



Statement
of the European Law Institute
on the
**Proposal for a Regulation on a
Common European Sales Law**
COM(2011) 635 final

1st Supplement:
Response to the EP Legislative Resolution
of 26 February 2014

The European Law Institute

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Following publication of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, on 11 October 2011, an ELI Working Group, assisted by an Advisory Committee, considered the Proposal and commented upon it. A first paper was approved by the ELI Council as an official Statement of the ELI on 7 September 2012. It was subsequently published on the ELI website and was received very positively.

In order to take account of political developments and discussions following the Statement's publication on 7 September 2012, the Working Group resumed its work and prepared a 1st Supplement to that Statement. As some of the developments were related to E-commerce and digital content, further experts joined the Working Group and Advisory Committee. Both consisted of members of the judiciary, legal practitioners and academics, from a broad range of legal traditions. The work was greatly assisted by comments received from the ELI Council and Senate.

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The views set out in this Statement should not be taken as representing the views of those bodies, on whose behalf individual members of the working party and advisory group were also acting.

The Working Group would like to thank JOKE BAECK, ELENA BARGELLI, GERHARD DANNEMANN, CHARLAINE HERBAIN, AXEL METZGER, THOMAS RAINER SCHMITT, HARTMUT WICKE and REINHARD ZIMMERMANN for their helpful comments.

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PREAMBLE

On 7 September 2012, the Council of the European Law Institute (the ELI) approved a paper prepared by the working party on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final ('the Proposal'), as an official Statement of the ELI ('the 2012 Statement').

Since the publication of the 2012 Statement, there has been a great deal of further discussion throughout Europe. Amongst other things, it became clear that digital content and cloud computing needed to receive more attention and that a political compromise to restrict the CESL's scope to distance contracts, and in particular to those contracts concluded on the internet, was developing. Against this background the ELI working party resumed its work and prepared this 1st Supplement to the 2012 Statement. A first draft still referring to the EP Legal Affairs Committee's draft report of 18 February 2013 was presented and publicly discussed at the ELI Projects Conference in Vienna in September 2013. The working party is greatly indebted to those ELI Fellows who subsequently submitted comments and suggestions for further improvement. The final version of the 1st Supplement, which takes account of the European Parliament's Legal Affairs Committee's report of 24 September 2013 and the EP Legislative Resolution of 26 February 2014, was considered and approved, subject to consideration of a final round of comments to be supervised by the Executive Committee, by the ELI Council on 28 February 2014.

This Supplement to the 2012 Statement, just as that Statement did not, does not consider the major political choices made by the Commission in respect of the Proposal and later on by the European Parliament and the Council. The working party accepted those choices, in particular the imminent political compromise to restrict the CESL to distance contracts, as given. Should decisions be made by the competent political bodies to amend the scope and overall regulatory approach still further the working party will submit another adapted paper.

The ELI working party has again critically examined the CESL. It makes a number of practical recommendations the aim of which is to maximise the CESL's utility and use in practice.

EXECUTIVE SUMMARY

Introduction

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

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

Proposed revisions

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

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

- the language to be used for communications between the parties;
- the means of distance communication that may be used;
- the means of distance communication and related support that must be provided;
- internet auctions;
- a prohibition of the use of the buyer's personal data after withdrawal, avoidance or termination by the buyer;
- a clarification concerning the buyer's obligation to take delivery.

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

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

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

Finally, this Supplement to the 2012I Statement makes some observations on selected issues in the EP Legislative Resolution, in particular,

- exclusions from the scope;
- contracts with an alien element;
- approach to linked and mixed contracts;
- termination;
- restitution, and;
- unfair contract terms.

By only highlighting some of the issues that were raised in 2012, the ELI does by no means withdraw from other positions that were taken in 2012 but are not reiterated in this 1st Supplement. Rather, the ELI takes account of the fact that, at this stage of the legislative process, it is of the essence to set priorities.

Part A: EXPLANATIONS

- (1) The ELI Working Group notes that there appears to be an emerging view that the scope of the instrument should be restricted to distance contracts, the vast majority of which will, in practice, be online contracts. The definition of a distance contract would be in line with the definitions in Directives 97/7/EC and 2011/83/EU but would include contracts between traders. The Working Group equally notes that the restriction to distance contracts brings with it a stronger focus on digital content, including a desire to use the CESL as a tool for further unleashing the potentials of cloud computing. It has therefore submitted a number of practical recommendations relating to the on-going revision of the Instrument.

I Consequences of the restriction to distance contracts

- (2) In accordance with the ELI Working Group's guiding principles on the CESL not to call into question major political decisions it refrains from commenting on the decision to restrict the CESL's scope to distance contracts. It highlights which implications would follow from a restriction to distance contracts with a view to coherence, clarity, and user-friendliness of the Instrument.

(1) Paradigm shift from Directive 2011/83/EU to Directive 2000/31/EC

- (3) At first sight, a restriction to distance contracts seems to imply no more than a deletion of rules which are applicable exclusively to off-premises and on-premises contracts. Such rules currently exist in Chapters 2 and 4 of Annex I in the Commission Proposal COM(2011) 635 final. On a closer look, however, it becomes clear that a focus on distance contracts, and in particular online contracts, actually entails a more far-reaching **paradigm shift for the rules governing the pre-contractual phase and the conclusion of the contract**. The CISG, while designed mainly for distance contracts, dates from the pre-electronic era; it therefore does not take modern communication technology into account. The PECL, the DCFR and Directive 2011/83/EU as three of the main sources of inspiration for the rules in the CESL Proposal take on-premises contracts between parties of equal bargaining power as the conceptual starting point and add specific protection for consumer contracts in general and distance and off-premises contracts in particular. Thus, the all-dominating dividing line is that between b2c and b2b contracts; electronic contracts are treated as an anomaly rather than as the paradigm case.

(4) A look at instruments specifically tailored to meet the needs of online trade, in contrast, suggest that the predominant dividing line in online trade is really a different one. Article 10(4) of Directive 2000/31/EC on electronic commerce indicates that the dividing line is between mass communication contracts on the one hand and contracts concluded by individual communication on the other. In electronic mass communication, traders as customers are in a similar situation to consumers, as their bargaining power or skills, which would usually justify a lower level of protection than for consumers, are not crucial factors. In the light of this, the ELI Working Party recommends **restructuring Chapter 2 of the Proposal so as to take better account of the difference between mass communication and individual communications**. At the same time there should be a definition of mass communication contracts in Article 2 of the Proposal along the lines of:

‘mass communication contract’ means a contract where offer and acceptance are electronic and do not involve the exclusive exchange of individual communications; a communication is not individual merely because a party has made a selection among pre-formulated options or was able to add remarks in a box provided for that purpose;

(5) Seen from a perspective that takes distance marketing in general and E-commerce in particular as the paradigm case rather than as different grades of anomaly from the paradigm case it seems also advisable to produce a more coherent and comprehensive draft of Chapter 2, more or less **merging pre-contractual information and related duties which have their origin in Directive 2011/83/EU, requirements from Directive 2000/31/EC, and the requirements that have to be met in order to make terms which are not individually negotiated a part of the contract**.

(6) As the amount of information to be provided, in particular, on a website, does not lead to an increase in costs to be borne by traders it seems to be also advisable to **integrate the general information duties that must be given under Directives 2000/31/EC on electronic commerce and 2006/123/EC on services in the internal market**. Detailed suggestions for revision are **to be found in Part B**.

(2) Language of the contract

(7) So far, determination of the language to be used has been outside the scope of the Instrument. The EP further underlines this in its Amendment 76 by including the list of subject matter outside the scope of the CESL in the text of the Instrument itself. While having accepted this in the 2012 Statement against the background of the much broader scope the Proposal then had, the ELI Working Group now believes that in an Instrument specifically tailored to meet the requirements of distance trade, in particular online trade, freedom to select a language is a prerequisite if the CESL is to be a success. The

ELI Working Party therefore suggests modifying Amendment 76 and **deleting “(c) the determination of the language of the contract;”**. It suggests adding an Amendment which clarifies in the rule on freedom of contract that this principle includes the **freedom of language**:

Article ...
Freedom of contract

1. Parties are free to conclude a contract and to determine its contents **and language**, subject to any applicable mandatory rules.
2. In relations between traders parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

(8) As buyers, in particular consumers, need **protection against communications being imposed on them in a foreign language**, and as neither Article 24(3) nor Article 76 of the Proposal nor the newly proposed Article 61(2), cf. Amendment 129, offer a sufficient degree of protection, there would have to be additional rules. Members of the working group have tried out cross-border consumer shopping from large internet sellers and experienced that they were confronted with up to four different languages, some of which they had never accepted and did not understand. In part, different languages were used by the seller itself, in part they were used by payment service providers or logistics providers to whom the consumer was referred in the course of the ordering process. In order to change this unfortunate situation there should be an additional Amendment after Amendment 83 along the lines of the following:

Article ...
Language

1. **For communications relating to the conclusion of a contract or the rights or obligations arising from it a party must use a language the use of which has been accepted by the other party, such as by entering into negotiations or initiating an ordering process in this language.**
2. **Where a trader is dealing with a consumer and in mass communication contracts the trader must, for all communications relating to the conclusion of a contract or the rights or obligations arising from it, use or offer to use a language that was used for the initial communication between the parties, such as through the trader’s website, and the use of which has been accepted by the other party. The trader may use another language at a later point in time where the other party has given explicit consent to the use of that other language before the contract was concluded or has previously opened a customer account in that other language.**
3. **Communications within the meaning of this Article include communications by a third party, such as a payment service provider, to which one party has referred the other party in relation to the contract or the rights or obligations arising from it.**
4. **A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in [damages] apply with appropriate adaptations.**

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

(9) In order to make sure the seller cannot rely on having made a communication that was not made in a language accepted by the other party, the ELI recommends adding another safeguard in the Article on 'Notice' (infra at (11)).

(3) Means of distance communication

(10) Similar issues arise concerning the means of distance communication to be used by the parties. If the CESL is to be an instrument specifically tailored to meet the requirements of distance trade, in particular online trade, there must be a rule on means of distance communication which may be used by, in particular, sellers. The ELI recommends introducing a very similar rule as concerning language (supra at (8)) and imposing a duty on each party to **use only such means of distance communication as have been accepted by the other party**. This could mean an additional Amendment along the lines of the following:

Article ...

Means of distance communication

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

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

2. **Where an address or similar code, such as a mobile phone number, may be used for different types of distance communication, or where accessibility depends on further technical equipment, such as a particular hardware or software, paragraph 1 applies accordingly to the specific type of distance communication unless the other party could, in all likelihood, be expected to use or have access to that specific type.**
3. **The rules in this Article are without prejudice to any more specific rules, such as rules of civil procedure, and to a party's right to contact the other party by all available means where that party can prove it has made best efforts to contact the other party in line with the rules in paragraphs 1 and 2 and the other party has failed to react.**

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

(11) In order to provide for a more **effective sanction** against the use of means of distance communication the other party was not prepared to use, the Working Group recommends additional Amendments of the Article on Notice which adapt the rule to the specific requirements of distance trade and which take into account both also the desirability of bringing the CESL into line with Article 12 of the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts:

Article ...

Notice

1. **Without prejudice to Articles [language] and [means of distance communication] and notwithstanding any provision to the contrary, a notice may be given by any means, including conduct, which is appropriate to the circumstances. Notice includes communications generated by means of a computer programme or other automated means without review or intervention by a natural person each time an action is initiated or a response is generated by the system.**
2. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
3. **A party who fails to comply with the rules under Articles [language] or [means of distance communication] may not rely on having given the notice in question, or on its taking effect at a particular time, unless that party shows that, and when, the other party has**
 - (a) **in the case of Article [language] properly understood the notice;**
 - (b) **in the case of Article [means of distance communication] actually become aware of the notice.**
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

(4) Fairness and support in distance communication

(12) However, protection against the unsolicited use of distance communication is not the only issue that arises in this context. The ELI Working Group recommends introducing a requirement that the seller who provides the possibility of placing an order via distance communication must also **provide appropriate, effective and accessible means for giving any kind of subsequent notice relating to that contract (in particular for**

exercising a right of withdrawal) by using the same means of distance communication.

It is often difficult for consumers to use different means of distance communication, such as when a seller offers to conclude a contract electronically on a trading website but then fails to provide the necessary means for the consumer to exercise the right of withdrawal on the same trading website or by clicking on a link provided in the email confirming the purchase. Consumers are often confronted with the standard withdrawal form, which they have to print out, fill in and send by post. In the digital age, this is proving to be an obstacle which fewer and fewer consumers are prepared to overcome.

(13) The ELI Working Group therefore suggests an additional Amendment along the lines of the following (see paragraph 1), which should be reinforced by a more specific rule in the context of pre-contractual duties concerning withdrawal and also a specific sanction, such as prolongation of the withdrawal period, where the trader fails to provide appropriate, effective and accessible means to exercise the right of withdrawal by the same means as were used for placing the order (for details see Articles 24(1)(c) and 41(2) in Part B). The rule suggested by the EP in Amendment 106 could, in the same context, be formulated in a more general way (see paragraph 2):

Article ...

Support in distance communication

1. **Where a seller provides to the other party the possibility of placing an order using a particular means of distance communication, the seller must provide to the other party appropriate, effective and accessible means for giving any kind of subsequent notice relating to that contract, in particular for exercising a right of withdrawal or remedy for non-performance, by using the same means of distance communication.**
2. **Where a seller provides to the other party the possibility of giving a notice by a means of distance communication which does not allow the other party to store a copy, in particular where an order is placed or a right of withdrawal or remedy for non-performance is exercised electronically on a trading website, the trader has a duty to communicate to the other party an acknowledgement of receipt, which must display the notice itself or its content, on a durable medium without undue delay. Where several related notices are given consecutively in the course of an ordering process, such as confirmations of various kinds, only one combined acknowledgement of receipt must be given.**
3. **A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in [*damages*] apply with appropriate adaptations.**
4. **In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.**

(5) Internet auctions

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

Article ...

Auctions

1. **A contract under the Common European Sales Law may be concluded in the way that the seller tenders goods, digital content or related services to the public or to several persons by way of fixing a starting price and inviting bids ('auction').**
2. **Every bid constitutes an offer. Without prejudice to other rules under this Section, an offer lapses when a higher bid is placed.**
3. **Where the seller provides the means for concluding a mass communication contract and fixes a time limit for making bids, and unless otherwise indicated by the seller or a third party to whose selling conditions the seller submits,**
 - (a) **the auction proposal constitutes an anticipated acceptance of the highest offer which fulfils the conditions stipulated in the auction proposal;**
 - (b) **the auction proposal may be revoked only for good reasons other than unexpected bidding behaviour once the first bid which fulfils the conditions stipulated in the auction proposal has been placed;**
 - (c) **the contract is concluded when the auction has reached its time limit.**

(6) Use of personal data

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

Article ...

Effects of withdrawal

1. Withdrawal terminates the obligations of both parties :
 - (a) to perform the contract; or

- (b) to conclude the contract in cases where an offer was made by the consumer.
2. **After withdrawal, both parties are obliged to make restitution of what they have received in accordance with Articles ... and The obligation to make restitution includes a duty to refrain from using and to delete what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.**

(16) A similar rule should be inserted in the Chapter on Restitution. This would mean a modification of Amendment 224 along the lines of the following, which would make Amendment 232 superfluous:

Article ...

Restitution in case of avoidance, termination or invalidity

1. Where a contract **or part of a contract** is avoided or terminated by either party **or is invalid or not binding for reasons other than avoidance or termination**, each party is obliged to return what that party ("the recipient") has received from the other party **under the contract or affected part thereof. The obligation to make restitution includes a duty to refrain from using and to delete what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.**
2. ...

(7) Taking delivery

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

Article ...

Taking delivery

1. ...
2. **In a contract between a trader and a consumer, in particular, physical absence of the consumer or his representative at the agreed upon place and at the time when the seller makes an attempt to deliver does not amount to non-performance of the obligation under paragraph 1, unless a specific date and time or period of time had explicitly been agreed upon by the parties.**

II Issues specifically relating to digital content

(18) It is important, in the view of the ELI Working Group, that the CESL is made equally applicable to what is supplied as a tangible item (such as a book printed on paper), to what is supplied as intangible data on a tangible medium (such as an E-book stored on a CD-ROM) and what is supplied in an entirely intangible manner (such as an E-book downloaded from the internet and stored in the purchaser's computer). It would be unrealistic in the twenty first century to treat these transactions as conceptually different, the first two governed by the law of sales and the third governed by something vaguer and to a certain extent dominated by issues of intellectual property law. They are simply different ways of supplying the product which is delivered to the purchaser. All three should, where certain conditions are met, be treated as sales and within the scope of the CESL. Furthermore it is our view that they should be treated in parallel so that there is clarity about the obligations and rights and duties of the seller and the buyer. In the following paragraphs we set out our analysis of the issues and the approach which should be taken in the CESL.

(1) The role of the licence agreement

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

(20) The ELI Working Group does not take a position on the *UsedSoft* decision as such. However, the decision serves to illustrate that entitlement in the digital world can and should, as far as ever possible, be **construed in a way that is parallel to the treatment of entitlement in the tangible world**. In the CESL Proposal, the definitions of the sale of goods on the one hand and of the supply of digital content on the other are so far not aligned in a parallel way. Rather, the definition of sale of goods exclusively focuses on the transfer of ownership, without mentioning the more factual aspect of the seller's obligation to deliver the goods, whereas the definition of supply of digital content exclusively focuses on the factual aspect of the making available of the digital content, without mentioning the licence agreement. The ELI Working Group therefore recommends that **both delivery and transfer of ownership be mentioned in the definition of sale of goods, and both supply and provision of a licence or similar right**

to use which makes the customer's legal position equivalent to ownership be mentioned in the definition of sale of digital content. Such right could be granted or transferred by the seller, or it could arise from the applicable law; in the latter case the seller would have to put the buyer into a position that makes him enjoy the right.

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

(22) This could mean a rule summarising the substantive scope of the CESL in a comprehensive manner along the lines of the following:

Article ...

Contracts covered by the Common European Sales Law

1. **The Common European Sales Law applies, subject to an agreement of the parties to that effect, to distance contracts which are**
 - (a) **contracts for the sale of goods, which means any contract under which a trader ('the seller') delivers goods and transfers the ownership of these goods, or undertakes to do so, to another person ('the buyer'); it includes a contract for the supply of goods to be manufactured or produced, whether or not according to the buyer's specifications;**
 - (b) **contracts for the sale of digital content, which means any contract under which a trader ('the seller') supplies digital content, whether or not on a tangible medium, and makes available a right to re-use the digital content for an unlimited period, or undertakes to do so, to another person ('the buyer'); it includes a contract for the supply of digital content designed according to the buyer's specifications;**
 - (c) **contracts for the provision of any related service, excluding financial services, linked to goods or digital content sold under the Common European Sales Law, such as installation, maintenance, repair or any other processing, or storage, provided by the seller of the goods or digital content to the buyer.**
2. **Provided that the seller was acting in pursuit of economic interests, the Common European Sales Law shall apply irrespective of whether a price was agreed for the goods, digital content or related service.**

(23) This should not exclude the possibility that the copy is only usable in combination with other hardware or software, as any tangible equipment sold may also depend on specific, additional, equipment or even on the continuous supply from the same seller of other items (e.g. coffee capsules). Neither should it exclude, in principle, the possibility that the copy itself has, for technical reasons, a limited lifespan and becomes unusable after, eg, one month, as it is likewise possible to sell goods which are for one-way use only or which deteriorate quickly. However, it must be borne in mind that a buyer of digital content who has been provided a licence to use the content for an unlimited period of time would not commit an infringement if he overcomes technical barriers and uses the copy for longer or without components foreseen by the trader.

(24) In accordance with the suggested definition of the substantive scope, Amendment 178 should be revised along the lines of the following:

Article ...

Main obligations of the seller

1. The seller of goods or of digital content must:
 - (a) deliver the goods or supply the digital content;
 - (b) transfer **or undertake to transfer** the ownership of the goods, including the tangible medium on which the digital content is supplied, **or make available a right to re-use the digital content for an unlimited period, or undertake to do so**;
 - (c) ensure that the goods or the digital content are in conformity with the contract;
 - (d) ensure that the buyer has the right to use the **goods or the** digital content in accordance with the contract; and
 - (e) deliver such documents representing or relating to the goods or digital content as may be required by the contract.
2. **The provisions relating to delivery apply accordingly to the supply of digital content.**
3. ...

(2) Cloud computing

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

the Internet, of the definition given by COM(2012) 529 final (at 2). This can cover a wide range of matters, including for instance:

- (i) the mere provision by a trader of a data storage facility, eg Dropbox, where the customer can upload personal digital content, including digital content supplied later by other traders, and consequently access it an unlimited number of times over the duration of the storage contract: this is the provision of a pure service which is not and should not be covered by the CESL;
- (ii) the supply of digital content which is downloaded from the trader's cloud to the customer's hardware; or the supply of digital content other than on a tangible medium where the content is directly transferred to cloud storage space provided to the customer by a trader under an existing storage contract: this is clearly covered by the CESL already now and does not call for any extra treatment;
- (iii) the provision of access by a trader to digital content such as music, video or software which is stored in that trader's cloud with no attendant permanent download onto a customer's hardware, or where the content downloaded onto the customer's hardware remains usable only while being connected with the trader's cloud: this is a borderline case between sale and service so far not properly dealt with by the CESL Proposal.

(26) The main reason why it could be problematic to apply the CESL to a contractual scheme as described under (iii) is its reliance on the notion of passing of risk. Under the CESL, like under any classical sales law, there is a particular point in time which is relevant for assessing conformity of the goods or digital content and from which point onwards the buyer has to pay the full price irrespective of whether the goods or digital content are later lost or deteriorated. By and large, this point in time is when the seller loses and the buyer gains physical control over what is supplied. Where digital content remains in the seller's cloud, however, the **seller remains to be in control of the digital content to a far greater extent than the buyer**. This is why it might not be appropriate to assess conformity of the digital content with the contract solely at the moment when it is first made accessible to the buyer, or to oblige the buyer to pay the full price where the digital content is made accessible once but later ceases to be accessible or loses some of its functionalities.

(27) There are, in the main, three possible analyses: First, it could be said that because of potential difficulties the CESL may not be used for these contractual schemes; however, this might seem somewhat artificial as a consumer 'buying' a product on an intangible medium will in practice make no distinction between (a) what he buys and downloads onto his computer or stores in another trader's cloud and (b) that which he buys and downloads when he wants to use it from the seller's cloud. Secondly, it could be said that the CESL may be used but its rules on the relevant time for establishing conformity of the digital content and on the passing of risk may not be applied to the effect that risk does not pass until the contractual relationship, including the storage component, has

come to an end; however, this would mean turning a sales law instrument for a particular group of cases into what is essentially a services law instrument, which would raise issues of coherence.

(28) If some or even all of the situations under (iii) are to be covered, the third and probably the simplest analysis of this under the CESL is that of a contract for the sale (supply) of digital content not supplied on a tangible medium combined with a storage agreement as a related service contract. This would mean that the **storage space in the supplier's cloud is, for the purpose of the sales component, treated in the same way as the customer's hardware or other storage facility**. Risk would pass once the digital content is made available to the consumer in the cloud storage space assigned to him, and any problems concerning accessibility of the digital content at a later point in time would amount to a non-performance under the related service (storage) component (cf EP Amendment 44).

(29) The analysis just referred to would mean that a contract for access to digital content in the seller's cloud can realistically only be treated as a sales contract with a related storage contract if the storage agreement meets certain requirements which make the whole contractual scheme so similar to a classic sales contract that the same basic sales law rules are in fact applicable. Otherwise, where these minimum requirements are not met, the contract is a service contract, for which a separate optional common European regime would have to be designed. The decisive factor, which specifically relates to cloud computing, seems to be **whether the customer gets, at least at the time when the storage contract comes to an end, a right to request download of a usable copy** of the digital content to a suitable storage facility within the customer's control at no further cost. Where, by contrast, the digital content is in this case no longer accessible for the customer, the contract resembles more a service contract than a sales contract. The ELI Working Group therefore tentatively recommends adding an Amendment which, at the appropriate position within the draft (e.g. Article 148 of the Proposal), takes account of the buyer's right to request download of digital content provided in the seller's cloud:

5. **Where the related service includes the storage of digital content sold the seller is under an obligation to transfer the attendant physical control of the content to the buyer upon the buyer's request, and at the latest when the contract for storage comes to an end, by enabling the transfer of a usable version of the digital content to another suitable storage facility of the buyer's choice at no further cost.**
6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 2 and 5 or derogate from or vary their effects.

(3) Multiple downloads, right to re-sell, and provision of updates

(30) The ELI Working Group believes that a limited number of the buyer's rights relating to digital content might need some further adjustment. While it takes the view that the minimum requirement that needs to be fulfilled in order to make a contract for the supply of digital content suitable to be dealt with under a sales law instrument is a licence or similar right allowing the use of the digital content for an unlimited period, there are **further rights usually associated with 'ownership' of a copy of digital content**, or further expectations on the part of the buyer, which the CESL should address.

(i) One of these rights is the buyer's right to download digital content anew where, for instance, the buyer has acquired new hardware and in particular where the old hardware with the copy of the digital content has been lost. In contrast to tangible goods, digital content can be reproduced an unlimited number of times at more or less no additional cost. There could therefore be a legitimate expectation on the part of the buyer that there is a right to **receive a new copy of the digital content** as far as the use of the old copy has become impossible. It should be recalled in this context that the CJEU in *UsedSoft* qualified the customer's entitlement in the software copy as 'ownership' in a situation where, when re-selling the software and transferring that 'ownership' to a third party, all the customer really transferred was the licence while the third party had to download a new copy of the software from Oracle's website under the 'used' licence.

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

(iii) Last but not least a buyer may also have a legitimate expectation that they are entitled to **receive updates of digital content** where such updates become available on the market and where they serve to close security gaps that have been discovered or in any other way to attain or maintain its functionalities which have been agreed upon under the contract, even where the digital content was in conformity with the contract when risk passed to the buyer.

(31) In the view of the ELI, the CESL might address these issues by including, in particular for consumer contracts, a mandatory obligation on the part of the seller to provide to the buyer a right to re-sell digital content even as far as such a right does not follow from

applicable rules of law, and possibly also to provide multiple downloads and updates. However, the Working Group is hesitant to suggest mandatory rules because it might seem to be a disproportionate restriction on freedom of contract. Instead, it recommends **default rules** to this end, combined with **special pre-contractual duties** to inform the buyer where *no* additional copies (even as far as covered by the licence) will be provided upon the buyer's request, where the buyer is *not* entitled to re-sell (providing the absence of such right is compatible with EU law) or where 'repair' updates are *not* provided automatically and free of any extra charge. Where the seller fails to comply with this duty there is a right on the part of the buyer to receive additional copies, to re-sell and/or to be provided with updates of the digital content. This could mean a rule along the lines of:

Article ...
Main obligations of the seller

...

3. **Unless where the parties have agreed otherwise, and notwithstanding any right of the buyer that might follow from applicable rules of law, the seller of digital content is under an obligation**
 - (a) **to make available to the buyer future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, automatically and free of any extra charge;**
 - (b) **to provide to the buyer a right to re-sell the copy of the digital content; and**
 - (c) **to supply a new copy or new copies of the digital content where, for whatever reason, the copy or copies originally supplied can no longer be used by the buyer.**

In a consumer or mass communication contract, terms restricting these rights are valid only where the seller has drawn the buyer's specific attention to these terms before the contract was concluded.

III Further comments on the EP Legislative Resolution

(32) **The ELI Working Group would like to express its deep appreciation for the improvements suggested by the EP in its Legislative Resolution of 26 February 2014, which will, if adopted, render the CESL a much better instrument that will serve the needs of traders and consumers in Europe.** However, the ELI Working Group would still like to raise a number of points for further discussion where it realises the EP has greatly improved the draft but where it feels those improvements might still have gone a step further. Many of those points have already been made in the 2012 Statement. **By highlighting only some of the issues that were raised in 2012, the ELI does not withdraw from other positions that were taken in 2012 but are not re-iterated in this 1st Supplement.** Rather, the ELI Working Group takes account of the fact that, at this

stage of the legislative process, possibly only a limited number of further amendments could be made and that it is of the essence to set priorities.

(1) Exclusions from the scope

(33) The ELI Working Group very much appreciates that the EP proposes to delete the restriction of the CESL, for b2b relations, to contracts where one of the parties is an SME (Amendment 70), that it likewise proposes to delete the exclusion of consumer contracts with a credit element (Amendment 69) and that it would like to see training included as a related service (Amendment 45). In particular against the background of the restriction to distance contracts the ELI Working Group notes with a degree of regret the EP's decision not to extend the scope of the CESL in other respects, especially as concerns the restriction to cross-border situations, including the restriction to cases with a minimum EU contact; the extension of scope to non-profit making entities; the restriction for the delivery of goods to contracts which include the payment of a price; and of the exclusion of transport and telecommunication support as a related service. The ELI would like to reiterate that a number of the restrictions of scope which have not been removed may prove to be detrimental to the success of the Instrument.

(34) While there may be political considerations which have led the European Institutions to retain the SME restriction and the cross-border requirements in their current form, the ELI Working Group finds it difficult to see that there are any similar considerations which would prevent the Institutions from **extending the scope to non-profit making entities** (cf the situation where a foreign legal entity places an order and the seller would have to find out, before accepting, whether he is dealing with a profit or non-profit making entity). It therefore strongly recommends to add an Amendment along the lines of:

“Where the seller is a trader and the buyer is a person who is neither a trader nor a consumer within the definitions provided in [definitions], the rules applicable to contracts between traders shall apply.”

(35) The same holds true for the exclusion of goods **delivered other than in exchange for a price** (cf the mobile device at 0 euro or the ‘welcome gift’ provided in exchange for personal data) and for the persisting **exclusion of transport and telecommunication support as related services** (cf the example of a seller having to comply with the domestic law of the consumer's country just for a service hotline or a delivery service). The ELI cannot perceive any political considerations that would suggest these exclusions, in particular as sector-specific rules would, in any case, remain untouched. **The Working Group strongly recommends rethinking these exclusions** (for an appropriate formulation see recommendation supra at (20)).

(2) Contracts with an ‘alien element’

(36) The ELI Working Group appreciates that the EP has addressed the issue of mixed and linked contracts and sought a new solution. In particular, it welcomes the EP’s proposal not to rule out, at least not in principle, contracts which contain an ‘alien element’, ie an element which is not the sale of goods, supply of digital content or provision of related services, from the scope of the CESL. Rather, the ‘alien element’ is to be treated as if agreed under a linked contract (cf Amendments 64 and 68). However, the EP has decided to include only those mixed contracts where the alien element can easily be separated, ie the contract is divisible, and their price can be apportioned. Where these conditions are not met, ie the contract is not divisible or the price of the alien elements cannot be apportioned, the CESL may not be chosen by the parties (Amendment 64).

(37) While the ELI Working Party sees the rationale behind this approach it believes the solution proposed in Amendment 64 fails to solve the main problem, which may jeopardise the success of the CESL as such: Under Article 6(1) of the Regulation, the CESL is not available where a contract includes any alien element not covered by the substantive scope, even if this element is minor. As the existence of even a minor alien element such as a support hotline, transport service, or a ‘welcome gift’, makes the CESL unavailable for use, this has the consequence that **the parties can never be sure whether a court will later detect an alien element and refuse to apply the CESL**. This will create a degree of uncertainty that will make the CESL less attractive to traders. Quite obviously, **this problem exists in particular in those cases where the contract is not divisible and no price can be apportioned to the alien element**.

(38) For these reasons the ELI Working Group suggests **deleting the words ‘provided those elements are divisible and their price can be apportioned’ in Amendment 64**. Alternatively, if the EP believes the inclusion of contracts where the alien elements are inseparably combined with the sales element would create too many problems, the ELI strongly recommends adding at least an **exception for minor elements**. Amendment 64 could then read **‘... provided those elements are only minor or, where they are not minor, are divisible and their price can be apportioned’**.

(3) Approach to linked contracts

(39) The ELI Working Group welcomes the improvement of the rules on linked contracts (Amendments 65 to 67). However, in addition to what it has already suggested in the 2012 Statement it now tends to believe that it might also be beneficial **to have a rule on linked contracts for cases where both contracts are governed by the CESL**. For instance, a person could buy, under two separate contracts each of which is governed by CESL, a computer and the software which is necessary to run the computer. The software could be provided either by the same trader or by another trader who cooperates with the

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

(40) The ELI Working Group therefore recommend including a rule on linked contracts where both contracts are governed by CESL. This rule could be formulated along the lines of the following:

Article ...

Linked and mixed contracts

1. **Where two contracts governed by the Common European Sales Law are related to each other they shall, for the purpose of exercising a right, remedy or defence that has arisen in the context of one of the contracts, or where one of the contracts is invalid or not binding, and unless otherwise provided, be treated as if they were one contract where**
 - (a) **at least one of the parties to the other contract would reasonably not have concluded that contract but for the contract in the context of which the right, remedy or defence has arisen or which is invalid or not binding, and the other party was aware or could be expected to be aware of this fact; and**
 - (b) **the parties to both contracts are the same or, in the case there are parties who are not a party to both contracts, where these parties have cooperated in the conclusion or preparation of the other contract.**

(41) While it greatly welcome the re-drafting of the rules on linked contracts in general, the ELI Working Group is very **concerned about the actual design of Amendment 67** for cases where only one of the contracts is governed by CESL and a party exercises a right, remedy or defence in the context of the non-CESL-contract or where that non-CESL-contract is invalid or not binding. The most important case will be the case where the linked contract is a credit agreement and the buyer who is a consumer exercises his right of withdrawal under the national rules implementing Directive 2008/48/EC. According to Amendment 67, a party to the contract governed by CESL would have a right to terminate the contract where that party would not have concluded the contract but for the linked contract, or would have done so only on fundamentally different terms, and where either of the parties exercises any right, remedy or defence under the linked contract or the linked contract is invalid or not binding.

(42) The first reason why the ELI Working Group is concerned is that Amendment 67 focuses on the subjective perspective of one of the parties. More importantly, however, the rule would mean that **even the exercise of the right or remedy to require performance under the linked contract would give the other party a right to terminate the CESL contract**. So if, for example, the bank that has granted credit to the buyer under a linked credit agreement exercises its right to require performance under that credit agreement, the buyer who is in default under the credit agreement would have a right to terminate the CESL contract. It thus takes the view that Amendment 67 would lead to **unacceptable results** and needs to be revised.

(43) The ELI Working Group still believes that the ‘safest’ way to deal with this situation is to have the rule already proposed in the 2012 ELI Statement. This would mean rephrasing Amendments 66 and 67 along the lines of the following:

2. **Where a contract governed by the Common European Sales Law is linked with another contract not governed by the Common European Sales Law, and unless otherwise provided,**
 - (a) **the law applicable to the contract not governed by the Common European Sales Law shall determine the effects which invalidity, lack of binding force or the exercise of any right, remedy or defence under the Common European Sales Law has on that contract;**
 - (b) **the national law under which the parties have agreed on the use of the Common European Sales Law shall determine the effects that invalidity, lack of binding force or the exercise of any right, remedy or defence in relation to the other contract has on the contract governed by the Common European Sales Law,**

including the issue of what counts as sufficient link between the contracts.

(44) However, the ELI Working Group also recognises that there may be a desire to regulate the effects on the CESL contract in the CESL itself in order to provide more certainty for the parties. Attention should be drawn to the fact, though, that rights, remedies or defences arising under a different legal regime would have to be ‘translated’ into the CESL, which may give rise to some degree of uncertainty. Likewise, attention should be drawn to the fact that withdrawal from a linked credit agreement under national law would mean a consumer’s right to withdrawal from the sales contract under the CESL also where the relevant Member State has taken a different approach and either denied a right of withdrawal from the sales contract or granted such right only with modifications. If the EP is willing to accept this, Amendments 66 and 67 could be rephrased as follows:

2. **Where a contract governed by the Common European Sales Law is linked with another contract not governed by the Common European Sales Law, and unless otherwise provided,**
 - (a) **the law applicable to the contract not governed by the Common European Sales Law shall determine the effects which invalidity, lack of binding force or the exercise of any right, remedy or defence under the Common**

European Sales Law has on that contract, including the issue of what counts as sufficient link between the contracts;

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

(4) Termination

(45) The ELI Working Group notes that the EP has made important suggestions for improvement concerning the Proposal's rules on termination, notably deleting the exemption for consumers from the requirement to give notice of termination within a reasonable or specified time (Amendment 201). However, it believes that the rules on termination, even with this Amendment, remain difficult to apply by a court in one State, let alone by courts in 28 different Member States, and urgently need to be revised more thoroughly.

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

(47) Another, more serious, reason is that Article 172(3), which refers to Article 8(2), on the one hand and Articles 9, 117 and 137 on the other **cannot be reconciled and follow two equally possible but mutually exclusive approaches to the nature of termination**: while Articles 9, 117 and 137 are based on the concept of partial termination and full restitution for the affected parts of the contract (cf also the EP's Amendment 224, which clearly relies on this assumption), Article 172(3) relies on the concept of total termination of the contract and partial restitution just for particular parts, and the role of Article 8(2) in this context remains largely unclear. Similarly, Article 9 for mixed-purpose contracts with a sales component and a services component cannot be reconciled with Article 147(2) for related service contracts: Whereas termination of only the affected component is the rule and total termination the exception under Article 9, Article 147(2) means that termination of the sales contract always terminates the

related service contract, but not *vice versa*, so that a customer who terminates the service contract cannot get rid of the sales contract. Article 139, in particular, seems to be unclear in meaning and rationale and might be a somewhat distorted copy of Article 64 CISG.

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

(49) The ELI Working Group's view is that the most important step which needs to be taken is to modify Amendment 225 so that the existing **Article 172(3) of the Proposal is deleted**. As has just been explained, Article 172(3) of the Proposal seems to be irreconcilable with the approach to termination taken throughout the other parts of the Instrument.

(50) Also, Article 139 is particularly problematic and somewhat difficult to understand. It would benefit from revision. The ELI Working Group therefore recommends **replacing the existing Article 139 of the Proposal** by a much simpler rule, which could, for instance, read as follows:

Article ...

Loss of right to terminate

1. **The seller loses a right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the seller could be expected to have become aware of the non-performance, whichever is later.**
2. **Paragraph 1 does not apply where no performance at all has been tendered.**

(51) It would also be highly advisable to have a rule on the effect which (a) termination of a related services contract has on the sales contract and (b) termination of a sales contract has on another sales contract linked with the first sales contract. The ELI Working Group recommends taking on board a **general rule on linked contracts under the CESL** along the lines of what is proposed supra at (39) et seq. In this case, the rule in **Article 147(2) would become obsolete** and could be deleted.

(52) Last but not least, the ELI Working Group remains to be **concerned about Article 174(1)(c)**, according to which a buyer must pay for the use of the goods where it would be inequitable to allow the recipient free use of them, having regard to the nature of the goods, the nature

and amount of the use and the availability of remedies other than termination. In the light of this rule, the consumer can never know in advance whether, even where they were acting in accordance with good faith and fair dealing, a court will later rule that it would be inequitable to allow free use of the goods. Having to pay for such use, however, significantly devalues the right to terminate. The consumer may thus refrain from terminating a contract and, on balance, be worse off than they would be if the right to terminate the contract was more restricted and took better account of the legitimate interests of the trader in the first place, but without any vague limitations.

(5) Restitution

(53) The ELI Working Group greatly appreciates the many revisions that have been made in the Chapter on restitution. It largely believes that those revisions make the CESL rules on restitution more consistent and better equipped to meet the needs of modern distance trade. However, it believes that it is difficult to deal with a subject matter as complex as that of restitution by way of punctual amendments, as new gaps and inconsistencies are apt to emerge. It has therefore submitted a full text in **Part B** which takes account of the choices deliberately made by the EP.

(54) The ELI Working Group would question the decision that has been made to leave Article 172(2) of the Proposal in place, according to which the obligation to return includes the obligation to return any natural or legal fruits, and to add fruits to the text of the Proposal even where they had so far not been mentioned (cf Amendments 240, 244, 245). Quite apart from the fact that a **definition of 'fruits' is missing** and that, in particular, the notion of what counts as 'legal fruits' varies widely among the laws in the Member States, there is no justification to treat fruits differently from use. Essentially, the **issues of restitution of fruits derived and of use made should be addressed in exactly the same manner**. To impose on the buyer an obligation to return fruits would **cause unnecessary litigation costs** as the buyer who has avoided or terminated the contract would normally have derived such fruits also if he had bought identical goods or digital content from another seller. Therefore, if that buyer has to return the fruits, he will have to claim damages under Chapter 16 for having been deprived of the fruits he would hypothetically have derived from the other goods.

(55) The same holds true for the decision made in Amendment 226 to impose the **cost of returning what was received** on the recipient. This rule appears to be appropriate in the context of withdrawal, but not in the context of restitution where it is almost always the seller who has caused the termination or avoidance by way of his non-performance of an obligation or breach of a duty. In this situation, the buyer would, in almost all cases, be **forced to raise an additional claim for damages** just for the costs of returning the goods. It ought to be mentioned that there should normally also be an **obligation on the**

part of the seller to take back the goods, as otherwise the same problem would arise with the costs of disposal. The ELI Working Group strongly recommends, instead of Amendment 226 in its present form, adding a rule along the lines of the following:

1. **The buyer must send back the goods or, in cases covered by ..., the tangible medium or hand them over to the seller or to a person authorised by the seller. The seller is under an obligation to take the goods back unless the parties agree otherwise.**
2. **In the case of avoidance or termination by the buyer the seller must bear the cost of returning the goods or, in cases covered by ..., the tangible medium, and the buyer may withhold restitution until the seller has indicated how the buyer can return the goods or tangible medium without having to advance fees.**

(56) The ELI Working Group agrees with the EP that the issue of personal data that have been received could, and possibly ought to, be addressed in the Chapter on restitution. However, it believes that **Amendments 232, 235, 236, 242 and 243 render the text of the Instrument much more complex, while the same effect could be achieved by way of what is suggested infra at (57) plus by adding what has been suggested supra at (16)**. Everything else already follows from data protection rules. It should also be noted that, for very extraordinary situations, there is still the flexibility clause.

(57) **Amendment 228 on the one hand and Amendments 240, 242 and 243 on the other overlap to a great extent**, as returning something in a condition of depreciation amounts to a (partial) non-performance of the obligation to return. The important restriction made in Amendment 241 that liability for damages must not exceed the price agreed for the goods or digital content is, however, missing in Amendment 228. It should also be noted that the rule in Amendment 241 already comprises the rules in Amendments 242 and 243 as no damages can be due where the price is Zero. The ELI Working Group therefore recommends repealing Amendments 229, 240, 241, 242 and 243, and instead modifying Amendment 228 along the lines of the following:

- 2d. **A party is liable under Articles 139 to 142 for failing to return what must be returned under this Chapter, including fruits where relevant, or for any diminished value to the extent that diminishment in value exceeds depreciation through regular use. Liability shall not exceed the price agreed for what must be returned, and there shall be no liability where no price has been agreed.**

(58) The ELI Working Group particularly appreciates that, with Amendments 230 and 231, a much more convincing and consistent regime has been suggested for restitution in cases where **digital content** has been received and must be returned. However, it would like to draw attention to the fact that, although Amendment 231 addresses the cases mentioned in points (a) and (b) of Amendment 230, a rule is missing for the case mentioned in point (c). This would mean the customer has to pay the monetary value under Article 173(4) of the Proposal, which the EP has left untouched, whereas the idea

was just the opposite, i.e. that the customer does not have to pay. In essence the ELI Working Group recommends to have a rule along the following lines:

1. Digital content shall only be deemed returnable where:
 - (a) the digital content was supplied on a tangible medium and the medium is still sealed or the seller did not seal it before delivery;
 - (b) it is otherwise clear that the recipient cannot have retained a usable copy of the digital content; or
 - (c) the seller can, without significant effort or expense, prevent any further use of the digital content on the part of the recipient, for instance by deleting the recipient's user account.
2. **The buyer who has received digital content which is returnable within the meaning of paragraph 1 fulfils its obligation to return by:**
 - (a) **refraining from any further use of the digital content from notification of the avoidance or termination and deleting all copies of the digital content or part of the digital content, whether or not usable;**
 - (b) **sending back any tangible medium in accordance with Article ...;**
 - (c) **paying for use made or fruits derived under the conditions specified in Article**
3. **The buyer who has received digital content which is not returnable within the meaning of paragraph 1 must pay the amount the buyer saved by making use of the digital content.**

(6) Unfair contract terms

(59) The ELI Working Group appreciates the suggestion made by the EP to provide for consumer protection also in cases where a term supplied by the trader causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, but where **such term has been individually negotiated** (Amendment 155). While it hesitated to suggest this in its 2012 Statement, because it appeared to be a policy choice which the Commission had deliberately refused to take we agree that this is a more elegant solution to the problem which it tried to address in the 2012 Statement by introducing a separate paragraph in the rule on avoidance for unfair exploitation. The ELI Working Group wonders whether in the light of this **some of the suggestions in Amendments 158 to 174 may go too far** as there may be cases where, for instance, an individually negotiated clause granting the trader a right to unilaterally change some feature of performance, is fair. On the other hand, the ELI Working Group is **very grateful to the EP for Amendment 156** which indeed renders the unfairness test a much better rule.

(60) The ELI Working Group is, however, concerned about Amendment 175 in which the EP seeks to replace ‘good commercial practice’ by ‘customary commercial practice’. The ELI would like to point out that a standard of fairness can hardly be defined by what is customary, taking into account that vast areas of b2b trade are characterized by grossly unfair practices. Apart from that, the idea of what is still ‘customary’ may vary from place to place and to a greater extent so than the idea of what is ‘good’. **The ELI therefore strongly recommends deleting Amendment 175.**

PART B: DETAIL OF PROPOSED CHANGES

In Part B, the ELI sets out in detail how what has been said in Part A, and a series of other recommendations not specifically mentioned in Part A, could be implemented in one coherent draft.

This will be presented as an amended version of the draft already submitted in the 2012 ELI Statement, with amendments marked in **bold** and brief explanations in footnotes. Where the numbering of this amended version deviates from the numbering of the 2012 version, this has been indicated in brackets.

Part I Introductory provisions

Chapter 1 Application and general principles

SECTION 1 APPLICATION OF THE INSTRUMENT

Article 1

Objective and subject matter

1. The purpose of this Regulation ('the Common European Sales Law') is to improve the conditions for the establishment and the functioning of the internal market by making available, **within the legal order of each Member State**,¹ a uniform set of contract law

¹ *The ELI finds the further clarification concerning the relationship between CESL and national law, which was introduced by the EP, very useful.*

rules for the sale of goods or of digital content and for related services **in distance contracts**.²

2. This Regulation enables traders, in particular small or medium-sized enterprises ('SME'), to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.
3. In relation to contracts between traders and consumers, this Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.

Article 2

Contracts covered by the Common European Sales Law

1. The Common European Sales Law applies, subject to an agreement of the parties to that effect, to **distance contracts which are**
 - (a) contracts for the sale of goods, which means any contract under which a trader ('the seller') **delivers goods and transfers the ownership of these goods, or undertakes to do so**,³ to another person ('the buyer'); it includes a contract for the supply of goods to be manufactured or produced, **whether or not according to the buyer's specifications**⁴;
 - (b) contracts for the sale of digital content, which means any contract under which a trader ('the seller') supplies **digital content, whether or not on a tangible medium, and makes available a right to re-use the digital content for an unlimited period, or undertakes to do so, to another person ('the buyer')**; it includes a contract for the supply of digital content **designed according to the buyer's specifications**,⁵
 - (c) contracts for the provision of any related service, excluding financial services, linked to goods or digital content sold under the Common European Sales Law, such as installation, maintenance, repair or any other processing, **or storage**, provided by the seller of the goods or digital content to the buyer.
2. Provided that the seller was acting in pursuit of economic interests, the Common European Sales Law shall apply irrespective of whether a price was agreed for the goods, digital content or related service.⁶

² *The restriction to distance contracts is a political choice which the ELI has accepted as given.*

³ *In the light of the need to draw a line between sales and services in relation to digital content not supplied on a tangible medium the ELI recommends dealing with tangible goods and digital content in a parallel way. This means that the main obligations of the seller should include both the factual side (delivery or supply) and the legal side (ownership or licence of unlimited period).*

⁴ *This clarification may be useful in order to have a definition that is parallel to that of supply of digital content.*

⁵ *See footnote 3.*

⁶ *The former ELI Article 2(2) was deleted in the light of what is now recommended under Article 7.*

Article 3

Optional nature of the Common European Sales Law

1. The parties may agree that the Common European Sales Law governs their contracts for the sale of goods or digital content and for the provision of related services as a uniform legal regime which is directly applicable in the Members States.
2. The parties may do so under the law of the Member State whose law is the law applicable to the contract according to the relevant rules of conflict of laws, in particular Regulation (EC) No 593/2008 ('Rome I'). For the purposes of conflict of laws and otherwise the Common European Sales Law shall be considered as an integral part of this law.
3. *[Any Member State may, for cases where its law is the law applicable to the contract, restrict availability of the Common European Sales Law to cross-border contracts within the definition given in Article 166.]*
4. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety. In relations between traders, partial choice may not affect the application of rules under the Common European Sales Law which cannot be derogated from by agreement.

Article 4

Agreement on the use of the Common European Sales Law

1. The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of this Article as well as the relevant provisions in the Common European Sales Law concerning the conclusion of a valid contract.
2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law requires express consent on the part of the consumer. The trader shall:
 - (a) draw the consumer's attention to the intended application of the Common European Sales Law before the agreement; and
 - (b) provide the consumer with a hyperlink to the website <http://ec.europa.eu/...> or, in all other circumstances, indicate this website or the information hotline **in a way appropriate to the means of distance communication used.**⁷
3. Where the trader has failed to comply with the requirements under paragraph 3 the consumer shall not be bound by the agreement to use the Common European Sales Law until the requirements have been complied with and the consumer has expressly consented subsequently to the use of the Common European Sales Law.
4. Notwithstanding the rule in paragraph 1, the Common European Sales Law shall govern compliance with and remedies for failure to comply with the pre-contractual information duties, and other matters that are relevant before the conclusion of a

⁷ This has been further simplified.

contract, where the **trader**⁸ enters into negotiations, or otherwise takes preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law. Where the trader has also made reference to other legal regimes, this is without prejudice to the rules of the law applicable under the relevant rule of conflict of laws.

Article 4bis
Agents and persons without full capacity⁹

1. **As far as the applicable national law provides that**
 - (a) **an agent can make a contract for the sale of goods or digital content or the provision of related services which is binding on a principal; or**
 - (b) **a person without full capacity to contract can validly make a contract for the sale of goods or digital content or the provision of related services**

such provision is deemed to include the power to validly agree to the use of the Common European Sales Law.

2. **As far as, under the applicable national law,**
 - (a) **a principal has given a mandate to an agent to make a contract for the sale of goods or digital content or the provision of related services; or**
 - (b) **the legal representative of a person without full capacity to contract has given consent to that person making a contract for the sale of goods or digital content or the provision of related services**

such mandate or consent shall be presumed, in the absence of evidence to the contrary, to include a mandate for the agent to agree to the use of the CESL.

Article 5
Consequences of the use of the Common European Sales Law

1. Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules, **which are, in particular:**¹⁰
 - (a) **pre-contractual information and related duties;**
 - (b) **the conclusion of a contract including formal requirements;**
 - (c) **the right of withdrawal and its consequences;**
 - (d) **avoidance of the contract resulting from mistake, fraud, threat or unfair exploitation and the consequences of such avoidance;**

⁸ *It has been pointed out that the previous version, which referred to both parties, could be misunderstood as saying that the consumer can unilaterally force the CESL on the trader where the trader failed to refer to any legal regime.*

⁹ *This Article is new. It is not essential for the functioning of the CESL, but it addresses the frequently expressed concerns that the CESL fails to deal with capacity and agency, and it goes as far as the CESL could reasonably go without sacrificing its character as an optional legal regime.*

¹⁰ *The ELI agrees that the inclusion of a 'positive list' of subject matters, as proposed by the EP, is a useful clarification.*

- (e) **interpretation;**
 - (f) **contents and effects including those of the relevant contract**
 - (g) **the assessment and the effects of unfairness of contract terms;**
 - (h) **rights and obligations of the parties;**
 - (i) **remedies for non-performance;**
 - (j) **restitution after avoidance, termination or in case of a non-binding contract;**
 - (k) **prescription and preclusion of the rights;**
 - (l) **sanctions available in case of the breach of the obligations and duties arising under its application.**
2. Matters not addressed in the Common European Sales law are governed by the relevant rules of the national law applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These matters include
- (a) legal personality;
 - (b) the invalidity of a contract arising from lack of capacity, illegality or immorality except **for the rule in Article 4bis** where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law;
 - (c) **language and formal requirements for communications in judicial or extra-judicial proceedings, or connected with any exercise of public authority;**¹¹
 - (d) matters of non-discrimination;
 - (e) representation **except for the rule in Article 4bis;**
 - (f) plurality of debtors and creditors and change of parties including assignment;
 - (g) set-off and merger;
 - (h) property law, including the transfer of ownership; and
 - (i) the law of torts including the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.
3. This Regulation is without prejudice to rules which specifically apply to certain sectors, in particular transport, **information technology** and financial services. **As far as a trader has complied with the information requirements under the Common European Sales Law any information requirements laid down by national laws which transpose the provisions of Directives 2000/31/EC and 2006/123/EC shall be deemed to have been fulfilled, except for information requirements specifically concerning the regulated professions, authorisation schemes or compulsory professional liability insurance.**¹²

¹¹ *Given that the Instrument is now restricted to distance sales, the ELI takes the position that freedom of language is of the essence and that the determination of the language of the contract must therefore be among the issues addressed by the CESL (excluding language requirements that might follow, eg, from national rules of civil procedure or tax law).*

¹² *The ELI has revised the rule on sector-specific legislation, taking account of the fact that ‘training’ has so far not been a focus of sector-specific legislation, that the broader term of ‘information*

4. Paragraph 1 is without prejudice to any mandatory rules of a Non-Member State which may be applicable according to the relevant rules of conflict of laws.

Article 6

Linked and mixed contracts

1. **Where two contracts governed by the Common European Sales Law are related to each other¹³ they shall, for the purpose of exercising a right, remedy or defence that has arisen in the context of one of the contracts, or where one of the contracts is invalid or not binding, and unless otherwise provided, be treated as if they were one contract where**
 - (a) **at least one of the parties to the other contract would reasonably not have concluded that contract but for the contract in the context of which the right, remedy or defence has arisen or which is invalid or not binding, and the other party was aware or could be expected to be aware of this fact; and**
 - (b) **the parties to both contracts are the same or, in the case there are parties who are not a party to both contracts, where these parties have cooperated in the conclusion or preparation of the other contract.**
2. Where a contract governed by the Common European Sales Law is linked with another contract not governed by the Common European Sales Law, and unless otherwise provided,
 - (a) **paragraph 1 applies accordingly¹⁴ concerning the effects on the contract governed by the Common European Sales Law where a right, remedy or defence has arisen in the context of the contract not governed by the Common European Sales Law or where that contract is invalid or not binding;**
 - (b) the law applicable to the contract not governed by the Common European Sales Law shall determine the effects which invalidity, lack of binding force or the exercise of any right, remedy or defence under the Common European Sales Law has on that contract, including the issue of what counts as sufficient link between the contracts.

technology' might be more appropriate, and that against the background of the new focus on e-commerce an integration of the information requirements under Directives 2000/31/EC and 2006/123/EC seems preferable. The specific information regime of that Directive should remain to be applicable only in exceptional cases where it would seem disproportionate to include the relevant information duties in the CESL.

¹³ *The ELI has added a rule on linked contracts where both contracts are governed by the CESL. This rule is essential for cases where two sales contracts are linked with each other and which have so far not been addressed by the CESL at all, but it can also serve as a much more comprehensive and consistent approach to cases where a sales contract is linked with a related service contract, replacing Article 147(2) of the Proposal and former ELI Article 2(2).*

¹⁴ *The ELI accepts that there is a strong desire to address, in the CESL itself, the effects which developments in the context of a linked contract have on the contract governed by the CESL. It therefore puts forward the suggestion in the new paragraph (2)(a), drawing attention to the fact that effects arising under national law would have to be 'translated' into the CESL.*

3. Where a contract includes any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 2 these other elements shall be considered as being agreed upon under a linked contract within the meaning of paragraph 2.

SECTION 2 INTERPRETATION

Article 7 Interpretation

1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.
2. Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.
3. Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

Article 8 Definitions

For the purpose of this Regulation, the following definitions shall apply

1. **In relation to the contract and its effects:**¹⁵
 - (a) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;
 - (b) **‘distance contract’ means a contract under an organised distance sales scheme concluded without the simultaneous physical presence of the parties with the exclusive use of one or more means of distance communication;**¹⁶
 - (c) **‘mass communication contract’ means a contract where offer and acceptance are electronic and do not involve the exclusive exchange of individual communications; a communication is not individual merely**

¹⁵ *The definitions have been re-arranged as the former division, into contracts in general and consumer contracts, no longer lended itself against the background of the restriction to distance contracts.*

¹⁶ *The definition of ‘distance contract’ has been broadened, removing both the restriction to consumer contracts and the requirement that also all preparatory steps have been made with the exclusive use of distance communication.*

because a party has made a selection among pre-formulated options or was able to add remarks in a box provided for that purpose;¹⁷

- (d) **‘ancillary contract’ a contract concluded on the occasion of and with relation to a main contract, either with the same party or with a third party on the basis of an arrangement between that third party and the other party to the main contract;¹⁸**
- (e) ‘goods’ means any tangible movable items; it excludes electricity and natural gas, as well as water and other types of gas unless they are put up for sale in a limited volume or set quantity;
- (f) ‘digital content’ means data which are produced and supplied in digital form, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software; it excludes services rendered by electronic means and the creation of new digital content and the amendment of existing digital content or any other interaction with the creations of other users;
- (g) ‘price’ means money that is due in exchange for goods sold, digital content supplied or a related service provided;
- (h) ‘not individually negotiated term’ is a contract term supplied by one party where the other party has not been able to influence its content, in particular because it has been drafted in advance, whether by the party supplying the term or by a third party and whether or not for more than one transaction; this implies that
 - (i) where one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection;
 - (ii) a party who claims that a term which has been formulated in advance for several transactions involving different parties has since been individually negotiated bears the burden of proving that it has been; and that
 - (iii) in a contract between a business and a consumer, the business bears the burden of proving that a term has been supplied by the consumer or that a term supplied by the business has been individually negotiated;
- (i) **‘notice’ means the communication of any statement which is intended to have legal effect or to convey information for a legal purpose;¹⁹**
- (j) ‘express’ with relation to a statement or agreement means that it is made separately from other statements or agreements and by way of active and unequivocal conduct, including by ticking a box or activating a button or similar function;

¹⁷ A new definition of ‘mass communication contract’ has been introduced in order to take account of the new focus on E-commerce.

¹⁸ A definition of ‘ancillary contract’ has been added.

¹⁹ The definition of ‘notice’ has been integrated in the list of definitions.

- (k) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored, including reproduction in tangible form;
- (l) 'obligation' means a duty to perform which one party to a legal relationship owes to another party and which that other party is entitled to enforce as such;
- (m) 'loss' means economic loss and non-economic loss in the form of pain and suffering or loss of amenity, excluding other forms of non-economic loss such as loss of enjoyment;
- (n) 'damages' means a sum of money to which a person may be entitled as compensation for loss;
- (o) 'reasonable', is to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved;

2. In relation to the contracting parties:

- (a) 'trader' means any natural or legal person who is acting, including through any other person acting in its name or on its behalf, primarily for purposes relating to that person's trade, business, craft, or profession;
 - (b) 'consumer' means any natural person who is acting primarily for purposes which are outside that person's trade, business, craft, or profession;
 - (c) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;
 - (d) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;
 - (e) 'residence' in relation to a trader is the place of the branch, agency or any other establishment through which the contract was concluded, failing such the place of central administration or principal place of business.
3. Where the seller is a trader and the buyer is a person who is neither a trader nor a consumer within the definitions provided in paragraph 2, the rules applicable to contracts between traders shall apply.

Article 9

Computation of time

1. Where a period²⁰ expressed in days, weeks, months or years is to be calculated from a specified event, action or time the period starts at 24:00 on the day during which the event occurs, the action takes place or the specified time arrives. Where the first day of the period is indicated as such, the period starts at 0:00 on that day.
2. Subject to paragraph 3:

²⁰ The ELI agrees with the EP that former paragraph (1) was superfluous and should be deleted.

- (a) a period expressed in days ends with the expiry of the last hour of the last day of the period;
 - (b) a period expressed in weeks, months or years ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month.
3. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days. Where, however, the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day; this provision does not apply to periods calculated retroactively from a given date or event.
 4. For the purposes of this Article:
 - (a) “public holiday” with reference to a Member State, or part of a Member State, of the European Union means any day designated as such for that Member State or part in a list published in the Official Journal of the European Union; and
 - (b) “working days” means all days other than Saturdays, Sundays and public holidays.
 5. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.

SECTION 3 GENERAL PRINCIPLES

Article 10

Freedom of contract

1. Parties are free to conclude a contract and to determine its contents **and language**,²¹ subject to any applicable mandatory rules.
2. In relations between traders parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.
3. In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application, or derogate from or vary the effects, of any of the provisions of the Common European Sales Law that are applicable specifically to

²¹ *The ELI believes that freedom of language is of the essence in an instrument that is designed to meet the specific needs of distance trade.*

relations between traders and consumers. They may exclude other provisions, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 11
No form required

Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.

Article 12
Good faith and fair dealing

1. Each party has a duty to act in accordance with good faith and fair dealing, which means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, but does not give rise directly to remedies for non-performance of an obligation.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 13
Co-operation

The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

Article 14
Support in distance communication

1. **Where a trader provides to the other party the possibility to place an order using a particular means of distance communication that trader must provide to the other party appropriate, effective and accessible means for giving any kind of subsequent notice relating to that contract, in particular for exercising a right of withdrawal or remedy for non-performance, by using the same means of distance communication.²²**
2. **Where a trader provides to the other party the possibility to give a notice by a means of distance communication which does not allow the other party to store a copy, in particular where an order is placed or a right of withdrawal or remedy for non-performance is exercised electronically on a trading website, the trader has a duty to communicate to the other party an acknowledgement of receipt, which must display the notice itself or its content, on a durable medium without undue delay.**

²² *An instrument specifically tailored to meet the needs of distance contracts should also contain certain basic ruled of fairness concerning support provided to the other party in the use of means of distance communication used by the trader. In particular, traders should not be allowed to facilitate the placing of orders (e.g. electronically on a trading website) but complicate the exercise of rights, remedies or defences on the part of the customer (e.g. by post).*

Where several related notices are given consecutively, such as confirmations of various kinds in the course of an ordering process, only one combined acknowledgement of receipt must be given.²³

3. A party who fails to comply with the rules under this Article liable for any loss thereby caused to the other party. The provisions in Chapter 12 and Chapter 15 Section 3 apply with appropriate adaptations.
4. In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 15
Language²⁴

1. For communications relating to the conclusion of a contract or the rights or obligations arising from it a party must use a language the use of which has been accepted by the other party, such as by entering into negotiations or initiating an ordering process in this language.
2. Where a trader is dealing with a consumer and in mass communication contracts the trader must, for all communications relating to the conclusion of a contract or the rights or obligations arising from it, use or offer to use a language that was used for the initial communication between the parties, such as through the trader's website, and the use of which has been accepted by the other party. The trader may use another language at a later point in time where the other party has given explicit consent to the use of that other language before the contract was concluded or has previously opened a customer account in that other language.
3. Communications within the meaning of this Article include communications by a third party, such as a payment or logistics service provider, to which one party has referred the other party in relation to the contract or the rights or obligations arising from it.
4. A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party. The provisions in Chapter 12 and Chapter 15 Section 3 apply with appropriate adaptations.
5. In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

²³ As compared with the 2012 Statement, paragraph (2) has been slightly reformulated so as to be technology-neutral. A clarification has been added that, in particular in the course of an ordering process, not each single step needs separate confirmation.

²⁴ This Article has been added. The ELI believes that it is essential to have a detailed rule on the language(s) which may be used for communications with relation to the contract. So far, there does not exist sufficient protection for buyers, in particular consumers, as relates to language.

Article 16
Means of distance communication²⁵

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

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

2. **Where an address or similar code, such as a mobile phone number, may be used for different types of distance communication, or where accessibility depends on further technical equipment, such as a particular hardware or software, paragraph 1 applies accordingly to the concrete type of distance communication unless the other party could, in all likelihood, be expected to use or have access to that particular type.**
3. **The rules in this Article are without prejudice to any more specific rules, such as rules of civil procedure, and to a party's right to contact the other party by all available means where that party can prove it has made best efforts to contact the other party in line with the rules in paragraphs 1 and 2 and the other party has failed to react.**
4. **A party who fails to comply with the rules under this Article is liable for any loss thereby caused to the other party.** The provisions in **Chapter 12 and Chapter 15 Section 3** apply with appropriate adaptations.
5. In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 17 (ex Article 14)
Notice

1. **Without prejudice to Articles 15 and 16 and** notwithstanding any provision to the contrary, a notice²⁶ may be given by any means, including conduct, which is appropriate to the circumstances. **Notice includes communications generated by**

²⁵ *If the CESL is to be an instrument specifically tailored to meet the needs of distance sales it is of the essence to have a rule on which means of distance communication may be used and/or must be offered. In particular, traders should not be allowed to use means of distance communication the other party was not prepared to use.*

²⁶ *The definition of 'notice' has been integrated in Article 2.*

means of a computer programme or other automated means without review or intervention by a natural person each time an action is initiated or a response is generated by the system.²⁷

2. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
3. **A party who fails to comply with the rules under Articles 15 or 16 may not rely on having given the notice in question, or its taking effect at a particular time, unless that party shows that, and when, the other party has**²⁸
 - (a) **in the case of Article 15 properly understood the notice;**
 - (b) **in the case of Article 16 actually become aware of the notice.**
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

²⁷ *The ELI has added a clarification on automated messages to paragraph (1) in order to bring the CESL in line with the 2005 UNCITRAL Convention on the use of electronic communication in international contracts.*

²⁸ *Paragraph (3) provides for the necessary protection of the other party against being unexpectedly confronted with a foreign language or a new means of distance communication. The new text has replaced the former paragraph (3) because the rule in the Proposal was unnecessarily long and because it would not have prevented a notice from becoming effective if the notice was made available to the addressee in another way or in another place than had been indicated by the addressee.*

Part II Making a binding contract

Chapter 2 Pre-contractual information and related duties

SECTION 1 GENERAL PROVISIONS

Article 18 (ex Article 16)

Application

1. **This Chapter applies to the giving of information before or at the time a contract is concluded and to the fulfilment by the trader of related duties. Specifically,²⁹**
 - (a) **the information duties under Section 2 apply to all contracts concluded under the Common European Sales Law;**
 - (b) **the information duties and related duties under Section 3 apply to**
 - (i) **contracts between a trader and a consumer; and**
 - (ii) **mass communication contracts.**
2. **The information provided under this Chapter forms an integral part of the contract. The rules in this Chapter shall however be without prejudice to any further requirements that must be met in order to make a binding agreement under the rules of Chapter 3 or to introduce a particular term into the contract under the rules of Chapter 7.³⁰**
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Article 19 (ex Articles 21, 23 to 25)

How and when information duties are to be fulfilled³¹

1. **Without prejudice to Articles 14 and 15 and any more specific requirements, any information required under this Chapter must be provided to the buyer**
 - (a) in a clear and comprehensible manner, using plain and intelligible language;
 - (b) in a way that is appropriate to the nature of the information and the means of distance communication used; and
 - (c) as early as reasonably possible before the contract is concluded or the buyer is bound by any offer as enables the buyer to make an informed decision.

²⁹ *With the new scope of the CESL, the focus should shift from the categories and paradigms of Directive 2011/83/EU to those of Directive 2000/31/EC. This means, inter alia, that also customers who are traders enjoy protection insofar as they are essentially in a similar position as consumers, and that a crucial distinction is made between mass communication and individual communication.*

³⁰ *The rule that has been inserted in paragraph (2) seems to be a useful clarification.*

³¹ *This Article has been redrafted in the light of the restriction to distance contracts.*

2. **The trader must provide the buyer with confirmation of the information required under Sections 2 and 3³² on a durable medium unless it has already been given to the buyer on a durable medium prior to the conclusion of the contract. The seller must do so in reasonable time after the conclusion of the contract, and in any event no later than the time of delivery of the goods or the commencement of the supply of digital content or of the provision of the related service.**
3. **At the buyer's request,³³ the trader must provide the following additional information at any time before or after the conclusion of the contract and without undue delay after the buyer has made the request:**
 - (a) **the existence and, where applicable, the conditions of the trader's after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy;**
 - (b) **whether the seller is subject to relevant codes of conduct, the denomination of such codes and how copies of them can be obtained; and**
 - (c) **the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and, where applicable, the methods for having access to it.**

SECTION 2 GENERAL PRE-CONTRACTUAL INFORMATION DUTIES

Article 20 (ex Article 17)

Disclosure of information about what is supplied

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

³² *The requirement to provide the consumer with a confirmation, on a durable medium, of his consent and acknowledgement to start with supply of digital content not supplied on a tangible medium or with the provision of services during the withdrawal period has become superfluous in the light of the new Article 14.*

³³ *Furthermore, the ELI recommends that such information as concerns extra benefits the trader would not be under an obligation to provide must be given to the buyer only at the buyer's request. Traders will make efforts to draw attention to such extra benefits anyway, and imposing an extra information duty is disproportionate and might discourage sellers from offering these benefits. Furthermore, given that such facts are apt to change, eg the seller subscribes to new codes of conduct or ADR schemes, and that they may become relevant only years after the conclusion of the contract, it is preferable to make sure the buyer gets up-to-date information when he needs it. In particular for consumers this means much better and more effective protection than burdening them with information at a point in time when they do not need it, and which may be out-of-date when they do need it. In order to make sure the consumer knows about the right to request additional information.*

2. In determining whether paragraph 1 requires the **seller** to disclose any information, and how that information is to be disclosed, regard is to be had to all the circumstances, including:
 - (a) the nature of the goods, digital content or related services and the medium of communication;
 - (b) the nature of the information and its likely importance to the **buyer**;
 - (c) whether the **seller** could be expected to have special expertise;
 - (d) the cost to the **seller** of acquiring the relevant information;
 - (e) whether the **buyer** could be expected to have that information or to acquire it by other means; and
 - (f) good commercial practice and a high level of consumer protection in the situation concerned.
3. In the case of digital content, the information to be provided under point (a) of paragraph 1 normally includes, and in any case where the **buyer** is a consumer, where applicable,
 - (a) the functionality, including applicable technical protection measures of digital content;
 - (b) any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of; and
 - (c) the terms of any licence agreement the buyer has to accept in order to use digital content.

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

Article 21

Identity of the seller³⁴ (ex Article 17)

1. **The seller has a duty to provide to the other party sufficient information on his identity. This information must include:**
 - (a) **the seller's trading name, his legal status and form and the geographic address at which he is established;**
 - (b) **the seller's** telephone number, fax number, e-mail address and website, where available, to enable the other party to contact the seller quickly and communicate with him efficiently, **in particular for addressing complaints;**
 - (c) where the **seller** is registered in a commercial or similar public register, the denomination of that register, the seller's registration number or equivalent means of identification in that register;

³⁴ *This Article has been streamlined and brought more into line with Directives 2000/31/EC and 2006/123/EC.*

- (d) where the activity is subject to VAT the seller's VAT identification number.
2. Where the trader who communicates with the buyer is different from the seller, the information under paragraph 1 must be given also with regard to that trader.

Article 22

Price and additional charges and costs

1. **The seller must provide information about the total price** including any additional charges and costs. **This information must include, where applicable:**
- (a) the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
 - (b) an estimate of the quantum of time, materials or similar factors required to fulfil the trader's obligations where the total price depends on that quantum and that quantum is not yet determined in advance;
 - (c) any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable; and
 - (d) **the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.**³⁵
2. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price. Where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided
3. Where the seller has not complied with **the duties under this Article the buyer is not liable to pay any charges or other costs, or to pay or provide deposits or other financial guarantees, not duly informed about. The buyer may claim reimbursement of any payments made and which were not due under this paragraph.**³⁶

Article 23

Contract terms

1. **The seller must make available to the buyer the terms on the basis of which the seller is prepared to conclude the contract and take reasonable steps to draw the buyer's attention to contract terms that are not individually negotiated.**³⁷ In a

³⁵ As the deposits and guarantees are closely related to the price they have been included in this Article.

³⁶ Specific sanctions for breach of information duties should be mentioned in the relevant Articles.

³⁷ The ELI recommends combining the requirements that must be met in order to introduce not individually negotiated terms into the contract on the one hand and the pre-contractual duties from Directives 2011/83/EU and 2000/31/EC to 'inform' about the contract terms on the other. Not only is it desirable to have everything a trader must do before the conclusion of a contract in one place. It is also highly problematic if the two standards diverge, i.e. if not individually negotiated terms can

contract between a trader and a consumer, such terms are not sufficiently brought to the consumer's attention unless they are

- (a) **presented in a way which is suitable to attract the attention of the consumer to their existence; and**
 - (b) **given or made available to the consumer by a trader in a manner which provides the consumer with an opportunity to comprehend them before the contract is concluded.**
- 2. In any case, the seller must provide information about the following, whether or not the terms are supplied by the seller:³⁸**
- (a) **the arrangements for payment, in particular which means of payment are accepted, including the functioning of any payment protector provided under Article 22bis;**
 - (b) **the arrangements for delivery of the goods, supply of the digital content or performance of the related services, including the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services; and**
 - (c) **in the case of a long-term contract the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.**
- 3. Where the seller has not complied with the duties under this Article the seller may not invoke contract terms supplied by him against the buyer. The buyer may insist on having the contract performed on the basis that the information provided was correct and complete.³⁹**

Article 24

Consumer rights⁴⁰

- 1. Where the buyer is a consumer the trader has a duty to provide information about whether or not the consumer has a right of withdrawal and, where applicable, the circumstances under which the consumer loses the right of withdrawal. Where the consumer has a right of withdrawal under Chapter 4 the trader must also provide**
- (a) **information about the conditions, time limit and procedures for exercising that right;**

become part of the contract even though the trader has not duly informed about them, or if the consumer was informed about contract terms that do not become part of the contract. As to the requirements that must be met in order to introduce terms into the contract the ELI has taken over the formulation suggested by the EP.

³⁸ *As consumers cannot be expected to know the relevant default rules under the CESL there should be a duty on the part of the trader to provide information about some basic details which are of particular importance to a buyer.*

³⁹ *Specific sanctions for breach of information duties should be mentioned in the relevant Articles.*

⁴⁰ *Revisions in this Article reflect decisions taken in Article 14 (support in distance communication), cf. paragraph (1)(c), and Article 19 (certain information only to be provided at the request of the buyer), cf. paragraph (3).*

- (b) information about whether the consumer will have to bear the cost of returning the goods or tangible medium in case of withdrawal and, where applicable, the approximate amount of this cost if the goods by their nature cannot normally be returned by post; and
 - (c) **appropriate, effective and accessible means for exercising that right by using the same means of distance communication as was used for the conclusion of the contract as well as the model withdrawal form set out in Appendix 2.**
- 2. Where the parties intend that either the supply of digital content which is not supplied on a tangible medium or the provision of a related service is to begin during the withdrawal period, the trader must, within his obligations under paragraph 1, seek the consumer's prior express consent and acknowledgement that the consumer will
 - (a) in the case of digital content, thereby lose the right to withdraw; or
 - (b) in the case of related services be liable to pay the trader the amount referred to in Article 43(5) and, where the service is completed, lose the right to withdraw.

There is no such duty where no price has been agreed or in the case of a minor part of the contract to which no price can be apportioned and in relation to which the trader would not raise any claims against the consumer in the event that the consumer exercises a right of withdrawal.⁴¹

- 3. **The trader has a duty to inform the consumer that further information within the meaning of Article 19(3) concerning after-sales consumer rights, relevant codes of conduct and availability of Alternative Dispute Resolution will be given at the consumer's request, and how the consumer can make this request.**
- 4. The information duties under paragraphs 1 to 3 may be fulfilled by supplying the Model instructions on **consumer rights** set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled the information requirements if he has supplied these instructions to the consumer correctly filled in.
- 5. **Where the trader has not complied with the duties under paragraphs 1 or 2 of this Article the withdrawal period is prolonged in accordance with Article 41(2). Where the trader has not complied with the duties under paragraph 2 the consumer retains a right of withdrawal in accordance with Article 39(3)(d) even where the supply of digital content not supplied on a tangible medium has begun and does not have to pay for supply of digital content or provision of services in accordance with Article 44(6) and (7).⁴²**

⁴¹ *This modification of paragraph (2) has been made in order to avoid undesirable results, in particular that the express consent and acknowledgement on the part of the consumer has to be sought for very minor contract components in relation to which no obligations would arise on the part of the consumer in the case of withdrawal.*

⁴² *The specific sanctions imposed on the seller for failing to comply with the duties are spelt out in this Article.*

Article 25

Steps towards a binding agreement in mass communication contracts

1. **In mass communication contracts, the seller must indicate by appropriate means⁴³ and no later than the start of the ordering process, where not already apparent from the context:**
 - (a) which languages are offered for the conclusion of the contract;
 - (b) which technical steps must be taken in order to conclude the contract, **and which means of distance communication will be used during the ordering process;**⁴⁴
 - (c) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate; **and**
 - (d) whether any delivery restrictions apply.
2. The seller must make available to the other party appropriate and effective technical means for identifying and correcting input errors, and must provide adequate information about these means, before the other party makes or accepts an offer.
3. Where a contract would oblige the buyer to make a payment, the seller must
 - (a) make the buyer aware of the information required by Article 21 immediately before the buyer places the order, irrespective of whether the information has already been given earlier, and do so in a clear and prominent manner;
 - (b) ensure that the buyer, when placing the order, explicitly acknowledges that the order implies an obligation to pay; where placing an order entails activating a button or a similar function on a trading website the button or similar function must be labelled in an easily legible manner only with 'order with obligation to pay' or similar unambiguous wording.

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

4. **In the acknowledgment required under Article 14(2) the trader must indicate in highlighted form whether or not a contract has already been concluded and, where applicable, which further steps are necessary in this regard.**⁴⁵ **Where a contract has not yet been concluded the seller must, without undue delay and in any case within 72 hours after receipt of any order from the buyer, send the buyer**
 - (a) confirmation of the conclusion of the contract and of the estimated time of performance; or
 - (b) confirmation of the fact that the buyer's offer has been rejected, **possibly combined with a new offer by the trader to conclude a contract on different terms such as with a later time of delivery.**⁴⁶

⁴³ In the first paragraph "legibly" has been replaced by "by appropriate means" as country flags or card symbols are much easier to understand than a description.

⁴⁴ This is a useful rule further safeguarding the buyer's legitimate interest not to be unexpectedly confronted with new means of distance communication.

⁴⁵ This has been brought into line with the new rule in Article 14.

⁴⁶ Added for reasons of clarification.

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

Article 25bis (ex Article 26)
Securing advance payment by a consumer

1. In contracts between a trader and a consumer the seller is only entitled to ask for payment of the price by the consumer before having fulfilled its main obligations under Article 85 if it offers sufficient protection for the refund of the total price, additional charges and costs in case of withdrawal, avoidance or termination by the consumer. Sufficient protection is provided by accredited escrow services, insurance companies or similar schemes (“payment protectors”).
2. A trader is prohibited from charging consumers, in respect of the use of a payment protector, fees that exceed the cost borne by the trader for the service.
3. The trader is allowed to grant the consumer the right to choose whether the advance payment shall be protected according to paragraph 1 or not. The two options must be presented in a similar, non-discriminatory way.

SECTION 4 BREACH OF INFORMATION AND RELATED DUTIES

Article 26 (ex Article 27)
Consequences of breach

1. Where a seller fails to comply with any duty imposed by this Chapter, in particular where information fails to be given or is incorrect or misleading, that seller is liable for any loss caused to the other party by such failure. The claim for damages shall be subject to the provisions in **Chapter 12⁴⁷** and Chapter 15 Section 3 with appropriate adaptations.
2. The claim for damages under paragraph 1 is without prejudice to
 - (a) any specific remedy, right or defence which may be available under this Chapter, Article 41(2), or Article 44(6) and (7);
 - (b) a right of the other party to avoid the contract under Chapter 5; or
 - (c) remedies for non-performance of an obligation under the contract.
3. In relations between a trader and a consumer the trader bears the burden of proof that it has fulfilled the duties required by this Chapter.

⁴⁷ It has been pointed out that the previous version failed to make sufficiently clear that in particular the rule on contributory causation by the other party is applicable also to a claim for damages.

Chapter 3 Conclusion of contract

SECTION 1 GENERAL PROVISIONS

Article 27 (ex Article 28)

Requirements for the conclusion of a contract

1. A contract is concluded if:
 - (a) the parties reach an agreement;
 - (b) they intend the agreement to have legal effect; and
 - (c) the agreement, supplemented if necessary by rules of the Common Sales Law, has sufficient content and certainty to be given legal effect.
2. Agreement is reached by acceptance of an offer. Unless otherwise stated in this Chapter, offer and acceptance are subject to the provisions in Articles **15 to 17**.
3. Whether the parties intend the agreement to have legal effect is to be determined according to the rules under Chapter 6 on interpretation.
4. Where one or more terms of an agreement are left open, a contract will be concluded if the parties intend to be bound to a contract on the terms they have agreed.

Article 28 (ex Article 29)

Offer

1. A proposal is an offer if:
 - (a) it is intended to result in a contract if it is accepted; and
 - (b) it has sufficient content and certainty for there to be a contract.
2. An offer may be made to one or more specific persons.
3. A proposal made to the public, such as on a website accessible by the public, is not an offer unless the circumstances indicate otherwise.

Article 29 (ex Article 30)

Revocation of offer

1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.
2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.
3. A revocation of an offer is ineffective if:
 - (a) the offer indicates that it is irrevocable;
 - (b) the offer states a fixed time period for its acceptance; or

- (c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 30 (ex Article 32)

Acceptance

1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.
2. Silence, inactivity or receipt of payment and its confirmation does not in itself constitute acceptance.

Article 31 (ex Article 34)

Time limit for acceptance

1. **Acceptance of an offer is ineffective once a rejection of the offer by the offeree has reached the offeror.**⁴⁸
2. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror, **or, where no such time limit has been fixed, within a reasonable time after the offer was made.**
3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

Article 32 (ex Article 35)

Late acceptance

1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.
2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.

Article 33

Time of conclusion of the contract

1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.
2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.
3. Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

⁴⁸ This has been streamlined, and the Articles on rejection and time limit have been merged.

Article 34
Auctions⁴⁹

1. **A contract under the Common European Sales Law may be concluded in the way that the seller tenders goods, digital content or related services to the public or to several persons by way of fixing a starting price and inviting bids ('auction').**
2. **Every bid constitutes an offer. Without prejudice to other rules under this Section, an offer lapses when a higher bid is placed.**
3. **Where the seller provides the means for concluding a mass communication contract and fixes a time limit for making bids, and unless otherwise indicated by the seller or a third party to whose selling conditions the seller submits,**
 - (a) **the auction proposal constitutes an anticipated acceptance of the highest offer which fulfils the conditions stipulated in the auction proposal;**
 - (b) **the auction proposal may be revoked only for good reasons other than unexpected bidding behaviour once the first bid which fulfils the conditions stipulated in the auction proposal has been placed;**
 - (c) **the contract is concluded when the auction has reached its time limit.**

SECTION 2 SPECIAL PROVISIONS FOR RELATIONS BETWEEN A TRADER AND A CONSUMER

Article 35 (ex Article 36)
Consent of the parties

1. In relations between a trader and a consumer, an offer has sufficient content and certainty only if it contains the object, the quantity or duration, and the price.
2. An acceptance which varies the terms of the original offer is a rejection of that offer combined with a new offer.
3. Where, however, the consumer has made an offer to the trader on the basis of information provided by the trader under Chapter 2 or otherwise, and the trader accepts this offer with expansions, restrictions or other alterations which would be to the detriment of the consumer, the contract is concluded on the basis of the information originally provided.

Article 36 (ex Article 37)
Protection against unsolicited contracts

1. The trader bears the burden of proof that an order or other statement communicated under the identity of a consumer has in fact been made by this consumer.
2. Where a trader supplies unsolicited goods to a consumer no contract arises from the consumer's failure to respond or from any action or inaction by the consumer in

⁴⁹ *A rule on the conclusion of contracts in the case of internet auctions seems to be imperative in an instrument specifically tailored to meet the needs of internet trade.*

relation to the goods or related services, and the consumer is exempt from any other liability to pay.

3. **An ancillary contract, or an ancillary agreement in the main contract, which imposes on the consumer an obligation to make an additional payment is not binding on the consumer unless the consumer has given express consent. The consumer may claim reimbursement of any additional payment made where the obligation to pay was not binding.**⁵⁰
4. When a trader makes a telephone call to a consumer or otherwise initiates a telephone communication with a view to concluding a contract
 - (a) the trader must present its calling line identification and, at the beginning of the conversation, inform the other party of its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call; and
 - (b) the contract concluded by telephone is binding on the consumer only if the consumer has signed the offer or has sent his written consent indicating the agreement to conclude a contract. The trader must provide the consumer with a confirmation of that agreement on a durable medium.

SECTION 3 SPECIAL PROVISIONS FOR RELATIONS BETWEEN TRADERS

Article 37 (ex Article 38) Modified acceptance

1. A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.
2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.
3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.
4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:
 - (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) the offeror objects to the additional or different terms without undue delay;
or

⁵⁰ *The rule against additional payments imposed by way of pre-ticked boxes or otherwise has been integrated in this Article because it is essentially a rule against unsolicited ancillary contracts (usually special insurance, fast delivery, etc).*

- (c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

Article 38 (ex Article 39)
Conflicting standard contract terms

- 5. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance.
- 6. Notwithstanding paragraph 1, no contract is concluded if one party:
 - (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph (1); or
 - (b) without undue delay, informs the other party of such an intention.

Chapter 4 Right to withdraw in contracts between traders and consumers

Article 39 (ex Article 40)
Right to withdraw

- 1. During the period provided for in Article **41**, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article **42**.
- 2. Paragraph 1 does not apply to:⁵¹
 - (a) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;
 - (b) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;
 - (c) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;
 - (d) a contract for the supply of goods which are liable to deteriorate or expire rapidly;
 - (e) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery

⁵¹ Those cases that were related to off-premises contracts have been deleted.

of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;

- (f) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
 - (g) a contract concluded at a public auction where goods or digital content are offered by the trader to the consumer who attends or is given the possibility of attending the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or digital content; and
 - (h) a contract for catering or services related to leisure activities which provides for a specific date or period of performance; and
 - (i) a contract which, in accordance with the laws of Member States, is established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope.
3. Paragraph 1 does not apply in the following situations:
- (a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;
 - (b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;
 - (c) where the items supplied were sealed audio or video recordings or digital content on a tangible medium and have been unsealed after delivery;
 - (d) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and acknowledgement in accordance with Article 24(2) and the trader has provided the confirmation in accordance with Article 14(2).
4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter, the consumer may withdraw the offer even if it would otherwise be irrevocable.

Article 40 (ex Article 41)
Exercise of right to withdraw

- 5. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 41.
- 6. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use

- (a) **the means provided in accordance with Article 14(1) and 24 (1)(c) for exercising the right of withdrawal by using the same means of distance communication as was used for the conclusion of the contract;⁵² or**
 - (b) **the model withdrawal form set out in Appendix 2; or**
 - (c) **any other unequivocal statement setting out the decision to withdraw.**
7. A communication of withdrawal is timely if sent before the end of the withdrawal period.
8. **Notwithstanding Article 14(2)**, the consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

Article 41 (ex Article 42)
Withdrawal period

1. The withdrawal period expires after fourteen days from:
- (a) the day on which the consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services;
 - (b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately, including a contract under which the seller also agrees to provide related services;
 - (c) the day on which the consumer has taken delivery of the last lot or piece in the case of a contract where the goods consist of multiple lots or pieces, including a contract under which the seller also agrees to provide related services;
 - (d) the day on which the consumer has taken delivery of the first item where the contract is for regular delivery of goods during a defined period of time, including a contract under which the seller also agrees to provide related services;
 - (e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;
 - (f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the sale of digital content where the digital content is supplied on a tangible medium;
 - (g) the day of the conclusion of the contract in the case of a contract where the digital content is not supplied on a tangible medium.
2. Where the trader has not provided the consumer with the information and the **appropriate, effective and accessible means for exercising the right of withdrawal** referred to in Article 24(1),⁵³ the withdrawal period expires:

⁵² *These revisions reflect the decisions taken in Article 14 (support in distance communication) and Article 24.*

⁵³ *This revision reflects the decisions taken in Articles 14 and 24.*

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

Article 42 (ex Article 43)
Effects of withdrawal

1. Withdrawal terminates the obligations of both parties:
 - (a) to perform the contract; or
 - (b) to conclude the contract in cases where an offer was made by the consumer.
2. After withdrawal, both parties are obliged to make restitution of what they have received **in accordance with Articles 43 and 44. The obligation to make restitution includes a duty to refrain from using and to delete what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.**⁵⁴
3. **In accordance with Article 6 any ancillary contract** is automatically terminated at no cost to the consumer. Paragraph 2 applies accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.

Article 43 (ex Article 44)
Obligations of the trader in the event of withdrawal

1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw from the contract in accordance with Article 40. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.
2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.
3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.

⁵⁴ *This clarification has been made in order to ensure that the trader may not continue using personal data he has received from the consumer in lieu of a monetary remuneration.*

Article 44 (ex Article 45)
Obligations of the consumer in the event of withdrawal

1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 40, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.
2. The consumer must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer in accordance with the rules in this Chapter that the consumer has to bear them.
3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 24.
4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.
5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.
6. The consumer is not liable to pay for the provision of related services, in full or in part, during the withdrawal period, where:
 - (a) the trader has failed to provide information in accordance with Article 24 (1) or (2); or
 - (b) the consumer has not given express consent and acknowledgement in accordance with Article 24 (2).
7. Where digital content is supplied on a tangible medium and a right of withdrawal exists in accordance with Article 39(3)(c) the rules on goods in paragraphs 1 to 4 apply to the tangible medium. Where digital content is not supplied on a tangible medium and a right of withdrawal exists in accordance with Article 39(3)(d) the consumer is not liable to pay for the supply.
8. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.

Chapter 5 Avoidance of a contract

Article 45 (ex Article 46) *Scope and mandatory nature*

1. This Chapter applies to the avoidance of a contract for defects in consent and similar defects.
2. The rules in this Chapter apply to the avoidance of an offer, acceptance or other unilateral statement indicating intention with appropriate adaptations.
3. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Article 46 (ex Article 47) *Mistake*

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms ; and
 - (b) the other party:
 - (i) caused the mistake, in particular by failing to comply with any pre-contractual duty under Chapter 2; or
 - (ii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing in accordance with Article 47 (3) would have required a party aware of the mistake to point it out.
2. A party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party.
3. An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

Article 47 (ex Article 48) *Fraud*

1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.

2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or **made** recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.
3. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:
 - (a) whether the party had special expertise;
 - (b) the cost to the party of acquiring the relevant information;
 - (c) the ease with which the other party could have acquired the information by other means;
 - (d) the nature of the information;
 - (e) the apparent importance of the information to the other party; and
 - (f) in contracts between traders good commercial practice in the situation concerned

Article 48 (ex Article 49)

Threats

A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of imminent and serious harm, or of an act which is wrongful in itself, or which it is wrongful to use as a means to obtain the conclusion of the contract.

Article 49 (ex Article 50)

Contracts concluded by way of unfair commercial practices

A party who is a consumer may avoid a contract if the contract was concluded because the other party made use of commercial practices which are unfair under Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

Article 50 (ex Article 51)

Third persons

1. Where a third person for whose acts a party is responsible or who with a party's assent is involved in the making of a contract:
 - (a) causes a mistake, or knows of or could be expected to know of a mistake, or
 - (b) is guilty of fraud or threats or unfair commercial practices,remedies under this Chapter are available as if the behaviour or knowledge had been that of the party.
2. Where a third person for whose acts a party is not responsible and who does not have the party's assent to be involved in the making of a contract is guilty of fraud or threats, remedies under this Chapter are available if the party knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.

Article 51 (ex Article 52)

Unfair exploitation

A party may avoid a contract if, at the time of the conclusion of the contract:⁵⁵

- (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and
- (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

Article 52 (ex Article 53)

Notice of avoidance

1. Avoidance is effected by notice to the other party.
2. A notice of avoidance is effective only if it is given within:
 - (a) six months in case of mistake; and
 - (b) one year in case of fraud, threats and unfair exploitation;after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely.

Article 53 (ex Article 54)

Confirmation

Where the party who has the right to avoid a contract under this Chapter confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.

Article 54 (ex Article 55)

Effects of avoidance

1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.
2. Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.
3. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent, is regulated by the rules on restitution in Chapter 16.

⁵⁵ Paragraph 2 was deleted in the light of the EP's proposal to include individually negotiated terms in the unfairness test.

Article 55 (ex Article 56)

Damages for loss

1. A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.
2. Claims for damages shall be subject to the provisions in **Chapter 12 and** Chapter 15 Section 3, with appropriate adaptations.

Article 56 (ex Article 57)

Choice of remedy

A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.

Part III Assessing what is in the contract

Chapter 6 Interpretation

Article 57 (ex Article 58)

General rules on interpretation of contracts

1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract, or equivalent conduct referred to in Article **17(1)**, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression or equivalent conduct is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give, in the light of the matters mentioned in Article **58** and the contract as a whole, to the expressions or equivalent conduct used by the parties.
4. The rules in this Chapter apply to the interpretation of an offer, acceptance or other unilateral statement indicating intention with appropriate adaptations.

Article 58 (ex Article 59)

Relevant matters

In assessing the meaning of expressions or equivalent conduct regard may be had, in particular, to:

- (a) any commonly understood meaning given to expressions in the branch of activity concerned;
- (b) the nature and purpose of the contract;
- (c) the circumstances in which it was concluded ;
- (d) the conduct of the parties, both prior to and subsequent to the conclusion of the contract;
- (e) any interpretation which the parties have previously given to expressions identical or similar to those used in the contract, and any practices established between the parties;
- (f) any relevant general usages;
- (g) good faith and fair dealing.

Article 59 (ex Article 61)

Preference for interpretation which gives contract terms effect

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

Article 60 (ex Article 62)

Not individually negotiated contract terms

1. To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated.
2. Where, in a contract which does not fall under Article 61, there is doubt about the meaning of a contract term which has not been individually negotiated, an interpretation of the term against the party who supplied it shall prevail.

Article 61 (ex Article 63)

Interpretation in favour of consumers

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

Chapter 7 Contents and effects

SECTION 1 HOW CONTRACT TERMS ARE ASCERTAINED⁵⁶

Article 62 (ex Article 64)

Sources of contract terms

The terms of the contract are derived from:

- (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;
- (b) information about the characteristics of what is to be supplied which is provided by the trader under Chapter 2, and any other statement made to the other party, before or when the contract is concluded;
- (c) any usage or practice by which parties are bound by virtue of Article 63;
- (d) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and
- (e) any contract term implied by virtue of Articles 64 or 65.

⁵⁶ *The rule on how terms not individually negotiated are included is now integrated in Chapter 2 (Article 23). The rule against the imposition of additional payments is now in Chapter 3 (Article 36(3)).*

Article 63 (ex Article 65)
Usages and practices in contracts between traders

1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
3. Usages and practices do not bind the parties to the extent to which they conflict with the agreement of the parties or any mandatory rules of the Common European Sales Law.

Article 64 (ex Article 66)
Contract terms derived from certain pre-contractual statements

1. Where the trader, or a person engaged in advertising or marketing for the trader, publicly makes a statement before the contract is concluded about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:
 - (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or
 - (b) the other party's decision to conclude the contract could not have been influenced by the statement.
2. Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 65 (ex Article 67)
Contract terms which may be implied

1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
 - (a) the nature and purpose of the contract; and
 - (b) the circumstances in which the contract was concluded.
2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed.
3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.

Article 66 (ex Article 68)

Determination of price

Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

Article 67 (ex Article 69)

Unilateral determination by a party

1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.
2. In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 68 (ex Article 70)

Determination by a third party

1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.
2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.
3. In relations between a trader and a consumer the parties may not to the detriment of the consumer exclude the application of paragraph 2 or derogate from or vary its effects.

Article 69 (ex Article 71)

Merger clauses

1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.
2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.
3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.
4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

SECTION 2 **SPECIFIC CONTRACT TERMS**

Article 70 (ex Article 74)

Conditional rights and obligations

1. The contract may provide that a right or obligation is conditional upon the occurrence of an uncertain future event, so that it takes effect only if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).
2. When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be.
3. When a contractual obligation comes to an end on the fulfilment of a resolutive condition any restitutionary effects are regulated by the rules in Chapter 16 on restitution with appropriate adaptations.

Article 71 (ex Article 75)

Contract terms in favour of third parties

1. The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.
2. The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.
3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:
 - (a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a contract with the third party; and
 - (b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.
4. The third party may reject a right conferred upon them by notice to either of the contracting parties, if that is done before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.
5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred. The contract determines whether and by whom and in what circumstances the right or benefit can be revoked or modified after that time. Even if the right or benefit conferred is by virtue of the contract revocable or subject to modification, the right to revoke or modify is lost if the parties have, or the party having the right to revoke or modify has, led the third party to believe that it is not

revocable or subject to modification and if the third party has reasonably acted in reliance on it.

Article 72

Contracts of indeterminate duration (ex Article 76)

1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party by giving a reasonable period of notice.
2. In relations between a trader and a consumer the period under paragraph 1 shall not exceed two months.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Chapter 8 Unfair contract terms

SECTION 1 GENERAL PROVISIONS

Article 73 (ex Article 77)

Effects of unfair contract terms

1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.
2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

Article 74 (ex Article 78)

Exclusions from unfairness test

1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.
2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 76.
3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

Article 75 (ex Article 79)

Mandatory nature

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

SECTION 2 UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN A TRADER AND A CONSUMER

Article 76 (ex Article 80)

Duty of transparency in contract terms not individually negotiated

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

Article 77 (ex Article 81)

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

1. In a contract between a trader and a consumer, a contract term supplied by the trader⁵⁷ is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (a) whether the trader complied with the duty of transparency set out in Article 76;
 - (b) **whether it is, in its individual context, of such a surprising nature that the consumer could not have expected the proposed term;**⁵⁸
 - (c) the nature of what is to be provided under the contract;
 - (d) the circumstances prevailing during the conclusion of the contract;
 - (e) to the other contract terms; and
 - (f) to the terms of any other contract on which the contract depends.

Article 78 (ex Article 82)

Contract terms which are always unfair

A contract term is always unfair for the purposes of this Section if its object or effect is to:

- (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader;
- (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;

⁵⁷ The deletion of the words 'which has not been individually negotiated' is a policy decision made by the EP. The ELI does not take a position on it as such but admits it is a very neat and elegant solution to the problem posed by the Commission Proposal that the consumer was without protection once individual negotiations have taken place.

⁵⁸ This has largely been copied from EP Amendment 156.

- (c) **inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;**⁵⁹
- (d) the trader's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
- (e) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;
- (f) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
- (g) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
- (h) provide that the consumer is bound by the contract when the trader is not;
- (i) require the consumer to use a more formal method for terminating the contract within the meaning of Section 2 of Chapter 15 than was used for conclusion of the contract;
- (j) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (k) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (l) determine that non-individually negotiated contract terms within the meaning of Article 8(1)(h) prevail or have preference over contract terms which have been individually negotiated.

Article 79 (ex Article 83)

Contract terms which are presumed to be unfair

A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:

- (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;
- (b) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;

⁵⁹ *The consumer's remedies for non-performance of an obligation on the part of the trader may not be restricted by agreement anyway. If at all, this clause must be in the 'black list'.*

- (c) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;
- (d) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance;
- (e) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
- (f) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- (g) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;
- (h) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;
- (i) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;
- (j) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
- (k) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;
- (l) allow a trader to transfer its obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
- (m) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;

- (n) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
- (o) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;
- (p) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;
- (q) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
- (r) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- (s) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- (t) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;
- (u) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- (v) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days.

SECTION 3 UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN TRADERS

Article 80 (ex Article 84)

Meaning of "unfair" in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - (a) it was not individually negotiated; and
 - (b) it grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (a) the nature of what is to be provided under the contract;
 - (b) the circumstances prevailing during the conclusion of the contract;
 - (c) the other contract terms; and
 - (d) the terms of any other contract on which the contract depends.

Article 81⁶⁰ (ex Article 154)

Unfair contract terms relating to interest for late payment

1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is **subject to the unfairness test under Article 80 irrespective of whether or not it was individually negotiated.**
2. For the purpose of paragraph 1, a contract term providing for a time or period for payment or a rate of interest less favourable to the aggrieved party than the time, period or rate specified in Article 148, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 150 paragraph 4 is presumed to be unfair.
3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.

⁶⁰ It has been rightly pointed out that this would be the proper place for what was previously proposed as Article 154.

Part IV Obligations of the parties

Chapter 9 Obligations of the parties to a sales contract

SECTION 1 THE SELLER'S OBLIGATIONS

Article 82 (ex Article 85)

Main obligations of the seller

1. The seller of goods or of digital content must:
 - (a) deliver the goods or supply the digital content;
 - (b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied, **or make available a right to re-use the digital content for an unlimited period;**⁶¹
 - (c) ensure that the goods or the digital content are in conformity with the contract;
 - (d) ensure that the buyer has the right to use the digital content in accordance with the contract; and
 - (e) deliver such documents representing or relating to the goods or digital content as may be required by the contract.
2. The provisions relating to delivery apply accordingly to the supply of digital content.
3. **Unless where the parties have agreed otherwise, and notwithstanding any right of the buyer that might follow from applicable rules of law, the seller of digital content is under an obligation**⁶²
 - (a) **to make available to the buyer future updates of the digital content which are designed to attain or maintain its functionalities, such as by closing security gaps, automatically and free of any extra charge;**
 - (b) **to provide to the buyer a right to re-sell the copy of the digital content; and**
 - (c) **to supply a new copy or new copies of the digital content where, for whatever reason, the copy or copies originally supplied can no longer be used by the buyer.**

In a consumer or mass communication contract, terms restricting these rights are valid only where the seller has drawn the buyer's specific attention to these terms before the contract was concluded.

⁶¹ *This modification follows from the decision to define sale of goods and of digital content in a parallel way.*

⁶² *Paragraph (3) has been inserted in order to take into due account the expectations on the part of the buyers of digital content.*

Article 83 (ex Article 86)

Method of delivery

1. Unless agreed otherwise, the seller fulfils the obligation to deliver:
 - (a) in the case of a consumer sales contract⁶³ in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods or the digital content to the consumer;
 - (b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or
 - (c) in cases that do not fall within points (a) or (b), by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.
2. In points (a) and (c) of paragraph 1, any reference to the consumer or the buyer includes a third party, not being the carrier, indicated by the consumer or the buyer in accordance with the contract, or the carrier where the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader.

Article 84 (ex Article 87)

Seller's obligations regarding carriage of the goods

1. Where the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.
2. Where the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
3. Where the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

Article 85 (ex Article 88)

Retention of title

Where a seller delivers goods before payment of the price, the seller is nevertheless not bound to transfer the ownership of the goods until they are fully paid if a retention-of-title clause has been agreed before the delivery.

⁶³ *The restriction to distance and off-premises contracts had to be removed, as all contracts under the CESL are now distance contracts.*

SECTION 2 CONFORMITY OF THE GOODS AND DIGITAL CONTENT

Article 86 (ex Article 89) Conformity with the contract

1. In order to conform with the contract, the goods or digital content must:
 - (a) be of the quantity, quality and description required by the contract;
 - (b) be contained or packaged in the manner required by the contract; and
 - (c) be supplied along with any accessories, installation instructions or other instructions required by the contract.
2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 86 to 88, save to the extent that the parties have agreed otherwise.
3. In a consumer sales contract, any agreement derogating from the requirements of Articles 92 and 94 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it.

Article 87 (ex Article 90) Criteria for conformity of the goods and digital content

The goods or digital content must:

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;
- (b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;
- (c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;
- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;
- (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Articles 62(b) and 64; and
- (g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect regard is to be had, inter alia, to whether or not the goods or digital content were supplied in exchange for the payment of a price.

Article 88 (ex Article 91)
Installation under a consumer sales contract

Where goods or digital content supplied under a consumer sales contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if:

- (a) the goods or the digital content were installed by the seller or under the seller's responsibility; or
- (b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

Article 89 (ex Article 92)
Third party rights or claims

1. The goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party.
2. As regards rights or claims based on intellectual property, subject to paragraphs 3 and 4, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party:
 - (a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's habitual residence indicated by the buyer at the time of the conclusion of the contract; and
 - (b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.
3. Paragraph 2 does not apply where
 - (a) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer;
 - (b) in a contract between traders, the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract; or
 - (c) in a contract between a trader and a consumer, the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.
4. In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 90 (ex Article 93)
Relevant time for establishing conformity

1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter 10.

2. In a consumer sales contract, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity.
3. In a case governed by Article 88(a) any reference in paragraphs 1 or 2 of this Article to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. In a case governed by Article 88(b) it is to be read as a reference to the time when the consumer had reasonable time for the installation.
4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.
5. In a contract between a trader and a consumer, the parties may not, to the detriment of a consumer, exclude the application of this Article or derogate from or vary its effect.

SECTION 3 THE BUYER'S OBLIGATIONS

Article 91 (ex Article 94)
Main obligations of the buyer

1. The buyer must:
 - (a) pay the price, unless the goods or digital content are not supplied in exchange for a price;
 - (b) take delivery of the goods or the digital content; and
 - (c) take over documents representing or relating to the goods or relating to the digital content as may be required by the contract.
2. Point (b) of paragraph 1 does not apply to contracts for the supply of digital content not supplied on a tangible medium.

Article 92 (ex Article 95)
Taking delivery

1. The buyer fulfils the obligation to take delivery by:
 - (a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and
 - (b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.
2. In a **contract between a trader and a consumer**,⁶⁴ in particular, physical absence of the consumer **or his representative at the agreed upon place and**⁶⁵ at the time when the seller makes an attempt to deliver does not amount to non-performance of the

⁶⁴ *The restriction to distance and off-premises contracts had to be deleted.*

⁶⁵ *This seems to be a useful clarification.*

obligation under paragraph 1, unless a specific date and time or period of time had explicitly been agreed upon by the parties.

Article 93 (ex Article 96)
Delivery of wrong quantity

1. If the seller delivers a quantity of goods or digital content less than that provided for in the contract the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.
2. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer **may refuse** the excess quantity. **The seller may fix a reasonable period for the buyer to declare whether he intends to exercise the right to refuse.**⁶⁶
3. If the buyer **does not exercise the right to refuse** the excess quantity it is treated as having been supplied under the contract and must be paid for, where a price was agreed upon, at the contractual rate.
4. In a consumer sales contract paragraph 3 does not apply if the consumer reasonably believes that the trader has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.

SECTION 4 PASSING OF RISK

Article 94 (ex Article 97)
Effect of passing of risk

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 95 (ex Article 98)
Identification of goods or digital content to contract

The risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.

Article 96 (ex Article 99)
Passing of risk in a consumer sales contract

1. In a consumer sales contract, the risk passes at the time when the consumer takes delivery, within the meaning of Article 83, of the goods or the tangible medium on which the digital content is supplied.
2. Where the consumer or the third party designated by the consumer fails to perform its obligation to take delivery the risk passes at the time when delivery should have

⁶⁶ *Changes in this Article have been made as it has been observed that the seller, without being entitled to fix a period, would be in a difficult situation if the buyer remains silent.*

been taken unless the non-performance is excused under Article 119 or the consumer is entitled to withhold taking of delivery pursuant to Article 133.

Article 97 (ex Article 100)
Passing of risk in contracts between traders

1. In a contract between traders the risk passes when the buyer takes delivery of the goods or digital content or the documents representing the goods.
2. If the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 133.
3. In a contract of sale which involves carriage of goods, whether or not the seller is authorised to retain documents controlling the disposition of the goods,
 - (a) if the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract;
 - (b) if the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.
4. Where goods are sold in transit the risk passes to the buyer as from the time the goods were handed over to the first carrier or when the contract is concluded, depending on the circumstances. Risk does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer.

Chapter 10 Obligations of the parties to a related service contract

SECTION 1 THE SELLER'S OBLIGATIONS

Article 98 (ex Article 101)
Obligation to achieve result

1. The seller must achieve any specific result stated in the contract explicitly.
2. The seller must achieve the specific result envisaged by the buyer at the time of the conclusion of the contract, provided that in the case of a result envisaged but not explicitly stated:
 - (a) the result envisaged was one which the buyer could reasonably be expected to have envisaged; and
 - (b) the buyer had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

3. Where in a contract between a trader and a consumer the related service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 87.
4. **Where the related service includes the storage of digital content sold the seller is under an obligation to transfer the attendant physical control of the goods or digital content to the buyer upon the buyer's request, and at the latest when the contract for storage comes to an end, by enabling the transfer of a usable version of the digital content to another suitable storage facility of the buyer's choice at no further cost.**⁶⁷
5. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of **paragraphs 2 and 4** or derogate from or vary their effects.

Article 99 (ex Article 102)
Obligation of care and skill

1. In the absence of any obligation to achieve a specific result, the seller must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service.
2. In determining the reasonable care and skill required of the seller, regard is to be had, among other things, to:
 - (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the buyer;
 - (b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and
 - (c) the time available for the performance of the related service.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 100 (ex Article 103)
Obligation to prevent damage

The seller must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the related service. This is without prejudice to any general duty to prevent injury, damage or loss which a party owes to the other party.

⁶⁷ *This rule has been inserted, in particular, to take account of contracts for the sale of digital content which remains stored in the seller's cloud and where it is thus difficult to draw a line between sales and services. The ELI tentatively takes the view that such contracts should qualify as sales only where the buyer ultimately has a right to attain 'physical' control of the copy of digital content, be it by downloading it to his hardware, be it by transferring it to another trader's cloud.*

Article 101 (ex Article 104)
Obligation to provide invoice

Where a separate price is payable for the related service, and the price is not a lump sum agreed at the time of conclusion of the contract, the seller must provide the buyer with an invoice which explains, in a clear and intelligible way, how the price was calculated.

Article 102 (ex Article 105)
Obligation to warn of unexpected or uneconomic cost

1. The seller must warn the buyer and ask the buyer whether he intends to exercise his right under Article 104 to decline performance if:
 - (a) the cost of the related service would be greater than already indicated by the seller to the buyer; or
 - (b) the related service would cost more than the value of the goods or the digital content after the related service has been provided, so far as this is known to the seller.
2. A seller who fails to warn and ask the buyer in accordance with paragraph 1 is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods or digital content after the related service has been provided.
3. In a contract between a trader and a consumer, the trader is only entitled to a price exceeding the estimate given to the consumer before the conclusion of the contract where
 - (a) the increase is due to an impediment within the consumer's control; and
 - (b) the trader could not be expected to take the possibility of such an impediment into account when making the estimate.

SECTION 2 THE BUYER'S OBLIGATIONS

Article 103 (ex Article 106)
Payment of the price

The buyer must pay any price that is payable for the related service in accordance with the contract.

Article 104 (ex Article 107)
Provision of access

Where it is necessary for the seller to obtain access to the customer's premises in order to perform the related service the buyer must provide such access at reasonable hours.

SECTION 2 DECLINE OF PERFORMANCE BY THE BUYER

Article 105 (ex Article 108)

Buyer's right to decline performance

1. The buyer may at any time give notice to the seller that performance, or further performance, of the related service is no longer required.
2. Where notice is given under paragraph 1:
 - (a) the seller no longer has the right or obligation to provide the related service; and
 - (b) the buyer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Chapter 11 Performance of obligations

SECTION 2 GENERAL

Article 106 (ex Article 109)

Place of performance

1. Where the place of performance of an obligation cannot be otherwise determined it is:
 - (a) in the case of an obligation to pay, the residence of the party entitled to receive payment;
 - (b) in the case of an obligation to deliver or supply in a consumer sales contract⁶⁸ **where** the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence;
 - (c) in the case of an obligation to deliver in any other type of sale, where the contract involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier;
 - (d) in the case of an obligation to return, the place of performance of the obligation to deliver;

⁶⁸ *The restriction to distance and off-premises contracts had to be removed.*

- (e) in the case of any other obligation, the residence of the party obliged to perform.
2. If a party has more than one residence, the residence for the purposes of paragraph 1 is that which has the closest relationship to the obligation.
 3. If a party causes any increase in the expenses incidental to performance by a change in residence subsequent to the time of the conclusion of the contract, that party is obliged to bear the increase.

Article 107 (ex Article 110)
Time of performance

1. If the time at which, or a period of time within which, an obligation is to be performed cannot be otherwise determined it must be performed without undue delay after it arises.
2. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content without undue delay, but not later than 30 days from the conclusion of the contract.
3. For goods or digital content, payment of the price is due at the moment of delivery. For related services, the price is payable when the related service is completed and the object of the related service is made available to the customer.
4. Advance payment by a consumer may not be asked for unless the requirements of Article 25bis are fulfilled.

Article 108 (ex Article 111)
Means of payment

1. Payment of money due may be made by the means of payment indicated by the contract terms or, if there is no such indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction.
2. A party entitled to receive payment who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The party may enforce the original obligation to pay if the order or promise is not honoured.
3. The original obligation is extinguished if the party entitled to receive payment accepts a promise to pay from a third party with whom the party entitled to receive payment has a pre-existing arrangement to accept the third party's promise as a means of payment.
4. In a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means.

Article 109 (ex Article 112)
Costs of performance

The costs of performing an obligation are borne by the party required to perform.

SECTION 2 MODIFIED PERFORMANCE

Article 110 (ex Article 113)

Early performance

1. A party may reject a tender of performance made by the other party before performance is due if it has a legitimate interest in so doing.
2. A party's acceptance of early performance does not affect the time fixed for the performance by the other party of any reciprocal obligation.

Article 111 (ex Article 114)

Performance entrusted to another

1. A party may entrust performance to another person, unless personal performance by the party is required by the contract terms.
2. A party who entrusts performance of an obligation to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

Article 112 (ex Article 115)

Performance by a third party

1. The party entitled to receive performance cannot refuse performance by a third party if personal performance by the party obliged to perform is not required by the contract terms and
 - (a) the third party acts with the assent of the party obliged to perform; or
 - (b) the third party has a legitimate interest in performing and the party obliged to perform has failed to perform or it is clear that this party will not perform at the time that performance is due.
2. Where the party entitled to receive performance accepts performance by a third party in circumstances not covered by paragraph 1 the party who was obliged to perform is discharged from the obligation but the party who has accepted performance is liable to the party who was obliged to perform for any loss caused by that acceptance.

SECTION 3 EFFECTS OF PERFORMANCE

Article 113 (ex Article 116)

Extinctive effect of performance

1. Full performance extinguishes the obligation if it is:
 - (a) in accordance with the terms regulating the obligation; or

- (b) of such a type as by law to afford the party obliged to perform a good discharge.
- 2. Performance by a third party which is accepted or cannot be refused by the party entitled to receive performance discharges the party obliged to perform except to the extent that the third person takes over the first party's right by assignment or subrogation according to the applicable law.

Article 114 (ex Article 117)
Imputation of performance

- 1. Where a party has to perform several obligations of the same nature and makes a performance which does not suffice to extinguish all of the obligations, the party may at the time of performance notify the other party of the obligation to which the performance is to be imputed.
- 2. If the party obliged to perform does not make a notification under paragraph 1 the other party may, by notifying the party that is obliged to perform within a reasonable time, impute the performance to one of the obligations. Such an imputation is not effective if it is to an obligation which is not yet due or is disputed.
- 3. In the absence of an effective imputation by either party, the performance is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:
 - (a) the obligation which is due or is the first to fall due;
 - (b) the obligation for which the party entitled to receive performance has no or the least security;
 - (c) the obligation which is the most burdensome for the party obliged;
 - (d) the obligation which arose first.

If none of those criteria applies, the performance is imputed proportionately to all the obligations.

- 4. The performance may be imputed under paragraph 2 or 3 to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the performance could be imputed in accordance with those paragraphs.
- 5. In the case of an obligation to pay, a payment is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the party entitled to receive payment makes a different imputation.

Article 115 (ex Article 118)
Performance not due

- 1. A performance or part of a performance that was made in the mistaken belief that it was due under the contract must be returned by the other party ('the recipient').
- 2. Subject to paragraphs 3 and 4, the rules on restitution in Chapter 16 apply with appropriate adaptations.

3. The recipient is not liable for more than what the recipient has retained or for any surviving value where what has been received cannot be returned, or cannot be returned in full, and the recipient
 - (a) did not know and could not be expected to know that it was not entitled to receive the performance; or
 - (b) did not deliberately accept the performance.
4. Where the recipient later gains knowledge that it was not entitled to receive performance, the recipient shall have an obligation to return or pay to the extent that it would, at the point in time when knowledge was gained, have been liable to return or pay under paragraph 3.

Article 116 (ex Article 119)
Performance not accepted

1. Where a party fails to accept money properly tendered, the tendering party may, after notice to the first party, be discharged from the obligation to pay through depositing the money to the order of the first party in accordance with the law of the place where payment is due.
2. A party who has an obligation to deliver or return goods or digital content and who is left in possession of the goods or the digital content because the other party, when bound to do so, has failed to accept or retake them must take reasonable steps to protect and preserve them.
3. The tendering party is discharged from the obligation to deliver or return if that party:
 - (a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the other party, and notifies the other party of this; or
 - (b) sells the goods or the digital content on reasonable terms after notice to the other party, and pays the net proceeds to the other party.
4. The tendering party is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

SECTION 4 PERFORMANCE MORE ONEROUS

Article 117 (ex Article 120)
Change of circumstances

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
2. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.
3. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:

- (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
 - (b) terminate the contract within the meaning of Section 2 of Chapter 15 at a date and on terms to be determined by the court.
4. Paragraphs 1 to 3 apply only if:
- (a) the change of circumstances occurred after the time when the contract was concluded;
 - (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
 - (c) the party relying on the change of circumstances did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

Part V Remedies for Non-Performance

Chapter 12 Availability of remedies for non-performance

Article 118 (ex Article 121)

Non-performance and fundamental non-performance

1. Non-performance of an obligation is any failure to perform that obligation, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.
2. Non-performance of an obligation by a party is fundamental if:
 - (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
 - (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.

Article 119 (ex Article 122)

Excused non-performance

1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.
3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

Article 120 (ex Article 123)

Remedies for non-performance

1. In the case of a non-performance of an obligation under Chapters 9 and 10 the aggrieved party may resort to the applicable remedies under Chapters 13 to 15.
2. The provisions on requiring performance, withholding performance, damages and interest apply also to the non-performance of obligations other than mentioned in Chapters 9 and 10.
3. Remedies which are not incompatible may be cumulated.

Article 121 (ex Article 124)
Non-performance attributable to creditor

A party may not resort to any of the remedies to the extent that this party caused the other party's non-performance or its effects. In assessing the extent to which a party has caused the other party's non-performance regard may be had, inter alia, to the degree it was to blame.

Article 122 (ex Article 125)
Mandatory nature

1. In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of Chapters 12 to 15, or derogate from or vary their effect before the non-performance is brought to the non-performing party's attention by the other party.
2. **Without prejudice to the rules in Chapter 8, a term of a contract which purports to exclude or restrict liability to pay damages for personal injury caused intentionally or by gross negligence is in any case void.**⁶⁹

Chapter 13 The seller's remedies

Article 123 (ex Article 126)
Overview of seller's remedies

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

- (a) require performance under Article 124;
- (b) withhold the seller's own performance under Section 1 of Chapter 15;
- (c) terminate the contract under Section 2 of Chapter 15; and
- (d) claim interest on the price or damages under Sections 3 and 4 of Chapter 15.

Article 124 (ex Article 127)
Requiring performance of buyer's obligations

1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.
2. **Performance of an obligation cannot be required where:**
 - (a) **performance would be impossible or has become unlawful;**
 - (b) **the burden or expense of performance would be disproportionate to the benefit that the seller would obtain; or**

⁶⁹ This rule has been transferred from the Section on damages as it seemed to belong either here or in Chapter 8.

- (c) **performance would be of such a personal character that it would be unreasonable to enforce it.**⁷⁰
- 3. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense. The seller's right to require damages for the buyer's non-performance remains unaffected.
- 4. In the case of a related service, Article 105 applies instead of paragraph (2).

Chapter 14 The buyer's remedies

SECTION 1 GENERAL PROVISIONS

Article 125 (ex Article 128) Overview of buyer's remedies

1. In the case of non-performance of an obligation by the seller, the buyer may, where the specific requirements for the respective remedies are met, do any of the following:
 - (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 2 of this Chapter;
 - (b) reduce the price under Section 3 of this Chapter;
 - (c) withhold the buyer's own performance under Section 1 of Chapter 15;
 - (d) terminate the contract under Section 2 of Chapter 15; and
 - (e) require damages under Section 3 of Chapter 15.
2. If the buyer is a trader the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Article 126. If the buyer is a consumer the buyer's rights are subject to cure by the trader only
 - (a) in a contract for the sale of goods or digital content to be manufactured, produced or modified according to the consumer's specifications or which are clearly personalised;
 - (b) in a contract for a related service except in the case of incorrect installation of goods or digital content; and
 - (c) where the consumer notifies the trader of the lack of conformity more than six months after risk has passed to the consumer.

⁷⁰ *It has been rightly pointed out that there is no justification for having these restrictions for performance on the part of the seller (cf Article 127), but not for performance on the part of the buyer.*

3. If the buyer is a trader the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Articles 127 and 128.
4. Where goods, digital content or services are not supplied in exchange for the payment of a price, the supply of personal data or other benefit, the buyer is not entitled to any remedy other than damages under Section 3 of Chapter 15 for personal injury or for damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of what was supplied, except for any gain of which the buyer has been deprived by damage to property.

Article 126 (ex Article 129)

Cure by the seller

1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.
2. Without prejudice to paragraph (1) a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.
3. An offer to cure is not precluded by notice of termination.
4. The buyer may refuse an offer to cure only if:
 - (a) the remedies of the buyer who is a consumer are not subject to cure by the seller under paragraph (2) of Article 125;
 - (b) cure cannot be effected promptly and without significant inconvenience to the buyer;
 - (c) the buyer has reason to believe that the seller's future performance cannot be relied on; or
 - (d) delay in performance would amount to a fundamental non-performance.
5. The seller has a reasonable period of time to effect cure. In contracts between a trader and a consumer, the reasonable period must not exceed 30 days.
6. The rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Article 127 (ex Article 130)

Examination of the goods in contracts between traders

1. In a contract between traders the buyer is expected to examine the goods or digital content or the effect produced by a related service, or cause them to be examined, within as short a period as is reasonable in the circumstances not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.
2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

3. If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 128 (ex Article 131)

Requirement of notification of lack of conformity in contracts between traders

1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity. The buyer does not have to notify the seller if the buyer has reason to believe that the seller is aware of the lack of conformity and will cure it on its own initiative.
2. The time starts to run when the goods or digital content are supplied or the service completed or when the buyer discovers could be expected to discover the lack of conformity, whichever is later. This does not apply in respect of the third party claims or rights referred to in Article 88.
3. The buyer loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity within two years from the time of delivery.
4. Where the parties have agreed that the goods or digital content must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph 2 does not expire before the end of the agreed period.
5. The seller is not entitled to rely on this Article if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer.

SECTION 2 REQUIRING PERFORMANCE

Article 129 (ex Article 132)

Requiring performance of seller's obligations

1. The buyer is entitled to require performance of the seller's obligations including the remedying free of charge of a performance which is not in conformity with the contract.
2. Performance cannot be required where:
 - (a) performance would be impossible or has become unlawful;
 - (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain; or
 - (c) performance would be of such a personal character that it would be unreasonable to enforce it.

Article 130 (ex Article 133)

Consumer's choice between repair and replacement

1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 129 the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:
 - (a) the value the goods would have if there were no lack of conformity;
 - (b) the significance of the lack of conformity; and
 - (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.
3. This Article and Article 130 do not apply to related services.

Article 131 (ex Article 134)

Return of replaced item

1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.
2. The rights and obligations of the parties with regard to the replaced item are governed by the rules of Chapter 16 on Restitution.

SECTION 3 PRICE REDUCTION

Article 132 (ex Article 135)

Right to reduce price

1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.
2. A buyer who is entitled to reduce the price under paragraph (1) and who has already paid a sum exceeding the reduced price may recover the excess from the seller.
3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Chapter 15 General remedies

SECTION 1 RIGHT TO WITHHOLD PERFORMANCE

*Article 133 (ex Article 136)
Right to withhold performance*

1. A party who is to perform at the same time as, or after, the other party performs has a right to withhold performance until the other party has tendered performance or has performed.
2. A party who is to perform before the other party performs and who reasonably believes that there will be non-performance by the other party when the other party's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the other party gives an adequate assurance of due performance or provides adequate security.
3. A party who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty.
4. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the other party's obligations are to be performed in separate parts or are otherwise divisible, the party entitled to withhold performance may do so only in relation to that part which has not been performed, unless the other party's non-performance is such as to justify withholding the first party's performance as a whole.

SECTION 2 TERMINATION

*Article 134 (ex Article 137)
Termination for fundamental non-performance*

A party may terminate the contractual relationship

- (a) if the other party's non-performance under the contract is fundamental within the meaning of Article 118(2); or
- (b) if the other party has declared in advance, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.

*Article 135 (ex Article 138)
Termination for delay in delivery after notice fixing additional time for performance*

1. In a case of delay in performance which is not in itself fundamental a party may terminate the contract if the party gives notice fixing an additional period of time of

reasonable length for performance and the other party does not perform within that period.

2. In relations between a trader and a consumer, the additional time under paragraph (1) for payment of the price by the consumer must not be less than 30 days. Notice may be given before the date when payment is due.

Article 136 (ex Article 139)

Termination by the consumer for a lack of conformity

In a consumer sales contract, where there is a non-performance because the goods, digital content or services do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is minor.

Article 137 (ex Article 140)

Scope of right to terminate

1. Where the non-performing party's obligations under the contract are not divisible the party entitled to terminate may only terminate the contractual relationship as a whole.
2. Where the non-performing party's obligations under the contract are to be performed in separate parts, or on a continuous basis, or are otherwise divisible, then:
 - (a) if there is a ground for termination for non-performance of a part to which a part of the counter-performance can be apportioned, the party entitled to terminate may terminate only in relation to this part;
 - (b) the party entitled to terminate may terminate the contractual relationship as a whole only if that party cannot reasonably be expected to accept performance of the other parts or there is a ground for termination in relation to the contractual relationship as a whole.

Article 138 (ex Article 141)

Notice of termination

1. A right to terminate under this Section is exercised by notice to the other party.
2. Where the notice under Article 135 provides for automatic termination if the other party does not perform within the period fixed by the notice, termination takes effect after that period without further notice.

Article 139 (ex Article 142)

Loss of right to terminate

1. A party entitled to terminate loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the party became aware, or if the party is a trader could be expected to have become aware, of the non-performance, whichever is later.
2. Paragraph 1 does not apply where no performance at all has been tendered.

Article 140 (ex Article 143)

Effects of termination

1. On termination under this Section, the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end.
2. Termination does not, however, affect any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.
3. Termination does not preclude a right to damages for non-performance of the now extinguished obligations in accordance with Section 3, including a right to a stipulated sum for non-performance.
4. The obligation to return benefits received by the other party's performance under the terminated contract or part of the contract and other restitutionary effects are governed by the rules on restitution set out in Chapter 16.

SECTION 3 DAMAGES

Article 141 (ex Article 144)

Right to damages

1. A party is entitled to damages for loss caused by the non-performance of an obligation by the other party, unless the non-performance is excused.
2. The loss for which damages are recoverable includes future loss which the aggrieved party could expect to occur.

Article 142 (ex Article 145)

General measure of damages

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the aggrieved party into the position in which this party would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position. Such damages cover loss which the aggrieved party has suffered and gain of which this party has been deprived.

Article 143 (ex Article 146)

Foreseeability of loss

The non-performing party is liable only for loss which this party foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance, **unless the non-performing party was acting maliciously with an intention to harm.**⁷¹

⁷¹ It has been pointed out that the foreseeability rule may be inadequate in certain cases of intentional misbehavior.

Article 144 (ex Article 147)

Reduction of loss

1. The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.
2. The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Article 145 (ex Article 148)

Substitute transaction

An aggrieved party who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.

Article 146 (ex Article 149)

*Current **market**⁷² price*

Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current **market** price for the performance, the aggrieved party may, in so far as entitled to damages, recover the difference between the contract price and the **market** price current at the time of termination as well as damages for any further loss.

Article 147 (ex Article 150)

Stipulated payment for non-performance

1. Where the terms regulating an obligation provide that a party who fails to perform an obligation is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of the actual loss.
2. The aggrieved party may recover damages for any further loss.
3. Despite any provision to the contrary, the sum specified may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.

SECTION 4 INTEREST ON LATE PAYMENTS

Article 148 (ex Article 151)

Interest on late payments

1. Where payment of a sum of money is overdue, the aggrieved party is entitled, without the need to give notice, to interest on that sum from the time when payment is due to

⁷² It has been pointed out that this clarification could be helpful.

the time of payment at the rate specified in paragraph 2 **unless non-performance is excused.**⁷³

2. The interest rate for overdue payment in general is:
 - (a) where the aggrieved party's habitual residence is in a Member State whose currency is the euro or in a third country, the rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus two percentage points;
 - (b) where the aggrieved party's habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus two percentage points.
3. Where a trader delays the payment of a price another six percentage points are added to the rate due under paragraph 2.
4. The aggrieved party may recover damages for any further loss.
5. **Interest for delay in payment is added to capital in order to produce interest unless the non-performing party is a consumer.**⁷⁴
6. **In contracts between a trader and a consumer**⁷⁵ the parties may not, **to the detriment of the consumer**, exclude the application of this Section or derogate from or vary its effects.

Article 149 (ex Article 152)

Interest when the non-performing party is a consumer

1. When the non-performing party is a consumer, interest does not start to run unless the aggrieved party has given notice to the consumer specifying the obligation to pay interest and its rate and the payment has been overdue for at least fourteen days. Notice may be given before the date when payment is due.
2. A term of the contract which fixes a rate of interest higher than that provided in Article 148, or accrual earlier than the time specified in paragraph 1 of this Article is not binding to the extent that this would be unfair according to Article 77.

Article 150 (ex Article 153)

Delayed payment of a price by a trader

1. Where a trader delays the payment of a price interest at the rate specified in Article 148 paragraphs 2 and 3 starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:

⁷³ This was mistakenly omitted in the 2012 Statement.

⁷⁴ It has been pointed out that this clarification would be useful. In the previous draft, there was just a rule for b2c contracts.

⁷⁵ It has been rightly observed that the original version, which had been taken from Article 171 of the Commission Proposal, was partially incompatible with Article 149 on unfair contract terms.

- (a) 30 days after the date when the non-performing party receives the invoice or an equivalent request for payment; or
 - (b) 30 days after the date of receipt of the goods, digital content or related services, if the date provided for in point (a) is earlier or uncertain, or if it is uncertain whether the party obliged to pay has received an invoice or equivalent request for payment.
- 2. Where conformity of goods, digital content or related services to the contract is to be ascertained by way of acceptance or examination, the 30 day period provided for in point (b) of paragraph 2 begins on the date of the acceptance or the date the examination procedure is finalised. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of related services, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 80.
- 3. The period for payment determined under paragraph 1 cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 80.
- 4. Without prejudice to Article 148 paragraph 4, the aggrieved party is entitled to obtain from the non-performing party reasonable compensation for any recovery costs incurred due to the non-performing party's late payment. The aggrieved party is entitled to obtain from the non-performing party, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the aggrieved party's recovery costs.

Part VI Restitution

Chapter 16 Restitution

Article 151 (ex Article 155)

*Restitution on avoidance, termination or invalidity*⁷⁶

1. Where a contract or part of a contract is avoided or terminated by either party **or is invalid or not binding for reasons other than avoidance or termination**,⁷⁷ each party is obliged to return what that party ("the recipient") has received from the other party under the affected contract or part of the contract. **The obligation to make restitution includes a duty to refrain from using and to delete what the parties have received under or in anticipation of the contract and what cannot be returned, such as personal data for purposes other than keeping record of the concrete contractual relationship.**⁷⁸
2. Restitution must be made without undue delay and in any event not later than fourteen days from **when a party first gives or receives notice** of the avoidance, termination **or invalidity**. Where the recipient is a consumer, this deadline is met if the consumer takes the necessary steps before the period of fourteen days has expired.
3. **A party is liable under Articles 141 to 147 for failing to return what must be returned under this Chapter, including fruits where relevant, or for any diminished value to the extent that diminishment in value exceeds depreciation through regular use. Liability shall not exceed the price agreed for what must be returned, and there shall be no liability where no price has been agreed.**⁷⁹
4. In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects before notice of avoidance or termination is given.

Article 152 (ex Article 156)

Payments received

1. The seller must reimburse all payments received from the buyer, using the same means of payment as the buyer used for the initial transaction, unless the buyer has expressly agreed otherwise and provided that the buyer does not incur any fees as a result of such reimbursement.
2. In the case of avoidance or termination by the buyer, reimbursement includes the costs of delivery and any other additional charges and costs.

⁷⁶ *The ELI agrees with the EP that invalidity should be mentioned already in the title.*

⁷⁷ *This has been integrated in paragraph (1) in order to reduce the number of paragraphs.*

⁷⁸ *This has been introduced in order to provide better protection of the buyer's personal data.*

⁷⁹ *The ELI agrees with the EP that this rule can be generalised. However, it is concerned about the wording chosen by the EP, as that wording could be interpreted as excluding a right on the part of the party requesting restitution to claim specific performance.*

3. In the case of a contract for the sale of goods, the seller, who has offered to collect the goods or who has indicated under Article 153(2) how the buyer can return the goods without having to advance fees, may withhold the reimbursement of payments until it has received the goods back where it has a legitimate interest in so doing, in particular where this is necessary to ascertain the existence and nature of a lack of conformity.
4. Without prejudice to the rules in Section 4 of Chapter 15 on late payments, the seller must pay interest, at the rate stipulated in Article 148, where:
 - (a) the other party is obliged to pay for use; or
 - (b) the seller gave cause for the contract to be avoided because of fraud, threats or unfair exploitation.

Article 153 (ex Article 157)
Goods

1. The buyer of goods must send back the goods or hand them over to the seller or to a person authorised by the seller. The seller is under an obligation to take the goods back unless the parties agree otherwise.
2. **Where the seller caused the ground for avoidance, termination or invalidity and this causation was clearly predominant**,⁸⁰ the seller must bear the cost of returning the goods, and the buyer may withhold restitution until the seller has indicated how the buyer can return the goods without having to advance fees.
3. The buyer who has made use of goods or derived fruits must pay the other party the **amount the buyer saved by that use**⁸¹ and return these fruits only where the buyer caused the ground for avoidance, termination **or invalidity** or was, prior to the start of the relevant period, aware of the ground for avoidance, termination **or invalidity**.

Article 154 (ex Article 158)
Digital content

1. Digital content received is deemed to be returnable:
 - (a) where the digital content was supplied on a tangible medium and the medium is still sealed, or the seller has failed to seal it before delivery;
 - (b) where it is otherwise clear that the recipient⁸² cannot have retained a usable copy of the digital content; or
 - (c) where the seller can, without significant effort or expense, prevent any further use of the digital content on the part of the recipient by deleting the recipient's user account or otherwise.
2. The buyer of digital content which is returnable within the meaning of paragraph 1 fulfils its obligation to return by:

⁸⁰ *More neutral formulation to include cases of invalidity, and clarification how to deal with cases where both parties have caused avoidance, termination or invalidity.*

⁸¹ *The ELI assumes that this is a policy choice made by the EP.*

⁸² *The words 'who sends back a tangible medium' have been deleted because they were superfluous.*

- (a) refraining from any further use of the digital content from notification of the avoidance or termination and deleting all copies of the digital content or part of the digital content, whether or not usable;
 - (b) sending back any tangible medium in accordance with Article 152;
 - (c) paying **for use made or fruits derived under the conditions specified in Article 153(3)**.⁸³
3. The buyer of digital content which is not returnable within the meaning of paragraph 1 must pay the **amount the buyer saved by making use of the digital content**.⁸⁴

Article 155 (ex Article 159)

Related services

1. The buyer who has received related services must pay to the seller an amount which is in proportion to what has been provided before the contract was avoided or terminated, in comparison with the full coverage of the contract.
2. The proportionate amount to be paid by the buyer to the seller shall be calculated on the basis of the total price agreed in the contract unless the buyer can show that this price was excessive.
3. **Where the seller caused the ground for avoidance, termination or invalidity and this causation was clearly predominant**,⁸⁵ liability of the buyer shall not exceed the amount the buyer saved by receiving the related service.

Article 156 (ex Article 160)

Equitable modification

Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the party incurred expenditure in reliance on the contract and whether the party did not cause, or lacked knowledge of, the ground for avoidance or termination.

⁸³ *The ELI assumes that this is a policy choice made by the EP.*

⁸⁴ *The ELI assumes that this is a policy choice made by the EP.*

⁸⁵ *More neutral formulation to include cases of invalidity, and clarification how to deal with cases where both parties have caused avoidance, termination or invalidity.*

Part VII Prescription

Chapter 17 Prescription

SECTION 1 GENERAL PROVISION

*Article 157 (ex Article 161)
Rights subject to prescription*

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

SECTION 2 PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENTS

*Article 158 (ex Article 162)
Periods of prescription*

1. The short period of prescription is three years.
2. The long period of prescription is ten years or, in the case of a right to damages for personal injuries, thirty years.
3. Prescription takes effect when either of the two periods has expired, whichever is the earlier.

*Article 159 (ex Article 163)
Commencement*

1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.
2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.
3. Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each non-performance of the obligation.

SECTION 3 EXTENSION OF PERIODS OF PRESCRIPTION

Article 160 (ex Article 164)

Suspension in case of judicial and other proceedings

1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.
2. Suspension lasts until a final decision has been made, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.
3. Paragraphs 1 and 2 apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.
4. Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.

Article 161 (ex Article 165)

Postponement of expiry in the case of negotiations

If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.

Article 162 (ex Article 166)

Postponement of expiry in case of incapacity

If a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed.

SECTION 4 RENEWAL OF PERIODS OF PRESCRIPTION

Article 163 (ex Article 167) Renewal by acknowledgement

If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run. In this case, the long period of prescription will not expire before the renewed short period.

Article 164 (ex Article 168) Period for a right established by legal proceedings

1. Where a right is established by judgment a new period of prescription of ten years begins to run.
2. The same applies to a right established by an arbitral award or other instrument which is enforceable as if it were a judgment.
3. The ten year period of prescription laid down in paragraph 1 begins to run again with each reasonable attempt at execution undertaken by the creditor.

SECTION 5 EFFECTS OF PRESCRIPTION

Article 165 (ex Article 169) Effects of prescription

1. After expiry of the relevant period of prescription the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for non-performance except withholding performance.
2. Whatever has been paid or transferred by the debtor in performance of the obligation in question may not be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out.
3. The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.

SECTION 6 MODIFICATION BY AGREEMENT

Article 166 (ex Article 170) Agreements concerning prescription

1. The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.

2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.
3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.
4. The parties may not exclude the application of this Article or derogate from or vary its effects.
5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.

Part VIII Final provisions

Chapter 18 Application in the Member States

Article 167 (ex Article 171)

Restriction to cross-border contracts

1. Any Member State may, for cases where its law is the law applicable to the contract, restrict availability of the Common European Sales Law to cross-border contracts.
2. For the purposes of this Regulation,
 - (a) a contract between traders is a cross-border contract if the parties have their habitual residence in different countries; and
 - (b) a contract between a trader and a consumer is a cross-border contract if either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence.
3. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located shall be treated as the place of the trader's habitual residence.
4. In cases not covered by paragraph 4, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a trader who is a natural person shall be that person's principal place of business.
5. For the purpose of determining whether a contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the Common European Sales Law.

Article 168 (ex Article 172)

Communication of judgments applying this Regulation

1. Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission.
2. The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgements of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public.

Article 169 (ex Article 173)

Review

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

European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.

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

Article 170 (ex Article 174)
Entry into force and application

1. This Regulation shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.
2. It shall apply from [6 months after entry into force].

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