Article 15; the text has been amended)

Amendment 204
Proposal for a regulation
Annex I – Article 186 e (new)

Text proposed by the Commission

Amendment

Article 186e

**Amendment to Regulation (EC) No
2006/2004**

***In the Annex to Regulation (EC) No
2006/2004¹, the following point shall be
added:***

***'18. Regulation of the European
Parliament and of the Council on a
Common European Sales Law (OJ L ***,
, p. **).'

¹ *OJ L 364, 9.12.2004, p. 1.*

Or. en

Justification

Regulation 2006/2004/EC establishes a system of cooperation between national consumer authorities, with the aim of ensuring compliance with harmonised consumer protection legislation. As the Common European Sales law includes a complete set of fully harmonised mandatory consumer protection rules, the Regulation should also be covered by Regulation 2006/2004/EC.

Amendment 205
Proposal for a regulation
Annex I – Article 186 f (new)

Text proposed by the Commission

Amendment

Article 186f

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

2. It shall apply from [6 months after its the entry into force].

This Regulation shall be binding in its entirety and directly applicable in the Member States.

Or. en

(See amendment for Article 16)

EXPLANATORY STATEMENT

I. Introduction

The Commission's proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) (COM(2011)0635) is a ground-breaking initiative of key importance for consumers and businesses in the internal market. It is the fruit of the European contract law initiative – targeted at addressing internal market problems created by diverging national contract laws – which has been under discussion for many years, with Parliament repeatedly giving guidance and support¹, most recently in its 2011 resolution on the Commission's Green Paper².

Following their working document of October 2012, your co-rapporteurs are now presenting their joint amendments in a draft report. They would like to stress that this document is not an exhaustive paper, but identifies those points that your rapporteurs wish to put forward for further discussion, and presents them in amendment form.

Your rapporteurs wish, in particular, to thank the European Law Institute for its statement on the project³, as well as the experts and stakeholders who provided input at the events organised by the Legal Affairs Committee and Policy Department C in 2012⁴, which were all valuable sources for the rapporteurs' work.

This explanatory statement highlights the main changes proposed in the draft report. Detailed justifications have been provided for the individual amendments.

II. Issues

In general, your rapporteurs aim at improving the text so as to be more user-friendly, clearer and more coherent with the *acquis*.

1. Structure

The division of the proposal into a "chapeau" regulation and an annex has caused much confusion. Your rapporteurs therefore propose to merge regulation and annex, so as to obtain one consolidated and integrated instrument.

Your rapporteurs are also aware that more profound changes to the structure of the CESL

¹ European Parliament resolutions of 26 May 1989 (OJ C 158, 26.6.1989, p. 400), of 6 May 1994 (OJ C 205, 25.7.1994, p. 518), of 15 November 2001 (OJ 140 E, 13.6.2002, p. 538), of 2 September 2003 (OJ C 76 E, 25.3.2004, p. 95), of 23 March (OJ C 292 E, 1.12.2006, p. 109), of 7 September 2006 (OJ C 305 E, 14.12.2006, p. 247), of 12 December 2007 (OJ C 323 E, 18.12.2008, p. 364), of 3 September 2008 (OJ C 295 E, 4.12.2009, p. 31).

² European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (P7_TA-PROV(2011)0262).

³ http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf.

⁴ <http://www.europarl.europa.eu/committees/en/juri/events.html#menuzone>.

have been advocated. More specifically, it has been said that Part IV on obligations and the remedies of the parties could benefit from restructuring in order to enhance user-friendliness. Your rapporteurs could indeed imagine a structure that groups at least the buyer's and seller's obligations and the buyer's and seller's remedies. However, after reflection, and in order to facilitate work on the draft report and the amendments that will be tabled, they have refrained from proposing such far-reaching rearrangements within the text. Where it seemed feasible to improve the structure within smaller units, be it within a provision or a section or chapter, the corresponding proposals have been made.

2. Scope

Whether the CESL should be limited to online or distance transactions remains a difficult question. After careful consideration, your rapporteurs propose at this stage to offer CESL for distance contracts only. The term "distance contracts" has been proposed as it is already used in the acquis (Distance Selling Directive, Distance Marketing of Financial Services Directive, Consumer Rights Directive). The main area targeted is the rapidly growing internet sales sector, where the idea of an optional instrument met robust support, even from circles more reluctant towards a broader use of such instrument. It is obvious that the CESL, as one set of EU-wide rules, is the ideal tool for online trade. The draft report seeks to open up debate on this. It deliberately does not provide for a full adaptation of CESL to distance trade. This would require further work and analysis, the results of which could be fed into the ongoing legislative process. However, some elements have already been added at this stage with a view to the use of the CESL in distance contracts, for instance with regard to digital content and cloud computing.

As for the substantive scope, your rapporteurs have put forward a more practical and user-friendly solution for mixed-purpose contracts and contracts with a credit element.

3. Relationship with the Rome I Regulation

As the relationship with the Rome I Regulation, in particular Article 6, is a crucial issue for the functioning of the CESL, your rapporteurs have attempted to clarify this issue through drafting changes both to the recitals and to the articles. The aim is, firstly, to clearly qualify the CESL as a second regime within the legal order of each Member State (see amendments to Article 1 and Article 11(1)); secondly, to make it crystal clear that the agreement to use the CESL is not to be confused with a choice between two legal orders, but is a "choice between two different regimes within the same national legal order" (see amendments to Recital 10). Thirdly, your rapporteurs felt it necessary to elaborate more on why Article 6(2) of the Rome I Regulation has no practical relevance, i.e. "as it would amount to a comparison between the mandatory provisions of two identical second contract law regimes" (see amendment to Recital 12).

4. References to national law

Your rapporteurs believe that it is important, in the interest of clarity and legal certainty, to stipulate clearly within the operative part of CESL which areas are covered, and also to provide a list of issues that are not covered (see amendment introducing a new Article 11a). As regards the matters covered, adaptations might prove necessary in the further course of the legislative procedure, particularly if the streamlining of CESL towards distance contracts, in particular online contracts, so requires.

5. Good faith and fair dealing

The rapporteurs believe that the principle of good faith and fair dealing is an important tool to find equitable solutions on a case-by-case basis. However, they have carefully considered concerns that have been raised, including but not only from a common law perspective, where this principle is not known. They therefore propose changes and clarifications to the definition (see amendment to Article 2(b)) and to the expression of the general principle as such (see amendment to Article 2 of Annex I). The definition originally proposed has been read as preventing the parties from driving a hard bargain, which raised concerns in particular in B2B contracts. In order to clarify that this is not intended, the proposed wording stipulates that no party should abuse its rights, which should be in the spirit of "good faith and fair dealing". The change is also relevant for Article 86 on B2B unfairness controls and should mitigate the related concern that parties to a contract might not be allowed to follow their own interests when they negotiate. Furthermore, the rapporteurs believe that the principle of good faith and fair dealing within the CESL should be limited to the so-called "shield" function of that principle only, i.e. precluding a party in breach from exercising or relying on a right, remedy or defence, and the so-called "sword" function, i.e. a right to damages, should be deleted.

6. Remedies of the buyer

Your rapporteurs have carefully considered the system of consumer remedies put forward by the CESL. One of the main issues is that of a better balance as regards the free choice of remedies, bearing in mind the absence of cure by the seller, the absence of a requirement to give notice of termination with a certain time and the general principle of the absence of payment for use. They wish to recall the very high level of consumer protection offered by CESL, which goes beyond the *acquis*, and in particular the Consumer Sales Directive. That level matches almost entirely, or even goes beyond, national laws, which is important as avoiding the application of Article 6(2) of the Rome I Regulation (see above under 3.) appears desirable only if its objective – to guarantee that the consumer is as protected as he would be under his own law – is ensured in a different way. On the other hand, the provision in Article 174(1)(c) of the Annex which, by allowing a claim for use where free use would be "inequitable", appears to be intended as corrective in abuse cases concerning termination without payment for use, is not clear and may ultimately deter consumers from exercising their rights. It seems preferable, also in the interest of consumers, to have clear rules, whilst maintaining in principle the level of consumer protection provided.

Against this background, your rapporteurs wish to put up for discussion three alternatives in order to provide a better balance between the consumer's right to termination and the seller's right to cure, which is justified also in order to limit the described uncertainties. The rapporteurs wish to underline that these options are proposed for consideration alternatively and by no means cumulatively.

- As a first alternative, one could introduce a deadline of 6 months after the risk has passed to the buyer, after the expiry of which the buyer would have to accept cure (see option for an amendment to Article 106(3)(a)(ii)). The rapporteurs are aware that the Consumer Sales Directive, in its Article 5(2), provides for an option for Member States to introduce a notification requirement as from two months from detection, and that this option was not used by all Member States. On the other hand, a case could be made for strongly privileging the first six months after delivery in which the buyer in any case benefits from a reversal of the burden of proof as concerns the existence of the non-conformity at the time of delivery. A limitation of the free choice of remedies

for the period after those six months could be seen as being of limited effect, as in any case it becomes more difficult for the buyer to prove non-conformity after 6 months.

- As a second alternative, a requirement could be introduced that the consumer must give notice of termination within a reasonable time after he first became aware of non-performance. Afterwards, the right of termination would be lost, and the consumer would have to have recourse to other, less extensive rights, such as replacement or repair. It is true that this represents a restriction as regards the termination rights of the consumer. On the other hand, the case could be made that it would be in any case in the interest of the consumer to exercise his right of termination at his earliest convenience after he became aware of the non-performance, especially since his capacity to prove non-performance deteriorates over time.
- As a third alternative, finally, an obligation could be introduced for the consumer to pay for use in cases where he terminates the contract (as opposed to cases of avoidance, where the reason for bringing an end to the contract seems to be less in one party's sphere, see amendment to Article 174(1) to (1b)). Under this option, the consumer would still have a free choice of remedies, but the seller would be able to claim payment for the use of the goods if the buyer decides to terminate the contract instead of invoking his less extensive rights, i.e. replacement or repair. In practice this means that, when a certain period has elapsed since the delivery of the goods, it becomes economically more reasonable for the buyer to invoke one of the other remedies (e.g. repair or replacement or reduction of the price). It has to be acknowledged though that the calculation of use is not always straightforward.

Your rapporteurs believe that one of these adaptations needs to be done. They have attempted to openly summarise the merits and drawbacks they see in each of these options and invite discussion on this basis.

7. Restitution

Your rapporteurs have put forward a proposal for reformulation and restructuring of the restitution rules. The aim is to provide a solution which strikes a viable balance between both sides, so that it is clear and foreseeable for consumers what they have to pay or return so that they may be confident in exercising their rights.

8. Digital content

As regards digital content, your rapporteurs propose, in particular, a solution to cases where digital content is not paid for with money, but e.g. with personal data. The protection of the buyer is extended in these cases, as he should have the full range of remedies available to him (except for price reduction, as he did not pay money). Furthermore, specific provisions for restitution are proposed for these cases.

9. Prescription

Your rapporteurs are aware that the 10-year prescription period has triggered critical reactions, whereas others, including the Commission, explain that its practical relevance is limited. In order to mitigate concerns, and whilst agreeing that the practical effects for the long period are limited, your rapporteurs propose a six-year period, which they believe to be an adequate solution in the light of the existing long prescription periods in the Member States. They have proposed some additional clarifications to the prescription chapter.

10. Flanking measures

Your rapporteurs have proposed a number of additional provisions in order to anchor flanking measures in the operative part of the text: this concerns the database of judgments, the link with alternative dispute resolution, as well as the elaboration of EU-wide standard model contracts.

C. Conclusion

It is the view of your rapporteurs that the CESL has huge potential advantages for consumers and businesses in the internal market, in particular in the digital era, and offers an opportunity that should not be missed. Your rapporteurs invite colleagues to give further consideration to the amendments put forward as those amendments, in their view, could ensure the success of this instrument. They also look forward debating these matters further.