Updated Position Paper

UEAPME[1] position on the Proposal for a Regulation of the European Parliament and of the Council on a Common Sales Law for the European Union (COM (2011)635 final)[2]

This updated position paper of UEAPME, the European Association of Crafts, Small and Medium-sized Enterprises, analyses exclusively from the SME perspective the proposal of the Common European Sales Law[3] and the recently published Working Document of the Legal Affairs Committee[4] on this topic. The paper also takes into account the discussions that have been carried out at different levels, since the publication of the proposal[5]. The intention of this paper is to assist with the establishment of a balanced European instrument, i.e. one which addresses SMEs, besides consumers, in the field of contract law.

1. Comments on the Working Document of the Legal Affairs Committee of the European Parliament

UEAPME welcomes the Working Document of the Legal Affairs Committee of the European Parliament and its observations on the Common European Sales Law (CESL). In particular, UEAPME would like to highlight the following aspects. The relationship of the future instrument of the CESL with Rome I Regulations has a particular importance for SMEs. The only way the instrument can have an added value for SMEs is that through the application of CESL the application of Rome I is excluded. To have the appropriate legal guarantee for this is a core issue.

UEAPME completely supports the observations on the scope with respect of the inclusion of B2B businesses to the instrument. Only if SMEs have the possibility to use CESL also for the B2B transactions an added value will be achieved (see further detailed remarks under point 3). Still, UEAPME believes that on some points detailed analyses and improvements are needed (see further detailed remarks under point 4).

UEAPME also agrees on the comments of the Working Document related to the question of whether the CESL should only apply for cross-border transactions or also for domestic transactions. The same can be said with respect to the limitation of the scope to online or distance transactions. In both cases the details have to be

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

[2] Due to the complexity of this issue and to the ongoing negotiations between EU institutions, the position of UEAPME will be updated as events warrant.

[3] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, 2011/0284 (COD)

[4] Working Document 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)), 8.10.2012

[5] UEAPME has been following the work of the European Law Institute on CESL and monitoring its Statement has been published on the proposal. However because of the complexity of this issue UEAPME believes it is too early to reflect on the work and eventually a targeted stakeholders' consultation would be necessary in order to analyse the Statement.

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considered seriously in order to avoid any distortion in competition. The limitation to only cross-border cases could lead to the aforementioned distortion, however it might be useful to have the CESL first in place only in these kinds of cases. In this respect, UEAPME does agree with the observation of the Working Document regarding online and distance transactions. For the future, the issue of in which way a too strict limitation of the scope would undermine the attractiveness of the instrument has to be taken into account as well. For these reasons, UEAPME asks for detailed analyses regarding all considerations related to the scope, in particular taking into account the economic consequences for SMEs.

Furthermore, UEAPME supports the Legal Affairs Committee's intention to ensure a strong link to ADR and ODR in both cases, B2C and B2B. Also, the establishment of model contracts as supportive instruments with respect of the CESL is more than necessary. Otherwise, the practicable usability could be hardly ensured.

Beside of the proposals of the Working Document on accompanying commentaries, which are considered as useful, and a possible advisory board, UEAPME underlines again that SME organisations should be actively involved in the promotion of the new instrument. For this reason it is more than necessary that in any kind of advisory board representatives of the addresses are also going to be involved. Further, it is necessary that on the application this kind of associations receive supportive measures, e.g. financed trainings, by the European Commission. In practice, the first contact point for SMEs in any kind of business transactions is their SME association. Because of this, it is obvious that the success of the instrument will strongly depend on how it is going to be promoted by theses associations.

UEAPME fully supports the observations of the Working Document on Annex I. Further comments on Annex I can be found under point 4.

UEAPME also supports and takes reference on the opinion of the Committee on Economic and Monetary Affairs on the CESL[6].

2. Consumer Sales of Goods Directive[7], United Nations Convention on Contracts for the International Sales of Goods (1980) (CISG), Consumer Rights Directive[8]

Several issues that the proposal regulates are covered in the Consumer Sales of Goods Directive. Almost in every case it can be observed that the proposal goes beyond of the level of the Directive 1999/44/EC. UEAPME strongly opposes this approach. It is more than necessary to keep the already established level. Anything else would put unnecessary extra administrative burdens on SMEs. Besides of this, with the Directive 1999/44/EC there is already a well functioning exercise in place. It would be far too dangerous and not necessary to deviate from it. **For this reason, for the issues already regulated in the Consumer Sales of Goods Directive, UEAPME calls for the Common European Sales Law to follow exactly the same wording, with particular attention to the hierarchy of the remedies (see further remarks on this under point 4).**

[6] Opinion of the Committee on Economic and Monetary Affairs for the Committee on Legal Affairs on the 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)), 8.10.2012, 11.10.2012

[7] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

[8] Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament

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UEAPME would like to highlight that on those places where there is the intention to take the CISG as a basis and provisions taken over in the proposal, the exact wording of the CISG should always be followed in all language versions. UEAPME believes that everything else would lead to confusion. Furthermore, since the CISG only applies for B2B contracts, the CESL has to mention explicitly if any kind of provision has been taken over from the CISG. Even if in the practice it is clear that those provisions will have an affect only in B2B cases, it is necessary to mention this also in the text.

On those places where the Consumer Rights Directive has been taken over it is important to keep the exact wording regarding any language versions of the CESL.

3. Comments on the "Chapeau" of the proposal

Missing provision of the language issue

We would like to outline that the instrument does not make any provision on the language issue at this stage. At the first view this gives the impression that this approach can be in favour of the trader. Nevertheless the uncertainty caused by this provision would lead to more difficulties. Since this element is not covered by the CESL, it will be necessary for a trader to look into the national provisions on language requirements. This issue should be not underestimated, especially since several Member States have special requirements concerning the language in consumer sales contracts. This will remain mandatory, since the instrument is not covering these aspects. Traders will have to study these requirements also in the future.

Secondly, it must be noticed that the trader will have to use translation any time he decides to use the CESL, since according to article 13.3(b) annex I for distance contracts the pre-contractual information have to "*be in plain and intelligible language*". This means that all those issues which have to be drawn to the consumer's attention according to article 13 annex I (e.g. main characteristic of the goods etc.) have to be translated for those contracts which in fact are the mostly used means to conclude cross-border business transactions.
We believe that in an instrument which is aiming to regulate cross-border sales contract the issue in which language the contract should be written is a very important element. **For these reasons UEAPME believes that it should be considered whether any kind of reference on the applicable language would not ensure more legal certainty.**

Article 2, Definitions

The definition of "related services" in article 2(m) could cause problems. It has to be sufficiently ensured and explicitly mentioned that those related services like "installation, maintenance, repair or any other processing" are of a subordinate nature with respect to the original sales contract. According to our opinion, it would be rather complex to distinguish this according to the aforementioned definition. See our remarks under "services contract". If there are no adequate safeguards in this respect a possible **deletion of "related services" from the scope of the proposal should be considered.**

Article 4 and article 13, the cross-border element

UEAPME believes that the optional instrument should apply first cross-border and after a step-by-step approach, looking into the functioning of the instrument, an extension to domestic contracts should be considered. It is important to see that the "mixed approach", namely that it is up to the Member States to decide if they extend the application of the instrument to domestic contracts or not, will lead to difficulties. On the one hand, the lack of a uniform provision on this aspect can cause distortions in competition. On the other hand, it has to be considered that in case a Member State decides to apply the instrument also for domestic contracts also enterprises that do not have the intention to go cross-border at all would have to deal with two separate sets of sales law regimes. This would put definitely extra administrative burdens on SMEs. A general approach in this respect is necessary. If one Member State allows the application of the instrument also for domestic

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contracts and another one does not, major disadvantages in competition can be foreseen. For this reason UEAPME believes that one general mandatory approach is needed in this respect. The adopted instrument should be "tested" first in cross-border transactions in order to evaluate its functioning[9]. However, we would like to underline that **in general** UEAPME is not in favour of the establishment of different regimes for cross-border and domestic issues with respect to SMEs.

Budgetary implication

UEAPME is strongly disappointed about the fact that in the "Budgetary implications" it is **only mentioned,** that the "Commission will organise training sessions for legal practitioners using the Common European Sales Law". Since, one of the main users of the instrument according to the legislators' intention should be SMEs, beside of the consumers, it is more than crucial that SME organisations receive EU founded training, as well. Otherwise, it is hardly to accept the promotion of the new instrument by these kinds of organisations. In the practice members consult on advice their organisation, whether it recommends the use of instruments, such e.g. UN Convention on the International Sales of Goods or model contracts. For these reasons **UEAPME calls for the introduction of EU founded trainings for SME organisations and more involvement in order to provide appropriate advice on the new instrument. Only in this way can be insured that the instrument will reach SMEs and will not remain an isolated tool.**

Article 8.2 and article 9, Agreement on the use of the Common European Sales Law, (CESL)

Article 9 should serve as a basis for a high level of consumer protection and should ensure that the consumer take actively notice about the application of the Common European Sales Law. However, UEAPME considers the proposed framework as **not sufficiently clear** and particularly burdensome for SMEs from the administrative point of views. The proposed structure of article 8 and article 9 will lead in this current form to enormous difficulties if it comes to the question of applicable law.

UEAPME calls for the simplification of article 8 and article 9 in a balanced, user-friendly way for both parties. First of all, UEAPME believes that it is possible to merge article 8 and article 9, which would already simply the structure. The future article has to sate on the one side the agreement on the use of the CESL and on the other side has to take reference on the pre-contractual information. UEAPME also calls for the introduction of a time limit within the consumer has to give his explicit consent, as mentioned in the particular cases of article 9.1. The introduction of a time for confirmation would bring for legal certainty for both parties. Otherwise, both the consumer and the SME could face easily the situation that they have indented to conclude the contract under CESL, but because of the absence of consumer's explicit consent in case of off line transactions the application of the CESL is not valid. This again would lead to the situation that, for the contract, according to Rome I regulation, the national mandatory consumer protection rules would be applicable. The dimensions of the possibly difficulties which article 8 and article 9 in its current form would cause are hardly predictable[10].

Article 10, Penalties for breach of specific requirements

According to article 10 the Member States would have the possibility to lay down penalties in B2C relations in case of the breaches of the requirements by the trader of article 8 and article 9. UEAPME considers that on one side the introduction of this article goes against the original idea of the Common European Sales Law, namely the establishment of a uniform European wide system for business contracts if the different Member States will have different penalties. On the other side from the legal point of view UEAPME does not see the need of this article, since in case of the breach of the requirements of article 8 and article 9, there are legal consequences

[9] With the exception of CGPME

[10] UEAPME position paper on the Common European Sales Law, (specific remarks) p.2, http://ueapme.com/IMG/pdf/120119_pp_Specific_Remarks_CESL.pdf

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the trader has to face. **For these reasons** UEAPME calls for the deletion of article 10.

Issue of B2B, SME2SME
If the optional instrument is put in force at European level, we would support the fact that the scope also covers B2B activities in order to have an added value.[11] The instrument would not harm the relation between big and small businesses, since they are free to decide if they going to use it for their contractual relations. Furthermore, the **freedom of contract is also sufficiently ensured in B2B relations**. We believe that in case such an instrument will be adopted B2B application can be only an advantage in SME2SME business activities. It can be a solid ground for a possible contract even without using the whole instrument as such. In this stage we have to underline that **model contract** are from **bigger benefit** in any kind of **B2C and B2B relations**, than abstract law instruments. We would like to encourage the Commission to take action on this issue.

4. Annex I

Article 4.2, Interpretation
The article states that issues within the scope which are "*not expressly settled by*" the CESL should "*be settled in accordance with the objectives and principles (...) without recourse to the national law that would be applicable in the absence of an agreement*". We fear that this approach will open too many unanswered questions and will lead to legal uncertainty. Since there is no existing case law in respect to the CESL, the courts can have difficulties to apply this article. It can easily happen that a court in one Member State interprets a not expressly settled issue within the scope differently than a court of another Member States. Moreover, many other issues (see recital 27 of the proposal) that belong to a contract will be still governed by national law. This means that for some issues, which are within the scope but "*not expressly settled*" should be governed and interpreted in accordance with the principles and objectives of the new instrument, but for other issues which are explicitly further governed by national law another interpretation will apply. Moreover, this can cause more confusion than solutions not only concerning disputes but also in commercial practises.

Because of the legal uncertainty that SMEs have to face in case of "*not expressly settled*" issues, we fear that this will discourage SMEs to provide a contract under the CESL. UEAPME calls therefore for more clarification.

Article 20 in relation to Article 21, Burden of proof in case of Duty to provide information when concluding contracts other than distance and off-premises contracts
With respect to information duties in case of contracts others than distance and off-premises, according to the CESL "*the trader bears the burden of proof that it has provided the information required*". Since the Consumer Rights Directive (CRD) is not providing any provision on this point at all, there are no full harmonised European rules which have to be followed. The legislator has here the level playing field to establish a well balanced rule. Either following the rules of the Member States, where in case the consumer is taking reference on the failure of information requirements, the consumer has to prove that those information were not provided or at least a shared burden of prove should have been introduced with a reversal of the burden of proof after a certain/defined time.

[11] With the exception of the Czech Chamber of Commerce

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Chapter 2, Pre-contractual information

Article 23, Duty to disclose information about goods and related services

In our remarks on the feasibility study, UEAPME has already mentioned that article 23.1 is too vague[12]. Paragraph 1 does not need to be embellished by the list in paragraph 2. If it was necessary to make clear that the concept of "good faith and fair dealing" would have to be considered in the actual circumstances of the case, this could have been stated in paragraph 1. After the word "*which*" in the penultimate line the following words: *"in all the circumstances of the particular case"* can be inserted.

Article 24.5, Additional duties to provide information on the distance contracts concluded by electronic means

Article 24.5 foresees that the trader has to "*acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party*". It is to anticipate that the "*acceptance*" also means the "*standard information notice*" according to article 9 of the proposal but still not clearly mentioned. We stress again the need for clear provisions on the "*standard information notice*" of article 9 (see aforementioned remarks on this point) especially if annex I is taking reference on it. **UEAPME calls for clarification at least in the accompanying commentaries.**

Article 29, Remedies for breach of information duties

All the traditional sanctions are included into text (article 29.3). This means that the lack of required information can lead to the termination of the contract, on the basis of fraud or mistake, as well. Article 29.1 provides also a new rule, stating that in case of failure to provide the required information the other party has a right to damages. Since there is already a far too extensive list of information duties (in order to be in line with the Consumer Rights Directive) the remedies according to article 29 are too burdensome. In our opinion the sanctions for not meeting the information duties are too extensive and not proportional. They are also too uncertain and, therefore, onerous for businesses. **UEAPME calls for the deletion of article 29.3**

Chapter 3, Conclusion of contract

Article 34, Acceptance, Article 35.3, Time of conclusion of the contract

With respect to *"conduct"* it should be explained more in detail what it means? Where is the *"implied behaviour"* placed within the rule for *"acceptance"*? Is article 35.3 to be understood as *"implied behaviour"*?
UEAPME calls for the clarification in this respect in the accompanying commentaries.

Article 39, Conflicting standard terms

This rule is too vague. It is not clear how conflicting provisions need to be dealt with**. UEAPME suggests that in case of conflicting standard terms, the terms of the offerer should prevail.**

Chapter 4, Right to withdraw in distance and off-premises contracts between traders and consumers

Article 42.1 (a) Withdrawal period

According to this provision, the withdrawal period expires in case of sales contracts, including those under which the seller also agrees to provide related services, 14 days from the day on which the good was delivered to the consumer.

This provision is very unbalanced since it hasn't been taken into account that eventually the consumer can use

[12] http://ueapme.com/IMG/pdf/20110701__UEAPME__position_paper_feasibility_study.pdf

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a third party. We would like to refer to the provision in the Consumer Rights Directive, which sets up a much clearer situation.[13] There it is stated that the 14 days withdrawal period shall expire "in the case of sales contracts, the day on which the consumer or a **third party other than the carrier and indicated by the consumer** acquires physical possession of the good". Any kind of provision differing from that and not taking into account the role of a third party would cause legal uncertainty. UEAPME calls for following the provision of the Consumer Rights Directive on this issue. **Since the Consumer Rights Directive has been already adopted and Member States have to transpose it until December 2013, it would cause confusion if the new instrument on the Common European Sales Law would introduce a differing provision on such a crucial issue like the expiration of the withdrawal period. For this reason UEAPME calls for the adaptation of article 42.1 (a) to article 9.2 (b) of the Consumer Rights Directive**.

Chapter 5, Defects in consent

Article 51, Unfair exploitation

Having "*urgent needs*", being "*improvident*", "*ignorant*" or "*inexperienced*" should not be a justification for avoiding a contract. The duty of "*good faith and fair dealing"* is covering these situations envisaged in this article. It is obvious that article 51 in particular paragraph 1, will be used, as a general cancelation right of the consumers. It is also hard to believe that in view of the extend of the pre-contractual information duties, which the trader has to comply with there would be still improvident and ignorant consumers in B2C relations. Also the relation of this article to article 52.2 (b), Notice of avoidance is considered as more than critical. **For this reasons UEAPME calls for the deletion of this article.**

Article 52, Notice of avoidance

According to article 52.2(a) a party may avoid a contract in case of a mistake provided that it gives notice of the avoidance within six months after it becomes aware of the mistake. This period is far too excessive. It should not take six months to give notice of avoidance after having found out the mistake. In those cases **one or two months** are the **appropriate** provisions. How should an SME start to use this instrument if such burdensome provisions are introduced? Six months do not mean any difficulty for a large company but in the commercial life of a small enterprise it is indeed quite a lot of time. The aim of the proposal is to create an instrument that should make cross border businesses within Europe easier for SMEs. In order to reach this aim, UEAPME emphasises again that the i**nstrument has to be designed taking into account the particularities of SMEs** besides an appropriate level of consumer protection.
UEAPME also does not see the need and does not consider this article as an SME protection measure in B2B relations. **For these reasons UEAPME calls**
1) either for the shortening of the periods for the notice OR
2) at least the period should start with the conclusion of the contract.

Article 57, Choice of remedy

UEAPME is strongly opposing article 57, which according to our understanding gives the free choice of remedies under chapter 5 and chapter 11. There should be no choice between avoidance for mistake and remedies in case of non-conformity. **UEAPME calls for the modification of this article in a way, those in cases of non-conformity exclusively the remedies of Chapter 11 should apply.**

[13] Consumer Rights Directive, article 9.2.(b)

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Chapter 6, Interpretation

Article 58, General rules on interpretation of contracts

UEAPME calls for the deletion of the second part of article 58.2. According to this provision if "*one party intended an expression"* and "*at the time of the conclusion*" the other party "*could be expected to have been aware of that intention"* the expression should be interpreted in that way. This would cause unnecessary uncertainty. Everything that is necessary for the appropriate interpretation of a contract is said in this (already too long) article. It is a general principle that the contract has to be interpreted in line with the original intentions of the parties. This includes all relevant cases. However, we still could agree on this detailed article, but fear that article 58.2 as aforementioned would lead to legal uncertainty on the interpretation.

Article 64, Interpretation in favour of consumers

With respect to this article, we see the need to clarify who is bearing the burden of proof on the *"terms supplied by the consumer"*? Since this article does not mention *"individually negotiated terms"* but only "*supplied terms by the consumer*", we have some doubts that article 7.4 would have an application since that article is talking about the burden of proof in case of "*not individually*" and "*individually"* negotiated terms. In order to have a clear approach within the instrument and avoid legal uncertainty for both parties, we call for a coherent application and use of wordings. Either it has to be clarified what *"supplied"* in fact means or, which would be more favourable, *"supplied"* should be substituted with *"individually negotiated"*, not least because article 64 mentions again *"individually negotiated"* terms.

Chapter 7, Contents and effects

Article 68, Contract terms which may be implied

According to article 68, "*where it is necessary to provide for a matter which is not regulated by the agreement of the parties, any usage or practice or any rule of the Common European Law, an additional term may be implied*". We see the need here for clarification: the proposal counts 186 articles, which is by far not enough to provide a coherent European civil law regime. For many questions, gaps will be encountered (for example: the transfer of ownership: at the moment of the agreement upon the essential elements of the contract, at the time of the passing of the risk, at the time of the official signing of the contract, etc.?). For this kind of matters, parties will have to refer to national contract law. At the same time, article 4 and also article 68 states that issues not settled and additional terms can be added in line with the principles of the CESL. This will cause confusion, since on several open issues (see list in recital 27) the parties have to refer to the national law, but on other issues again interpretation in line with CESL is required. Moreover, if according to article 68 any national judge can add an implied term to a contract, this could lead to many unforeseen judicial problems. For certain small issues, this could be welcomed (although as mentioned before, we fear that problems will appear) but for more important issues, there should at least be a legal basis foreseen in the future regulation. Otherwise, where would a judge need to look for inspiration for the implied term? International treaties such as the United Nations Convention on Contract for the International Sale for Goods (Vienna Convention), the UNIDROIT principles, the case law of the ECJ, or national law?

Article 69, Contract terms derived from certain pre-contractual statements

Paragraph 3 of article 69 stipulates that a "*public statement made by or on behalf of a producer or other person earlier*" in the transaction chain "*is regarded as being made by the trader*". Exclusion is foreseen for those cases when the trader was not or could not be aware of the statement in the time of the conclusion. This provision is very similar to article 2.2 (d) of the Sales of Goods Directive and the exclusion seems to go also in the direction as article 4 of the Sales of Goods Directive. Nevertheless there is a major difference. In the Sales of Goods Directive the provision about public statement is placed under the conformity with the contract. In the CESL the not same, but very similar provision has been brought to relation with pre-contractual statements. This has been establishing another approach and goes beyond the already existing one of the Sales of Goods Directive. This

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again might lead to the particular situation that the trader has to control any internet content, which is simple not possible.

In order to avoid any unnecessary burdens for SMEs, UEAPME calls for maintaining the already existing and well functioning system of the Sales of Goods Directive in this respect and place this provision under article 100, which deals with the criteria for conformity of the goods and digital content of the CESL. Only in this way can be confusion between mandatory consumer protection law and the CESL be avoided.
In this respect we would like to highlight again, that where there are already existing provisions in the Sales of Goods Directives for the same matter in the CESL these provisions of the Directive should be taken over. **UEAPME does not support any deviation from the existing rules of the Sales of Goods Directive.**

Article 70, Duty to raise awareness of not individually negotiated contract terms
UEAPME calls for clarification on "reasonable step" in article 70.1. Further paragraph 2 of article 70 would put extensive administrative burdens on SMEs. According to this provision in B2C cases a contract term is not sufficiently brought to the consumer's attention with a reference on it, even in cases the consumer has signed the document. It would mean that the trader has to establish another, additional way, beside of the the consumer's signature, in order to prove that he raised awareness. This can be considered as clear exaggeration and will not lead to a higher level of consumer protection. Eventually the consumer would have to sign or click (depending on the kind of transaction) an additional document. We can hardly believe that the consumer would do it in a responsible way, but on the other side the trader has to comply with an additional duty. **For these reasons UEAPME calls for the deletion of article 70.2.**

Article 72, Merger clause
In the proposal, merger clauses have no effect whatsoever in B2C contracts (article 72.3). This means that even if in a B2C contract a period of negotiations (for example: B2C contracts sale of property, etc.) has taken place, a merger clause will not have any effect. This is unacceptable. In long negotiation processes, parties should be able to contain all agreements in one contract.
For this reason UEAPME calls for the deletion of article 72.3.

Chapter 8, Unfair contract terms

Article 85(w), Contract terms which are presumed to be unfair
The agreement on the length on the contract is a significant element of the contract, and has to be left to the negotiations between the parties. Both parties have the possibility to argue that the contract term was not individually negotiated, but it is not proportional to classify it already as "presumed to be unfair". Moreover, for certain businesses this is practically impossible to realise (for example businesses that provide the building and maintaining of a website). A contract to build a website for example requires large investments on the part of the business at the beginning of the contract. If the contract can then only be concluded for maximum one year, this would mean that these contracts will become far more expensive, since the business will have to make sure that it gets a return for investment in that year.

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Chapter 9, General Provisions[14]

The general approach that the CESL has taken regarding non-performance is far too broad from an SME point of view. The currently applicable regime of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been a well established one at European level. The Directive 1999/44 EC is focusing on the lack of conformity and, as already mentioned before UEAPME advocated to follow this structure also regarding the optional instrument of sales law.

Article 87.2, Non-performance and fundamental non-performance and article 114, Termination for non-performance

The definition of "fundamental non-performance" according to article 87.2 is to be considered from the SME point of view as broad and vague. First of all the wording is following only partly the wording of the UN Convention for International Sales of Goods. UEAPME calls for adaptation to the original of the CISG. Further UEAPME sees significant difficulties in relation to article 114 Termination for non-performance. This provision establishes different regimes for B2C and B2B relations. This makes the situation unnecessary difficult. In B2B the termination is linked to article 87.2 and in B2C to the significance of the lack of conformity. This will mean that the trader has to know the difference between the two. Beside of this article 3.6 of the Sales of Consumer Goods Directive use the expression of "minor" lack of conformity. For this reason **UEAPME calls for modification in that way that the termination is linked to the fundamental non-performance** but at least in order to keep coherence **for following the wording of the Directive 1999/44/EC with respect of article 114.2**. Secondly the introduction of article 87.2 b) is not clear enough, also not existing in the CISG. **In order to avoid legal confusion UEAPME calls for the deletion of article 87.2b)**

Also in the context of article 87 and article 114 the loss of right to terminate according to 119.2 a) the contract has to be mentioned. According to this provision, in B2C contracts there is no time limit for the consumer to terminate the contract. This means that besides the provisions on prescription, which again are considered too extensive for SMEs, the consumer does not lose his/her right to terminate. Even if he/she becomes aware of non-performance at the beginning of the contractual relation, he/she can enforce his right on termination at least up to one year. This clause is bringing a far too extensive imbalance in the contractual relation.
UEAPME calls for the extension of the scope of article 119.1 for B2C sales contracts as well.

Article 88, Excused non-performance

This provision on excused non-performance is giving the impression that the CESL is following the approach of strict liability i.e., independent from fault. Since the instrument is meant to be addressed to SMEs, in order to stimulate cross border business activities in the first place, strict liability will be definitely not supportive to achieve this aim. Otherwise, this provision together with article 106.4 and 159 result in the trader always being fully liable for all damages (including consequential damages), independent from his own fault.

Article 89, Change of circumstances

This provision on the change of circumstances refers to an obligation for the parties to enter into negotiations with a view to adapting or terminating the contract in case of excessively onerous performance "*because of an exceptional change of circumstances*". From a practical point of view, which is decisive for SMEs when it comes to the decision to opt for CESL, this rule is far too unclear. Firstly, there is an obligation of the party to perform "*even if the performance has become more onerous*" because of higher costs of the performance as agreed or "*because the value of what is to be received in return has diminished*". This again means that everything else in

[14] The remarks of this paper on chapter 9-15 are partly corresponding with the comments have been made by UEAPME for the Workshop organised by the Legal Affairs Committee of the European Parliament:

http://www.europarl.europa.eu/committees/en/juri/studiesdownload.html?languageDocument=EN&file=74543

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the change of circumstances should be considered as "*exceptional change*" and "*excessively onerous*". In these cases, the parties have to start negotiations in order to adapt or terminate the contracts. In deed through article 110.3 which is dealing with issue when performance cannot be required, some more clarity is brought in the relation. **Still, UEAPME calls for more clarity on this point at least in the accompanying commentaries** in order to ensure the correct understanding of article 89. From a practical point of view, it can be also quite challenging for an SME to judge when it has to start negotiations with the other party in order to comply with this obligation. This would be also a point which in the accompanying commentaries should be clarified.

Chapter 10, The seller's obligations

Article 91.b, Main obligations of the sellers

This provision takes reference on the transfer of ownership as one of the seller's obligations, although this is not regulated by the proposal as such. The reasons for leaving the issue of transfer of ownership out might be that this question is not considered to have a direct link to the contract as such. Despite this perception, this is an important point when it comes to sales of goods. The idea and aim behind any kind of sale of goods is that the ownership of a good is going to be transferred to another party. The lack of any reference in this respect will cause difficulties from an SME point of view. **According to UEAPME it would bring more clarity if it is stated that the ownership is going to be transferred at the conclusion of the contract, unless otherwise indicated.**

Article 97, Goods or digital content not accepted by the buyer

In case goods or digital content are not accepted by the buyer the seller has to take reasonable steps in order to protect the good, if the buyer left him/her in the possession of the good. In this context article 134, which deals with the termination by the seller in case of fundamental non-performance by the buyer, and article 135 about the termination for delay after notice are relevant, as well. According to article 135.2 if the non-performance of the buyer is non-fundamental, the seller has to give in B2C relations an additional time for performance of 30 days to the buyer. From the SME point of view, this clause is more than burdensome. Also in this respect the fundamental question of consumer responsibility and responsible consumer behaviour has to be raised. It is without doubt that one of the core responsibilities of the buyer, apart from the obligation to pay the price of the good, is to collect it. However, article 97 states in an indirect way that not collecting the good is not a fundamental non-performance. Otherwise, the seller would have the right to terminate the contract immediately. Not only this is not the case, but in addition the seller has to allow for another 30 additional days for the consumer's performance[15]. In the meantime, the seller bears costs to preserve the good. Although article 97.3 is providing for the seller to be reimbursed for any of his/her justified costs, after having sold the good the question of what happens with the costs related to the storage, in case the value of the good does not cover them, remains open. **UEAPME calls for clarification on it that receiving delivery is a fundamental obligation of the buyer.** If receiving delivery is not considered a fundamental obligation, **at least the period of 30 days which the seller has to give the buyer in addition for performance before termination of the contract according to article 135.2 must be shortened to a maximum of 14 days.**

Article 99, Conformity with the contract

It is again not understandable why the CESL has decided not to follow the structure of Directive 1999/44/EC with respect of this article. Article 2 of 1999/44/EC regulates this issue quite clearly and in a user friendly way. From an SME point of view, this is not the case for the CESL. **UEAPME calls for maintaining of the provision of the Consume Sales if Goods Directive in this respect.**

[15] Article 135.2, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

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Chapter 11, The buyer's remedies

For UEAPME and its members', the provisions related to the buyer's remedies are considered among the most relevant issues of the instrument. The main question in this respect is whether provisions are providing completely free choice to the consumer in B2C relations in case of non-performance, and particularly in case of lack of conformity, or whether they follow the principle of remedies based on the hierarchy. At European level, the approach of hierarchy is provided in article 3 of 1999/44/EC in case of lack of conformity. UEAPME does not believe that the proposed system of the CESL in this respect will make the instrument more attractive for consumers. Also because, this does not mean that the instrument is going to provide more certainty for the consumer. There are often cases, when it comes to the application of remedies by a buyer, that the latter is simply unable to decide which remedy is the appropriate one for the situation in question. Often, technical knowledge is also required for the trader to find out which remedy is the most appropriate one. Termination as such can be hardly in the interest of any of the parties already at the first stage.

For an SME not knowing how the buyer might use its choice of remedies will establish such an uncertain situation that the SME will not make use of the instrument. **Because this is considered as one of the most relevant point for UEAPME members regarding the discussions on the CESL we call for maintaining the system of the hierarchy of the Consume Sales of Goods Directive.**

Article 106.1.c), Overview of buyer's remedies

UEAPME believes that termination should be the last resort in all cases. It can clearly be said that SMEs will be discouraged from using the instrument through this very radical solution. On the second place of the list is the strict regime of article 106.3 a) "*the buyer's rights are not subject to cure by the seller*". For the trader the situation is even worse because the buyer does not have any obligation to examine the goods in B2C. Only in B2B relations is the examination of the good required, according to article 121.

Article 121, Examination of the goods in contracts between traders

It is welcome that article 121 regulates the examination of the goods in contracts between traders. However it is not understandable why this obligation is not extended to B2C contracts as well. At this point, a new approach is clearly necessary, especially since, due to the strict and unbalanced regime of the buyer's remedies, it is not possible to abstain from the examination obligation. Article 122 regulates the requirement of notification of lack of conformity in B2B cases and in this way establishing the same situation as the aforementioned article 121. Here again the question why the same provision has not been introduced for B2C relations must be asked.
UEAPME calls for the extension of article 121 and article 122 also to B2C cases.

Further B2B relations 14 days might be too restrictive for examination in some cases. In B2B relations, the buyer often needs to examine the good from the technical point of view because of the particularities of B2B contracts. With regards to technically complex goods, 14 days might be not always enough. **For this reason, UEAPME calls for the establishment of a flexible regime, by reference to and taking into account the characteristics of the goods.**

Article 107, Limitation of remedies for digital content not supplied in exchange for a price

We wonder whether it would not be better to leave the decision to the buyer on whether he wants remedies or claim damages or any extra compensation.

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Chapter 12, The buyer's obligations

Article 130.3 and 130.5, Early delivery and delivery of wrong quality

Article 130.3 states that in case of the delivery of greater quantity by the seller for the buyer, the buyer can retain it, and according to 130.4 it will be *"treated as having supplied under the contract"* and the buyer has to pay for it. However, in B2C relations according to 130.5 the provision of 130.4 does not apply if the seller delivered greater quantity *"knowing that it had not been ordered"*. We miss with respect to this provision any reference on the responsible custody of the buyer concerning article 130. It would be crucial to state that if the buyer is in possession of the good (or digital content), which was delivered in greater quality and article 130.5 is going to be applicable, the buyer still has to treat the good or the digital content in line with the principle of the responsible custody.

Chapter 13, The seller's remedies

Article 132, Requiring performance of buyer's obligations

From the SME point of view, article 132 is considered more than critical. The first impression is that this provision seems to protect the seller. Nevertheless, to benefit from this protection SMEs have to fulfil requirements which are practically nearly impossible for them.

One of the main concerns is that most of the times the fact that the buyer is not taking delivery is also combined with non payment. These cases cause the biggest financial and cash flow problems for SMEs. During the legislative procedure of the future instrument the economical circumstances of our times should be kept in mind. Not receiving payments is unfortunately the most typical and serious problem for SMEs, and this jeopardises their existence, especially nowadays. Article 132.2 states that it is the right of the seller to require delivery by the buyer and recover the price "*unless the seller could have made a reasonable substitute transaction without significant effort or expense".* Already the interpretation of *"significant effort"* should be clarified. The buyer will still have the possibility to prove that the seller could have made a substitute transaction. The requirement of making any kind of substitute transactions with or without effort, in order to recover the price is not appropriate. In the everyday business life it is without any doubt that if an SME has the possibility to have a substitute transaction, it will do so. The possibility of substitute transactions will also have additional financial costs and waste extra human resources. It can be also costly in terms of time to look for substitute transactions, and maybe it would not be worth the effort in some cases. Moreover, in relation to this issue, article 135.2 is requiring that in B2C relations the trader can only terminate the contract in case of non performance of the buyer, if the trader has given an extra 30 days period for performance. Already this period is considered as far too long and in this way burdensome for SMEs. This again means that the seller, even if he/she wants to look for a substitute transaction according to article 132.2, has to notify the buyer in advance and has to give him the mentioned additional time for performance. Only after this time has expired can the seller start to look for a substitute transaction. This establishes a clear unbalance in B2C relations. In addition, according to article 97.1, the seller has to protect the good during this 30-day period. This again is bringing more imbalances and unpredictable consequences in the trade relations.

For these reasons UEAPME calls for the deletion of article 132.2 on the substitute transaction and for shortening the period of 135.2.

Chapter 14, Passing of risk

Article 140, Effect of passing of risk

After the risk has been passed to the buyer, he/she is obliged to pay the price. This is the case in B2C relations in general when the buyer "*has acquired the physical possession of the goods"* according to article 142.1. In case of B2B relations, this happens according to article 143 *"when the buyer takes delivery of the goods or*

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digital content or the documents representing the goods". The buyer only has the right to reject the payment for the price after the risk has been passed, and according to article 140, only if the *"loss or damage is due to an act or omission of the seller".*
In other words: Once the risk has passed to the buyer he is obliged to pay the full price for the goods even if these goods are damaged or lost. Only in cases where the loss or damage is due to an act or omission of the seller this obligation shall not apply, i.e. when the loss or damage of the goods is due to an act or omission of the seller the buyer does not have to pay for the lost or damaged goods even though the risk has passed already.
The wording of article 140 CESL (*"...is due to..."*) seemingly only refers to the relevant chain of causation whereas the question if any fault leading to the mentioned "act or omission" is required for the loss/damage to be attributed to the seller is not taken into account.
Thus, this wording establishes a regime of strict liability without taking into account whether the trader has any fault in the case of the act or the omission which caused the loss or damages. This causes a significant imbalance and is an aspect on which improvement is definitely needed from the SME point of view.
UEAPME calls for the reconsideration of the system of strict liability.
Article 142.4, Passing of risk in a consumer sales contract
It is important to clarify that *"the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the"* FIRST *"carrier"*.

Article 144.2, Goods placed at buyer's disposal
According to this article *"if the goods or digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk should pass when the delivery was 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"*. UEAPME has some concerns regarding the balance of this article. Instead of AND, the word OR should be added. In a normal situation, the buyer knows when the delivery is due, since according to article 16 the buyer has to receive information about it. This means that the buyer has to be aware about the time and circumstances of the delivery and there is no need to add anything else, and definitely not an additional condition. Who bears the burden of proof on when the buyer has become in fact aware? This will cause legal uncertainty.

Chapter 15, Obligations and remedies of the parties (to a related service contract according to Part V)

Article 152,Obligation to warn of unexpected or uneconomic cost
Article 152.1 stipulates that the service provider needs to draw to the attention of the customer if (a) the related service would cost more than originally indicated or (b) "*the related service would cost more than the value of the goods"* and this is known by the service provider. From the SME point of view, additional information on article 152.1 (b) would clearly cause extra burdens. In the everyday reality, if the aforementioned case according to article 152.1 (b) appears and the difference between the amount of the good and the related service is so high, this should be already known from the beginning. If the difference is not high, then it is not relevant. Moreover, there are types of related services which could be more expensive than the good, despite the fact that the service is considered "only" related to the good. It also has to be clarified what is happening if the customer is not giving it constent in the case of article 152.
For these reasons UEAPME calls regarding 152.1.a) for the introduction of the criteria that "the cost of the related service" has to be considerably/notably greater "then already indicated by the service provider". Further UEAPME calls for the deletion of article 152.1b). UEAPME calls for the introduction of a certain period, within the customer has to give his consent with respect to this article.

Article 156, Requirement of notification of lack of conformity in related service contracts between traders
This provision deals with the requirement of notification of lack of conformity in B2B service contracts. In line

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with article 122.2, it could be suggested to introduce the same (or at least some) period within which notification has to be given by the customer[16]. Since this rule would not be mandatory in B2B contracts, any other timeframe could be negotiated as well. However, it would help to establish a coherent framework for the CESL and to improve the self-standing character of the instrument, as far as this is possible. For the same reasons, it would be also very useful to introduce the same kind of notification obligation in respect of B2C contracts.

Article 158.1, Consumer's right to decline performance
According to this provison *"the customer may at any time give notice to the service provider"* that there is no need for performance at all, or of further performance, of the related service. Although article 158.2 (b) states that the customer has to pay the price if there is no reason for termination and in this way it is ensured that the service provider can get paid, in order to establish clear **rules UEAPME calls for fix a time limit, instead of what is mentioned in paragraph 1 of article 158 or at least that the notice has to be given before the performance has started**. This is needed especially because in B2C relations this rule has a mandatory nature.

Chapter 16, Damages and interest

Article 159.1, Right to damages
It is not clear why the *"creditor is entitled to damages for loss caused"* only *"by the non-performance"*. Moreover, it is also not clear under which requirements an excuse concerning this paragraph is possible, e.g. due diligence. Furthermore, with respect to this article we have the impression that the issue of the duty to mitigate is not clearly covered in Annex I.

Chapter 18, Prescription

We would also like to underline that article 179 imply extremely long prescription periods, between 2 to 30 years. In our view it is far too long and absolutely inacceptable. In particular the prescription period for remedies in case of lack of conformity has to be brought in line with the existing Sales of Goods Directive (1999/44, article 5) both with regard to the length and the start of the period. The proposed starting point of the "short" prescription period would lead to tremendous legal uncertainty.. Article 186 only allows in B2B relations to short the period by agreement between the parties. For this reason UEAPME calls for the modification of the prescription period. It **should therefore run from the time of delivery** as provided in the Sales of Goods Directive, but at least it should be significantly shortened.

Articles that should apply to both B2C and B2B cases [17]

Article 23: In B2B contracts the supplier only has a duty to provide information concerning the main characteristics of the goods.
This is very different from the three pages of informational duties that are foreseen in B2C contracts. Consumers therefore need to be informed about practically every aspect of the contract, while a business only needs to be informed about the main characteristics.

Article 24.2 and article 27: Where a contract is concluded by electronic means, the business must make available to the other party technical means for identifying and correcting input errors.
Although this article foresees that businesses and consumers can withdraw from a contract that was concluded

[16] 'According to the requirement of notification of lack of conformity in sales contracts between trader the buyer has to notify the seller about the lack of conformity within two years after the good was handed over to the buyer, article 122.2, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law,* Brussels, 11.10.2011 COM (2011) 635 final

[17] WKÖ and ZDH agree only with the comments on articles 105, 114, 121 and 122.

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without these guarantees, the additional right to damages can be excluded for businesses. We do not see why this right to damages should be treated differently for consumers and businesses.

Article 28.3: A party who supplies information needs to take reasonable care that the information supplied is correct and is not misleading. In a B2C contract this cannot be derogated from.
Although a party that gives incorrect information might not be in compliance with his duty of good faith and fair dealing, we see no reason why only in B2C contracts parties cannot derogate from this article. This issue definitely does not have any effect on the freedom of contract.

Article 56.2: In a B2C contract, parties may not exclude or restrict remedies for mistake.
Why only in B2C? To extend the application of this article to B2B relations would not harm the freedom of contract.

Article 69.4: Terms derived from certain pre-contractual statements
In B2C contracts, parties may not derogate from this article, which foresees that statements made by the business or third parties prior to the conclusion of the contract can become terms of the contract under the modalities of this article.

Article 86.1: Meaning of 'unfair' in contracts between businesses
We suggest that article 86.1(b) is re-drafted as follows: *"it is of such a nature that its use is contrary to good faith and fair dealing"*. The reference to gross deviation from good commercial practice does not add anything to the concept of "good faith and fair dealing". A party could have acted in accordance with good commercial practice but not in accordance with "good faith and fair dealing".

Article 105.2: In a consumer sales contract, any nonconformity which becomes apparent within six months of the time when the risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the non-conformity.
There should be a possibility for the business to prove that the nonconformity did not exist at the time when the risk passes. And in any way, if this article is maintained, there is no reason to provide it in B2C relations only, since in B2B it would not have any effect on the principle of the freedom of contract.

Article 114: A buyer may terminate the contract in case of fundamental non-performance. In case of B2C-contracts, the consumer may terminate the contract in case of any non-performance, unless the non-performance is insignificant (Article 155).
We do not see why such a difference in B2C versus B2B contracts would have to be included.

Article 115: In case of a delay in performance, the buyer may provide a notice giving the seller an additional period of time in which the seller may perform. After that period of time, the buyer may terminate the contract.
This article may not be derogated from in B2C contracts. We do not see why this rule only applies in B2C contracts. Here again we do not see any harm for the contractual freedom.

Articles 121 and 122: In B2B-contracts the buyer is expected to examine the goods within as short a period of time as possible, and give the seller notice in case a non conformity is discovered.
We do not see why this duty is not foreseen for consumers as well.

Article 148.4 and 148.5: "Where in a contract between a business and a consumer the service includes installation of the goods, the installation must be such that the installed good conform to the contract as required by Article 101". Further according to 148.5 in B2C contracts, parties may not derogate from the effects of this article that further provides that the service provider needs to make sure that the service is performed with care and skill. This should be a universal obligation, and not only an obligation in B2C contracts, since there is no

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effect on the freedom of contract principle.

Article 150: A service provider may entrust performance to another person, but remains responsible for performance. In B2C contracts, parties may not derogate from this effect.
There is absolutely no reason why a business may exclude its liability for performance by a third party that he chose, in B2B-contracts, since again the contractual freedom would not be jeopardised.

Late payment

Article 166 and 167 reiterates the provisions of the Late Payments Directive. However, this article includes a new provision that is only applicable in B2C contracts. This new provision of article 167 states that:
- a consumer can only be asked for interest if his non-performance is not excused (while in B2B contracts, no such rule is mentioned);
- interest does not start to run until 30 days after the creditor has given notice to the debtor.

This means that in practice a consumer only has to pay interest after 30 days. Even if an invoice stipulates that it serves as a notice, the business will still have to wait 30 days before it can ask interest, even if the invoice states that the amount due, is to be paid within 20 days for example. We suggest sticking with the original text of the late payment directive to prevent various legal interpretations.

Congruence between expert text and CRD and Late Payments Directive
It would be absolutely crucial to use exact the same wording concerning those which have been already regulated in other instruments. Some examples:

- definition of off-premises contracts in the CRD (article 2(8)) and in the Common European Law (article 2(q)) are not worded in exactly the same way;
- definition of distance contracts in the CRD (article 2(7)) and in the Common European Law (article 2 (p)) are not worded in exactly the same way.

The same goes for the rules on late payments; since there is already a Late Payment Directive, we would urge that the rules embodied in that Directive would be copied, or that the expert text would simply refer to the directive.

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5. Conclusion

The balance between the protection of consumers and the protection of businesses, which is absolutely vital for an optional instrument to be successful, is absolutely lacking, as proved by the very wide right of withdrawal, the informational duties and the (new) sanctions when these duties are not respected, the fact that the consumer's rights are not subject to the seller's right to cure, the fact that the requirements of examination and notification (articles 121 and 122) do not apply for the consumer, the fact that the consumer can terminate a contract in any case of non-performance (except if insignificant), while a business can only terminate in case of fundamental non-performance (article 114) the fact that a consumer does not have to give notice of termination within a reasonable period of time (article 119). **For these reasons UEAPME calls the legislator to adjust the aforementioned short comings in order to establish a well balanced contract law instrument for both parties.**

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