Position Paper[1]

UEAPME[2] 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) (specific remarks)[3]

I. Comments on the "Chapeau" of the proposal

Missing provision of the language issue

We would like to outline that the instrument has failed to make any provision on the language issue at this stage. This would have been more than necessary with respect to an instrument that is meant to be used in cross-border transactions for sales contracts. Since this is not covered by the Common European Sales Law (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. These examples show again that it will be not possible to use the CESL as a self-standing instrument and that it will not decrease the reluctance of the traders if it comes to cross-border transactions.

Thirdly, 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.

Article 2, Definitions

Article 2(g) defines "damages" as "*a sum of money to which a person may be entitled as compensation for loss, injury and damage".* How can a word be explained with the same word?

Article 2(l) defines "consumer sales contracts". We are wondering what the situation is when a consumer is selling something to a business (e.g. second-hand cars).

[1] This position paper contains our specific remarks. For our general remarks, see http://www.ueapme.com/IMG/pdf/120119_pp_General_Remarks_CESL.pdf

[2] 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.

[3] 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.

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Furthermore, the definition of "related services" in article 2(m) could cause problems. It has to be clarified 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". For this reason **we propose the deletion of "related services" from the scope of the proposal.**

Article 4 and article 13, the cross-border element

As already mentioned in our general remarks, an 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. We fear 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. According to our opinion it would not be the right approach to extend the scope for both, cross-border and domestic sales contracts in the first stage, since this is a completely new instrument.[4] If it will be adopted this instrument should be "tested" first in cross-border transactions in order to evaluate its functioning. 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.

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. However, the framework proposed by the regulation in order to achieve this, is not the correct approach, since the way how it is designed it is **not sufficiently clear** and will put **unnecessary extra administrative burden on SMEs**.

According to article 8.2 the application of the CESL will be only valid in B2C relations *"if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract."* In addition **article 9** is establishing the rules on "*standard information notice in contracts between a trader and a consumer".* The following issues need further consideration:

- In recital 23 it is stated that there is in the regulation a "*standard information notice*" in order to avoid "*unnecessary administrative burdens*" for traders**. If an SME has to provide information twice**, it costs time and money, meaning an unnecessary administrative burden. Why it is not possible to include the information and the explicit statement of the consumer on the application of the CESL in the pre-contractual information notices?

- Article 9.1 is stating that the consumer is not "*bound by the agreement until the consumer has received the confirmation"* on the agreement "*accompanied by the information notice and has expressly consented subsequently to use of the Common Sales Law".* There is **no time limit** when the consumer has to give its explicit statement for the trader. The only reference is that the trader has to provide the "*additional information*" "*before the agreement"*. It gives the impression that it is not possible to make an agreement at all before the consumer has given his confirmation on the extra information statement. However, further in this article it is stated that the consumer is not bound by the agreement if he did not receive the extra information notice.

[4] With the exception of CGPME

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What is happening if the trader is providing and sending the good to the consumer, but for the consumer there is no time obligation within which he has to provide an answer on the application of the CESL? Furthermore, how can the trader prove that the statement was received by the consumer? There are also provisions missing concerning the burden of prove with respect to this article. This provision can lead to confusion on both sides:

a. If there is no clear time indication the consumer can have the impression that this explicit statement can be done any time.

b. The trader can easily face a situation in which the consumer has already started to use the good for a while without giving the explicit statement. It can lead to a situation that the consumer at the end is not bound according to article 9.2 by the agreement.

Article 14, Communication of judgments applying this Regulation

We welcome that the proposal is planning to establish a database on final judgments of the Member States and the European Court of Justice applying the rules of the future Regulation. We hope that the necessary translation of the judgments will be available as well. However, from the SME point of view it is quite doubtful if the average European enterprise will contact such a database and will search for relevant judgments. This shows again that it is not possible to use the instrument without the involvement of legal advice. In connection to this, we have some doubts on how a uniform interpretation can be ensured, since Member States have their own case law practises. Since not all issues affected by this instrument are regulated in it (e.g. transfer of ownership) and will remain within national law, the case law practises of the Member States will have an influence on the instrument anyway. In our view this will undermine the uniform interpretation of the instrument.

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.[5] 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.

II) 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.

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

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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 11, Computation of time

Since the CESL is designed in the first place for cross-border business activities, the issue of the public holidays have to be clarified. There is no clear answer to the question of what happend if in one country, for example in the country of the trader a day is public holiday, but this is not the case in the country of the consumer. Because of the nature of this instrument, this question is crucial. The absence of clear provisions will lead to many difficulties for both parties.

With respect to article 11.2(b) there are examples in countries where a public holiday is declared for a working day. For example if a Thursday is a public holiday, in some Member States the Friday is given as a bridge in order to have a long weekend. This Friday has to be recuperated on a Saturday or Sunday. We see the need to give on this point a clear provision in order to avoid misunderstanding.

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.

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[6]. 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 not clear if the "*acceptance*" also means the "*standard information notice*" according to article 9 of the proposal. We stress again the need for clear provisions on the "*standard information notice*" of article 9 (see aforementioned remarks on this point).

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

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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.

Article 34, Acceptance

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"*?

Article 35.3, Time of conclusion of the contract

Is article 35.3 to be understood as *"implied behaviour"*?

Article 39, Conflicting standard terms

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

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 a third party. We would like to refer to the provision in the Consumer Rights Directive, which sets up a much clearer situation.[7] 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.**

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.

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

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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.

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.

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?

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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.

Article 78, Contract terms in favour of third parties

With respect to article 78.1 it should be clarified that the consent of the other party should be asked as well, if any right is going to be conferred on third party. With respect to article 78.4 on the rejection of the conferred right to and by the third party, the words *"impliedly accepted"* must be deleted. It makes the situation unsecure.

Article 85(w), Contract terms which are presumed to be unfair

This provision was listed in the Feasibility Study of the Expert Group under "Terms which are always unfair". In the final proposal it was relocated under "contract terms which are presumed to be unfair". Both are not justified. 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.

Article 91.b, Main obligations of the seller

In this point it is stated that the "*seller (...) must transfer the ownership of the good, including the tangible medium on which the digital content is supplied*". This point is a good example of our worries, as we mentioned already beforehand, that this instrument will leave many open questions since it is impossible to regulate all kinds of relevant elements. The question of ownership is a crucial one with respect to contract law. This means that for this question, as it is also stated in recital (27) "*all matters of contractual or non-contractual nature that are not address 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 Regulation (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule."* The transfer of ownership belongs to those issues as well.

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

According to Article 97, the seller needs to take reasonable steps to protect and preserve goods of which the buyer failed to take delivery of. Though the seller is entitled to be reimbursed for any costs incurred for this protection, he is only discharged of his obligations to deliver if he deposits the goods with a third party, or if he sells the goods to a third person, after notice to the buyer, and on the express condition that he pays the net proceedings to the buyer.

We do not see the reasoning behind this article. If a buyer fails to collect the goods on the agreed date, it is logical to assume that a seller informs the buyer of this, and asks him to take delivery within a reasonable, but short time. In the meantime, the seller has indeed an obligation to preserve and protect the goods, and he may ask for any costs this preservation demanded. Moreover, we would welcome if the responsibility of the buyer would be also outlined in order to inform the seller that the good will not be collected on the agreed day. In such cases, both parties have obligation, not only the seller.

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However, we do not see why the seller could only be discharged of his obligation to deliver if he deposits the goods with a third party, or if he pays the net proceeds to the buyer. We think that the logical approach would be to delete paragraph 2 of article 97, or to replace it with the rule, that if the buyer does not come to take delivery of the goods on the date the seller set forth in his notice, the seller may consider the contract to be terminated. An exception on this rule should be made for **goods** that were **made on specific instructions** from the buyer. In this case, the buyer should have an **obligation** to pay and take delivery of the good.

Article 102, Third party rights or claims

Article 102.1 provides that goods or digital content have to be free of any right or claim of a third party. However, it is not clear who is liable for this. It should be clarified as well who bears the cost if eventually the third party has to be released of his rights. If both parties know that the good or digital content is not free of third party rights or claims, they have to share the costs in order to ensure that situation according to 102.1.

Article 106.1 and 106.3, Overview of buyers' remedies

Before the buyer exercises his rights listed in paragraph (1) he should be required to notify the seller of the extent and nature of the non-performance of the obligation. **Such notification is a fundamental principle is most legal systems.** The buyer's rights should be subject to the seller's right to cure unless the non-performance was so fundamental that the buyer would have no confidence in the seller's ability to effectively cure.

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.

Article 112.2, Return of replaced item

According to article 112.2 "*the buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement".* We consider this article unbalanced. We can agree on it that the buyer can use the item according to the nature of the good or digital content but if a damage caused by the buyer appears, the buyer should be liable to pay for any damage to the replaced item in the period prior to the replacement.

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.

Article 138, Notice of termination

It would be important to clarify in which way the notice should and can happen (fax, email or registered letter).

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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.

Article 158.1, Customer's right to decline performance

According to article 158.1 "*the customer may at any time give notice to the service provider that performance, or further performance of the related services is no longer required*". This is far too broad. There should be more restrictions on how long it is possible to give notice in order to establish legal certainty. It would be proportionate if the customer would have the possibility to give the notice until the performance on the related service has not started, if he/she is aware about the start of it.

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.

Non-performance

Non-conformity of the goods

- Article 105.2 states that in consumer sales contracts, any non-conformity 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. The possibility for the seller to prove that the non-conformity did not exist at that time should be included.

- Article 122: the professional buyer loses his right to terminate the contract in case of non-conformity, if he does not give notice of this non-conformity within two years after the goods were handed over to him. There is a need for clarification: now it can be read as if this article applies even if the defects to the product are still hidden at that time, which obviously cannot be the case.

- The **requirements of examination** and notification (articles 121 and 122) do not apply for the consumer. This rule is burdening businesses disproportionately without any reasonable justification.

- The consumer does not have to give notice of termination within a reasonable period of time (article 119.2). This rule is burdening businesses disproportionately without any reasonable justification.

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Chapter 13, Remedies in case of non-performance

As a general rule, in case of a non-performance the buyer may[8]:

Ask for performance

- Under article 110.3 (performance may always be asked, unless disproportionate), a consumer always has the choice between repair and replacement, unless one of the choices would be disproportionate (article 111). If the business in a B2C contract has not completed repair or replacement within one month, the consumer may resort to other remedies, except withholding its own performance.

Withhold its own performance

- For as long as his reasonable belief that the seller will not perform continues.

Terminate the contract

- If the non – performance is fundamental in B2B-contracts (article 114.1);
- If the non-performance is not insignificant (B2C) (article 114.2);
- In case the non- performance is not fundamental: if the buyer gives the seller a fixed amount of time to perform (article 115.1);
- In case of anticipated non-performance (article 116);
- There must always be a notice to the seller in order to exercise this right. This notice has to be given within a reasonable time, unless the buyer is a consumer (article 118).

Reduce the price

- In a proportionate way (article 120).

Claim damages and interests (article 106, 1e)

All of this means that if the buyer is a consumer (article 106, 3):

- The consumer's rights are not subject to the seller's right to cure;
- The requirements of examination and notification (articles 121 and 122) do not apply for the consumer;
- The consumer can terminate a contract in case of significant non-performance, while a business can only terminate in case of fundamental non-performance (article 114);
- Consumers do not have to give notice of termination within a reasonable period of time (article 119).

These rules are burdening businesses disproportionately without any reasonable justification.

Chapter 14, Passing of risk

Article 142 is worded in the same way as article 23 of the Consumer Rights Directive (CRD) proposal, by providing that the risk passes on to the buyer only after he takes physical possession of the goods. However, the proposal introduces an extra "protection" on consumers, stating that this rule even applies in distance or off premises contracts if the consumer fails to take over the goods and this non-performance is not excused (article 142.3). This is not realistic: if a consumer has to take delivery of the goods and does not fulfil this obligation, there is no reason why the business would still have to carry the risk.

[8] Article 106

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Chapter 15, Section 1, Application of certain general rules on sales contracts

The services regulated in chapter 15 which are related to sales contracts (related services) open up the principal applicability of the CESL to almost all services. The reason is the wording of article 2(m) which is too broadly defined. According to this article, chapter 15 applies to all services which are offered by a seller and are related to a sales contract. However, we would like to state again that the **concerned services are only subordinated annex services and should not be in the major focus.** The sales contract with its major obligations shall stay of paramount importance in the contractual relations of the parties.

Therefore, it is essential that the services aspect is only a subordinated contractual obligation. Otherwise, a clear distinction between sales and services contracts would not be possible, especially if a transfer of ownership is included. A distinction between sales and services contracts is a complex issue. To ensure legal clarity it would be better to resign the codification of related services.

The service provider's obligation to warn the customer that the service would cost more than the value of the goods after the service has been provided (article 152) is too onerous and cannot be required as a general obligation. The service provider may not know the value of the goods and, furthermore, it may only become apparent during the course of the service that it would – ultimately – cost more than the value of the goods.

According to article 152.2, the customer does not have to pay the "*price exceeding the cost already indicated*" or *"the value of the goods or digital content after the related service has been provided"* if information was not provided by the service provider on the unexpected and uneconomic cost. This point has to be softened, since the commercial reality is often not simple, as already mentioned before.

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. **The prescription period should therefore run from the time of delivery** as provided in the Sales of Goods Directive.

Articles that are binding only in B2C[9]

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 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.

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

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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 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 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.

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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 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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III. Conclusion

The initial purpose of the drafting of the expert text was to stimulate cross-border transactions by strengthening the legal certainty and lowering the costs for businesses and consumers, thereby strengthening their faith in the internal market. On the basis of the 186 articles that are provided here, it is very doubtful that businesses, especially the smaller SMEs, will be inclined to use a European instrument that would be based on this proposal. 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 possibility for the consumer to terminate the contract even in case of a significant non-conformity (instead of a fundamental non-conformity), 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 case of significant non-performance, 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).

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