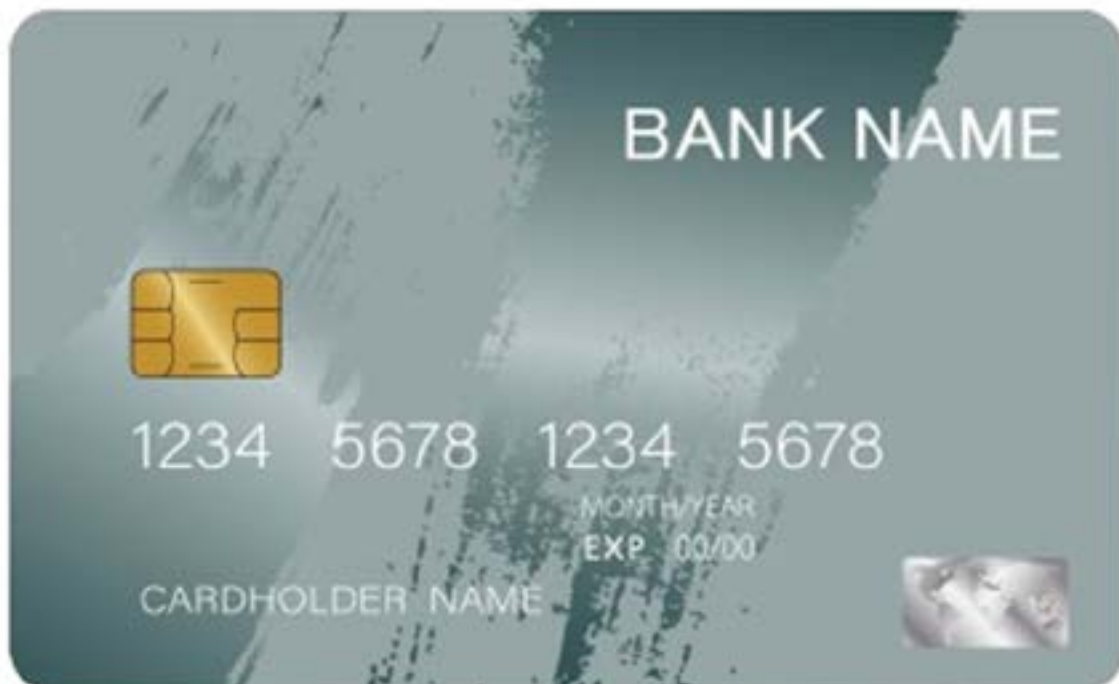


# Proposal for a Regulation on a Common European Sales Law

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Statement of the European Law Institute



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

## **The European Law Institute**

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public.

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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 party, assisted by an advisory panel, considered the Proposal and comment upon it. Both the working party and the advisory panel consisted of members of the judiciary, legal practitioners and academics, from a broad range of legal traditions.

The working party was greatly assisted in its work by comments it received from the ELI Council and Senate over a period of about five months from the run-up to the Council meeting on 18 February 2012 to the final Council decision.

### The Working Party

#### Chair:

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Sir John Thomas is President of the Queen's Bench Division of the High Court of Justice and a judge of the Court of Appeal of England and Wales, The United Kingdom. He serves as the vice-president of the Insurance and Reinsurance Arbitration Society (ARIAS (UK)) and the vice-president of the British Maritime Law Association. He is co-chairman of the Trustees of the International Law Book Facility.

#### Redaction Committee:

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John Sorabji is a practising barrister and the Legal Secretary to the Master of the Rolls. He is also a Senior Fellow at University College, London's Judicial Institute and an Honorary Professor in its Faculty of Law, where he lectures on Principles of Civil Justice. He is also an assistant editor of both the *Civil Justice Quarterly* and of the *International Journal of Procedural Law*.

##### **Matthias Storme** (acting also on behalf of the CCBE)

Matthias Storme is professor at the KU Leuven (University of Leuven, Belgium) and professor (extra-ord.) at the Universiteit Antwerpen, and an attorney in Brussels. He is the author of approximately 200 books and articles. He is joint editor-in-chief of the *European Review of Private Law* and editor of the *Tijdschrift voor privaatrecht*, guest professor at Universiteit Tilburg and CUPL

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**Fryderyk Zoll**

Fryderyk Zoll is a professor of the civil law at the Jagiellonian University of Cracow (Poland), a visiting professor in Kiel (Germany) and a professor of the European, Polish and comparative private law at the University of Osnabrück (Germany). He is a member of the Codification Commission at the Polish Ministry of Justice. He has acted as a foreign law expert at the English High Court, the International Chamber of Commerce and the Arbitration Tribunal in the Hague. He was a member of the Research Group on the Existing EC Private Law (Acquis Group) and a research coordinator of the Research Group on the EU Project – the Perspectives of the Europeanization of the Law of Succession.

## **The Advisory Panel**

### **Special Advisor:**

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Ole Lando is professor emeritus of Copenhagen Business School in Frederiksberg (Denmark). He is the founder and the chairman of the Commission on European Contract Law (CECL), often referred to as the Lando-Commission. Professor Lando is a member of UNIDROIT Working Group on International Commercial Contracts, Finnish Academy of Sciences, Royal Swedish Academy of Sciences, Uppsala, Groupe européen de droit international privé and Academia Europea, amongst others.

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Carole Aubert de Vincelles is a professor of private law at the Cergy-Pontoise University (France). She is a co-founder and general counsel of Trans Europe Experts, a European network of legal experts. She is also a member of the European Research Group on Existing EC Private Law (Acquis Group) and has participated in the working group on the French reform of contract law. She has supervised several books on the European law of obligations and has published many articles on contract law. She authors a European consumer law chronicle in the *Revue des contrats* and a European law of obligations chronicle in the *Revue trimestrielle de droit européen*.

#### **Fabrizio Cafaggi**

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Remo Caponi is a full professor of civil procedure at the University of Florence (Italy). He is a fellow of the Alexander von Humboldt Foundation (Germany) and a member of International Association of Procedural Law - IAPL (Council), European Law Academy - ERA (Board of Trustees), Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e. V., and Associazione italiana fra gli studiosi del processo civile (Board of Directors).

**Sjef van Erp**

Sjef van Erp is a professor of civil law and European private law at Maastricht University (The Netherlands) and a deputy justice at the Court of Appeals in Hertogenbosch. He is also the president of the Netherlands Comparative Law Association, editor-in-chief of the *European Journal of Comparative Law and Governance* (formerly: *Electronic Journal of Comparative Law*), editor-in-chief of the recently established *European Property Law Journal*, and a member of the American Law Institute. He took the initiative for and is co-editor of the *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on property law*.

**Johan Gernandt**

Johan Gernandt is a Swedish attorney and has been the chairman of the Board of Governors of the Bank of Sweden since October 2006. He also serves as the chairman of the Stockholm Chamber of Commerce's Arbitration Institute, the Stockholm Centre for Commercial Law and the Svenska Dagbladet Foundation. He is a member of the ICC Commission on International Arbitration (Paris) and acts as an arbitrator for a number of other bodies in Russia, the Ukraine and China.

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Denis Philippe has been teaching contract law at the Catholic University of Louvain (UCL, Belgium) since 1988. He has been a visiting professor at the University of Paris X Nanterre since 1989. Professor Philippe has 30 years of experience in the field of civil and commercial law as a lawyer at the Belgian and Luxembourg Bars. He has specific expertise in drafting, reviewing and negotiating of contracts made under Belgian law as well as international contracts. He has authored many scientific publications in these areas. He is regularly appointed as an arbitrator by the ICC and as an expert in the field of energy law by the European Union.



**Friedrich, Graf von Westphalen**

Friedrich, Graf von Westphalen is the founder and senior partner of the law firm “Friedrich Graf von Westphalen & Partner. He has been the vice-president of the German Bar Association since 2003 and the head of the German delegation to the CCBE (Council of European Bars and Law Societies) since 2010. He has written many handbooks, commentaries and articles on various matters of national and international contract law. He is an honorary professor at the University of Bielefeld.

**Lajos Vékás**

Lajos Vékás is professor emeritus at the Eötvös Loránd University Budapest. He was member of the Study Group for a European Civil Code and chairman of the Commission for the Codification of a new Civil Code in Hungary. He was Rector of his University (1990 – 1993) and the first Rector of Collegium Budapest, Institute of Advanced Study. Professor Vékás is author of numerous books in Hungarian, German and English.

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.

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## PREAMBLE

On 19 July 2011 the Council of The European Law Institute (the ELI) identified the European Commission's work on a proposed European contract law optional instrument as an important development on which it should issue a Statement within the meaning of the ELI Project Guidelines setting out practical recommendations, which if implemented would increase the Proposal's utility (ELI Council Decision 2011/13). This paper was considered and approved by the ELI Council as an official Statement of the ELI on 7 September 2012.

This Statement examines, in the light of the European Commission's policy objectives, the Proposal COM(2011) 635 final (the Proposal). The policy objectives underpinning the proposed Common European Sales Law contained in Annex I to the document (the CESL) are to: enhance the viability of the EU's internal market through facilitating cross-border trade, both in respect of business to consumer transactions (B2C) and business to business transactions (B2B)<sup>1</sup>; secure a high and uniform level of consumer protection across the European Union (EU)<sup>2</sup>; maximise the opportunities which can accrue to small and medium enterprises (SME) from an effective internal market<sup>3</sup>; maintain the EU's policy of non-discrimination against consumers and businesses from third countries<sup>4</sup>; and maintain, except in defined circumstances, freedom of contract<sup>5</sup>.

This Statement does not however consider the major political choices made by the Commission in respect of the Proposal. The working party accepted those choices as given. It therefore accepted that the Proposal should be applicable to B2B and B2C contractual relationships, but not applicable to C2C relationships and that it should apply to both E-commerce and more traditional distribution channels. Should a decision be made by the competent political bodies to take a different approach the working party will submit an adapted paper.

To achieve its underlying objectives the CESL will have to be attractive to its potential users; a point all the more pertinent as it is to be an optional law and as the failure of the instrument in practice might mean the end of the vision of a common European contract law, at least for the next decades. The ELI working party has therefore critically examined the CESL, and makes a number of practical recommendations contained in this paper the aim of which is to maximise the CESL's utility and use in practice. The Statement is divided into three parts:

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<sup>1</sup> Recitals (1) – (8) and (36), Article 1 Regulation.

<sup>2</sup> COM(2011) 636 final at 6; Recitals (11) and (12).

<sup>3</sup> COM(2011) 636 final at 7, Recital (21).

<sup>4</sup> COM(2011) 636 final at 7.

<sup>5</sup> Recital (22).

- (i) **Part A** outlines significant practical and conceptual issues which arise from the CESL, and which are elaborated in the proposed revisions in **Part C**;
- (ii) **Part B** sets out practical suggestions to facilitate the CESL's effective implementation; and
- (iii) **Part C** sets out proposed revisions to the CESL.

## EXECUTIVE SUMMARY

The Statement by ELI has as its aim to maximise the CESL's practical utility and attractiveness to users. The suggestions are all designed to make the CESL simpler, more coherent and more certain so as to enhance the potential benefits for traders and consumers.

The Statement contains the following constructive recommendations, which the working party has concluded are either essential for the CESL's successful implementation, or highly desirable or desirable reforms – all to make the CESL workable in practice.

It is important to note that the suggested revisions we put forward as a result of our recommendations would, if adopted in their entirety, reduce the number of Articles from 202 Articles (186 + 16) to 174 Articles, despite the fact we have added a number of new provisions which (1) close gaps in the law contained in the Proposal and (2) improve the level of consumer protection in areas where the Proposal did not provide protection.

### (A) Revision of the Proposal

#### (I) Single Instrument

- **Consolidation of the Proposal:** The Regulation and its Annex 1 should be consolidated into a single instrument in order to reduce complexity, render the Regulation more coherent and of greater utility. **This is desirable** (see paragraph (5) – (6)).

#### (II) Scope Revisions

- **Abandon SME Restriction:** The formal restriction to SMEs should be abandoned. The proposed restriction is unprecedented in an instrument of this nature, renders contracting under the CESL too complex, and significantly reduces the CESL's utility. **This is essential** (see paragraph (7) – (9)).
- **Extend scope to non-profit making entities:** The present exclusion of such bodies renders the instrument's application uncertain and reduces the CESL's utility. **This is highly desirable** (see paragraph (10) – (11)).
- **Revise the cross-border requirements:** The cross-border requirement has a number of operational disadvantages which require consideration. If maintained the minimum EU link should be abandoned for B2B contracts. Further revisions need to be made in respect of B2C contracts. **This is highly desirable** (see paragraph (13) – (15)).
- **Take a different approach to contracts with an alien element:** The existence of a minor alien element in the contract should not make the CESL unavailable for use. The parties

can never be sure whether a court will later detect such an alien element and refuse to apply the CESL, which makes the CESL unattractive. **This is essential** (see paragraph (17)).

- **Remove exclusions from substantive scope:** To increase the CESL's utility and attractiveness the exclusions relating to deferred payment, to transportation, telecommunication support and training as related services and to delivery of goods not in exchange for price should be revised. **This is essential** (see paragraph (17) – (21)).

### (III) Choice of CESL

- **B2C opt-in made easier:** The mechanism for a consumer to opt-in under the CESL is too complex. It should be revised and simplified to increase the CESL's attractiveness to consumers. **This is essential** (see paragraph (22))
- **Replace the Standard Information Notice (SIN):** The SIN is likely to be misleading at best. It should be replaced by a weblink to an official website containing brief and concise information. **This is highly desirable** (see paragraph (23))
- **Prevent derogation from mandatory rules by way of partial choice:** Clarification is needed that CESL rules that are mandatory in B2B contracts may not be derogated from by way of partial choice of the CESL. **This is essential** (see paragraph (24)).
- **Automatic, exclusive, application of pre-contractual information duties:** To render pre-contractual information duties properly effective the CESL needs to be revised to ensure only they apply to the pre-contractual phase. **This is essential** (see paragraph (25) – (26)).

### (IV) User-friendliness, clarity and coherence

- **Collate definitions:** To increase utility the definitions should be revised and assembled in one place within the CESL. **This is desirable** (see paragraph (28)).
- **Simplify the terminology:** To make the CESL shorter, simpler and more user-friendly the parties should be referred to as 'seller' and 'buyer' with regard to goods, digital content and services, and the supply of digital content should be referred to as sale. **This is highly desirable** (see paragraph (29)).
- **Rearrange rules derived from Directive 2011/83/EU:** A number of rules within the CESL are derived from Directive 2011/83/EU. These rules should be restructured in a more rational, logic manner. **This is highly desirable** (see paragraph (30) – (31)).
- **Restructure CESL Parts IV to VI:** to ensure the CESL follows the life cycle of a contract Part IV should be divided into a part on the rights and obligations of parties and a part on remedies for non-performance. The rules on modalities of performance and remedies for non-performance should be restructured so as to avoid repetition, uncertainty and unnecessary gaps. **This is highly desirable** (see paragraph (32) – (34))

#### **(V) Avoiding inconsistencies and unacceptable results**

- **Improve the rules on termination:** The rules on termination ought to be fundamentally revised to increase their coherence and comprehensibility and remove significant inconsistencies. **This is essential** (see paragraph (35) – (36)).
- **Revise the Chapter on restitution:** The approach to restitution needs to be fundamentally revised in order to render it workable, to remove inconsistencies and ensure it does not, as at present, produce unacceptable results. **This is essential** (see paragraph (37) – (38)).
- **Rethink the balance of consumer rights and legal certainty:** The CESL affords the consumer very far-reaching rights which it then renders subject to limitation by very vague general clauses. This ought to be revised so as to avoid excessive divergence of results within the EU/EEA and not to deter consumers from exercising their rights. **This is essential** (see paragraph (39) – (41)).
- **Face the challenges posed by digital content:** The rules on digital content in the CESL ought to be more in line with the specific challenges posed by digital products. **This is highly desirable** (see paragraph (42) – (44)).
- **Revise good faith provisions:** The general duty to act in good faith is capable of multiple interpretations. It ought therefore to be revised to render its proper interpretation and application clearer. At the very least, it should ensure that a breach of the duty to act in good faith does not give rise directly to remedies for non-performance of an obligation. **This is essential** (see paragraph (45)).

#### **(VI) Improving consumer protection**

- **Payment protectors:** To increase consumer confidence in respect of internet trade payment protectors should be included in the CESL. **This is desirable** (see paragraph (46) – (47)).
- **Early confirmation and acknowledgement of receipt in E-commerce:** To increase consumer confidence in internet trade an obligation on internet traders to confirm within a fixed period that the contract has been concluded should be incorporated into the CESL. There should be a general duty, imposed on traders, to provide an acknowledgement of receipt of any communication received via a website. **This is desirable** (see paragraph (48) – (50)).
- **Better protection in the context of related services:** Several protective measures should be introduced to provide better consumer protection against unexpected cost for related services. **This is highly desirable** (see paragraph (51) – (52)).
- **Protection against individually negotiated clauses:** The protection of consumers against unfair clauses that have been individually negotiated needs to be improved. **This is desirable** (see paragraph (53)).



- **Unfair commercial practices:** The relationship between contractual sanctions for breach of duties under Directive 2005/29/EC and the CESL is in need of clarification. **This is desirable** (see paragraph (54)).

### **(B) Effective Implementation**

- **Advisory Body and Official Commentary:** The establishment of an advisory body, analogous to DOCDEX and the CISG Advisory Council to provide guidance on the interpretation or application of CESL. The advisory body should complement an official commentary to the CESL. **This is essential** (see paragraph (57) – (64)).
- **Case law Database and Digest:** A systematised database of national and CJEU decisions on CESL should be established. It should contain judgments and standard form judgment summaries translated into a number of EU languages. The database should be supplemented by a regular digest of important decisions and guidance issued by the Advisory Body, which should be responsible for both the database and digest. **This is essential** (see paragraph (65) – (71)).
- **Judicial Co-operation:** Measures should continue to be taken to further judicial co-operation in order to ensure a uniform interpretation and application across the EU. **This is highly desirable** (see paragraph (72) – (73)).
- **Alternative and Online Dispute Resolution:** effective measures should implement effective alternatives to court process to resolve disputes arising under the CESL. **This is highly desirable** (see paragraph (74) – (80)).

## **Part A: SUMMARY OF PROPOSED CHANGES**

- (1) In **Part A** we highlight a number of specific issues which, we suggest, require particular consideration by the Commission, the European Parliament and the Council. These issues, and a series of more detailed issues not specifically mentioned in this Part, are reflected in the suggestions for revision of the Proposal set out in **Part C**.
- (2) The working party treated major policy choices reflected in the Proposal as given. It has not therefore examined questions such as whether it is necessary to have a regulation or a different type of instrument, whether to have an instrument for both B2B (contracts between businesses) and B2C (contracts between a business and a consumer) or just for the latter, or which types of contracts should generally be included.
- (3) The working party thus focused on matters of a more technical nature. It approached the issues raised by the Proposal, and makes suggested revisions on the basis that they should render the CESL of greater practical utility and attractiveness to potential users. In particular, these suggestions are designed to render the CESL simpler, more coherent and more certain, in order to enhance the potential benefits for traders and to improve consumer protection, in particular in the digital age. Where the working party felt there were overwhelming technical arguments against a particular solution proposed by the Commission, some interference with policy choices, despite what is said in the preceding paragraph, could not be avoided.
- (4) The suggestions for revision are contained in a comprehensive redraft of the CESL. This has been done to ensure that each of the suggested revisions fits within a complete draft. This is not to be understood as a competing CESL proposal, but rather as a “toolbox”, in that the suggestions may be adopted as a whole, in sections, or as individual clauses. The working party hopes that the suggestions for revision made will serve as a source of inspiration for all political institutions involved, at a European or national level, during the negotiation and finalisation of the CESL. The major changes suggested are set out in the following paragraphs.

### **I Need for a Single Instrument rather than a Regulation and Annex**

- (5) The Proposal is divided into two main sub-instruments: the Regulation and Annex I, the substantive Common European Sales Law rules. This is complex, not least because it duplicates Article numbers across the Regulation and its Annex I. It further renders it necessary to refer to Articles by reference to either the Regulation or the Annex. This is

cumbersome, and can lead to confusion and inadvertent error. It is also unclear why, in a number of cases, a specific provision has been placed in the Regulation where it ought more properly be placed in the Annex and addressed to the parties to a contract. This is most obvious in respect of the definitions, set out at Article 2 of the Regulation, where they might more properly be placed within Annex I (cf. also *infra*, paras (28) et seq). It is suggested that this renders the CESL unnecessarily complex.

- (6) In order to reduce this complexity and render the CESL consistent with the well-established approach to European Union law making, the working party proposes that the Proposal is revised so that it is a single instrument with consecutively numbered articles. Such a revision would simplify the instrument, rendering it less complex, more coherent and of greater practical utility. This change is reflected as set out in **Part C**, which recasts the CESL as a single instrument.

## **II Changes to the Scope of the CESL**

### **(1) Personal scope**

- (7) As noted above, the working party treated as given the Commission's policy choices. However, as set out in paragraph (3), the working party had to consider certain policy issues where it considered there to be overwhelming arguments of a technical nature against a particular rule. This is the case with: i) the restriction, imposed by Article 7 of the Regulation, which requires that in contracts between two businesses (**B2B contracts**), one must be an SME; and ii) the fact that the CESL in the form of the Proposal cannot be used for selling to non-profit making entities.

#### **(a) Abandonment of the Restriction to SME**

- (8) In B2B contracts the CESL can only be used where one party is an SME. A large enterprise would, therefore, before accepting an order placed by another business, have to check whether the particular customer satisfies the definition of an SME. The definition adopts the criteria set out under Article 7 of the Regulation in conjunction, according to Recital 21, with Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). These criteria are complex and pose particular difficulties for businesses with more than one branch or establishment. A seller would have to ask the customer to provide information such as the annual turnover, balance sheet, and number of employees, which would be difficult to operate and cause embarrassment and great uncertainty as to whether or not the CESL applies to a contract. As far as the working party is aware it is unprecedented for a distinction to be made between businesses in this way in an instrument of this nature.

- (9) The working party does not believe that this restriction is required by the principles of subsidiarity and proportionality, as these principles, in accordance with well-established CJEU case law, do not require (or even allow) the restriction of a legislative measure in a way that seriously calls into question its suitability to attain the aim pursued. In particular as more than 90% of all businesses in the EU qualify as SMEs, the working party strongly recommends the formal restriction to SMEs be abandoned. It would be sufficient to state simply in the introductory Article that the instrument is designed to serve the interests of SMEs **(see ELI Article 1(2))**.

### **(b) Application to non-profit making entity**

- (10) The Proposal's personal scope is not explicitly restricted to profit making entities. The rules within the Proposal are however drafted in such a way that they only apply where the buyer is either a trader within the definition given in Article 2(e) or a consumer within the definition in Article 2(f) of the Regulation. As a consumer must be a natural person, and as a trader must be acting in the course of its trade, business, craft or profession, the CESL is not available where the buyer is a non-profit making entity, such as a charity or as the majority of clubs, associations and public institutions including schools etc. This requires a trader who wishes to sell under the CESL to ascertain, in each case where a customer is not a natural person, whether that customer is a profit or non-profit making entity. This would cause, without any justification, an unnecessary degree of complexity and uncertainty, in particular in cross-border settings and for mass contracts.
- (11) The working party therefore suggests a clause **(see ELI Article 8(3))** stating that, where the buyer is a non-profit making organisation, the CESL rules for buyers who are traders will apply accordingly. Even though this will place non-profit making entities at a disadvantage compared with those national legal systems that treat non-profit making entities as consumers, the working party believes it is the only practicable solution for cross-border settings as traders selling cross-border under the CESL cannot be expected to ascertain readily the difference between a non-profit entity and a profit making entity based in another Member State.

## **(2) Territorial scope**

- (12) The working party recognises that there are valid reasons for restricting the CESL's territorial scope primarily to cross-border contracts and creating an option for Member States to make the CESL available for domestic contracts where the parties are located in that Member State. In accordance with the approach as stated in paragraph (3), the working party only wishes to draw attention to a number of serious drawbacks which arise from the cross-border requirement and which will make the CESL less attractive.

#### **(a) Cross-Border requirement has disadvantages**

- (13) Among these drawbacks, there is the fact that the cross-border requirement will place SMEs at a strategic disadvantage vis-à-vis large enterprises. Large enterprises will usually be established in more than one country and can thus easily redirect contracts, particularly in respect of E-commerce, to an establishment in another Member State. They can thus ensure that all their contracts have a cross-border element and thereby trade within the whole EU/EEA under one and the same legal regime. An SME situated in a single Member State which has not made use of the option in Article 13(a) of the Regulation to extend the CESL to its domestic contracts cannot operate in such a fashion. It will have to cope with two legal regimes, and thus it is placed at a serious disadvantage. Similarly, the requirement puts sellers within the EU/EEA at a strategic disadvantage vis-à-vis sellers from outside the EU/EEA as, again, the latter can sell into the whole EU/EEA under one and the same legal regime.

#### **(b) Revisions needed to minimum EU link**

- (14) Assuming the cross-border requirement is maintained (either as a default rule as under the Proposal or as an option for Member States as proposed under **ELI Articles 3(3) and 171**) the question arises whether the minimum EU link, as defined by Article 4, is justifiable. For B2B contracts, the Proposal requires that at least one of the traders must have its habitual residence in a Member State, thereby preventing, for example, a Swiss and a Chinese trader who have chosen the law of a Member State as the law governing their contract, from using the CESL. The working party cannot see any justification for this limitation and proposes the abandonment of the requirement.
- (15) For B2C contracts, the Proposal requires that the residential address, the billing address or the delivery address indicated by the consumer must be in a Member State. This means that traders within the EU/EEA are largely prevented from exporting to third countries under the CESL, whereas traders from third countries can use the CESL to reach the whole EU/EEA market. The working party cannot see a sufficient justification for the restriction. The minimum EU link, as formulated in the Proposal, is arguably designed to protect traders against foreign mandatory law. However, it fails to do so as even where the residential address, the billing address or the delivery address of the consumer are within the EU/EEA, the foreign mandatory law may prevail by virtue of Articles 6(2) or 9(2) of the Rome I Regulation where the consumer's habitual residence is outside the EU/EEA. This holds true all the more so where a forum in a third country is available and that country's conflict of laws rules have a similar effect or even prohibit any choice of the applicable law in consumer contracts (as is the case e.g. in Switzerland).

### **(3) Substantive scope: Removal of Exclusions**

- (16) In respect of the substantive scope, the working party also puts forward its proposals for revision only in so far as it is convinced that an issue in relation to scope may raise questions as to the CESL's practicability and attractiveness. The exclusion of (i) mixed-purpose contracts and (ii) contracts with a credit element in Article 6 of the Regulation in the Proposal raises such an issue as does the exclusion of (iii) transport, telecommunication support and training as related services and (iv) of delivery of goods not exchanged for a price.

#### **(a) The problem of alien elements in a CESL contract ('mixed-purpose' contracts)**

- (17) 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. Alien elements would be elements clearly outside the scope of a sales law instrument, such as lease of goods, but also elements explicitly excluded from the scope, such as transport services related to a sales contract, telecommunication support, training or gratuities. As the existence of even a minor alien element such as a support hotline, a 'welcome gift', or possibly even delivery services, 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 unattractive to traders. The Proposal would not preclude the parties from making a contract for delivery services, the support hotline or the gratuity which is clearly separate and not governed by the CESL. This, however, would mean that the trader has to comply, just for this minor component of the contractual relationship, with the full range of requirements under the otherwise applicable national law, including the mandatory consumer law of the target country applicable under Article 6(2) of the Rome I Regulation. The trader would therefore be fully deprived of the benefits the CESL is supposed to afford to it. The working party therefore recommends that several unnecessary restrictions in scope are removed and that the Proposal is revised so that alien elements will not make the CESL unavailable but be simply governed by the otherwise applicable national law.

#### **(b) Abandonment of several restrictions in scope**

- (18) The working party proposes that the exclusion of transport, telecommunication support, and training as related services is removed (**see ELI Article 2(1)(c)**). It was unable to discern sufficient justification for these restrictions in scope. In particular, there is no sufficient justification in sector-specific legislation, as it is easily possible, in line with existing EU legal instruments, to include a clause clarifying that sector-specific legislation remains unaffected. Likewise, the requirement that a related service contract is concluded at the same time as the sales contract should be abandoned as it restricts the scope of the CESL without sufficient justification.

- (19) There is even less justification for excluding contracts for the delivery of goods other than in exchange for a price, for example the 'welcome gift' given as an incentive for early orders or the customer's personal data or the mobile phone device supplied 'at 0 Euro' where the customer signs a contract with a telecommunication provider with a duration of 24 months. As the CESL is restricted to sale by traders, it will not apply to gifts between private individuals, anyway. The working party suggests that the delivery of goods not in exchange for a price is included (**see ELI Article 2(3)**).
- (20) Similarly, the working party is concerned about the exclusion, in Article 6(2) of the Regulation, of contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment or similar financial accommodation. This exclusion creates significant uncertainty as to what counts as 'deferred payment' and whether it prevents a trader from allowing the consumer a generous time for payment, in particular where such terms may have had an influence on the price. The working party fails to see sufficient justification for the exclusion and therefore suggests deleting it, as the sector-specific requirements under national law implementing Directive 2008/48/EC would remain unaffected (**see ELI Article 5(3)**). The rationale behind the exclusion in Article 6(2) cannot be the protection of third parties, because the rule is formulated in a way solely as to exclude credit granted by the seller itself.

### **(c) New approach to mixed and linked contracts**

- (21) In addition to abandoning several restrictions in scope for which, in the view of the working party, there is no sufficient justification, the approach taken to mixed and linked contracts in general should be reconsidered. To exclude contracts with an alien element from the CESL altogether may, as has been pointed out above at paragraph (17), create problems and much uncertainty, as the parties could never be sure the CESL applies at least to the core parts of their contractual relationship. The working party therefore proposes introducing a rule along the lines of **ELI Article 6** which will have the effect of ensuring that the CESL is available even if the contract includes alien elements or linkage to a contract not governed by the CESL. The law applicable to the alien element or to the linked contract will determine the effect which invalidity or the exercise of any right or remedy under the CESL has on the other contract; the national law under which the parties have agreed on the use of the CESL will determine the effect that invalidity or the exercise of any right or remedy in relation to the other contract has on the contract governed by the CESL.

### **III Choice of the CESL**

#### **(1) Choice in B2C contracts**

(22) Opting into the CESL for a B2C contract is, under the Proposal, complicated. Not only are there at least two separate agreements, one for the application of the CESL and one for the sale itself, but the opt-in mechanism proposed by Articles 8 and 9 of the Regulation in the Proposal is apt to discourage consumers. It gives them the impression that the CESL is a disadvantageous regime for them and that they must receive a warning. The working party believes that this is the wrong approach: if the CESL is disadvantageous for consumers (which it is not), it must be revised, but if it offers a high level of consumer protection, its use must be encouraged.

(23) The working party remains concerned about the Standard Information Notice (SIN) provided in Annex II of the Proposal. The SIN is intended to explain to consumers, in a nutshell, what the CESL is about, providing them with rough and not entirely accurate information such as that they will have a right of withdrawal ‘in most cases’. This, however, is apt to mislead consumers, as there is a fair probability that they will not have a right of withdrawal in a particular case because the contract falls under one of the exceptions. Nor is the SIN useful to average consumers who will normally be unaware of the rights and obligations they would have under the otherwise applicable national law. The working party therefore suggests that the SIN is replaced by the link to an official website where the consumer can also obtain, for each Member State, very brief and concise information about the main differences between their national legal regime and the CESL e.g. that there is no right to cure under the CESL while there is under the law of their Member State of habitual residence (**see ELI Article 4(2)**).

#### **(2) Choice in B2B contracts**

(24) Article 8(3) of the Regulation renders partial choice of the CESL possible in B2B contracts. There is however a contradiction between allowing partial choice in B2B contracts and the rule in Article 1(1) of the CESL according to which parties may not derogate from mandatory rules. The working group therefore recommends that the position is clarified in the text to make it clear that parties cannot, by way of partial choice, escape the application of mandatory rules (**see ELI Article 3(4)**).

#### **(3) Need for CESL to apply right away to pre-contractual duties**

(25) According to Article 11 of the Regulation, the CESL’s rules on pre-contractual information duties will apply only, retrospectively, where the sales contract between the parties is actually concluded at a later point in time. Where the contract is not concluded, the otherwise applicable national law applies. This means that, during the



phase of marketing and negotiations, the trader cannot be sure whether it is operating under the CESL or under the otherwise applicable national law. In order to be on the safe side, and in particular to avoid injunctions sought by local competitors, a trader has to comply with both sets of requirements: those imposed by the CESL and those imposed by the mandatory law of the target Member State. This would deprive traders of most of the benefits afforded to them by the CESL.

- (26) The working party therefore recommends that the CESL apply exclusively to pre-contractual information duties and other requirements relevant for the pre-contractual phase where the trader makes reference, during negotiations or otherwise, to the CESL as the potentially applicable legal regime (**see ELI Article 4(4)**). Naturally, where the trader also refers to national law, it has to satisfy the requirements of the otherwise applicable law as well. If this change is made, the CESL could apply during the pre-contractual phase even without a valid agreement between the parties on the use of the CESL. The working party does not believe that this will cause any real difficulty because an EU regulation can, in any case, define the scope of its own application.

## **IV User-friendliness, clarity and coherence of the CESL**

- (27) As an optional regime that has to compete with national legal systems, the CESL will be a success only if it is sufficiently simple, clear, coherent and user-friendly overall. Even if it is in truth unrealistic to believe that consumers, or the average trader, will read and understand a legal instrument of some 150 to 200 Articles, it will be decisive for the attractiveness of the CESL whether the average lawyer or judge in 27 Member States will be in a position to understand, apply and provide advice on the CESL easily. The majority of suggestions made by the working party in Part C are motivated by the desire to make the 2011 Proposal more user-friendly, in particular simpler, clearer and more coherent. As it would not be apposite to explain in Part A of this Statement the entirety of suggestions made, the following will serve to illustrate by way of example what the working party has done.

### **(1) Collation of definitions in one place**

- (28) The definitions provided in Article 2 of the Regulation pose a major challenge to the user. Not only is it extremely difficult to understand why the central list of definitions is in the Regulation and not in the Annex I (above at paragraph (5)), but it is also confusing for users to find some very important definitions in the Annex I, notably in its Articles 5, 7, 8(1) and 10(1). As far as the definitions in Article 2 of the Regulation are concerned, they seem to lack any logical order. Some of them seem superfluous (e.g. 'standard contract term', as the CESL largely refers to 'not individually negotiated term'). Some are misleading (e.g. definition of 'obligation' fails to explain the difference from 'duty'). Some are insufficiently clear (e.g. 'loss of quality of life' within the definition of 'loss').

Others seem to be missing (e.g. ‘express’, which is a term used frequently in the CESL without making clear what it implies). For some terms (e.g. ‘sales contract’, ‘related services’) it is unclear why they are explained in the list of definitions, and not in Article 5 on material scope, where a more detailed definition of supply of digital content is to be found. The working party set out in **Part C** an alternative formulation that seeks to amend these shortcomings (**see ELI Article 8**).

## **(2) Simplification of terminology**

(29) The Proposal differentiates between three types of contract: sale of goods, supply of digital content, and related services. For each of these types parties are given different names within the text: for sales contracts they are called ‘seller’ and ‘buyer’, for contracts for the supply of digital content they are called ‘supplier’ and ‘user’, and for related service contracts they are called ‘service provider’ and ‘customer’. The situation is complicated still further by the fact that, solely for the purpose of Part IV, the supplier of digital content is also referred to as the ‘seller’ (cf. Article 91). This abundance of different terminology is apt to mislead the user and lacks any justification. The working party therefore suggests that the supplier of digital content is referred to as a ‘seller’ of digital content throughout the whole instrument. It also suggests that references to the supply of digital content be revised so that they refer to the ‘sale’ of digital content (fully supported by CJEU Case C-128/11 *UsedSoft*, at 42 to 46). Equally, as parties to a related service contract are, under the Proposal, necessarily identical with parties to a sales contract, clarity suggests that the terms ‘service provider’ and ‘customer’ are abandoned and that the terms ‘seller’ and ‘buyer’ are also used for the purpose of related services (**see ELI Article 2(1)**). The working party also suggests that the use of abstract terminology, such as ‘creditor’, ‘debtor’ or ‘recipient’, is avoided as far as is possible and that such references are replaced by more concrete terms, such as ‘seller’ or ‘buyer’.

## **(3) Rearrangement of rules copied from Directive 2011/83/EU**

(30) As far as pre-contractual information duties and other duties imposed by Directive 2011/83/EU are concerned, the working party acknowledges that the draftsmen decided to put the rules for distance marketing at the beginning of the section (as distance marketing is the most important case in practice) and to keep the rules copied from Directive 2011/83/EU together, even if they do not fit under the heading of “Pre-contractual information” but are really about the conclusion of the contract or other issues. Nevertheless, the working party concluded that this would aggravate the misgivings, felt in wide sections of the European legal community and beyond about long lists with items of information and other duties the reasons for which remain, in part, not sufficiently clear. It must also be borne in mind that Directive 2011/83/EU is not directly applicable (as we have already mentioned at paragraph (46)), but can be

made more user-friendly by national legislatures, whereas the CESL is the law with which contracting parties in Europe will be confronted directly.

- (31) The working party therefore suggests rearranging the way in which information and related duties are set out so as to reflect underlying principles. The working party therefore suggests starting with the most general information duties owed vis-à-vis every buyer, proceeding to information duties owed vis-à-vis consumers (because of the consumer's lack of bargaining power) and ending with some additional information duties only owed for off-premises and distance contracts. These last are justified by the 'invisibility' of the trader's place of business and the existence of a right of withdrawal **(see ELI Articles 17 to 20)**. In rearranging the order of the provisions, the working party has tried to leave the separate 'building blocks' of Directive 2011/83/EU intact as far as possible. The working party also made suggestions for rearranging the order of other rules derived from Directive 2011/83/EU in a more logical manner and for improving some of the most impenetrable rules, e.g. those on digital content not supplied on a tangible medium **(see ELI Articles 21 to 25)**.

#### **(4) Restructuring Parts IV to VI**

##### **(a) Getting closer to the idea of the 'life cycle' of a contract**

- (32) In the Proposal, Part IV on the obligations and remedies of the parties to a sales contract is very long. It starts with an extremely abstract Chapter 9 of general provisions, confronting the user, first, with definitions of non-performance and fundamental non-performance, secondly, with excused non-performance, thirdly with change of circumstances and fourthly with a rule generalising certain specific rules in Part IV to other cases. The user is thus confronted in the very first place with abstract rules which are relevant only where something has gone seriously wrong, or in very exceptional circumstances, before reading anything on the obligations of the parties in the average case. This is not user friendly, in particular for consumers. The working party therefore suggests a different structure. It has split Part IV into (1) a Part on the rights and obligations of the parties and (2) a Part on remedies for non-performance **(see ELI Parts IV and V)**. In doing so, the draft follows more closely the life cycle of a contract: it first deals with the 'normal' situation of performance, dealing with the content of the obligations, the ways in which the contract may be performed (the modalities of performance), the effects of performance, and then only with non-performance in general followed by the remedies for non-performance.

##### **(b) Rendering the rules on obligations and remedies shorter and clearer**

- (33) In the Proposal, the rules on modalities of performance and on some of the remedies for non-performance are fragmented. Specific provisions are made for the seller, buyer, service provider and customer, either by spelling them out in full for each case separately, or by referring to rules in another Chapter which are to be applied with

appropriate adaptations. The simplification of terminology explained at paragraph (29) above, combined with our conclusion that the rules on obligations and remedies are overly repetitive, has paved the way for restructuring Parts IV to VI in a way that is designed to make the instrument much shorter and clearer. In the Proposal, the rules on some modalities of performance and on the remedies of withholding performance and of termination are more or less the same for buyer and seller. It is thus possible to deal with the rules on performance under one Chapter entitled ‘Performance of obligations’ (**ELI Chapter 11**) and with the remedies of withholding performance and termination under one Chapter entitled ‘General remedies’ (**ELI Chapter 15**), together with damages and interest for late payment. Equally, the rules on remedies are, with only minor modifications, the same for parties to a sales contract and for parties to a related service contract. It is therefore advisable that the remedies concerning the sales component and the services component are dealt with in the same Chapters (**ELI Chapters 12 to 15**). This does not merely significantly reduce the number of Articles. It also helps avoid mistakes, which may be provoked due to either unnecessarily replicating rules and the danger of ‘false friends’, or to the use of extremely vague references to the application of certain Chapters ‘with appropriate adaptations’.

### **(c) Closing gaps in the context of performance and remedies**

- (34) The structure of the Proposal described in paragraph (33) above also means that, where an explicit rule on the modalities of performance or the remedies for non-performance is missing, there exists a gap. It is only in the case of the main obligations of seller and buyer that it is sufficiently clear that the rules on modalities of performance and on non-performance are in the instrument and can be found as such. For obligations other than the main obligations of the parties, such as the obligations to pay damages or to make restitution, the rules on modalities of performance and on remedies for non-performance are unclear, and it is even unclear whether these issues are governed by the instrument or by the national law otherwise applicable. The working party therefore has proposed that the rules on modalities of performance (**ELI Chapter 11**) and on remedies for non-performance (**see ELI Article 123(2)**) are formulated in such a way that they cover all obligations arising out of the contract or its termination.

## **V Avoiding inconsistencies and excessive uncertainty**

### **(1) Restructuring and revising the rules on termination**

- (35) One of several examples where the working party sought to achieve more coherence is the provisions relating to termination. In the Proposal, the rules on termination are scattered about the whole instrument: 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; and Chapter 17, with the exception of Article 172(3), deals with restitution after termination. The working party therefore proposed bringing together all rules on termination, with the exception of restitution, in one Section (**see ELI Section 2 of Chapter 15**).

- (36) Article 172(3), which refers to Article 8(2), on the one hand and Articles 9, 117 and 137 on the other cannot be reconciled and follow two equally possible but mutually exclusive approaches to the nature of termination: while Articles 9, 117 and 137 are based on the concept of partial termination and full restitution for the affected parts of the contract, Article 172(3) relies on the concept of total termination of the contract and partial restitution just for particular parts, and the role of Article 8(2) in this context remains vague. Similarly, Article 9 for mixed-purpose contracts with a sales component and a services component cannot be reconciled with Article 147(2) for ancillary 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 ancillary 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. The working party therefore tried to remove inconsistencies and to make the provisions simpler and more comprehensible (**see, in particular, ELI Articles 140, 142 and 143**).

## **(2) An alternative draft for Restitution**

- (37) The working party acknowledges that an attempt was made to draft Chapter 17 on restitution after avoidance or termination in a new and very concise way. However, it identified serious shortcomings in the present form of the draft. First, it must be noted that the rules lead to inconsistent results: Where the buyer of a car cannot return the car because it was stolen, given away as a gift or because it exploded and was totally destroyed as a consequence of the car's non-conformity with the contract, the buyer must pay the full monetary value of the car. However, where the car crashed in an accident, the buyer may simply return the wrecked car and where it was not given away as a gift but sold in good faith at 1 Euro, the buyer needs only to return the 1 Euro. Similarly, the buyer always has to return or pay for natural or legal 'fruits' derived, but the seller has to pay interest only in very narrowly defined circumstances. Chapter 17 of the Proposal also fails to address some of the most important and controversial issues relevant in day-to-day business, such as who has to bear the cost of restitution, whether the goods must be collected by the seller or brought back by the buyer, and whether and to what extent de-installation of the goods can be required.

- (38) Realising that Chapter 17 of the Proposal needs to be redrafted in its entirety, the working party puts forward in Part C an alternative Chapter on restitution (**ELI Chapter**

16), taking the rules on withdrawal as a basis for that redraft. This ensures that the rules on restitution after withdrawal and on restitution after avoidance or termination are coherent and that the rules chosen have a firm basis in the *acquis*. Bearing in mind that the rules are, to a large extent, parallel, consideration might be given to the idea of having only one set of rules on restitution which is applicable to restitution after withdrawal, avoidance and termination.

### **(3) Rethinking the combination of far-reaching consumer rights and their limitation by way of general clauses**

(39) It may be a central policy decision—which as such is not questioned by the working party for the reasons given at paragraph (2)—not to make the consumer’s remedies subject to cure by the seller (except for related services other than installation), and not to require consumers to give notice of termination within a reasonable time after becoming aware of the non-conformity, cf. Articles 106(3) and 119(2)(a) of the Proposal. From the point of view of many European jurisdictions, these consumer rights are very far-reaching, not least because they leave room for abusive behaviour on the part of the consumer. The same holds true for the theoretical possibility of still being able to exercise remedies for non-conformity and other forms of non-performance after more than nine years. However, these far-reaching consumer rights are not expressly provided in the Proposal, but simply arise by way of limitations such as the ‘good faith clause’ in Article 2 and the rule on payment for use after termination in Article 174(1). It is quite obvious that a consumer who, by failing to give notice of the non-conformity or of its wish to terminate the contract within reasonable time, and who continues to use the goods for almost two years in order finally to terminate the contract and claim back the price, may be held to be acting contrary to good faith and fair dealing. The same may be said of a consumer who orders customised goods to be manufactured according to his personal needs and who terminates the contract because of a non-conformity that is not insignificant, but which can easily be cured by the seller. It is thus to be expected that, based on the notion of good faith, courts in several Member States will deny the consumer a right to terminate in such cases. Alternatively, they will allow for termination but require the buyer to pay a prohibitive amount for the use of the goods under 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.

(40) It is thus to be feared that the application of the CESL will diverge to an extent that goes well beyond inevitable divergences of interpretation. What is worse, 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 there was a more balanced rule that took better account of the legitimate interests of the trader in the first place, but without any vague limitations.

- (41) The working party therefore suggests bringing the rules on consumer remedies more in line with what might be held to be a requirement of good faith and fair dealing. By way of example, it proposes that consumer remedies are rendered subject to cure by the seller in the case of customised or personalised goods and where more than six months have passed since risk has passed to the buyer (**ELI Article 128(2)**). Likewise, it proposes a requirement that notice of termination must be given within a reasonable time after the consumer first became aware of non-performance (**ELI Article 142**).

#### **(4) Facing the challenges posed by digital content**

- (42) The working group recognises that, consistently with the European Commission's Digital Agenda, the CESL includes rules specifically designed to fit the challenges posed by digital products. However, the working group believes that the rules as presently drafted do not sufficiently respond to these challenges. For example, the buyer is, under Article 123 of the Proposal, under an obligation to take delivery of digital content even where that digital content is not supplied on a tangible medium. This means that a buyer who orders software that is supplied online, but who later realises, after reading a computer magazine, that software of this kind may cause serious harm to other software they happen to be using, not only has to pay the price for the digital content (assuming it is nevertheless in conformity with the contract) but is also under an obligation to download the software and thus risk damage to his existing hardware and software. As digital content does not generate any storage costs on the part of the supplier there is no justification for an obligation to take delivery on the part of the buyer. The working party therefore suggests excluding the buyer's obligation to take delivery in cases of digital content not supplied on a tangible medium (**see ELI Article 94(2)**).
- (43) Another example is Article 107 according to which there are hardly any remedies for non-performance of the supplier's obligations where digital content was not supplied in exchange for a price. There is no reason why a trader who promises a consumer digital content as a 'gift', but gets personal data, an early order or similar benefits in return, should not be liable for repair or replacement. A rule like the one in Article 107 is appropriate only where the digital content is really free, as, for example, with Adobe Reader. The working group therefore suggests restricting Article 107 to these cases (**see ELI Article 128(4)**).
- (44) The rules on restitution are also not properly suited to meet the specific requirements of digital content. According to Article 173(1) and (4), the recipient of digital content must always pay the monetary value, but only up to the amount which the consumer, which we understand to be a reference to customer, saved. However, this 'one-size-fits-

all solution' is not appropriate in many cases. Where, for example, digital content is supplied on a tangible medium and this medium is still sealed or it is otherwise, for technical reasons, clear that the buyer will not have retained a copy of the digital content, the buyer must be able to make restitution simply by sending back the tangible medium. This is so even where a consumer has a right of withdrawal (cf. Article 40(3)(c) *e contrario*), and it must be the case all the more where the contract has been avoided or terminated by the buyer because of the seller's non-performance of an obligation. Article 173 also fails to take account of the fact that an increasing number of traders supply digital content under a DRM scheme which may be run by the trader or the producer of the digital content. Usually, this implies that the digital content can be used only after the buyer has registered with the trader or the producer and created a user account, and it is technically possible, without significant effort or expense, to block a user account and thus prevent any further use of the digital content by a particular person. The working party therefore suggests that the Proposal differentiate between cases where, for technical reasons, digital content may be deemed to be 'returnable' and can be treated in the same way as goods, and other cases (see ELI Article 158).

## **(5) No self-standing damages for a failure to act in good faith**

- (45) The working party is concerned about the degree of legal certainty in several places which parties may expect if they opt into the CESL. This is not so much about the frequent use of the term 'reasonable', which usually either denotes something self-evident (which could be omitted) or something that depends on the circumstances of the individual case and thus can and should not be fixed. What the working group is more concerned about is the implications of the general duty to act in accordance with good faith and fair dealing, in particular as the concept is so far unknown in some legal systems. These concerns are mainly that a self-standing claim for damages, as provided for in Article 2(2) of the Proposal, is excessive and may potentially undermine the CESL in its entirety. In the DCFR, a deliberate choice was made to limit the effects of the duty to act in good faith in such a way that this duty does not give rise to remedies for non-performance, including specific performance and damages in lieu of performance. The working party proposes reinstating this restriction by providing that a breach of the duty to act in good faith does not give rise *directly* to remedies for non-performance of an obligation (see ELI Article 12(2)).

## **VI Improving consumer protection**

- (46) As the Proposal largely takes Directive 2011/83/EU as a firm basis, the level of consumer protection, particularly in the fields covered by the Directive, is already very high. However, it has to be borne in mind that the Directive may, as far as a particular issue is not within the fully harmonised field, be supplemented by national law. Such supplementation will not occur with the CESL as national rules only play a subsidiary



role where a whole area of the law, such as capacity, agency, set-off or merger, has been omitted from its scope. There is therefore a certain danger that, by copying the precise terms of Directive 2011/83/EU, the CESL will lead to the ossification, and perpetuation, of lacunae and deficiencies in consumer protection in particular fields. The working party therefore suggests adding to the well-established consumer acquis certain protective tools, which it believes will prove to be essential in cross-border E-commerce.

## **(1) Protection of advance payments**

- (47) One of the main obstacles to cross-border internet trade is the consumer's lack of confidence in getting their money back where, for example, the contract has to be unwound upon withdrawal, avoidance or termination. The working party therefore suggests requiring traders to offer protection of advance payments by way of accredited escrow services, insurance companies or similar schemes ('payment protectors') **(see ELI Article 26)**. So that too heavy a burden is not imposed on SMEs, traders should be allowed to grant consumers the right to choose whether or not they want advance payment protection. Traders must, however, be prohibited from charging consumers, in respect of the use of a payment protector, fees that exceed the cost borne by the trader for the use of the service.

## **(2) Early confirmation and acknowledgement of receipt in E-commerce**

- (48) Another well known problem which, in practice, deters many consumers from ordering goods abroad is that they will quite often receive a confirmation of receipt provided for under national law implementing Directive 2000/31/EC, but then not receive delivery or any message for weeks. In some cases, they will, after a fortnight or so, receive a message that the trader regrets to inform them that it does not deliver to the Member State of the consumer, or the goods are out of stock. In other cases the consumer will never receive any message at all. However, the consumer cannot simply order the same goods with another trader as long as the first trader is entitled to deliver (i.e. within 30 days): should the goods eventually be delivered, the consumer may have to pay for them, or he may have a right of withdrawal with all the inconvenience of having to send the goods back at his own expense.
- (49) The working party therefore proposes that an obligation is imposed on internet traders to send a confirmation of the conclusion of the contract and of the estimated time of delivery, or of the fact that the consumer's offer has been rejected, without undue delay and in any case within four days after receipt of any order from the consumer. Where the trader fails to comply with this duty, the consumer will not be bound by its previous order and may reject any performance tendered by the trader as well as claim reimbursement of any advance payments made, in addition to having a claim to damages **(see ELI Article 24(3))**.

(50) The working party also suggests the imposition of a duty on traders which affords the other party the opportunity of giving a notice electronically on a trading website to communicate on a durable medium to the other party an acknowledgement of receipt, which must display the notice itself or its content without undue delay (**see ELI Article 15**). A similar requirement already exists for orders placed by the customer and the consumer's exercise of a right of withdrawal.

### **(3) Better protection in the context of related services**

(51) In the view of the working party, the Proposal fails to afford sufficient protection to consumers when it comes to related services. In practice, a problem which consumers face is that traders often provide pre-contractual information only on the price per hour and on how the total price will be calculated, possibly adding orally how long it expects the service to take, and then significantly run over the estimate, leaving the consumer with twice or three times the cost he had expected. Another problem is where traders only offer separate options (e.g. the supply and installation of a new washing machine, or simply the supply of a washing machine) and it is not clear to the consumer which of those options is sufficient to achieve the result which the consumer desires e.g., because the consumer also wants to have their old washing machine removed and disposed in addition to supply and installation of the new one. This is particularly problematic where the cost of removal of the old washing machine is not included in the price and will cost as much as supply and installation of the new one. Article 152 fails to solve the problem because the consumer, once the service provider has begun to perform the service, does not really have a choice: if consent is given, the consumer will have to pay the increased price, whereas if consent is not given, the consumer will have to pay roughly what was agreed on before without getting the benefit of the completed service.

(52) In the light of this, the working group proposes three measures: (i) add a qualification to the pre-contractual information duty on price, i.e. that the trader must give an estimate of the quantum of time, materials or similar factors required to fulfill the trader's obligations where the total price depends on that quantum and that quantum is not yet determined in advance (**see ELI Article 19(2)(b)**); (ii) add a rule according to which the trader is only entitled to a price exceeding the estimate given to the consumer before the conclusion of the contract where the increase is due to an impediment within the consumer's control and the trader could not be expected to take the possibility of such an impediment into account when making the estimate (**see ELI Article 105(3)**); and (iii) modify the rule on the service provider's obligations so that the seller must achieve the specific result envisaged by the buyer at the time of the conclusion of the contract where the result envisaged was one which the buyer could reasonably be expected to have envisaged and the buyer had no reason to believe that there was a substantial risk that the result would not be achieved by the service (**see ELI Article 101(2)**).

#### **(4) Better protection against individually negotiated terms**

(53) Under the Proposal, contract terms in consumer contracts are subject to control as being unfair where they have not been individually negotiated. It is not entirely clear whether Articles 84 and 85 also apply to individually negotiated clauses; Article 83 definitely does not. Where a term has been individually negotiated, there is hardly any safeguard against unfair contract terms, except under Article 51 of the Proposal on unfair exploitation, which affords relief only in very narrowly defined circumstances, to be proved by the other party. This means that any consumer, by the mere attempt to negotiate a clause, where that attempt is successful in only one minor point, will be largely without protection; such protection would however be available under many national legal systems. The working party agrees that it would not be wise to extend the scope of unfairness control under Chapter 8, but proposes the introduction, in the Article on unfair exploitation, of a presumption that there was unfair exploitation where the terms of a consumer contract are such as to create a grossly unfair imbalance of the parties' rights and obligations to the detriment of the consumer (**see ELI Article 52(2)**).

#### **(5) Unfair commercial practices**

(54) Several Member States have introduced a right of the consumer to avoid a contract or to withdraw from a contract that has been made where the trader was acting in violation of national law implementing Directive 2005/29/EC on unfair commercial practices (UCP). Whether (i) such rights are derogated by the CESL; or (ii) should remain unaffected by the CESL; or whether (iii) an equivalent right should be included in the CESL, thus automatically derogating national law in the field is a policy issue. The working party simply wants to draw attention to the fact, though, that the relationship between contractual sanctions for UCP on the one hand and the CESL on the other must be clarified. The working party has put forward a draft for consideration which provisionally suggests adoption of a uniform rule in favour of a right to avoidance under the CESL (**see ELI Article 50**).

## **Part B: RECOMMENDATIONS FOR EFFECTIVE IMPLEMENTATION**

### **Introduction - Making the CESL work in Practice**

(55) In this Part, we make recommendations which if adopted will maximise the CESL's effective practical implementation. The recommendations made are intended to encourage use of the CESL by:

- (i) making its meaning more certain and predictable;
- (ii) securing a swift and economic means of dispute resolution; and
- (iii) securing predictable enforcement.

### **VII Need for Certainty and predictability**

(56) Law should be clear and predictable. It should be capable of providing normative guidance without first having recourse to the courts to interpret and explain its provisions and effect. The CESL will apply in the 27 EU Member States, each of which has a different legal culture and tradition. Its provisions are to be interpreted autonomously i.e., without reference to those legal cultures and traditions<sup>6</sup>. It is of paramount importance therefore that its terms are sufficiently clear and predictable in effect, so that consumers and traders can use the CESL with confidence that it will be interpreted and applied consistently throughout the EU. To increase its certainty and predictability, the following outline recommendations are made. These will be expanded and developed in a further paper.

#### **(1) An Official Commentary and an Advisory Body**

(57) Court proceedings, as a means to clarify the meaning of the CESL's provisions, are slow, time-consuming and expensive. An effective extra-judicial means to obtain clarity and guidance should be established. This mechanism should be simple to use, speedy and inexpensive. It should be able to provide, without prejudice to the CJEU's role, highly persuasive, non-binding, interpretations of the meanings of its provisions in the first instance, without recourse to litigation.

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<sup>6</sup> CESL article 4(1).

- (58) The Commission intends to produce an official commentary on the CESL<sup>7</sup>. The working party considers this to be one aspect of an extra-judicial means of providing such clarity and guidance. In order to be as informative as possible, the commentary should have two aspects. First, it should provide a clear and comprehensive exegesis of the CESL's articles. Secondly, it should provide an explanation, where appropriate, of the policy choices which underpin specific articles. A clear explanation of such choices will enable courts across the EU Member States properly to interpret and apply the CESL, as well as enabling them to fill any gaps. As such it will facilitate the development of a consistent, uniform application of the CESL.
- (59) An official commentary will not be able to provide guidance for CESL users in respect of every issue which arises concerning its interpretation or application. As such an official commentary is not a complete solution. The working party therefore recommends the establishment of an official advisory body.
- (60) Such bodies operate successfully in a number of areas. One such example is DOCDEX, which provides persuasive guidance provided by experts selected by an ICC committee from a list maintained by the ICC Banking Commission on disputes referred for non-binding resolution according to the ICC DOCDEX Rules. Another is the CISG Advisory Council<sup>8</sup>, which provides clear and persuasive guidance regarding the meaning, interpretation and application of the United Nations Convention on Contracts for the International Sale of Goods (the CISG).
- (61) The working party therefore recommends that the Commission consider establishing an advisory body, analogous to DOCDEX and the CISG Advisory Council. Such a body should be capable of delivering guidance on specific questions which arise regarding the interpretation or application of the CESL. Such guidance should be highly persuasive, albeit not definitive: definitive interpretations being the province of the courts and, ultimately, the CJEU.
- (62) The advisory body should be able to act on its own motion or in response to a query raised with it by, for instance, a business, consumer, or lawyer. It should be capable of acting on its own motion if, for instance, it becomes clear that a provision, or provisions, within the CESL are being applied or interpreted in different ways in different EU Member States.
- (63) Additionally, such a body could provide further guidance through collecting, collating and publishing information concerning disputes under the CESL that have been settled via arbitration, where it is capable of providing guidance on the interpretation and application of the CESL.

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<sup>7</sup> Recital (34).

<sup>8</sup> <<http://www.cisgac.com/>>

(64) The official commentary and an advisory body are complementary mechanisms. In order to facilitate consistency between the commentary and any guidance provided by the advisory body, it may be appropriate for a number of those individuals responsible for preparing the commentary to be initial members of the advisory body. This would provide a degree of continuity between the two. The advisory body's membership would however benefit from a wider membership. In order to ensure that it was able to draw upon the expertise of practitioners and members of the European judiciaries, its membership should draw on these two constituencies.

## **(2) A Case law Database and Digest**

(65) The CJEU is responsible for providing the definitive interpretation of the CESL. Due to the nature of the majority of transactions which will take place under the CESL, i.e., relatively low value consumer sales, especially those conducted over the internet, disputes arising from such claims will primarily be raised and resolved in Member State courts. Relatively few disputes are likely to proceed to the CJEU. The majority of authoritative judicial determinations will therefore arise from national decisions. In order to facilitate this and secure a uniform interpretation of the CESL across the EU, the Commission anticipates creating a central database of national decisions and decisions of the CJEU<sup>9</sup>. Very good examples of databases are those established by UNCITRAL – Case Law on UNCITRAL Texts (CLOUT) and the UNCITRAL Digest on CISG.

(66) It is essential that those decisions are properly accessible throughout the EU, if they are to promote a common understanding and application of the CESL. The following minimum requirements should therefore be met:

- (i) To facilitate ease of use, the database will need to be fully systematised and easily searchable, see for instance, the Venice Commission's Codices database<sup>10</sup>;
- (ii) To facilitate effective access, and the development of a uniform autonomous approach to the CESL, judgments on the database should, as far as practicable, be translated into a number of the EU's official languages. To be properly effective this will require urgent work to be carried out on legal translation to ensure that the translations capture the proper meaning and nuance of the original judgment;
- (iii) In order to overcome the different approaches to judgments from across the EU and to enable the database to be operated efficiently and with economy, consideration might be given to producing a model standard-form, judgment summary which can then be incorporated into the database with minimal editing. This summary should accompany the judgment. It should be succinct, thus rendering it easily accessible and minimising translation costs. It should be

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<sup>9</sup> Recital (24).

<sup>10</sup> See <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>>

divided into five sections and be no more than two – three pages in length. The sections should set out: (a) the issue and the relevant CESL article(s); (b) a brief summary of the facts; (c) a short summary of the main arguments; (d) the decision; and (e) the reasons for the decision, clearly stating the principle decided; and

- (iv) The development and implementation of judicial and legal training in respect of (ii) and (iii) above. This training will have to run in tandem with training on the meaning and application of the CESL's substantive provisions. In addition the working party will give consideration to what University Law Schools can do in the period prior to implementation.

(67) A judgment and judgment summary database ought to be supplemented by a regular digest. Such a digest could contain both important judgments and their summaries and set them out in a properly systematised format. It could also contain any opinions issued by the advisory body, which had been issued since the previous digest had been published.

(68) To ensure further consistency between the commentary and the advisory body, it would be advisable to place responsibility for both the database content and the preparation of the digest with the advisory body. This approach has the following advantages.

(69) First, if the database is to be a properly authoritative record of judicial decisions from across the EU only properly authoritative judgments should be placed on it. It will therefore be necessary for consideration to be given to the status of any decision i.e., is the decision a first-instance decision, an intermediate appellate decision or a final appellate decision. Equally, consideration will need to be given to the extent to which the issue that arises in the decision forms part of the reasons for the decision, or is simply comment. The advisory body should be best placed to carry out this function, to identify key decisions and ensure only they are placed on the body of the database and the digest.

(70) Secondly, such scrutiny will also ensure that the advisory group is able to identify, at an early stage, any divergence of approach between Member States' courts, highlight them by way of cross-reference on the database and through the digest, and if appropriate, consider the point and issue an advisory opinion.

(71) Thirdly, it will facilitate the creation of a single website containing: the commentary; details of the advisory body, its membership, how to contact it, and its advisory opinions; and the case database and digest. A single point of contact will thus be created for consumers, businesses, lawyers and judges throughout the EU.

### **(3) Improved Judicial Co-operation**

(72) A judgment database is an essential element of a package of measures which should secure a consistent, predictable, judicial approach to the CESL. In the longer term consideration might be given to the improvement of judicial cooperation across the EU member states.

(73) The Commission already has a programme focused on improving judicial co-operation. This programme could be supplemented by

- (a) asking the Member States' judiciaries to ensure that CESL cases are only heard by the same designated divisions or chambers of courts and to nominate a judge or judges to have responsibility for liaising with the Advisory Body, in order to ensure that the digest and any significant decisions from other Member States are brought to the attention of the judges and other practitioners. The judge would be able to raise issues of concern regarding interpretation, while also being responsible for ensuring that the digest and any recent significant decisions from other Member States are brought to the attention of and used by judges within their Member State; and
- (b) the development of training programmes by national judicial training bodies in respect of the CESL. This could involve the participation of judges from other Member States in both course design and delivery. In this way a cross-border, uniform training approach could be developed and could help foster the European judicial culture.

## **VIII Alternatives to Court Process**

(74) Both in respect of B2C and B2B contracts effective alternatives to formal court processes are an essential requirement. The working party recommends that the Commission develop its approach to Alternative Dispute Resolution (ADR)<sup>11</sup> and Online Dispute Resolution (ODR)<sup>12</sup> in respect of the CESL within the overarching framework of its present proposals on both these issues. In developing its general approach to ADR and ODR and its application to the CESL, the Commission may wish to consider the following observations. More detailed consideration of ADR and ODR will be set out in a separate paper.

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<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (COM(2011) 793, final 2011/0373 (COD)).

<sup>12</sup> Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR) (COM(2011) 794, final 2011/0374 (COD)).



## **(1) ADR**

- (75) In so far as ADR is concerned, experience has shown that it works well in both B2C and B2B transactions.
- (76) The working party is strongly of the view that ADR should play a significant role in the resolution of disputes arising between parties to CESL agreements as an effective alternative to the formal court process. The working party suggests that consideration be given to incorporating into CESL a continuing requirement that contract parties must actively consider resort to ADR, such as mediation or conciliation, prior to issuing and during the course of proceedings. In this context it is going to be important that the costs to parties arising from any mediation or conciliation process are provided for in some way so that this aspect is not too onerous on the parties. It also has to be borne in mind that ADR may not be suitable for all cases.
- (77) Where ADR fails, parties must be able to resort to the courts for formal adjudication. Where it is successful however it will not simply be of benefit to the immediate parties. It will also benefit access to justice for those parties whose dispute is either not suitable for consensual resolution or cannot be resolved consensually. It will do so as the courts, as is generally the case where ADR is concerned, will be able to utilise their resources on such cases, and not on those cases which could be resolved consensually.
- (78) There are three important lessons however which should be noted: (1) the smaller the claim, the more important that the cost of ADR is included within any initial court fee paid to initiate court proceedings; (2) if a third party (such as a mediator) is used, then that person must be trained and experienced; not everyone trained is good at ADR. (3) ADR is not suitable for all cases; its use and cost need carefully to be controlled by the parties and, where appropriate, the courts. These points need to be emphasised, as ADR should not be seen as a palliative that will cure the defects of enforcement of remedies.
- (79) Related to, but distinct from, mediation and conciliation, special consideration needs to be given to commercial arbitration in B2B contracts. While such clauses work well, are of benefit to contract parties and could be incorporated as a standard clause into B2B contracts, there is a greater risk than arises through ADR in non-commercial cases that such arbitration can diminish certainty in the law through reducing the development of case law and definitive guidance from courts on the correct interpretation and application of the CESL<sup>13</sup>. The benefits of removing disputes from the courts, noted above, remain however the same, and may equally be greater.

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<sup>13</sup> Some arbitral regimes have adopted an informal system of case law, but these have a risk of producing law that is private to the system or to certain users of the system.

## **(2) ODR**

(80) In so far as ODR is concerned, experience shows that such systems work particularly well for small claims arising from consumer disputes, especially those where goods are sold over the internet: see for instance, eBay's SquareTrade online dispute resolution system<sup>14</sup>.

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<sup>14</sup> See Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford) (2010) at 219 for a discussion.

## Part C: THE DETAIL OF SUGGESTED CHANGES

Part C is provided in two separate formats:

- (i) a black letter or plain text version showing the Proposal with our amendments incorporated into the text of the Proposal to show how the proposal would read if all the changes were adopted. **It is important to note that this is not intended to be nor is an alternative, competing, text of the CESL;** and
- (ii) a tabulated version in a number of parts containing a detailed analysis of the suggested changes which contrast the text of the suggested changes and the text of the Proposal and provides a detailed explanation of the suggestions.

# **I Consolidated black letter version of Proposal with suggested amendments**

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## **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 a uniform set of contract law rules for the sale of goods or of digital content and for related services.
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
  - (a) contracts for the sale of goods, which means any contract under which a trader ('the seller') transfers or undertakes to transfer the ownership of goods to another person ('the buyer'); it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;
  - (b) contracts for the sale of digital content, which means any contract under which a trader ('the seller') supplies or undertakes to supply digital content to another person ('the buyer') in a way that it can be stored, processed or accessed, and re-used by the buyer, whether or not according to the buyer's specifications, whether or not supplied on a tangible medium;
  - (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, provided by the seller of the goods or digital content to the buyer.
2. Any combination of a sales contract and a related service contract shall be treated like a sales contract with a related service component.

3. 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.

### *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 171.]*
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;
  - (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 ..., where the consumer will get, for each Member State, concise information on the consumer's rights under the Common European Sales Law compared with under the national law of that Member State.
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 contract, where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law. 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 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.
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 where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law;
  - (c) the determination of the language of the contract;
  - (d) matters of non-discrimination;
  - (e) representation;
  - (f) plurality of debtors and creditors and change of parties including assignment;
  - (g) set-off and merger;
  - (h) property law, including the transfer of ownership; 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, telecommunication, training and financial services, and to the information requirements laid down by national laws which transpose the provisions of Directive 2006/123/EC on services in the internal market, and which complement the requirements laid down in the Common European Sales Law.
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*

##### *Mixed and linked contracts*

1. 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 other contract shall determine the effects which invalidity or the exercise of any right or remedy under the Common European Sales Law has on the other 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 or the exercise of any right or remedy 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.

- 2. 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 1.

## **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 contracts and obligations in general:
  - (a) 'contract' means an agreement intended to give rise to obligations or other legal effects;
  - (b) '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;
  - (c) '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;
  - (d) 'price' means money that is due in exchange for goods sold, digital content supplied or a related service provided;

- (e) '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;
- (f) '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;
- (g) '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;
- (h) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;
- (i) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;
- (j) '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;
- (k) 'damages' means a sum of money to which a person may be entitled as compensation for loss;
- (l) '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;
- (m) '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;
- (n) 'court' includes an arbitral tribunal.

2. In relation to contracts between a trader and a consumer in particular:

- (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) 'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer;
  - (d) 'commercial guarantee' means any undertaking by the trader or a producer going beyond legal obligations under Article 128 to reimburse the price paid or to replace or repair, or service goods or digital content in any way if they are not in conformity with the contract or if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the associated advertising ;
  - (e) '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;
  - (f) 'distance contract' means any contract between a trader and a consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;
  - (g) 'off-premises contract' means any contract between a trader and a consumer:
    - (i) concluded in the simultaneous physical presence of the trader and the consumer at a place which is not the trader's business premises, or concluded on the basis of an offer made by the consumer in the same circumstances, or concluded immediately after the consumer was personally and individually addressed in the same circumstances; or
    - (ii) concluded during an excursion organised by or with the help of the trader with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;
  - (h) 'business premises' means any immovable retail premises where a trader carries out activity on a permanent basis, or any movable retail premises where a trader carries out activity on a usual basis.
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. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.
2. Where a period 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.

3. Subject to paragraph 4:
  - (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.
4. 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.
5. 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.
6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.

### **SECTION 3      GENERAL PRINCIPLES**

#### *Article 10* *Freedom of contract*

1. Parties are free to conclude a contract and to determine its contents, 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 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*  
*Notice*

1. This Article applies in relation to the giving of notice, which includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose, under the rules of the Common European Sales Law and the contract.
2. Notwithstanding any provision to the contrary, a notice may be given by any means, including conduct, which is appropriate to the circumstances.
3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. A notice reaches the addressee when, whichever is the earliest:
  - (a) it is delivered to the addressee or to the addressee's habitual residence;
  - (b) in the case of a notice transmitted by electronic mail or other individual communication, it can be accessed by the addressee; or
  - (c) it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.
4. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
5. Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

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 3 or derogate from or vary its effects.

#### *Article 15*

##### *Notice given electronically*

1. Where a trader provides to the other party the possibility to give a notice electronically on a trading website, in particular place an order or exercise a right of withdrawal, 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.
2. The trader is liable for any loss caused to the other party by a breach of this duty. The provisions in Chapter 15 Section 3 apply with appropriate adaptations.
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.

## **Part II      Making a binding contract**

### **Chapter 2              Pre-contractual information and related duties**

#### **SECTION 1      GENERAL PRE-CONTRACTUAL DUTIES**

##### *Article 16*

##### *General provisions*

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.
2. A party who supplies information, whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.
3. The information provided under this Chapter forms an integral part of the contract, unless parties who are traders have agreed otherwise, and may therefore not be altered unilaterally to the detriment of the other party.
4. In relations between a trader and a consumer,
  - (a) the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects;
  - (b) the trader bears the burden of proof that it has fulfilled the duties required by this Chapter.

##### *Article 17*

##### *Duty to disclose information about what is supplied and the identity of the supplier*

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services, the supplier has a duty to disclose by any appropriate means to the other party any information which the supplier 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
  - (a) the main characteristics of the goods, digital content or related services to be supplied; and
  - (b) the identity of the supplier, such as the supplier's trading name, the geographical address at which it is established and its telephone number.
2. In determining whether paragraph 1 requires the supplier 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 other party;
  - (c) whether the supplier could be expected to have special expertise;



- (d) the cost to the supplier of acquiring the relevant information;
  - (e) whether the other party 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 other party 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;
  - (c) the terms of any licence agreement the buyer has to accept in order to use digital content.

#### *Article 18*

##### *Special duties in contracts concluded by electronic means*

1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.
2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.
3. The trader must provide information about the following matters before the other party makes or accepts an offer:
  - (a) the technical steps to be taken in order to conclude the contract;
  - (b) whether or not a contract document will be filed by the trader and whether it will be accessible;
  - (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
  - (d) the languages offered for the conclusion of the contract;
  - (e) the terms on the basis of which the trader is prepared to conclude the contract.
4. Without prejudice to any stricter requirements for relations with a consumer under Section 2, the trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.
5. In the acknowledgment required under Article 15 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.

## **SECTION 2      SPECIAL PRE-CONTRACTUAL INFORMATION TO BE GIVEN BY A TRADER DEALING WITH A CONSUMER**

### *Article 19*

#### *Pre-contractual information duties*

1. In contracts between a trader and a consumer a trader has a duty to provide, in addition to the information required by Articles 17 and 18, the following information to the consumer in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:
  - (a) the total price and additional charges and costs; and
  - (b) the other contract terms.
2. The information to be provided under point (a) of paragraph 1 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;
  - (d) in the case of a contract of indeterminate duration or a contract containing a subscription, the total price per billing period, including, where charged at a fixed rate, the total monthly price, or, where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated ; and
  - (e) 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.
3. The information to be provided under point (b) of paragraph 1 must include, where applicable:
  - (a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;
  - (b) 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;

- (c) the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
  - (d) the payment protector provided under Article 26, the functioning of the payment protection service and the additional charges that might apply;
  - (e) the existence and the conditions of the trader's after-sale services, commercial guarantees and complaints handling policy;
  - (f) the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it; and
  - (g) the existence of relevant codes of conduct and how copies of them can be obtained.
4. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion, unless the contract is a distance or off-premises contract and Article 20 applies.

#### *Article 20*

#### *Additional information about the identity of the trader and withdrawal when concluding a distance or off-premises contract*

1. In addition to the information required by Articles 17 to 19 a trader concluding a distance contract or off-premises contract has a duty to provide:
  - (a) further information on its identity; and
  - (b) information about rights of withdrawal including facilities for the consumer to make any related declaration required.
2. The information to be provided under point (a) of paragraph 1 must include:
  - (a) the identity of the trader, such as its trading name;
  - (b) the geographical address at which the trader is established;
  - (c) the telephone number, fax number, e-mail address and website of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;
  - (d) where the trader is registered in a commercial or similar public register, the denomination of that register, the trader's registration number or equivalent means of identification in that register;
  - (e) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and
  - (f) where different from the address given pursuant to points (b) and (e) of this paragraph, the geographical address of the trader, and where applicable that of the trader on whose behalf it is acting, where the consumer can address any complaints.
3. The information to be provided under point (b) of paragraph 1 must include

- (a) whether or not the consumer has a right of withdrawal and, where applicable, the circumstances under which the consumer loses the right of withdrawal;
    - (b) where the consumer has a right of withdrawal under Chapter 4, the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2;
    - (c) whether the consumer will have to bear the cost of returning the goods 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.
  - 4. 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 its obligations under point (b) of paragraph 1, seek the consumer's prior express consent and acknowledgement that the consumer will
    - (a) in the case of digital content, thereby lose its right to withdraw; or
    - (b) in the case of related services be liable to pay the trader the amount referred to in Article 45(5).
- For an off-premise contract, the consumer's consent and acknowledgement must be made on paper or, where the consumer agrees, on a different durable medium.
- 5. The duty to provide the information required by paragraphs 1 to 4 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.
  - 6. This Article does not apply where the contract is:
    - (a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
    - (b) concluded by means of an automatic vending machine or automated commercial premises;
    - (c) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.

### **SECTION 3      HOW AND WHEN INFORMATION AND RELATED DUTIES OWED TO A CONSUMER ARE TO BE FULFILLED**

#### *Article 21 General requirements*

- 1. The information required by Articles 16 to 20 must be provided to the consumer

- (a) in a clear and comprehensible manner, using plain and intelligible language; and
  - (b) as early as reasonably possible before the contract is concluded or the consumer is bound by any offer as enables the consumer to make an informed decision.
- 2. Where information is provided on a durable medium, it must allow quick and easy access to the different heads of information as well as being capable of being printed in a cost-effective way by the consumer.
- 3. For contracts other than distance or off-premises contracts the information required need not be given explicitly if it is already apparent from the context.

#### *Article 22*

##### *Specific requirements in off-premises contracts*

- 1. For an off-premises contract, the information required by Articles 16 to 20 must be given on paper or, if the consumer agrees, on another durable medium.
- 2. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including, where applicable, the confirmation of the consumer's consent and acknowledgment referred to in Article 20 (3), on paper or, if the consumer agrees, on a different durable medium. The trader must do so without undue delay after the conclusion of the off-premises 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.

#### *Article 23*

##### *Specific requirements in distance contracts*

- 1. For a distance contract, the information required by Articles 16 to 20 must be given or made available to the consumer in a way that is appropriate to the nature of the information and the means of distance communication used.
- 2. If the means of distance communication allows limited space or time to display the information, the trader may provide the information referred to in points (a) and (c) to (g) of Article 19 (3) and in points (b) to (f) of Article 20 (1) by another means of distance communication.
- 3. The trader must provide the consumer with confirmation that a contract has been concluded, including, where applicable, confirmation of the consumer's consent and acknowledgement specified in Article 20 (3) and all the information referred to in Articles 16 to 20 on a durable medium. The trader must do so in reasonable time after the conclusion of the distance 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. The information referred to in Articles 16 to 20 need not be included where it has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.

#### *Article 24*

##### *Additional requirements in distance contracts concluded by electronic means*

1. On a trading website, the trader must indicate clearly and legibly and no later than the start of the ordering process whether any delivery restrictions apply and which means of payment are accepted.
2. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must
  - (a) immediately before the consumer places the order, make the consumer aware of the information required by Article 17, Article 19 (2) and Article 19 (3)(b) and do so in a clear and prominent manner;
  - (b) ensure that the consumer, 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, the button or similar function must be labelled in an easily legible manner only with the words 'order with obligation to pay' or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader.

Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order.

3. In a contract that is concluded by electronic means the trader must, without prejudice to the rules under Chapter 3 and without undue delay and in any case within four days after receipt of any order from the consumer, send the consumer
  - (a) confirmation of the conclusion of the contract referred to in Article 23 (3); and
  - (b) confirmation of the estimated time of delivery, or of the fact that the consumer's offer has been rejected;

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

#### *Article 25*

##### *Additional requirements in distance contracts concluded by telephone*

1. When a trader makes a telephone call to a consumer, with a view to concluding a distance contract, the trader must present its calling line identification and, at the beginning of the conversation with the consumer, inform the consumer 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.
2. A distance contract concluded by telephone, unless the telephone call was made upon the initiative of the consumer, 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 4     PROTECTION OF ADVANCE PAYMENTS**

### *Article 26*

#### *Securing advance payment by the consumer*

1. The trader 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 5     BREACH OF INFORMATION AND RELATED DUTIES**

### *Article 27*

#### *Consequences of breach*

1. A party that fails to comply with any duty imposed by this Chapter 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 15 Section 3 with appropriate adaptations.
2. Where the trader has not complied with the information requirements relating to rights and obligations of the parties under the contract, the other party may insist to have the contract performed on the basis that the information provided was correct and complete as required under this Chapter. In particular, a consumer is not liable to pay any additional charges or other costs not duly informed about.
3. The remedies, rights or defences provided under this Article are without prejudice to
  - (a) any specific remedy, right or defence which may be available under this Chapter, Article 42 (2), or Articles 161 and 162;
  - (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.

## Chapter 3 Conclusion of contract

### SECTION 1 GENERAL PROVISIONS

#### *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 14 and 15.
3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.
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 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 is not an offer, unless the circumstances indicate otherwise.

#### *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 31*  
*Rejection of offer*

When a rejection of an offer reaches the offeror, the offer lapses.

*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 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.

*Article 34*  
*Time limit for acceptance*

1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.
2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror 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 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.

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

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

## **SECTION 3      SPECIAL PROVISIONS FOR RELATIONS BETWEEN TRADERS**

### *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
- (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 39*

#### *Conflicting standard contract terms*

1. 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.
2. 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 distance and off-premises contracts between traders and consumers**

#### *Article 40*

#### *Right to withdraw*

1. During the period provided for in Article 42, 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 45, from:
  - (a) a distance contract;
  - (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.
2. Paragraph 1 does not apply to:
  - (a) a contract concluded by means of an automatic vending machine or automated commercial premises;
  - (b) 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;

- (c) 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;
- (d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;
- (e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;
- (f) 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 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;
- (g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
- (h) 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
- (i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance; and
- (j) 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 20(3) and the trader has provided the confirmation in accordance with Article 23(3);
- (e) the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs or maintenance or a similar service. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than parts

necessarily used in performing the services specifically requested by the consumer, the right of withdrawal applies to those additional related services or goods.

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 41*

##### *Exercise of right to withdraw*

1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.
2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.
3. A communication of withdrawal is timely if sent before the end of the withdrawal period.
4. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

#### *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 referred to in Article 20(2), the withdrawal period expires:
  - (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 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 under the contract in accordance with Chapter 14. The consumer does not incur any liability through the exercise of the right of withdrawal except as provided for in that Chapter.
3. Without prejudice to Article 6 any contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader ('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 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 41. 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.

4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

#### *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 41, 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 20.
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 20 (2) or (3); or
  - (b) the consumer has not given express consent and acknowledgement in accordance with Article 20 (3).
7. Where digital content is supplied on a tangible medium and a right of withdrawal exists in accordance with Article 40(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 40(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 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 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 48 (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 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 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 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 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 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 52*  
*Unfair exploitation*

1. A party may avoid a contract if, at the time of the conclusion of the contract:
  - (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.
2. Without prejudice to the rules under Chapter 4, the requirements of paragraph 1 are presumed to be fulfilled where the terms of a contract between a trader and a consumer are such as to create a grossly unfair imbalance of the parties' rights and obligations to the detriment of the consumer, contrary to good faith and fair dealing. Article 78 applies accordingly to this presumption.

*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 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 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.

#### *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 15 Section 3, with appropriate adaptations.

#### *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 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 14(2), 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 59 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 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 60*

##### *Language*

Where a contract is in two or more language versions unless one is expressed as being authoritative, the version in which the contract was originally drawn up is to be treated as the authoritative one.

#### *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 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 63, 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 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 ASCERTAINED**

#### *Article 64*

##### *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 65;
- (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 66 or 67.

*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 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 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 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 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 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 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      CONTRACTS BETWEEN A TRADER AND A CONSUMER**

### *Article 72*

#### *Duty to raise awareness of not individually negotiated contract terms in contracts with consumers*

1. Contract terms supplied by a trader and not individually negotiated within the meaning of Article 8(1)(e) may be invoked against a consumer only if the consumer was aware of them, or if the trader took reasonable steps to draw the consumer's attention to them, before or at the time the contract was concluded.
2. For the purposes of this Article, contract terms are not sufficiently brought to the consumer's attention unless they are presented:
  - (a) in a conspicuous way, which is suitable to attract the consumer's specific attention;
  - (b) in an accessible way, which allows the consumer to take adequate notice of their content before the contract is concluded; and
  - (c) in a way comprehensible to the consumer, without prejudice to the transparency requirement under Article 80.

### *Article 73*

#### *Additional payments in contracts between a trader and a consumer*

1. In a contract between a trader and a consumer, no contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation is binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment.
2. Any additional payment made by a consumer unless the obligation to pay is binding, consistently with paragraph 1, is recoverable by the consumer.

## **SECTION 3      OTHER SPECIFIC CONTRACT TERMS**

### *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 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 76*

##### *Contracts of indeterminate duration*

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 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 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 80.
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 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 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 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 trader which has not been individually negotiated 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 80;
  - (b) the nature of what is to be provided under the contract;
  - (c) the circumstances prevailing during the conclusion of the contract;
  - (d) to the other contract terms; and
  - (e) to the terms of any other contract on which the contract depends.

#### *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;
- (c) limit 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;
- (d) 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;
- (e) 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;
- (f) 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;
- (g) provide that the consumer is bound by the contract when the trader is not;
- (h) 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;

- (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (k) determine that non-individually negotiated contract terms within the meaning of Article 8(1)(e) prevail or have preference over contract terms which have been individually negotiated.

### *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 remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
- (c) 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;
- (d) 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;
- (e) 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;
- (f) 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;
- (g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- (h) 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;
- (i) 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;

- (j) 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;
- (k) 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;
- (l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;
- (m) 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;
- (n) 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;
- (o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
- (p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;
- (q) 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;
- (r) 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;
- (s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- (t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- (u) 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;
- (v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- (w) 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 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.

## **Part IV    Obligations of the parties**

### **Chapter 9   Obligations of the parties to a sales contract**

#### **SECTION 1    THE SELLER'S OBLIGATIONS**

##### *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;
  - (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.

##### *Article 86*

##### *Method of delivery*

1. Unless agreed otherwise, the seller fulfils the obligation to deliver:
  - (a) in the case of a consumer sales contract which is a distance or off-premises contract or 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 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 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.

## **SECTION 2 CONFORMITY OF THE GOODS AND DIGITAL CONTENT**

#### *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 90 to 92, save to the extent that the parties have agreed otherwise.
3. In a consumer sales contract, any agreement derogating from the requirements of Articles 90 and 92 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 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 64(b) and 66; 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 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 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 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 91(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 91(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 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 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 distance or off-premises contract, in particular, physical absence of the consumer 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.

#### *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 retain or refuse the excess quantity.
3. If the buyer retains 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 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 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 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 86, 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 been taken unless the non-performance is excused under Article 122 or the consumer is entitled to withhold taking of delivery pursuant to Article 136.

### *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 136.
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 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 91.

#### *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 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.

#### *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 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 108 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 106 Payment of the price*

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

### *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 3 DECLINE OF PERFORMANCE BY THE BUYER**

### *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 1 GENERAL**

#### *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 contract which is a distance or off-premises contract, or in which 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;
  - (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 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 26 are fulfilled.

#### *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 112*  
*Costs of performance*

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

## **SECTION 2      MODIFIED PERFORMANCE**

*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 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 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 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 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 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 14 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 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 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 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 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 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 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 125*

##### *Mandatory nature*

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.

## **Chapter 13      The seller's remedies**

#### *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 127;
- (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 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. 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.
3. In the case of a related service, Article 108 applies instead of paragraph (2).

## Chapter 14      The buyer's remedies

### SECTION 1      GENERAL PROVISIONS

#### *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 129. 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.
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 130 and 131.
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 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 128;
  - (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 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 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 92.
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 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 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 132 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 134 do not apply to related services.

*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 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 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 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 121 (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 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 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 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 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 138 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 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 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 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.
3. 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 void.

#### *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 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.

#### *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 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 149*  
*Current price*

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

*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 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 the time of payment at the rate specified in paragraph 2.
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. The parties may not exclude the application of this Section or derogate from or vary its effects.

#### *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 151, 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 81.
3. Interest for delay in payment cannot be added to capital in order to produce interest.

#### *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 151 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:
  - (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 152.
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 152.
4. Without prejudice to Article 151 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.

#### *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 not binding to the extent that

the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.

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 151, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 153 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.



## **Part VI    Restitution**

### **Chapter 16       Restitution**

#### *Article 155*

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

1. Where a contract or part of a contract is avoided or terminated by either party, 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.
2. Restitution must be made without undue delay and in any event not later than fourteen days from notification of the avoidance or termination. 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. Where a contract or part of a contract is invalid or not binding under the Common European Sales Law for reasons other than avoidance or termination, this Chapter applies 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 Chapter or derogate from or vary its effects before notice of avoidance or termination is given.

#### *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.
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 157(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 153, 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 157*  
*Goods delivered*

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. In the case of avoidance or termination by the buyer 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 monetary value of that use or return these fruits only where the buyer caused the ground for avoidance or termination or was, prior to the start of the relevant period, aware of the ground for avoidance or termination.
4. The buyer is liable under Section 3 of Chapter 15 for not being able to return the goods, including fruits where relevant, or for any diminished value of the goods to the extent that diminishment in value exceeds depreciation through regular use. Liability shall not exceed the price agreed for the goods.

*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 recipient who sends back a tangible medium 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:
  - (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 157; and
  - (c) paying the monetary value of any use made of the digital content where the buyer caused the ground for avoidance or termination or was, prior to the start of the relevant period, aware of the ground for avoidance or termination.
3. The recipient of digital content which is not returnable within the meaning of paragraph 1 must pay the monetary value of the digital content, which shall be calculated on the basis of the total price agreed in the contract. In the case of avoidance or termination by the buyer the buyer is not liable to pay unless to the extent that there is a saving on his part.

*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. In the case of avoidance or termination by the buyer, liability of the buyer shall not exceed the amount the buyer saved by receiving the related service.

*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.

## **Part VII            Prescription**

### **Chapter 17        Prescription**

#### **SECTION 1        GENERAL PROVISION**

##### *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 COMMENCEMENT**

##### *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 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 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 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 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 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 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 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 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 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 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 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 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.



## **II Tabulated version of Proposal with parallel text showing suggested amendments**

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Original text	Suggested Wording	Remarks
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**Bold** = modification (usually implying certain deletions) or insertion

■ = mere omission

	<b>Part I      Introductory provisions</b>	
	<b>Ex Regulation and Part I</b>	
	<b>Chapter 1 Application and general principles</b>	
	<b>SECTION 1      APPLICATION OF THE INSTRUMENT</b>	
<p><i>Regulation Article 1</i> <i>Objective and subject matter</i></p> <p>1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.</p>	<p><i>Article 1</i> <i>Objective and subject matter</i></p> <p>1. The purpose of this Regulation (<b>'the Common European Sales Law'</b>) is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules ■for the sale of goods <b>or of</b> digital content and for related services■.</p> <p>2. This Regulation enables traders, <b>in particular small or medium-sized enterprises ('SME')</b>, to</p>	<p><b>(1)</b> The 2011 Proposal includes a Regulation. The Regulation contains many highly technical rules, most of which are addressed to contract parties. Some rules are however solely addressed to the Member States. Among those addressed to contract parties there are rules, such as the definitions, which are essential for a proper understanding of the substantive sales law's provisions. The bulk of</p>

<p>2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.</p> <p>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.</p> <p style="text-align: center;"><i>Regulation Article 7 Parties to the contract</i></p> <p>1. ...Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise ('SME').</p> <p>2. For the purposes of this Regulation, an SME is a trader which</p> <ul style="list-style-type: none"> <li>(a) employs fewer than 250 persons; and</li> <li>(b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State which is not participating in the third stage of economic and monetary union or in a third country, the equivalent amounts in the currency of that Member</li> </ul>	<p>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.</p> <p>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.</p>	<p>substantive sales law provisions are however not contained in the Regulation itself, but are set out in an Annex to the Regulation (Annex I).</p> <p>As a consequence of this it is frequently unclear why a specific provision has been put into the Regulation instead of Annex I, and vice versa. This renders use of the Common European Sales Law (CESL) unnecessarily complicated as it is not sufficient simply to provide an Article's number. This creates an unnecessary, otherwise avoidable risk that users will make mistakes when using the Regulation and substantive sales law.</p> <p>This problem can be remedied by revising the Proposal so that it is a single instrument, such that the Annexes only contain EU standard and model forms and that technicalities are moved to the very end of the instrument.</p> <p><b>(2)</b> Restricting the CESL's application, in the context of B2B contracts, to those contracts where at least one of</p>
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<p>State or third country.</p> <p><i>Regulation Article 13</i> <i>Member States' options</i></p> <p>A Member State may decide to make the Common European Sales Law available for: ...</p> <p>(b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).</p>		<p>the traders is an SME makes choosing the CESL significantly more complex, uncertain and thus less attractive.</p> <p>One consequence of this is that large enterprises will have no real incentive or interest in ever using the CESL in relations with other traders as they would have to ascertain how many employees the customer had, its annual turnover etc before entering into a contract.</p> <p>The rationale for this restriction is ostensibly to satisfy the Proposal's basis in the TFEU. As more than 90% of traders within the EU are SME, this rationale can, however, easily be met through clearly articulating the aim of SME protection in Article 1. Finally, the principles of subsidiarity and proportionality do not require a restriction to SME. Such a restriction would significantly retard the instrument's ability achieve the aims pursued with it.</p>
<p><i>Regulation Article 7</i> <i>Parties to the contract</i></p> <p>1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital</p>	<p><i>Article 2</i> <i>Contracts <b>covered by</b> the Common European Sales Law</i></p> <p>1. The Common European Sales Law applies, subject to an agreement of the parties to that</p>	<p><b>(1)</b> The CESL's substantive scope rules are presently scattered around the Regulation, with some of the most fundamental information hidden in a long list</p>

<p>content is a trader. ...</p> <p style="text-align: center;"><i>Regulation Article 2</i> <i>Definitions</i></p> <p>For the purpose of this Regulation, the following definitions shall apply: ...</p> <p>...</p> <p>(j) 'digital content' means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, 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:</p> <ul style="list-style-type: none"> <li>(i) financial services, including online banking services;</li> <li>(ii) legal or financial advice provided in electronic form;</li> <li>(iii) electronic healthcare services;</li> <li>(iv) electronic communications services and networks, and associated facilities and services;</li> <li>(v) gambling;</li> <li>(vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other</li> </ul>	<p>effect, to</p> <ul style="list-style-type: none"> <li>(a) <b>contracts for the sale of goods, which</b> means any contract under which a trader ('the seller') transfers or undertakes to transfer the ownership of goods to another person ('the buyer'); it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;</li> <li>(b) <b>contracts for the sale of digital content, which means any contract under which a trader ('the seller') supplies or undertakes to supply digital content to another person ('the buyer') in a way that it</b> can be stored, processed or accessed, and re-used by the buyer, whether or not according to the buyer's specifications, whether or not supplied on a tangible medium;</li> <li>(c) <b>contracts for the provision of any related</b> service, excluding financial services, <b>linked</b> to goods or digital content <b>sold under the Common European Sales Law</b>, such as installation, maintenance, repair or any other processing, provided by the seller of the goods <b>or</b> digital content <b>to the buyer</b>.</li> </ul> <p>2. Any combination of a sales contract and a related</p>	<p>of definitions. This is extremely confusing for the user. It can be remedied through introducing a revised Article 2, which clearly states for which contracts the CESL may be used.</p> <p><b>(2)</b> The Commission added '<i>supply of digital content</i>' as a third type of contract next to sale of goods and provision of services.</p> <p>This distinction is made throughout most of the rules and consequently increases the CESL's complexity. Furthermore, the language used is not consistent: '<i>consumer sales contract</i>' sometimes appears to include contracts for the supply of digital content (e.g. in Article 101), and sometimes not (e.g. in Article 94(1)(a)).</p> <p>One probable reason why the '<i>supply</i>' of digital content was not simply treated as the '<i>sale</i>' of digital content is that supply does not imply transfer of ownership. The notion of '<i>sale</i>' does not however necessarily include transfer of ownership as is illustrated by the sale of rights, shares etc. In any event,</p>
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<p>users;</p> <p>(k) 'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;</p> <p>(l) ...;</p> <p>(m) 'related service' means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:</p> <ul style="list-style-type: none"> <li>(i) transport services,</li> <li>(ii) training services,</li> <li>(iii) telecommunications support services;</li> <li>and</li> <li>(iv) financial services;</li> </ul> <p>(n) 'service provider' means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;</p>	<p>service contract shall be treated like a sales contract with a related service component.</p> <p>3. <b>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.</b></p>	<p>the supply of digital content includes the creation or transfer of rights under a licensing agreement</p> <p>It is therefore perfectly possible to refer to the 'sale' of digital content. Such a revision would much better illustrate the CESL's scope of application, while specifically drawing attention to the fact that it does not simply encompass services provided by digital means.</p> <p><b>(3)</b> Another possible reason why the supply of digital content was not treated as the 'sale' of digital content is that the CESL includes cases where digital content is not supplied in exchange for a price.</p> <p>Rather than discard the 'sale' approach and introduce a new category it would be preferable to generally remove the requirement of a price, i.e. to also remove it for goods and services. Such a revision is appropriate as price is often hidden in other payments or conduct on the part of the customer.</p> <p>For example, where a mobile</p>
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<p>(o) 'customer' means any person who purchases a related service; ...</p> <p style="text-align: center;"><i>Regulation Article 5</i> <i>Contracts for which the Common European Sales Law can be used</i></p> <p>The Common European Sales Law may be used for:</p> <ul style="list-style-type: none"> <li>(a) sales contracts;</li> <li>(b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.</li> <li>(c) related service contracts, irrespective of whether a separate price was agreed for the related service.</li> </ul> <p style="text-align: center;"><i>Article 9</i> <i>Mixed-purpose contracts</i></p> <p>1. Where a contract provides both for the sale of goods or the supply of digital content and for the provision of a related service, the rules of Part IV apply to the obligations and remedies of the parties as seller and buyer of goods or digital content and the rules of Part V apply to the obligations and remedies of the parties as service provider and customer.</p> <p>...</p>		<p>phone device is supplied '<i>for 0 Euro</i>', this should be considered as a sale because the price is hidden i.e., incorporated, into the fees to be paid to the mobile phone company. Similarly, where customers are induced to place an order with a distance seller through the promise of a '<i>welcome gift</i>' the price is hidden in the price paid for the items ordered and in the personal data given away by the customer.</p> <p>There is no justification to differentiate in this respect between digital content on the one hand and goods and services on the other. Such differentiation if maintained will, in particular, render the CESL less attractive, not least if traders are required to comply with the otherwise applicable national laws just for the '<i>welcome gift</i>'.</p> <p><b>(4)</b> Excluding transport, training and telecommunication support from the scope of related services, which are among the most relevant services related to a sales contract, may make the CESL particularly unattractive</p>
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		<p>for traders. It means that, where the seller wishes to offer a service hotline or transport service, the CESL is either unavailable (if Article 6(1) is taken seriously) or the seller will have to comply with the whole set of requirements under the otherwise applicable national law simply in respect of these minor elements. This would mean that the seller would not benefit at all from the CESL as a uniform legal regime.</p> <p>There is no sufficient justification for excluding transport, training and telecommunication support: The CESL could include such matters within the scope of related services without interfering with existing European or national legislation in these fields i.e., through clarifying that sector-specific legislation remains unaffected (cf. ELI Article 5(3)).</p> <p><b>(5)</b> The requirement that service contracts must be concluded at the same time as sales contracts lacks any convincing justification. It makes the instrument still more complicated and potentially</p>
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		<p>unattractive as sellers will not be in a position to offer related services under the CESL if the buyer decides only later that he would like to opt, e.g., for installation services.</p> <p><b>(6)</b> What, in Article 9, is called a '<i>mixed purpose contract</i>' should be treated in the same way as the combination of a sales contract with a related service contract. It is usually virtually impossible to tell whether there is one contract (possibly contained in two documents) or two related contracts, and a difference must not be made when it comes, in particular, to remedies.</p>
<p><i>Regulation Article 3</i> <i>Optional nature of the Common European Sales Law</i></p> <p>The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.</p> <p><i>Regulation Article 4</i> <i>Cross-border contracts</i></p>	<p><i>Article 3</i> <i>Optional nature of the Common European Sales Law</i></p> <ol style="list-style-type: none"> <li>1. The parties may agree that the Common European Sales Law governs their contracts for the sale of goods <b>or</b> digital content and for the provision of related services <b>as a uniform legal regime which is directly applicable in the Members States.</b></li> <li>2. <b>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</b></li> </ol>	<p><b>(1)</b> The fact that the CESL operates as a '<i>second national contract law regime</i>', including the implications for the relationship with the Rome I Regulation, is so fundamental that it must be stated in the text of the Regulation itself and not be hidden in the Recitals.</p> <p><b>(2)</b> The cross-border requirement puts SME at a strategic disadvantage vis-à-vis</p>

<ol style="list-style-type: none"> <li>1. The Common European Sales Law may be used for cross-border contracts.</li> <li>2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.</li> <li>3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if: <ol style="list-style-type: none"> <li>(a) 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; and</li> <li>(b) at least one of these countries is a Member State.</li> </ol> </li> <li>4. For the purposes of this Regulation, 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.</li> <li>5. 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.</li> <li>6. For the purpose of determining whether a contract</li> </ol>	<p><b>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.</b></p> <ol style="list-style-type: none"> <li>3. <b><i>[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 171.]</i></b></li> <li>4. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety. <b>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.</b></li> </ol>	<p>large enterprises as the latter can easily redirect contracts to a branch in another country and benefit from one single legal regime.</p> <p>Generally speaking, the cross-border requirement makes it easier for traders in third countries to sell into the whole EU than for EU traders to sell within the EU, which does not exactly benefit the internal market.</p> <p>If abandoning the cross-border requirement is not feasible from a political point of view one might consider an option for Member States to restrict it to cross-border contracts (for cases where opting into the CESL occurs under the law of that Member State).</p> <p><b>(3)</b> There is a contradiction between allowing partial choice in B2B contracts and having mandatory rules for B2B contracts.</p> <p>ELI Article 3(4) therefore clarifies that you cannot, by way of partial choice, escape the application of mandatory rules.</p>
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<p>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.</p> <p><i>Regulation Article 13</i> <i>Member States' options</i></p> <p>A Member State may decide to make the Common European Sales Law available for:</p> <p>(a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State; and/or</p> <p>(b) ...</p> <p><i>Regulation Article 8</i> <i>Agreement on the use of the Common European Sales Law</i></p> <p>3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.</p>		
<p><i>Regulation Article 8</i> <i>Agreement on the use of the Common European Sales Law</i></p> <p>1. The use of the Common European Sales Law requires an agreement of the parties to that effect.</p>	<p><i>Article 4</i> <i>Agreement on the use of the Common European Sales Law</i></p> <p>1. The use of the Common European Sales Law requires an agreement of the parties to that</p>	<p><b>(1)</b> The CESL renders it extremely complicated and cumbersome for parties, where the buyer is a consumer, to agree on its use. The proposed procedure will scare off European consumers as the</p>

<p>The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article and Article 9, as well as the relevant provisions in the Common European Sales Law.</p> <p>2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.</p> <p>3. ...</p> <p style="text-align: center;"><i>Regulation Article 9</i> <i>Standard Information Notice in contracts between a trader and a consumer</i></p> <p>1. In addition to the pre-contractual information duties laid down in the Common European Sales Law, in relations between a trader and a consumer the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement by providing the consumer with the information notice in Annex II in a prominent manner. Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, the consumer shall not be bound by the agreement until the consumer has</p>	<p>effect. The existence of such an agreement and its validity shall be determined on the basis of <b>this Article</b> as well as the relevant provisions in the Common European Sales Law <b>concerning the conclusion of a valid contract</b>.</p> <p>2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law <b>requires express consent on the part of the consumer</b>. The trader shall:</p> <p>(a) draw the consumer's attention to the intended application of the Common European Sales Law before the agreement;</p> <p>(b) <b>provide the consumer with a hyperlink to the website <a href="http://ec.europa.eu/...">http://ec.europa.eu/...</a> or, in all other circumstances, indicate this website or the information hotline ..., where the consumer will get, for each Member State, concise information on the consumer's rights under the Common European Sales Law compared with under the national law of that Member State.</b></p> <p>3. Where the trader has failed to <b>comply with the requirements under paragraph 3</b>, the consumer shall not be bound by the agreement <b>to use the Common European Sales Law until the requirements have been complied with and the consumer</b> has expressly consented subsequently to the use of the Common European Sales Law.</p>	<p>rules governing the choice of the CESL, as presently drafted, give the impression that the CESL is potentially harmful to them.</p> <p>This is the wrong approach. If the CESL is harmful to consumers, the project must be abandoned. If it is beneficial, its use must be facilitated.</p> <p>The SIN in Annex II not only complicates the process of making a contract, it also adds to existing information overload and is furthermore very dangerous for the consumer i.e., information such as the consumer has a right of withdrawal '<i>in most cases</i>' suggests that there is such a right even where the immediate contract falls under one of the numerous exceptions.</p> <p>The CESL could therefore be improved if the idea of a SIN is abandoned. In its place the CESL could direct consumers to a website where they could, if they so wished, obtain concise and reliable information about the comparative merits of the CESL. Naturally, this information could not take the form of a lecture on comparative law.</p>
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<p>received the confirmation referred to in Article 8(2) accompanied by the information notice and has expressly consented subsequently to use of the Common European Sales Law.</p> <p>2. The information notice referred to in paragraph 1 shall, if given in electronic form, contain a hyperlink or, in all other circumstances, include the indication of a website through which the text of the Common European Sales Law can be obtained free of charge.</p> <p style="text-align: center;"><i>Regulation Article 10</i> <i>Penalties for breach of specific requirements</i></p> <p>Member States shall lay down penalties for breaches by traders in relations with consumers of the requirements set out in Articles 8 and 9 and shall take all the measures necessary to ensure that those penalties are applied. The penalties thus provided shall be effective, proportionate and dissuasive. Member States shall notify the relevant provisions to the Commission no later than [1 year after the date of application of this Regulation] and shall notify any subsequent changes as soon as possible.</p> <p style="text-align: center;"><i>Regulation Article 11</i> <i>Consequences of the use of the Common European Sales Law</i></p> <p>... Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.</p>	<p>4. <b>Notwithstanding the rule in paragraph 1</b>, the Common European Sales Law shall govern compliance with and remedies for failure to comply with the pre-contractual information duties, <b>and other matters that are relevant before the conclusion of a contract, where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law. 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.</b></p>	<p>Instead it should highlight in clear and simple language the main differences, such as the absence of a trader's right to cure or strict liability for damages, between the CESL and national regimes.</p> <p>(2) Article 11 as currently drafted means that pre-contractual information duties contained in the CESL only apply where 'a contract' (= the sales contract) is actually concluded i.e., they only apply retrospectively.</p> <p>This approach is highly questionable. It can only be the agreement to use the CESL that is decisive in this respect and not the sales contract. However, even this would mean that, before an agreement to use the CESL is actually made, a trader would have to comply with both the CESL and the otherwise applicable national regimes. This is of practical importance for injunctions and similar tools. It would essentially deprive traders of the CESL's benefits in the pre-contractual phase and render it unattractive.</p>
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		<p>Rather than adopt this approach, the CESL should govern the pre-contractual phase from the point where the parties (in reality, the trader) refer to the CESL during negotiations. Only where a trader leaves open the question whether it is prepared to contract under the CESL or under the otherwise applicable law, must it comply with both sets of standards.</p>
<p><i>Regulation Article 11</i>  <i>Consequences of the use of the Common European Sales Law</i></p> <p>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. ...</p> <p><i>Regulation Recital 27</i></p> <p>(27) All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the</p>	<p><i>Article 5</i>  <i>Consequences of the use of the Common European Sales Law</i></p> <ol style="list-style-type: none"> <li>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.</li> <li><b>Matters</b> not addressed in the Common European Sales law are governed by the <b>relevant</b> 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 <b>matters</b> include <ol style="list-style-type: none"> <li>legal personality;</li> <li>the invalidity of a contract arising from lack of capacity, illegality or immorality <b>except where the grounds giving rise to</b></li> </ol> </li> </ol>	<p><b>(1)</b> It is essential that parties can straightforwardly ascertain which matters are covered by the CESL and which matters are governed by the otherwise applicable national law. As such it is necessary to clarify this within the Regulation itself.</p> <p><b>(2)</b> Immorality is a very broad concept. It is by no means restricted to drug trafficking, child pornography etc. It is,</p>

<p>invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.</p> <p><i>Regulation Article 12</i>  <i>Information requirements resulting from Service Directive</i></p> <p>This Regulation is without prejudice to the information requirements laid down by national laws which transpose the provisions of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and which complement the information requirements laid down in the Common European Sales Law.</p>	<p><b>illegality or immorality are addressed in the Common European Sales Law;■</b></p> <ul style="list-style-type: none"> <li>(c) the determination of the language of the contract;</li> <li>(d) matters of non-discrimination;</li> <li>(e) representation;</li> <li>(f) plurality of debtors and creditors and change of parties including assignment;</li> <li>(g) set-off and merger;</li> <li>(h) property law, including the transfer of ownership■; and</li> <li>(i) the law of torts <b>including</b> the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.</li> </ul> <p>3. This Regulation is without prejudice <b>to rules which specifically apply to certain sectors, in particular transport, telecommunication, training and financial services, and</b> to the information requirements laid down by national laws which transpose the provisions of Directive 2006/123/EC■ on services in the internal market, and which complement the ■requirements laid down in the Common European Sales Law.</p> <p>4. Paragraph 1 is without prejudice to any mandatory rules of a Non-Member State which may be applicable according to the relevant rules</p>	<p>under many national regimes, also used to solve matters addressed in, for instance, the CESL’s chapters on unfair contract terms or remedies for non-performance.</p> <p><b>3)</b> If transport, telecommunication support, training and cases of deferred payment are to be included, clarification concerning specific legislation in these sectors is required.</p> <p><b>(4)</b> There are situations where—under the Proposal as well as under the ELI draft—the parties cannot avoid the mandatory rules of Non-Member States. This is so, for instance, where the consumer’s (habitual) residence is in a Non-Member</p>
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	of conflict of laws.	State because of Article 6(2) of the Rome I Regulation or of a provision under the conflict of laws rules of that Non-Member State.
<p style="text-align: center;"><i>Regulation Article 6</i> <i>Exclusion of mixed-purpose contracts and contracts linked to a consumer credit</i></p> <p>1. The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5.</p> <p>2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments.</p>	<p style="text-align: center;"><i>Article 6</i> <b><i>Mixed and linked contracts</i></b></p> <p>1. <b>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,</b></p> <p style="padding-left: 40px;">(a) <b>the law applicable to the other contract shall determine the effects which invalidity or the exercise of any right or remedy under the Common European Sales Law has on the other contract;</b></p> <p style="padding-left: 40px;">(b) <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 or the exercise of any right or remedy in relation to the other contract has on the contract governed by the Common European Sales Law,</b></p> <p style="padding-left: 40px;"><b>including the issue of what counts as sufficient link between the contracts.</b></p> <p>2. <b>Where a contract includes</b> any elements other than the sale of goods, the supply of digital</p>	<p><b>(1)</b> Under Article 6, any element in the contract that fails to fall under the definitions set out in Article 5 renders the CESL unavailable for the parties. Arguably, this holds true even where the contract includes the provision for, e.g., transport services or a service hotline. This makes contracting under the CESL particularly uncertain and unattractive as parties can never be sure whether a national court will later hold that a contract contains such an element (an '<i>other element</i>'), and thereby refuse to apply the CESL.</p> <p>To ensure this problem cannot arise the CESL should be revised so as not to exclude mixed contracts but rather to treat them as linked contracts, i.e. the '<i>other element</i>' is, in the worst case, then governed by the otherwise applicable national law.</p>

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 1.**

(2) There is no sufficient justification for excluding cases of deferred payment. The information requirements and other specific requirements set out under Directive 2008/48/EC as well as specific form requirements under national law can easily be combined with the CESL regime (cf. ELI Article 5(3)). It is particularly surprising that Article 9 excludes credit agreements where the seller itself grants the credit, but not where it is a third party who grants the credit.

(3) However, a rule clarifying the significance of linked contracts and the position of third parties would be required. Third parties, in particular parties to a linked credit agreement, do not have to be protected against the direct or indirect application of the CESL as far as these parties would have to accept the choice of any national law under conflict of laws. It is therefore sufficient to state that the conditions under which two contracts are considered as linked contracts as well as the effects of termination etc are

		<p>governed by the otherwise applicable law.</p> <p>What is arguably more problematic is to allow Member States to determine the effects a non-CESL contract has on a contract governed by the CESL. However, in doing so, Member States have to act in conformity with other EU law, including the Treaties, which will prevent them from introducing rules that would undermine the application of the CESL.</p>
	<b>SECTION 2    INTERPRETATION</b>	
<p><i>Article 4</i> <i>Interpretation</i></p> <ol style="list-style-type: none"> <li>1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.</li> <li>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</li> </ol>	<p><i>Article 7</i> <i>Interpretation</i></p> <ol style="list-style-type: none"> <li>1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.</li> <li>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</li> </ol>	

<p>the Common European Sales Law or to any other law.</p> <p>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.</p>	<p>be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.</p> <p>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.</p>	
<p style="text-align: center;"><i>Regulation Article 2 Definitions</i></p> <p>For the purpose of this Regulation, the following definitions shall apply:</p> <p>(a) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;</p> <p>(b) ‘good faith and fair dealing’ means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question;</p> <p>(c) ‘loss’ means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment;</p> <p>(d) ‘standard contract terms’ means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of</p>	<p style="text-align: center;"><i>Article 8 Definitions</i></p> <p>For the purpose of this Regulation, the following definitions shall apply</p> <p>1. <b>In relation to contracts and obligations in general:</b></p> <p>(a) ‘contract’ means an agreement intended to give rise to obligations or other legal effects;</p> <p>(b) ‘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;</p> <p>(c) <b>‘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</b></p>	<p><b>(1)</b> The catalogue of definitions in the Commission Proposal seems to lack a coherent structure.</p> <p>It may be helpful to divide the definitions into general definitions and definitions that are relevant only to consumer contracts. Within the two sections, logical order is of the essence. Alphabetical order is not appropriate because of the different language versions.</p> <p><b>(2)</b> Some definitions, e.g. ‘standard contract terms’ or ‘public auction’ are superfluous as the terms are used only once or twice in the CESL and a</p>

<p>the Common European Sales Law;</p> <p>(e) 'trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession;</p> <p>(f) 'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession;</p> <p>(g) 'damages' means a sum of money to which a person may be entitled as compensation for loss, injury or damage;</p> <p>(h) 'goods' means any tangible movable items; it excludes:</p> <ul style="list-style-type: none"> <li>(i) electricity and natural gas; and</li> <li>(ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity.</li> </ul> <p>(i) 'price' means money that is due in exchange for goods sold, digital content supplied or a related service provided;</p> <p>(j) 'digital content' means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, 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:</p> <ul style="list-style-type: none"> <li>(i) financial services, including online banking services;</li> </ul>	<p><b>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;</b></p> <p>(d) 'price' means money that is due in exchange for goods sold, digital content supplied or a related service provided;</p> <p>(e) 'not individually negotiated term' <b>is a contract term</b> supplied by one party <b>where the</b> other party has not been able to influence its content, in particular because it has been drafted in advance, <b>whether by the party supplying the term or by a third party and</b> whether or not <b>for more than one transaction</b>; this implies that</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(ii) a party who claims that a term <b>which has been formulated in advance for several transactions involving different parties</b> has since been individually negotiated bears the burden of proving that it has</li> </ul>	<p>general definition leads to further complexity instead of facilitating understanding and ease of use. The definition of 'mandatory rules' is not only superfluous, but also misleading, because the CESL contains only rules that cannot be excluded, derogated from or varied to the detriment of one of the parties (the protected party, e.g. the consumer).</p> <p><b>(3)</b> Some definitions, e.g. '<i>not individually negotiated contract terms</i>' or '<i>reasonable</i>' are set out in separate provisions (of the Annex, whereas the other definitions are in the Regulation). This is extremely confusing as it confounds a user's reasonable expectation that all general definitions will be set out in one place. There should therefore only be one catalogue of definitions.</p>
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<p>(ii) legal or financial advice provided in electronic form;</p> <p>(iii) electronic healthcare services;</p> <p>(iv) electronic communications services and networks, and associated facilities and services;</p> <p>(v) gambling;</p> <p>(vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;</p> <p>(k) 'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;</p> <p>(l) 'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer;</p> <p>(m) 'related service' means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales</p>	<p>been; and that</p> <p>(iii) in a contract between a business and a consumer, the business bears the burden of proving that <b>a term has been supplied by the consumer or that</b> a term supplied by the business has been individually negotiated;</p> <p>(f) <b>'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;</b></p> <p>(g) 'obligation' means a duty to perform which one party to a legal relationship owes to another party <b>and which that other party is entitled to enforce as such;</b></p> <p>(h) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;</p> <p>(i) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;</p> <p>(j) 'loss' means economic loss and non-economic loss in the form of pain and</p>	<p><b>(4)</b> At various places, the CESL uses the term '<i>express</i>' with relation to a consent, agreement, request etc made by one of the parties. A general definition for '<i>express</i>' is therefore required in order to avoid uncertainty.</p> <p><b>(5)</b> For the purpose of the Chapter on damages and otherwise it is necessary to differentiate between obligations and (other) duties. The relevant factor is whether or not the party to whom the duty is owed is entitled to enforce it as such or whether that party only may claim damages etc in case consequential loss was caused by breach of the duty.</p>
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<p>contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:</p> <ul style="list-style-type: none"> <li>(i) transport services,</li> <li>(ii) training services,</li> <li>(iii) telecommunications support services; and</li> <li>(iv) financial services;</li> </ul> <p>(n) ‘service provider’ means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;</p> <p>(o) ‘customer’ means any person who purchases a related service;</p> <p>(p) ‘distance contract’ means any contract between the trader and the consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;</p> <p>(q) ‘off-premises contract’ means any contract between a trader and a consumer:</p> <ul style="list-style-type: none"> <li>(i) concluded in the simultaneous</li> </ul>	<p>suffering <b>or loss of amenity</b>, excluding other forms of non-economic loss such as ■ loss of enjoyment;</p> <p>(k) ‘damages’ means a sum of money to which a person may be entitled as compensation for loss■;</p> <p>(l) ‘<b>reasonable</b>’, 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;</p> <p>(m) ‘<b>residence</b>’ in relation to a trader is the <b>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</b>;</p> <p>(n) ‘<b>court</b>’ includes an <b>arbitral tribunal</b>.</p> <p>2. <b>In relation to contracts between a trader and a consumer in particular:</b></p> <p>(a) ‘trader’ means any natural or legal person who is acting, <b>including through any other person acting in its name or on its behalf, primarily</b> for purposes relating to that person’s trade, business, craft, or profession;</p> <p>(b) ‘consumer’ means any natural person who is acting <b>primarily</b> for purposes</p>	<p><b>(6)</b> The phrase ‘<i>such as impairment of the quality of life</i>’ in Article 2(c), is unclear in its scope and will only lead to confusion and litigation. The same problem arises in respect of the phrase ‘<i>injury or damage</i>’ in Article 2(g). If that is what is intended (which is unclear) it should be clarified that loss of amenity is included.</p> <p><b>(7)</b> A general definition of ‘<i>residence</i>’ and of ‘<i>court</i>’ is useful as these expressions are used at various places.</p> <p><b>(8)</b> The issue of how to deal with dual-use cases has been a point of controversy, which, in the Recitals of Directive 2011/83/EU, has arguably been solved by focussing on the</p>
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<p>physical presence of the trader or, where the trader is a legal person, the natural person representing the trader and the consumer in a place which is not the trader's business premises, or concluded on the basis of an offer made by the consumer in the same circumstances; or</p> <p>(ii) concluded on the trader's business premises or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the trader's business premises in the simultaneous physical presence of the trader or, where the trader is a legal person, a natural person representing the trader and the consumer; or</p> <p>(iii) concluded during an excursion organised by the trader or, where the trader is a legal person, the natural person representing the trader with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;</p> <p>(r) 'business premises' means:</p> <p>(i) any immovable retail premises where a trader carries out activity on a</p>	<p>which are outside that person's trade, business, craft, or profession;</p> <p>(c) 'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer;</p> <p>(d) 'commercial guarantee' means any undertaking by a trader or a producer <b>going beyond</b> legal obligations under Article 128 ■ to reimburse the price paid or to replace or repair, or service goods or digital content in any way <b>if they are not in conformity with the contract</b> or if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the <b>associated</b> advertising ■;</p> <p>(e) '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;</p> <p>(f) 'distance contract' means any contract between a trader and a consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader ■ and the consumer, with the exclusive use of</p>	<p>primary purpose for concluding the contract.</p> <p>It is also desirable to bring the definition of trader more in line with the respective definition in Directive 2001/83/EU. In particular it should be clarified that a trader may be acting through other persons acting in his name or on his behalf.</p> <p><b>(9)</b> The definition of '<i>commercial guarantee</i>', which is used solely in the context of information duties, notably in Articles 13(1)(f) and 20(1)(e), should be drafted more simply to render it closer to the formulation in Article 6 of Directive 1999/44/EC.</p> <p><b>(10)</b> The clarification that, where the trader is a legal person, it is a natural person representing the trader that counts only leads to confusion. It goes without saying that, where the trader is a legal entity, we must always look at the conduct of</p>
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<p>permanent basis, or</p> <p>(ii) any movable retail premises where a trader carries out activity on a usual basis;</p> <p>(s) 'commercial guarantee' means any undertaking by the trader or a producer to the consumer, in addition to legal obligations under Article 106 in case of lack of conformity to reimburse the price paid or to replace or repair, or service goods or digital content in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;</p> <p>(t) '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;</p> <p>(u) 'public auction' means a method of sale where goods or digital content are offered by the trader to the consumer who attends or is given the possibility to attend 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;</p>	<p>one or more means of distance communication up to and including the time at which the contract is concluded;</p> <p>(g) 'off-premises contract' means any contract between a trader and a consumer:</p> <p>(i) concluded in the simultaneous physical presence of the trader ■ and the consumer <b>at</b> a place which is not the trader's business premises, or concluded on the basis of an offer made by the consumer in the same circumstances, or concluded ■ immediately after the consumer was personally and individually addressed <b>in the same circumstances</b>; or</p> <p>(ii) concluded during an excursion organised by <b>or with the help of</b> the trader ■ with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;</p> <p>(h) 'business premises' means any immovable retail premises where a trader carries out activity on a permanent basis, or any movable retail premises where a trader carries out activity on a usual basis.</p> <p>3. <b>Where the seller is a trader and the buyer is a</b></p>	<p>natural persons representing the trader. This is so for any rule under the CESL, not just for the definitions of '<i>distance contract</i>' and '<i>off-premises contract</i>'. The clarification may lead users to the erroneous conclusion that, where the trader is a natural person, physical contact between an agent and the consumer is irrelevant.</p> <p><b>(11)</b> The definition of '<i>off-premises contract</i>' should be simplified. Furthermore, the rule on excursions fails to include three-party-constellations where trader T1 organises the excursion and the contract is then made with trader T2 on that second trader's business premises. This has been a well-known gap in consumer protection since Directive 85/577/EEC, and a number of Member States have filled the gap by autonomously extending the rules to three-party-constellations where</p>
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<p>(v) 'mandatory rule' means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary;</p> <p>(w) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;</p> <p>(x) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;</p> <p>(y) 'obligation' means a duty to perform which one party to a legal relationship owes to another party.</p> <p style="text-align: center;"><i>Regulation Article 4</i> <i>Cross-border contracts</i></p> <p>...</p> <p>4. For the purposes of this Regulation, 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.</p> <p>5. 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</p>	<p><b>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.</b></p>	<p>the two traders cooperate. The same should be done under the CESL. Therefore, the definition should include cases where the trader with whom the contract in question was made helped with organising the excursion, e.g. by organising a special sales event or opening premises beyond regular opening hours.</p> <p><b>(12)</b> In European law, the notion of consumer only includes natural persons. This would mean that, e.g. most non-profit organisations cannot buy under the CESL and that traders cannot sell to those legal entities under the CESL as far as these entities are not traders. This makes using the CESL very uncertain and much less attractive.</p> <p>Another question is whether such legal persons should be treated in the same way as buyers who are consumers or in the same way as buyers who are traders. Even though</p>
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<p>habitual residence.</p> <p style="text-align: center;"><i>Article 5</i> <i>Reasonableness</i></p> <ol style="list-style-type: none"> <li>1. Reasonableness 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.</li> <li>2. Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.</li> </ol> <p style="text-align: center;"><i>Article 7</i> <i>Not individually negotiated contract terms</i></p> <ol style="list-style-type: none"> <li>1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.</li> <li>2. Where one party supplies a selection of contract 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.</li> <li>3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.</li> <li>4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract</li> </ol>		<p>some Member States treat them as consumers, this would create too much uncertainty for traders who, particularly in cross-border settings, cannot be expected to check whether or not a legal person is acting for purposes related to a trade, business, craft or profession. It is therefore proposed that non-profit organisations who buy under the CESL should be treated as traders.</p>
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<p>term supplied by the trader has been individually negotiated.</p> <p>5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.</p>		
<p style="text-align: center;"><i>Article 11</i> <i>Computation of time</i></p> <p>1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.</p> <p>2. Subject to paragraphs 3 to 7:</p> <ul style="list-style-type: none"> <li>(a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;</li> <li>(b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and 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</li> </ul>	<p style="text-align: center;"><i>Article 9</i> <i>Computation of time</i></p> <p>1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.</p> <p>2. <b>Where a period 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.</b></p> <p>3. Subject to paragraph 4:</p> <ul style="list-style-type: none"> <li>(a) a period expressed in days ■ ends with the expiry of the last hour of the last day of the period;</li> <li>(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</li> </ul>	<p>This provision should be restructured in order to increase its comprehensibility.</p> <p>In particular, Article 11(3) is very misleading. It is also potentially incompatible with the provisions for computation of time under the European Convention on the Calculation of Time-Limits and those of most national legal systems: if the day on which the event occurs does not fall within the period, this may be understood as saying that the period runs from the next day, which in turn leads to an undesirable result under Article 112(b).</p>

<p>last day of that month.</p> <p>3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.</p> <p>4. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.</p> <p>5. Where 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.</p> <p>6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.</p> <p>7. For the purposes of this Article:</p> <p>(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</p>	<p>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.</p> <p>4. 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, <b>however</b>, 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. <b>The latter</b> does not apply to periods calculated retroactively from a given date or event.</p> <p>5. For the purposes of this Article:</p> <p>(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</p> <p>(b) “working days” means all days other than Saturdays, Sundays and public holidays.</p> <p>6. Where a person sends another person a</p>	
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<p>Journal of the European Union; and</p> <p>(b) “working days” means all days other than Saturdays, Sundays and public holidays.</p>	<p>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.</p>	
	<p><b>SECTION 3      GENERAL PRINCIPLES</b></p>	
<p><i>Article 1</i> <i>Freedom of contract</i></p> <ol style="list-style-type: none"> <li>Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.</li> <li>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.</li> </ol>	<p><i>Article 10</i> <i>Freedom of contract</i></p> <ol style="list-style-type: none"> <li>Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.</li> <li><b>In relations between traders</b> 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.</li> <li><b>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 relations between traders and consumers. They may exclude other provisions, or derogate from or vary their</b></li> </ol>	<p>The provisions which state that particular CESL rules may not be derogated from to the detriment of the consumer are scattered throughout the whole instrument.</p> <p>These provisions can be reduced in number by specifying that provisions specifically applicable to B2C relations are always mandatory (unless explicitly provided otherwise). Such a revision will also help to reduce errors: as users could easily overlook one of the scattered provisions as the text presently</p>

	<b>effects, unless otherwise stated in those provisions.</b>	stands.
<p><i>Article 6</i> <i>No form required</i></p> <p>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.</p>	<p><i>Article 11</i> <i>No form required</i></p> <p>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.</p>	
<p><i>Article 2</i> <i>Good faith and fair dealing</i></p> <ol style="list-style-type: none"> <li>Each party has a duty to act in accordance with good faith and fair dealing.</li> <li>Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.</li> <li>The parties may not exclude the application of this Article or derogate from or vary its effects.</li> </ol> <p><i>Regulation Article 2</i> <i>Definitions</i></p> <p>For the purpose of this Regulation, the following definitions shall apply: ...</p> <p>(a) 'good faith and fair dealing' means a standard of conduct characterised by honesty, openness and consideration for the interests of the other</p>	<p><i>Article 12</i> <i>Good faith and fair dealing</i></p> <ol style="list-style-type: none"> <li>Each party has a duty to act in accordance with good faith and fair dealing, <b>which</b> 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.</li> <li>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, <b>but does not give rise directly to remedies for non-performance of an obligation.</b></li> <li>The parties may not exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p>It seems preferable to recognise the indirect effect of good faith on remedies which are otherwise available, but not to create a direct liability for breach of the duty.</p>

party to the transaction or relationship in question;		
<p><i>Article 3</i> <i>Co-operation</i></p> <p>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.</p>	<p><i>Article 13</i> <i>Co-operation</i></p> <p>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.</p>	
<p><i>Article 10</i> <i>Notice</i></p> <ol style="list-style-type: none"> <li>This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.</li> <li>A notice may be given by any means appropriate to the circumstances.</li> <li>A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.</li> <li>A notice reaches the addressee: <ol style="list-style-type: none"> <li>when it is delivered to the addressee;</li> <li>when it is delivered to the addressee's place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee's habitual residence;</li> </ol> </li> </ol>	<p><i>Article 14</i> <i>Notice</i></p> <ol style="list-style-type: none"> <li>This Article applies in relation to the giving of notice, <b>which</b> includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose, <b>under the rules of the Common European Sales Law and the contract.</b></li> <li><b>Notwithstanding any provision to the contrary,</b> a notice may be given by any means, <b>including conduct, which is</b> appropriate to the circumstances.</li> <li>A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. A notice reaches the addressee <b>when, whichever is the earliest:</b> <ol style="list-style-type: none"> <li>it is delivered to the addressee <b>or</b> ■ to the addressee's habitual residence;</li> <li>in the case of a notice transmitted by electronic mail or other individual</li> </ol> </li> </ol>	<p><b>(1)</b> The relationship between Article 10 of the Proposal, which defines <i>notice</i> as a '<i>statement which is intended to have legal effect or to convey information for a legal purpose</i>', and Article 12, which deals with '<i>unilateral statements or conduct</i>' is largely unclear.</p> <p>Article 10 reflects a very European concept. Article 12, which refers to '<i>statement</i>', seems however to preserve the very German notion of juridical act (<i>Rechtsgeschäft</i>) and as such is an alien element within the CESL.</p> <p>A better approach would be to move the substantive rules on interpretation and defects in consent presently found in</p>



<p>(c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or</p> <p>(d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.</p> <p>The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest.</p> <p>5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.</p> <p>6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 3 and 4 or derogate from or vary its effects.</p> <p style="text-align: center;"><i>Article 76</i> <i>Language</i></p> <p>Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.</p>	<p>communication, it can be accessed by the addressee; or</p> <p>(c) it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.</p> <p>4. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.</p> <p>5. Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.</p> <p>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 3 or derogate from or vary its effects.</p>	<p>Article 12 to the respective Chapters. A user who has an issue concerning interpretation is apt to look in the Chapter titled '<i>Interpretation</i>', and the user who searches for possibilities to avoid a unilateral statement will look in the Chapter titled '<i>Avoidance</i>'.</p> <p><b>(2)</b> Article 10 could, additionally, be shortened and simplified.</p>
	<p style="text-align: center;"><b>Article 15</b> <b>Notice given electronically</b></p> <p>1. <b>Where a trader provides to the other party the</b></p>	<p>Traders often require customers, in particular</p>

	<p><b>possibility to give a notice electronically on a trading website, in particular place an order or exercise a right of withdrawal, 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.</b></p> <p><b>2. The trader is liable for any loss caused to the other party by a breach of this duty. The provisions in Chapter 15 Section 3 apply with appropriate adaptations.</b></p> <p><b>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.</b></p>	<p>consumers, to communicate with them via their website and only via their website. This can be problematic where a consumer is later required to prove that they gave notice, such as notice to terminate the contract, to the trader. .</p> <p>To cure this problem the rules contained in Articles 24(5) and 41(3) of the Proposal should apply to all kinds of notice, and the acknowledgement of receipt should display the notice itself or its content.</p>
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	Part II Making a binding contract	
	Chapter 2 Pre-contractual information and related duties	
	SECTION 1 GENERAL PRE-CONTRACTUAL DUTIES	
<p><i>Article 28</i> <i>Duty to ensure that information supplied is correct</i></p> <ol style="list-style-type: none"> <li>1. A party who supplies information before or at the time a contract is concluded, whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.</li> <li>2. ...</li> <li>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.</li> </ol> <p><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <ol style="list-style-type: none"> <li>1. ...</li> </ol>	<p><i>Article 16</i> <i>General provisions</i></p> <ol style="list-style-type: none"> <li>1. <b>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.</b></li> <li>2. A party who supplies information, ■whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.</li> <li>3. The information provided <b>under this Chapter</b> forms an integral part of the contract, <b>unless parties who are traders have agreed otherwise, and may therefore not be altered unilaterally to the detriment of the other party.</b></li> <li>4. <b>In relations between a trader and a consumer,</b> <ol style="list-style-type: none"> <li>(a) the parties may not, to the detriment of the consumer, exclude the application of this <b>Chapter</b> or derogate from or vary its</li> </ol> </li> </ol>	<p><b>(1)</b> Chapter 2 on pre-contractual information and related duties entirely overlaps with Chapters II and III of the Consumer Rights Directive (CRD). As the CRD aims at full harmonisation and as a number of Member States may implement it without making any changes in structure and wording, there are good arguments for simply replicating what is in the CRD into the CESL.</p> <p>However, it must be borne in mind that the situation under the CESL is, in some respects, different from that under the CRD:</p> <ul style="list-style-type: none"> <li>• the CESL is a Regulation and cannot be made more user-friendly by national legislatures;</li> <li>• the CESL is an optional regime which must be simple in order</li> </ul>

<p>2. The information provided, except for the addresses required by point (c) of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.</p> <p style="text-align: center;"><i>Article 21</i> <i>Burden of proof</i></p> <p>The trader bears the burden of proof that it has provided the information required by this Section.</p> <p style="text-align: center;"><i>Article 22</i> <i>Mandatory nature</i></p> <p>The parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.</p>	<p>effects;</p> <p>(b) the trader bears the burden of proof that it has fulfilled the duties required by this <b>Chapter</b>.</p>	<p>to be attractive for the parties;</p> <ul style="list-style-type: none"> <li>digital content provided on a tangible medium falls under ‘goods’ under the CRD, but is dealt with together with other digital content under the CESL, which implies the rules for digital content cannot be the same;</li> <li>the Proposal includes some deviations from the CRD, in substance (e.g. full performance of a service does not exclude withdrawal) as well as in structure (e.g. duties for contracts other than OPC and distance contracts at the end); and</li> <li>some features which are copied from the CRD are simply redactional errors which should not be perpetuated, e.g. Article 17(2) = Article 6(1)(i) CRD, is obviously wrong; the three cases listed in Article 45(6)(b) = Article 14(4)(b) CRD, are superfluous and misleading because of Article 40(3)(d) = Article 16(m) CRD.</li> </ul> <p><b>(2)</b> In the light of these observations, it seems preferable to redraft Chapter 2 in order to</p>
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		<p>improve its user-friendliness, even if this should result in further presentational deviations from the CRD.</p> <p>In particular, the general rules, which are applicable to all contracts, should come first and be succeeded by the more specific rules which are applicable only to consumer contracts or only to distance or off-premises contracts. This not only helps to shorten the text by avoiding reiteration but also improves overall coherence and intelligibility. The user understands better why a particular piece of information must be given by the trader in a particular situation, potentially reducing existing misgivings concerning information overload in European consumer law.</p> <p>The draft should also be simplified by grouping the different pieces of information in a logical manner, e.g. by making clear that functionality and interoperability of digital content are just specifications of the '<i>main characteristics</i>' of the digital content.</p>
<i>Article 13</i>	<i>Article 17</i>	<p><b>(1)</b> The new ELI Articles 17 to 20 concisely list the items of pre-contractual information to be given</p>

<p><i>Duty to provide information when concluding a distance or off-premises contract</i></p> <p>1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:</p> <ul style="list-style-type: none"> <li>(a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;</li> <li>(b) ...</li> </ul> <p style="text-align: center;"><i>Article 20</i></p> <p><i>Duty to provide information when concluding contracts other than distance and off-premises contracts</i></p> <p>1. In contracts other than distance and off-premises contracts, a trader has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, if that information is not already apparent from the context:</p> <ul style="list-style-type: none"> <li>(a) the main characteristics of the goods, digital content or related services to</li> </ul>	<p><i>Duty to disclose information about <b>what is supplied and the identity of the supplier</b></i></p> <p>1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services■, the <b>supplier</b> has a duty to disclose by any appropriate means to the <b>other party</b> any information ■which the <b>supplier</b> 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 <b>concerning</b></p> <ul style="list-style-type: none"> <li>(a) the main characteristics of the goods, digital content or related services to be supplied■; and</li> <li>(b) the identity of the <b>supplier</b>, such as the <b>supplier's</b> trading name, the geographical address at which it is established and its telephone number.</li> </ul> <p>2. In determining whether paragraph 1 requires the <b>supplier</b> to disclose any information, <b>and how that information is to be disclosed</b>, regard is to be had to all the circumstances, including:</p> <ul style="list-style-type: none"> <li>(a) the nature of the goods, digital content or related services and the medium of communication;</li> <li>(b) the nature of the information and <b>its</b> likely importance to the <b>other party</b>;</li> <li>(c) whether the supplier <b>could be expected to have</b> special expertise;</li> <li>(d) the cost to the <b>supplier</b> of acquiring the</li> </ul>	<p>by a trader:</p> <p>Article 17 applies to all contracts under the CESL. Every trader must make certain minimum disclosure about the goods, digital content or services on offer and about its identity.</p> <p>Article 18 applies to all electronic contracts under the CESL. It brings the CESL into accordance with the E-commerce Directive but also contains further requirements.</p> <p>Article 19 contains additional information to be provided in all cases where a trader is dealing with a consumer. Consumers normally do not have the possibility to negotiate the price or the contract terms with the trader, in particular not in mass contracts. For them, it is normally a ‘<i>take it or leave it</i>’. In theory, the trader cannot enforce any terms the consumer was not aware of and did not agree to, but in practice, the consumer hardly stands a chance against the trader. This requires that the consumer receives full and transparent information on the price and the other contract terms before making the contract.</p> <p>Article 20 contains information that must be given only in distance</p>
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<p>be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;</p> <p>(b) ...</p> <p>(c) the identity of the trader, such as the trader's trading name, the geographical address at which it is established and its telephone number;</p> <p style="text-align: center;"><i>Article 23</i> <i>Duty to disclose information about goods and related services</i></p> <p>1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier 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.</p> <p>2. In determining whether paragraph (1) requires the supplier to disclose any information, regard is to be had to all the circumstances, including:</p> <p>(a) whether the supplier had special expertise;</p> <p>(b) the cost to the supplier of acquiring</p>	<p>relevant information;</p> <p>(e) <b>whether the other party could be expected to have that information or to acquire it by other means; and</b></p> <p>(f) good commercial practice <b>and a high level of consumer protection</b> in the situation concerned.</p> <p>3. <b>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 other party is a consumer, where applicable,</b></p> <p>(a) the functionality, including applicable technical protection measures of digital content; ■</p> <p>(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;</p> <p>(c) <b>the terms of any licence agreement the buyer has to accept in order to use the digital content.</b></p>	<p>and off-premises contracts: In these contracts, it is particularly important that the consumer receives full information on the trader's identity as the consumer cannot simply go to the trader's business premises in order to enforce its rights. Also, information must be provided on the right of withdrawal.</p> <p><b>(2)</b> The CESL should make clear that the terms of a licence agreement are particularly important for any sale of digital content.</p>
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<p>the relevant information;</p> <p>(c) the ease with which the other trader could have acquired the information by other means;</p> <p>(d) the nature of the information;</p> <p>(e) the likely importance of the information to the other trader; and</p> <p>(f) good commercial practice in the situation concerned.</p>		
<p style="text-align: center;"><i>Article 24</i></p> <p><i>Additional duties to provide information in distance contracts concluded by electronic means</i></p> <p>1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.</p> <p>2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.</p> <p>3. The trader must provide information about the following matters before the other party makes or accepts an offer:</p> <p style="padding-left: 40px;">(a) the technical steps to be taken in order to conclude the contract;</p>	<p style="text-align: center;"><i>Article 18</i></p> <p><b>Special duties</b> in contracts concluded by electronic means</p> <p>1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.</p> <p>2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.</p> <p>3. The trader must provide information about the following matters before the other party makes or accepts an offer:</p> <p style="padding-left: 40px;">(a) the technical steps to be taken in order to conclude the contract;</p> <p style="padding-left: 40px;">(b) whether or not a contract document will</p>	



<p>(b) whether or not a contract document will be filed by the trader and whether it will be accessible;</p> <p>(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;</p> <p>(d) the languages offered for the conclusion of the contract;</p> <p>(e) the contract terms.</p> <p>4. The trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.</p> <p>5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.</p>	<p>be filed by the trader and whether it will be accessible;</p> <p>(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;</p> <p>(d) the languages offered for the conclusion of the contract;</p> <p>(e) the <b>terms on the basis of which the trader is prepared to conclude</b> the contract.</p> <p>4. <b>Without prejudice to any stricter requirements for relations with a consumer under Section 2,</b> the trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.</p> <p>5. <b>In the acknowledgment required under Article 15 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.</b></p>	<p><b>(1)</b> The contract terms are, particularly in relations between traders, to be determined on the basis of the agreement of the parties. This should be reflected in the language.</p> <p><b>(2)</b> The relationship between point (e) and the duties of the trader in distance contracts with a consumer must be clarified because it is not self-evident that one of the two is the more specific rule or that they apply cumulatively.</p> <p><b>(3)</b> In E-commerce, the customer is often not able to ascertain whether an order has already been accepted or not because it is unclear whether the confirmation of receipt already amounts to acceptance. This creates much uncertainty for the customer and should be avoided.</p>

	<p style="text-align: center;"><b>SECTION 2    SPECIAL PRE-CONTRACTUAL INFORMATION TO BE GIVEN BY A TRADER DEALING WITH A CONSUMER</b></p>	
<p style="text-align: center;"><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <p>1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:</p> <ul style="list-style-type: none"> <li>(a) ...</li> <li>(b) the total price and additional charges and costs, in accordance with Article 14;</li> <li>(c) ...</li> <li>(d) the contract terms, in accordance with Article 16;</li> <li>(e) ...</li> <li>(f) where applicable, the existence and the conditions of the trader's after-sale customer assistance, after-sale services, commercial guarantees and</li> </ul>	<p style="text-align: center;"><i>Article 19</i> <i>Pre-contractual information duties</i></p> <p>1. In contracts <b>between a trader and a consumer</b> a trader has a duty to provide, <b>in addition to the information required by Articles 17 and 18</b>, the following information to the consumer in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:</p> <ul style="list-style-type: none"> <li>(a) the total price and additional charges and costs■; <b>and</b></li> <li>(b) the <b>other</b> contract terms ■.</li> </ul> <p>2. The information to be provided under point (a) of <b>paragraph 1</b> must include, <b>where applicable</b>:</p> <ul style="list-style-type: none"> <li>(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; ■</li> <li>(b) <b>an estimate of the quantum of time,</b></li> </ul>	<p>See general explanations above (at Articles 16 and 17).</p> <p>In order to secure a sufficiently high level of consumer protection it is essential that a duty is imposed on traders which requires them to provide consumers with an estimate of the time or materials required to fulfil their</p>

<p>complaints handling policy;</p> <p>(g) where applicable, the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it;</p> <p>(h) where applicable, the functionality, including applicable technical protection measures, of digital content; and</p> <p>(i) where applicable, 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.</p> <p style="text-align: center;"><i>Article 20</i> <i>Duty to provide information when concluding contracts other than distance and off-premises contracts</i></p> <p>1. In contracts other than distance and off-premises contracts, a trader has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, if that information is not already apparent from the context:</p> <p>(a) ...</p> <p>(b) the total price and additional charges</p>	<p><b>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;</b></p> <p>(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;</p> <p>(d) in the case of a contract of indeterminate duration or a contract containing a subscription, ■the total price per billing period, <b>including</b>, where charged at a fixed rate, ■the total monthly price, <b>or</b>, where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated ■; <b>and</b></p> <p>(e) ■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.</p> <p>3. The information to be provided under point (b) of <b>paragraph 1</b> must include, <b>where applicable</b>:</p> <p>(a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related</p>	<p>obligations.</p> <p>Where, for instance, the price for installing goods is calculated as X Euro per hour, the information to be provided under (a) is of no use whatsoever to a consumer if it remains unclear how many hours are required. Even if an estimate can only be given, such information is essential for Article 152 (Obligation to warn of unexpected or uneconomic cost) to be effective.</p>
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<p>and costs, in accordance with Article 14(1);</p> <p>(c) ...</p> <p>(d) the contract terms in accordance with points (a) and (b) of Article 16;</p> <p>(e) where applicable, the existence and the conditions of the trader's after-sale services, commercial guarantees and complaints handling policy;</p> <p>(f) where applicable, the functionality, including applicable technical protection measures of digital content; and</p> <p>(g) where applicable, 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.</p> <p>2. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion.</p> <p style="text-align: center;"><i>Article 14</i> <i>Information about price and additional charges and costs</i></p> <p>1. The information to be provided under point (b) of Article 13 (1) must include:</p> <p>(a) the total price of the goods, digital</p>	<p>services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;</p> <p>(b) ■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; ■</p> <p>(c) the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;</p> <p>(d) <b>the payment protector provided under Article 26, the functioning of the payment protection service and the additional charges that might apply;</b></p> <p>(e) ■the existence and the conditions of the trader's after sale services, commercial guarantees and complaints handling policy;</p> <p>(f) ■the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it; and</p> <p>(g) ■the existence of relevant codes of conduct and how copies of them can be</p>	<p>See explanations at Article 26.</p>
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<p>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; and</p> <p>(b) where applicable, 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.</p> <p>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.</p> <p>3. Where applicable, the trader must inform the consumer of 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.</p> <p style="text-align: center;"><i>Article 16</i> <i>Information about the contract terms</i></p>	<p>obtained.</p> <p>4. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion, <b>unless the contract is a distance or off-premises contract and Article 20 applies.</b></p>	
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<p>The information to be provided under point (d) of Article 13 (1) must include:</p> <ul style="list-style-type: none"> <li>(a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;</li> <li>(b) where applicable, 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; and</li> <li>(c) where applicable, the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;</li> <li>(d) where applicable, the existence of relevant codes of conduct and how copies of them can be obtained.</li> </ul>		
<p style="text-align: center;"><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <p>1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound</p>	<p style="text-align: center;"><i>Article 20</i> <b><i>Additional information about the identity of the trader and withdrawal when concluding a distance or off-premises contract</i></b></p> <p>1. <b>In addition to the information required by Articles 17 to 19 a trader concluding a distance contract or off-premises contract has a duty to</b></p>	<p><b>(1)</b> See general explanations above (at Articles 16 and 17).</p>

<p>by any offer:</p> <p>...</p> <p>(a) the rights of withdrawal, in accordance with Article 17;</p> <p>(b) ...</p> <p>5. This Article does not apply where the contract is:</p> <p>(a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;</p> <p>(b) concluded by means of an automatic vending machine or automated commercial premises;</p> <p>(c) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.</p> <p style="text-align: center;"><i>Article 17</i> <i>Information about rights of withdrawal when concluding a distance or off-premises contract</i></p> <p>1. Where the consumer has a right of withdrawal under Chapter 4, the information to be</p>	<p><b>provide,</b></p> <p>(a) <b>further information on its identity; and</b></p> <p>(b) <b>information about rights of withdrawal including facilities for the consumer to make any related declaration required.</b></p> <p>2. <b>The information to be provided under point (a) of paragraph 1 must include:</b></p> <p>(a) the identity of the trader, such as its trading name;</p> <p>(b) the geographical address at which the trader is established;</p> <p>(c) the telephone number, fax number, <b>e-mail address and website</b> of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;</p> <p>(d) <b>where the trader is registered in a commercial or similar public register, the denomination of that register, the trader's registration number or equivalent means of identification in that register;</b></p> <p>(e) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and</p> <p>(f) where different from the address given pursuant to points (b) and (e) of this <b>paragraph</b>, the geographical address of the trader, and where applicable that of</p>	<p><b>(2)</b> The website is, in all likelihood, even more important for consumers than a fax number.</p> <p><b>(3)</b> In a distance or off-premises contract, in particular where consumers wish to bring legal proceedings against a trader, the trader's registration number and the name of the register should also be disclosed. Further consideration does however need to be given to whether this justifies an additional deviation from the CRD.</p>
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<p>provided under point (e) of Article 13 (1) must include the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2.</p> <p>2. Where applicable, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, that the consumer will have to bear the cost of returning the goods in the event of withdrawal if the goods by their nature cannot be normally returned by post.</p> <p>3. Where the consumer can exercise the right of withdrawal after having made a request for the provision of related services to begin during the withdrawal period, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer would be liable to pay the trader the amount referred to in Article 45 (5).</p> <p>4. The duty to provide the information required by paragraphs 1, 2 and 3 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.</p> <p>5. Where a right of withdrawal is not provided for</p>	<p>the trader on whose behalf it is acting, where the consumer can address any complaints.</p> <p>3. <b>The information to be provided under point (b) of paragraph 1 must include</b></p> <p>(a) <b>whether or not the consumer has a right of withdrawal and</b>, where applicable, the circumstances under which the consumer loses the right of withdrawal;</p> <p>(b) where the consumer has a right of withdrawal under Chapter 4, <b>the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2;</b></p> <p>(c) <b>whether</b> the consumer will have to bear the cost of returning the goods in case of withdrawal <b>and, where applicable, the approximate amount of this cost</b> if the goods by their nature cannot normally be returned by post.</p> <p>4. <b>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 its obligations under point (b) of paragraph 1, seek the consumer's prior express consent and acknowledgement that the consumer will</b></p> <p>(a) <b>in the case of digital content, thereby</b></p>	<p><b>(4)</b> Consumers should receive information regarding the approximate the cost of returning goods where they cannot be returned by post.</p> <p>The CESL's text, which was copied from the CRD, does not make sense as it stands.</p> <p><b>(5)</b> Within the CESL's text, as is generally the case in respect of the CRD, the rules on digital content not supplied on a tangible medium and the rules on services are extremely complex and tend toward the impenetrable, even for</p>
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<p>in accordance with points (c) to (i) of Article 40 (2) and paragraph 3 of that Article, the information to be provided under point (e) of Article 13 (1) must include a statement that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses the right of withdrawal.</p> <p style="text-align: center;"><i>Article 15</i> <i>Information about the identity and address of the trader</i></p> <p>The information to be provided under point (c) of Article 13 (1) must include:</p> <ul style="list-style-type: none"> <li>(a) the identity of the trader, such as its trading name;</li> <li>(b) the geographical address at which the trader is established;</li> <li>(c) the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;</li> <li>(d) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and</li> <li>(e) where different from the address given pursuant to points (b) and (d) of this Article, the geographical address of the trader, and where applicable that of the trader on</li> </ul>	<p style="text-align: center;"><b>lose its right to withdraw; or</b></p> <p style="text-align: center;"><b>(b) in the case of related services, be liable to pay the trader the amount referred to in Article 45(5).■</b></p> <p style="text-align: center;"><b>For an off-premise contract, the consumer's consent and acknowledgement must be made on paper or, where the consumer agrees, on a different durable medium.</b></p> <p>5. The duty to provide the information required by paragraphs 1 to 4 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.</p> <p>6. This Article does not apply where the contract is:</p> <ul style="list-style-type: none"> <li>(a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;</li> <li>(b) concluded by means of an automatic vending machine or automated commercial premises;</li> <li>(c) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total</li> </ul>	<p>consumer law experts.</p> <p>The difference, for instance, between 'request' and 'express consent' on the part of the consumer is unclear.</p> <p>Similarly, it is unclear why traders must actively seek a consumer's request in the case of services (Articles 18(2) and 19(6)), but there is no parallel rule in respect of digital content.</p> <p>It is also unclear why consumers must make their request for the provision of a service to begin on a durable medium (Article 19(6)), whereas consumer consent for the supply of digital content to begin may be given in another form with only the trader's confirmation required to be made on a durable medium (Article 19(5)). The latter is effectively useless for consumers because such confirmation is usually provided seconds before the supply of the digital content begins. Furthermore, there is no possibility to revoke consent in any event. This must be simplified, otherwise parties will not be in a position to understand their rights and obligations.</p>
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<p>whose behalf it is acting, where the consumer can address any complaints.</p> <p><i>Article 18</i>  <i>Off-premises contracts: additional information requirements and confirmation</i></p> <p>1. ...</p> <p>2. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes such an express request on a durable medium.</p> <p><i>Article 19</i>  <i>Distance contracts: additional information and other requirements</i></p> <p>...</p> <p>5. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes an express request to that effect on a durable medium.</p>	<p>price of the</p> <p>(d) contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.</p>	

	<p><b>SECTION 3     HOW AND WHEN INFORMATION AND RELATED DUTIES OWED TO A CONSUMER ARE TO BE FULFILLED</b></p>	
<p><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <ol style="list-style-type: none"> <li>1. ...</li> <li>2. ...</li> <li>3. For a distance contract, the information required by this Article must: <ol style="list-style-type: none"> <li>(a) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;</li> <li>(b) be in plain and intelligible language; and</li> <li>(c) insofar as it is provided on a durable medium, be legible.</li> </ol> </li> <li>4. For an off-premises contract, the information required by this Article must: <ol style="list-style-type: none"> <li>(a) be given on paper or, if the consumer agrees, on another durable medium; and</li> </ol> </li> </ol>	<p><i>Article 21</i> <b>General requirements</b></p> <ol style="list-style-type: none"> <li>1. <b>The information required by Articles 16 to 20 must be provided to the consumer</b> <ol style="list-style-type: none"> <li>(a) in a clear and comprehensible manner, <b>using</b> plain and intelligible language; <b>and</b></li> <li>(b) <b>as early as reasonably possible before the contract is concluded or the consumer is bound by any offer as enables the consumer to make an informed decision.</b></li> </ol> </li> <li>2. <b>Where information is provided on a durable medium, it must allow quick and easy access to the different heads of information as well as being capable of being printed in a cost-effective way by the consumer.</b></li> <li>3. <b>For contracts other than distance or off-premises contracts the information required need not be given explicitly if it is already apparent from the context.</b></li> </ol>	<p>The rules on how and when information is to be provided are to be found in different places. This renders them unclear for users. They should be consolidated into a single Section.</p>

<p>(b) be legible and in plain, intelligible language.</p> <p><i>Article 20</i> <i>Duty to provide information when concluding contracts other than distance and off-premises contracts</i></p> <p>1. In contracts other than distance and off-premises contracts, a trader has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, if that information is not already apparent from the context: ...</p>		
<p><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <p>1. For an off-premises contract, the information required by this Article must:</p> <p>(a) be given on paper or, if the consumer agrees, on another durable medium; and</p> <p>(b) ...</p> <p><i>Article 18</i> <i>Off-premises contracts: additional information requirements and confirmation</i></p>	<p><i>Article 22</i> <b><i>Specific requirements in off-premises contracts</i></b></p> <p>1. For an off-premises contract, the information required by Articles <b>16 to 20</b> must be given on paper or, if the consumer agrees, on another durable medium.</p> <p>2. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including, where applicable, the confirmation of the consumer's consent and acknowledgment <b>referred to in Article 20 (3)</b>, on paper or, if the consumer agrees, on a different durable medium. <b>The trader must do so without undue delay after the conclusion of the off-</b></p>	<p><b>(1)</b> All the rules specifically applicable to off-premises contracts should be consolidated in one Article.</p> <p><b>(2)</b> The CESL provides no indication when the duty to provide a copy must be fulfilled. It seems advisable to have a similar rule as</p>

<ol style="list-style-type: none"> <li>1. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including where applicable, the confirmation of the consumer's consent and acknowledgment as provided for in point (d) of Article 40(3) on paper or, if the consumer agrees, on a different durable medium.</li> <li>2. ...</li> </ol>	<p><b>premises 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.</b></p>	<p>for distance contracts but to replace '<i>within a reasonable time</i>' with '<i>without undue delay</i>'.</p>
<p style="text-align: center;"><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <ol style="list-style-type: none"> <li>1. ...</li> <li>2. For a distance contract, the information required by this Article must: <ol style="list-style-type: none"> <li>(a) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;</li> <li>(b) ...</li> </ol> </li> </ol> <p style="text-align: center;"><i>Article 19</i> <i>Distance contracts: additional information and other requirements</i></p> <ol style="list-style-type: none"> <li>1. ...</li> <li>2. If the distance contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader must provide at least</li> </ol>	<p style="text-align: center;"><i>Article 23</i> <b><i>Specific requirements in distance contracts</i></b></p> <ol style="list-style-type: none"> <li>1. For a distance contract, the information required by <b>Articles 16 to 20</b> must be given or made available to the consumer in a way that is appropriate to <b>the nature of the information and the means of distance communication used.</b></li> <li>2. If the ■means of distance communication ■ allows limited space or time to display the information, the trader <b>may provide the information referred to in points (a) and (c) to (g) of Article 19 (3) and in points (b) to (f) of Article 20 (1) by another means of distance communication.</b></li> <li>3. The trader must provide the consumer with confirmation <b>that a contract has been</b> concluded, including, where applicable, confirmation of the consumer's consent and acknowledgement <b>specified in Article 20 (3) ■</b> and all the information referred to in <b>Articles 16 to 20</b> on a durable medium. The trader must <b>do so</b> in</li> </ol>	<p>All the rules specifically applicable in distance contracts should be consolidated in one Article.</p> <p>Some of the rules might also be simplified and/or clarified.</p>

<p>the information referred to in paragraph 3 of this Article on that particular means prior to the conclusion of such a contract. The other information referred to in Article 13 shall be provided by the trader to the consumer in an appropriate way in accordance with Article 13(3).</p> <p>3. The information required under paragraph 2 is:</p> <ul style="list-style-type: none"> <li>(a) the main characteristics of the goods, digital content or related services, as required by point (a) of Article 13 (1);</li> <li>(b) the identity of the trader, as required by point (a) of Article 15;</li> <li>(c) the total price, including all items referred to in point (b) of Article 13 (1) and Article 14(1) and (2);</li> <li>(d) the right of withdrawal; and</li> <li>(e) where relevant, the duration of the contract, and if the contract is for an indefinite period, the requirements for terminating the contract, referred to in point (b) of Article 16.</li> </ul> <p>4. ...</p> <p>5. The trader must give the consumer a confirmation of ... all the information referred to in Article 13 on a durable medium. The trader must give that information in reasonable time after the conclusion of the distance contract, and at the latest at the time of the</p>	<p>reasonable time after the conclusion of the distance contract, and in any event no later than the time of delivery of the goods or the <b>commencement</b> of the supply of digital content or <b>of</b> the provision of the related service. <b>The information referred to in Articles 16 to 20 need not be included</b> where it has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.</p>	
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<p>delivery of the goods or before the supply of digital content or the provision of the related service begins, unless the information has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.</p>		
<p style="text-align: center;"><i>Article 25</i> <i>Additional requirements in distance contracts concluded by electronic means</i></p> <ol style="list-style-type: none"> <li>1. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must make the consumer aware in a clear and prominent manner, and immediately before the consumer places the order, of the information required by point (a) of Article 13 (1), Article 14(1) and (2), and point (b) of Article 16 (1).</li> <li>2. The trader must ensure that the consumer, 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, the button or similar function must be labelled in an easily legible manner only with the words "order with obligation to pay" or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this paragraph, the</li> </ol>	<p style="text-align: center;"><i>Article 24</i> <i>Additional requirements in distance contracts concluded by electronic means</i></p> <ol style="list-style-type: none"> <li>1. <b>On a trading website</b>, the trader must indicate clearly and legibly, ■ and <b>no later than the start of</b> the ordering process, whether any delivery restrictions apply and <b>which</b> means of payment are accepted.</li> <li>2. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must <ol style="list-style-type: none"> <li>(a) immediately before the consumer places the order, <b>make</b> the consumer aware of the information required by Article 17, Article 19 (2) and Article 19 (3)(b) and <b>do so</b> in a clear and prominent manner;</li> <li>(b) ensure that the consumer, when placing the order, explicitly acknowledges that the order <b>includes</b> an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner with the words</li> </ol> </li> </ol>	<p><b>(1)</b> This Article could be restructured. Two of the rules it contains i.e., Article 25(1) and (2), are clearly connected. The rule contained in Article 25(3) is clearly distinct and requires separate treatment.</p>

<p>consumer is not bound by the contract or order.</p> <p>3. The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.</p>	<p>'order with obligation to pay' or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader.</p> <p>Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order.</p> <p>3. <b>In a contract that is concluded by electronic means the trader must, without prejudice to the rules under Chapter 3 and without undue delay and in any case within four days after receipt of any order from the consumer, send the consumer</b></p> <p>(a) <b>confirmation of the conclusion of the contract referred to in Article 23 (3); and</b></p> <p>(b) <b>confirmation of the estimated time of delivery, or of the fact that the consumer's offer has been rejected.</b></p> <p><b>Where the trader fails to comply with this duty the consumer shall not be bound by its order and may reject any performance tendered by the trader as well as claim reimbursement of any advance payments made.</b></p>	<p>(2) Consumers that shop electronically, particularly in cross-border situations, often face the problem that they place an order but do not know whether their order has been accepted by the trader and, if so, when the trader will deliver. This creates a good deal of uncertainty and frustration, in particular as consumers, as the CESL currently stands, are nevertheless bound by the contract.</p> <p>A right of withdrawal is not available for all contracts, and consumers would remain, in any case, obliged to return goods and pay for their return. There is therefore a pressing need for additional protection.</p>
<p><i>Article 19</i> <i>Distance contracts: additional information and other requirements</i></p> <p>1. When a trader makes a telephone call to a consumer, with a view to concluding a distance</p>	<p><i>Article 25</i> <b><i>Additional requirements in distance contracts concluded by telephone</i></b></p> <p>1. When a trader makes a telephone call to a consumer, with a view to concluding a distance</p>	<p>(1) The rules specifically applicable to distance contracts which are concluded by telephone should be consolidated into a single Article</p> <p>(2) The minimum requirement, of</p>



<p>contract, the trader must, at the beginning of the conversation with the consumer, disclose 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.</p> <p>2. ...</p> <p>3. ...</p> <p>4. A distance contract concluded by telephone is valid 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.</p>	<p>contract, the trader must <b>present its calling line identification and</b>, at the beginning of the conversation with the consumer, <b>inform the consumer of</b> 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.</p> <p>2. A distance contract concluded by telephone, <b>unless the telephone call was made upon the initiative of the consumer, is binding on the consumer</b> only if the consumer has signed the offer or <span style="background-color: black; color: black;">■</span> sent his written consent indicating <span style="background-color: black; color: black;">■</span> agreement to conclude a contract. The trader must provide the consumer with <span style="background-color: black; color: black;">■</span> confirmation of that agreement on a durable medium.</p>	<p>presenting the calling line identification, which is provided for by other EU law, must also be provided under the CESL.</p> <p><b>(3)</b> Article 19(4) does not really serve consumer interests. Consumers may have an urgent need to conclude contracts via telephone. They only need protection against contracts which are initiated by traders (with the burden of proof being on the trader). Even then, consumers should have a right to choose whether they want the contract or not i.e., such contracts should be binding only upon the consumer's election.</p>
	<p><b>SECTION 4    PROTECTION OF ADVANCE PAYMENTS</b></p>	
	<p style="text-align: center;"><i>Article 26</i></p> <p style="text-align: center;"><b><i>Securing advance payment by the consumer</i></b></p> <p>1. <b>The trader 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</b></p>	<p>One of the main obstacles to cross-border trade is that consumers often fail to have any confidence that they will be able to secure repayment of their money in the event that anything goes wrong</p>

	<p><b>consumer. Sufficient protection is provided by accredited escrow services, insurance companies or similar schemes (“payment protectors”).</b></p> <p>2. <b>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.</b></p> <p>3. <b>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.</b></p>	<p>with the contract or its performance.</p> <p>Ensuring that any advance payment made by a consumer was held securely would significantly improve consumer protection in cross-border trade.</p>
	<p><b>SECTION 5 ■ BREACH OF INFORMATION AND RELATED DUTIES</b></p>	
<p><i>Article 13</i> <i>Duty to provide information when concluding a distance or off-premises contract</i></p> <p>1. ...</p> <p>2. The information provided, except for the addresses required by point (c) of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.</p>	<p><i>Article 27</i> <i>Consequences of breach</i></p> <p>1. A party <b>that fails</b> to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure. <b>The claim for damages shall be subject to the provisions in Chapter 15 Section 3 with appropriate adaptations.</b></p> <p>2. Where the trader has not complied with the information requirements relating to <b>the rights and obligations of the parties under the</b></p>	<p><b>(1)</b> As the CESL presently stands the relationship between pre-contractual information duties and</p>

<p style="text-align: center;"><i>Article 29</i> <i>Remedies for breach of information duties</i></p> <ol style="list-style-type: none"> <li>1. A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.</li> <li>2. Where the trader has not complied with the information requirements relating to additional charges or other costs as referred to in Article 14 or on the costs of returning the goods as referred to in Article 17(2) the consumer is not liable to pay the additional charges and other costs.</li> <li>3. The remedies provided under this Article are without prejudice to any remedy which may be available under Article 42 (2), Article 48 or Article 49.</li> <li>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.</li> </ol>	<p><b>contract, the other party may insist that the contract is performed on the basis that the information provided was correct and complete as required under this Chapter. In particular, a consumer is not liable to pay any additional charges or other costs not duly informed about.</b></p> <ol style="list-style-type: none"> <li>3. The remedies, <b>rights or defences</b> provided under this Article are without prejudice to             <ol style="list-style-type: none"> <li>(a) any <b>specific</b> remedy, <b>right or defence</b> which may be available under <b>this Chapter, Article 42 (2), or Article 45;</b></li> <li>(b) <b>a right of the other party to avoid the contract under Chapter 5; or</b></li> <li>(c) <b>remedies for non-performance of an obligation under the contract.</b></li> </ol> </li> </ol>	<p>contractual terms is not sufficiently clear. ELI Article 26 seeks to remedy this problem, in particular by generalising the rule in CESL Article 29(2).</p> <p><b>(2)</b> Reference to the rules on restitution after withdrawal was missing.</p> <p><b>(3)</b> Clarification is also required to show that remedies for non-performance remain unaffected</p>

	<b>Chapter 3 Conclusion of contract</b>	
	<b>SECTION 1 GENERAL PROVISIONS</b>	
<p style="text-align: center;"><i>Article 30</i> <i>Requirements for the conclusion of a contract</i></p> <ol style="list-style-type: none"> <li>1. A contract is concluded if: <ol style="list-style-type: none"> <li>(a) the parties reach an agreement;</li> <li>(b) they intend the agreement to have legal effect; and</li> <li>(c) the agreement, supplemented if necessary by rules of the Common Sales Law, has sufficient content and certainty to be given legal effect.</li> </ol> </li> <li>2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct.</li> <li>3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.</li> <li>4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.</li> </ol>	<p style="text-align: center;"><i>Article 28</i> <i>Requirements for the conclusion of a contract</i></p> <ol style="list-style-type: none"> <li>1. A contract is concluded if: <ol style="list-style-type: none"> <li>(a) the parties reach an agreement;</li> <li>(b) they intend the agreement to have legal effect; and</li> <li>(c) the agreement, supplemented if necessary by rules of the Common Sales Law, has sufficient content and certainty to be given legal effect.</li> </ol> </li> <li>2. Agreement is reached by acceptance of an offer. <b>Unless otherwise stated in this Chapter, offer and acceptance are subject to the provisions in Articles 14 and 15.</b></li> <li>3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.</li> <li>4. <b>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.</b></li> </ol>	<p>This clarifies the relationship with the rules in Part I.</p> <p>Clarification.</p>

<p style="text-align: center;"><i>Article 31</i> <i>Offer</i></p> <ol style="list-style-type: none"> <li>1. A proposal is an offer if: <ol style="list-style-type: none"> <li>(a) it is intended to result in a contract if it is accepted; and</li> <li>(b) it has sufficient content and certainty for there to be a contract.</li> </ol> </li> <li>2. An offer may be made to one or more specific persons.</li> <li>3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.</li> </ol>	<p style="text-align: center;"><i>Article 29</i> <i>Offer</i></p> <ol style="list-style-type: none"> <li>1. A proposal is an offer if: <ol style="list-style-type: none"> <li>(a) it is intended to result in a contract if it is accepted; and</li> <li>(b) it has sufficient content and certainty for there to be a contract.</li> </ol> </li> <li>2. An offer may be made to one or more specific persons.</li> <li>3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.</li> </ol>	
<p style="text-align: center;"><i>Article 32</i> <i>Revocation of offer</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>3. A revocation of an offer is ineffective if: <ol style="list-style-type: none"> <li>(a) the offer indicates that it is irrevocable;</li> <li>(b) the offer states a fixed time period for</li> </ol> </li> </ol>	<p style="text-align: center;"><i>Article 30</i> <i>Revocation of offer</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>3. A revocation of an offer is ineffective if: <ol style="list-style-type: none"> <li>(a) the offer indicates that it is irrevocable;</li> <li>(b) the offer states a fixed time period for its acceptance; or</li> <li>(c) it was otherwise reasonable for the</li> </ol> </li> </ol>	

<p>its acceptance; or</p> <p>(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.</p>	<p>offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.</p>	
<p><i>Article 33</i> <i>Rejection of offer</i></p> <p>When a rejection of an offer reaches the offeror, the offer lapses.</p>	<p><i>Article 31</i> <i>Rejection of offer</i></p> <p>When a rejection of an offer reaches the offeror, the offer lapses.</p>	
<p><i>Article 34</i> <i>Acceptance</i></p> <p>1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.</p> <p>2. Silence or inactivity does not in itself constitute acceptance.</p>	<p><i>Article 32</i> <i>Acceptance</i></p> <p>1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.</p> <p>2. Silence, ■inactivity <b>or receipt of payment and its confirmation</b> does not in itself constitute acceptance.</p>	
<p><i>Article 35</i> <i>Time of conclusion of the contract</i></p> <p>1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.</p> <p>2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.</p> <p>3. Notwithstanding paragraph 2, where by virtue</p>	<p><i>Article 33</i> <i>Time of conclusion of the contract</i></p> <p>1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.</p> <p>2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.</p> <p>3. Notwithstanding paragraph 2, where by virtue of</p>	

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.	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.	
<p style="text-align: center;"><i>Article 36</i> <i>Time limit for acceptance</i></p> <ol style="list-style-type: none"> <li>1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.</li> <li>2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.</li> <li>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.</li> </ol>	<p style="text-align: center;"><i>Article 34</i> <i>Time limit for acceptance</i></p> <ol style="list-style-type: none"> <li>1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.</li> <li>2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.</li> <li>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.</li> </ol>	
<p style="text-align: center;"><i>Article 37</i> <i>Late acceptance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where a letter or other communication</li> </ol>	<p style="text-align: center;"><i>Article 35</i> <i>Late acceptance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where a letter or other communication</li> </ol>	

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.	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.	
	<b>SECTION 2 SPECIAL PROVISIONS FOR RELATIONS BETWEEN A TRADER AND A CONSUMER</b>	
<p><i>Article 38</i> <i>Modified acceptance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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</li> </ol>	<p><i>Article 36</i> <i>Consent of the parties</i></p> <ol style="list-style-type: none"> <li>1. <b>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.</b></li> <li>2. <b>An acceptance which varies the terms of the original offer is a rejection of that offer combined with a new offer.</b></li> <li>3. <b>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</b></li> </ol>	<p>The rules on minimum content of the parties' agreement and on modified acceptance as they presently stand are suitable only for relations between traders.</p> <p>In particular, consumers need protection where traders accepts an offer with modifications, i.e. makes a new offer which is then accepted by way of conduct on the part of the consumer.</p>



<p>that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.</p> <p>4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:</p> <ul style="list-style-type: none"> <li>(a) the offer expressly limits acceptance to the terms of the offer;</li> <li>(b) the offeror objects to the additional or different terms without undue delay; or</li> <li>(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.</li> </ul>	<p><b>of the information originally provided.</b></p>	
	<p style="text-align: center;"><i>Article 37</i></p> <p style="text-align: center;"><b><i>Protection against unsolicited contracts</i></b></p> <ol style="list-style-type: none"> <li>1. <b>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.</b></li> <li>2. <b>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 relation to the goods or related services, and the consumer is exempt from any other liability to pay.</b></li> </ol>	<p><b>(1)</b> Claims brought by traders against consumers under unsolicited contracts are one of the major problems of consumer contract law. ELI Article 36(1) introduces additional protection to consumers in cases where a trader falsely or erroneously claims that an order has been placed by this consumer</p> <p><b>(2)</b> Even if it is true that the CESL only applies where the parties have validly opted for its application, and that this cannot be the case where the consumer has remained</p>

		silent, it seems preferable to include some basic protective mechanisms against unsolicited contracts in order to avoid doubts and litigation in this respect.
	<b>SECTION 3 SPECIAL PROVISIONS FOR RELATIONS BETWEEN TRADERS</b>	
<p><i>Article 38</i> <i>Modified acceptance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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</li> </ol>	<p><i>Article 38</i> <i>Modified acceptance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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</li> </ol>	

<p>then become part of the contract.</p> <p>4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:</p> <ul style="list-style-type: none"> <li>(a) the offer expressly limits acceptance to the terms of the offer;</li> <li>(b) the offeror objects to the additional or different terms without undue delay; or</li> <li>(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.</li> </ul>	<p>become part of the contract.</p> <p>4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:</p> <ul style="list-style-type: none"> <li>(a) the offer expressly limits acceptance to the terms of the offer;</li> <li>(b) the offeror objects to the additional or different terms without undue delay; or</li> <li>(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.</li> </ul>	
<p style="text-align: center;"><i>Article 39</i> <i>Conflicting standard contract terms</i></p> <p>1. 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.</p> <p>2. Notwithstanding paragraph 1, no contract is concluded if one party:</p> <ul style="list-style-type: none"> <li>(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</li> </ul>	<p style="text-align: center;"><i>Article 39</i> <i>Conflicting standard contract terms</i></p> <p>1. 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.</p> <p>2. Notwithstanding paragraph 1, no contract is concluded if one party:</p> <ul style="list-style-type: none"> <li>(a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a</li> </ul>	

<p>paragraph (1); or</p> <p>(b) without undue delay, informs the other party of such an intention.</p>	<p>contract on the basis of paragraph (1); or</p> <p>(b) without undue delay, informs the other party of such an intention.</p>	
	<p><b>Chapter 4 Right to withdraw in distance and off-premises contracts between traders and consumers</b></p>	
<p><i>Article 40</i> <i>Right to withdraw</i></p> <p>1. During the period provided for in Article 42, 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 45, from:</p> <p>(a) a distance contract;</p> <p>(b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.</p>	<p><i>Article 40</i> <i>Right to withdraw</i></p> <p>1. During the period provided for in Article <b>42</b>, 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 <b>45</b>, from:</p> <p>(a) a distance contract;</p> <p>(b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.</p> <p>2. Paragraph 1 does not apply to:</p>	

<p>2. Paragraph 1 does not apply to:</p> <ul style="list-style-type: none"> <li>(a) a contract concluded by means of an automatic vending machine or automated commercial premises;</li> <li>(b) 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;</li> <li>(c) 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;</li> <li>(d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;</li> <li>(e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;</li> <li>(f) 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</li> </ul>	<ul style="list-style-type: none"> <li>(a) a contract concluded by means of an automatic vending machine or automated commercial premises;</li> <li>(b) 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;</li> <li>(c) 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;</li> <li>(d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;</li> <li>(e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;</li> <li>(f) 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 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</li> </ul>	
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<p>delivery 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;</p> <p>(g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;</p> <p>(h) a contract concluded at a public auction; and</p> <p>(i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.</p> <p>3. Paragraph 1 does not apply in the following situations:</p> <p>(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;</p> <p>(b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;</p> <p>(c) where the goods supplied were sealed audio or video recordings or computer</p>	<p>market which cannot be controlled by the trader;</p> <p>(g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;</p> <p>(h) a contract concluded at a public auction <b>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;</b> and</p> <p>(i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance; and</p> <p>(j) <b>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.</b></p>	<p><b>(1)</b> The term “public auction” is not used anywhere else. Its definition should properly be included here.</p> <p><b>(2)</b> This exception was made in the CRD and should be made also in the CESL.</p>
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<p>software and have been unsealed after delivery;</p> <p>(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 with the acknowledgement by the consumer of losing the right to withdraw;</p> <p>(e) the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods.</p> <p>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.</p>	<p>3. Paragraph 1 does not apply in the following situations:</p> <p>(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;</p> <p>(b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;</p> <p>(c) where the <b>items</b> supplied were sealed audio or video recordings or <b>digital content on a tangible medium</b> and have been unsealed after delivery;</p> <p>(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 <b>acknowledgement in accordance with Article 20(3) and the trader has provided the confirmation in accordance with Article 23(3);</b></p> <p>(e) the consumer has specifically requested a visit from the trader for the purpose of carrying out <b>repairs or maintenance or a similar service</b>. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than <b>parts necessarily used in</b></p>	<p><b>(3)</b> As computer software does not fall under the definition of 'goods' under the CESL, and as the CESL uses the more general term of 'digital content', this provision, which was copied from the CRD, is inappropriate.</p> <p><b>(4)</b> Reference to confirmation is required in order to bring the rule more in line with Article 45(6)(b) CESL.</p> <p><b>(5)</b> Clarifications are made in order to prevent misunderstanding.</p>
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	<p>performing the <b>services specifically requested by the consumer</b>, the right of withdrawal applies to those additional related services or goods.</p> <p>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.</p>	
<p><i>Article 41</i> <i>Exercise of right to withdraw</i></p> <p>1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.</p> <p>2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.</p> <p>3. Where the trader gives the consumer the option to withdraw electronically on its trading website, and the consumer does so, the trader has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.</p>	<p><i>Article 41</i> <i>Exercise of right to withdraw</i></p> <p>1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article <b>42</b>.</p> <p>2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw. ■</p> <p>3. A communication of withdrawal is timely if sent before the end of the withdrawal period.</p> <p>4. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.</p>	



<p>4. A communication of withdrawal is timely if sent before the end of the withdrawal period.</p> <p>5. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.</p>		
<p style="text-align: center;"><i>Article 42</i> <i>Withdrawal period</i></p> <p>1. The withdrawal period expires after fourteen days from:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(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;</li> <li>(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</li> </ul>	<p style="text-align: center;"><i>Article 42</i> <i>Withdrawal period</i></p> <p>1. The withdrawal period expires after fourteen days from:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(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;</li> <li>(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;</li> </ul>	

<p>under which the seller also agrees to provide related services;</p> <p>(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;</p> <p>(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;</p> <p>(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 supply of digital content where the digital content is supplied on a tangible medium;</p> <p>(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.</p> <p>2. Where the trader has not provided the consumer with the information referred to in Article 17 (1), the withdrawal period expires:</p> <p>(a) after one year from the end of the initial withdrawal period, as determined in accordance with</p>	<p>(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;</p> <p>(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;</p> <p>(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 <b>sale</b> of digital content where the digital content is supplied on a tangible medium;</p> <p>(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.</p> <p>2. Where the trader has not provided the consumer with the information referred to in Article <b>20(2)</b>, the withdrawal period expires:</p> <p>(a) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1; or</p> <p>(b) where the trader provides the consumer with the information required within one year from the end of the withdrawal</p>	
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<p>paragraph 1; or</p> <p>(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.</p>	<p>period as determined in accordance with paragraph 1, after fourteen days from the day the consumer receives the information.</p>	
<p style="text-align: center;"><i>Article 43</i> <i>Effects of withdrawal</i></p> <p>Withdrawal terminates the obligations of both parties under the contract:</p> <p>(a) to perform the contract; or</p> <p>(b) to conclude the contract in cases where an offer was made by the consumer.</p> <p style="text-align: center;"><i>Article 46</i> <i>Ancillary contracts</i></p> <p>1. Where a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 41 to 45, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in paragraphs 2 and 3. For the purpose of this Article an ancillary contract means a contract by which a consumer acquires goods, digital content or related</p>	<p style="text-align: center;"><i>Article 43</i> <i>Effects of withdrawal</i></p> <p>1. Withdrawal terminates the obligations of both parties ■:</p> <p>(a) to perform the contract; or</p> <p>(b) to conclude the contract in cases where an offer was made by the consumer.</p> <p>2. <b>After withdrawal, both parties are obliged to make restitution of what they have received under the contract in accordance with Chapter 14.</b> The consumer does not incur any liability through the exercise of the right of withdrawal <b>except</b> as provided for in <b>that Chapter</b>.</p> <p>3. <b>Without prejudice to Article 6 any ■</b>contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the</p>	

<p>services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.</p> <p>2. The provisions of Articles 43, 44 and 45 apply accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.</p> <p>3. For ancillary contracts which are not governed by the Common European Sales Law the applicable law governs the obligations of the parties in the event of withdrawal.</p>	<p>basis of an arrangement between that third party and the trader (<b>'ancillary contract'</b>) is automatically terminated at no cost to the consumer■. <b>Paragraph 2 applies</b> accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law. ■</p>	
<p style="text-align: center;"><i>Article 44</i> <i>Obligations of the trader in the event of withdrawal</i></p> <p>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 41. 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</p>	<p style="text-align: center;"><i>Article 44</i> <i>Obligations of the trader in the event of withdrawal</i></p> <p>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 <b>41</b>. 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.</p>	

<p>such reimbursement.</p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.</li> </ol>	<ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.</li> </ol>	
<p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <ol style="list-style-type: none"> <li>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 41, unless the trader has offered to</li> </ol>	<p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <ol style="list-style-type: none"> <li>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 <b>41</b>, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the</li> </ol>	

<p>collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.</p> <p>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 that the consumer has to bear them.</p> <p>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 17 (1).</p> <p>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.</p> <p>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</p>	<p>goods before the period of fourteen days has expired.</p> <p>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 <b>in accordance with the rules in this Chapter</b> that the consumer has to bear them.</p> <p>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 <b>20</b>.</p> <p>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.</p> <p>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</p>	<p>Clarification is necessary.</p>
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<p>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.</p> <p>6. The consumer is not liable for the cost for:</p> <ul style="list-style-type: none"> <li>(a) the provision of related services, in full or in part, during the withdrawal period, where: <ul style="list-style-type: none"> <li>(i) the trader has failed to provide information in accordance with Article 17(1) and (3); or</li> <li>(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);</li> </ul> </li> <li>(b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where: <ul style="list-style-type: none"> <li>(i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);</li> <li>(ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or</li> </ul> </li> </ul>	<p>basis of the market value of what has been provided.</p> <p>6. The consumer is not liable <b>to pay</b> for the provision of related services, in full or in part, during the withdrawal period, where:</p> <ul style="list-style-type: none"> <li>(a) the trader has failed to provide information in accordance with Article <b>20 (3) or (4)</b>; or</li> <li>(b) the consumer has not <b>given express consent and acknowledgement in accordance with Article 20 (4)</b>.</li> </ul> <p>7. <b>Where digital content is supplied on a tangible medium and a right of withdrawal exists in accordance with Article 40(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 40(3)(d) the consumer is not liable to pay for the supply.</b></p> <p>8. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p>	<p><b>(1)</b> Under the CRD, digital content supplied on a tangible medium is treated as goods, whereas it does not fall under the definition of goods in the CESL. As Article 45 is copied from the CRD a provision must be added which refers to the rules on goods.</p> <p><b>(2)</b> The three cases listed in Article 45(6)(b) CESL are superfluous and misleading because of Article 40(3)(d). In a contract for the supply of digital content other than on a tangible medium withdrawal is in any event only possible, where at least one of the instances listed is fulfilled, so the consumer is never liable to pay.</p>
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<p>(iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).</p> <p>7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p>		
	<h2>Chapter 5 Avoidance of a contract</h2>	
<p style="text-align: center;"><i>Article 12</i> <i>Unilateral statements or conduct</i></p> <p>...</p> <p>4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention.</p> <p>5. Any reference to a statement referred to in this Article includes a reference to conduct which can be regarded as the equivalent of a statement.</p> <p style="text-align: center;"><i>Article 56</i> <i>Exclusion or restriction of remedies</i></p> <p>1. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly</p>	<p style="text-align: center;"><i>Article 46</i> <i>Scope and mandatory nature</i></p> <p>1. <b>This Chapter applies to the avoidance of a contract for defects in consent and similar defects.</b></p> <p>2. <b>The rules in this Chapter apply to the avoidance of an offer, acceptance or other unilateral statement indicating intention with appropriate adaptations.</b></p> <p>3. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.</p> <p>4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, <b>exclude the application of this Chapter or derogate from or vary its effects.</b></p>	<p>It would be preferable to have the rule on avoidance of unilateral statements in this Chapter, as it titled '<i>avoidance</i>' as this is where the user is most likely to look for it.</p>



<p>excluded or restricted.</p> <p>2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, directly or indirectly exclude or restrict remedies for mistake.</p>		
<p style="text-align: center;"><i>Article 48</i> <i>Mistake</i></p> <p>1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:</p> <ul style="list-style-type: none"> <li>(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and</li> <li>(b) the other party: <ul style="list-style-type: none"> <li>(i) caused the mistake;</li> <li>(ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;</li> <li>(iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not</li> </ul> </li> </ul>	<p style="text-align: center;"><i>Article 47</i> <i>Mistake</i></p> <p>1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) the other party: <ul style="list-style-type: none"> <li>(i) caused the mistake, <b>in particular</b> by failing to comply with any pre-contractual ■duty under Chapter 2■; or</li> <li>(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 <b>in accordance with Article 48 (3)</b> would have required a party aware of the mistake to point it out. ■</li> </ul> </li> </ul>	<p><b>(1)</b> This clarification is recommended in order to improve certainty and coherence.</p> <p><b>(2)</b> Avoidance for common mistake has been deleted as this is an alien element in the Chapter. Cases of</p>

<p>pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or</p> <p>(iv) made the same mistake.</p> <p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p>	<p>common mistake can often be solved by way of interpretation, or change of circumstances, and for the extremely few remaining cases the good faith principle (<i>venire contra factum proprium</i>) provides a solution.</p>
<p><i>Article 49</i> <i>Fraud</i></p> <p>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.</p> <p>2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or 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</p>	<p><i>Article 48</i> <i>Fraud</i></p> <p>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.</p> <p>2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or 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.</p>	

<p>is withheld to make a mistake.</p> <p>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:</p> <ul style="list-style-type: none"> <li>(a) whether the party had special expertise;</li> <li>(b) the cost to the party of acquiring the relevant information;</li> <li>(c) the ease with which the other party could have acquired the information by other means;</li> <li>(d) the nature of the information;</li> <li>(e) the apparent importance of the information to the other party; and</li> <li>(f) in contracts between traders good commercial practice in the situation concerned</li> </ul>	<p>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:</p> <ul style="list-style-type: none"> <li>(a) whether the party had special expertise;</li> <li>(b) the cost to the party of acquiring the relevant information;</li> <li>(c) the ease with which the other party could have acquired the information by other means;</li> <li>(d) the nature of the information;</li> <li>(e) the apparent importance of the information to the other party; and</li> <li>(f) in contracts between traders good commercial practice in the situation concerned</li> </ul>	
<p style="text-align: center;"><i>Article 50</i> <i>Threats</i></p> <p>A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act.</p>	<p style="text-align: center;"><i>Article 49</i> <i>Threats</i></p> <p>A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of <b>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.</b></p>	<p>Clarification (in line with the PECL and the DCFR).</p>
	<p style="text-align: center;"><i>Article 50</i></p>	<p>Some Member States have</p>

	<p><b><i>Contracts concluded by way of unfair commercial practices</i></b></p> <p><b>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.</b></p>	<p>introduced contractual sanctions for the violation of standards under the UCP Directive, usually a right to avoid the contract.</p> <p>The CESL must either clarify that these sanctions remain untouched or also introduce a right of avoidance under the CESL. The latter seems preferable as it reduces the problems entailed by excessive <i>dépeçage</i>.</p>
	<p><b><i>Article 51</i></b> <b><i>Third persons</i></b></p> <ol style="list-style-type: none"> <li>1. <b>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:</b> <ol style="list-style-type: none"> <li>(a) <b>causes a mistake, or knows of or could be expected to know of a mistake, or</b></li> <li>(b) <b>is guilty of fraud or threats or unfair commercial practices,</b></li> </ol> <p><b>remedies under this Chapter are available as if the behaviour or knowledge had been that of the party.</b></p> </li> <li>2. <b>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</b></li> </ol>	<p>A rule on mistake caused by fraud or threat committed by third parties is clearly missing from the CESL.</p>

	<b>known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.</b>	
<p style="text-align: center;"><i>Article 51</i> <i>Unfair exploitation</i></p> <p>A party may avoid a contract if, at the time of the conclusion of the contract:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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.</li> </ul>	<p style="text-align: center;"><i>Article 52</i> <i>Unfair exploitation</i></p> <p>1. A party may avoid a contract if, at the time of the conclusion of the contract:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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.</li> </ul> <p>2. <b>Without prejudice to the rules under Chapter 4, the requirements of paragraph 1 are presumed to be fulfilled where the terms of a contract between a trader and a consumer are such as to create a grossly unfair imbalance of the parties' rights and obligations to the detriment of the consumer, contrary to good faith and fair dealing. Article 78 applies accordingly to this presumption.</b></p>	<p>Under the CESL, consumers have no real protection against grossly unfair clauses that have been individually negotiated.</p> <p>Where a trader supplies a term that is grossly, grossly unfair, and in negotiations with the consumer the term is modified so that it is just grossly unfair, the consumer loses protection provided by Chapter 8 (even though it is not entirely clear whether Articles 84 and 85 also apply to individually negotiated clauses). The requirements of unfair exploitation, however, may be difficult to prove.</p> <p>It is therefore suggested that a (rebuttable) presumption that a grossly unfair term in a consumer contract was obtained by way of unfair exploitation should be introduced.</p>

<p style="text-align: center;"><i>Article 52</i> <i>Notice of avoidance</i></p> <ol style="list-style-type: none"> <li>1. Avoidance is effected by notice to the other party.</li> <li>2. A notice of avoidance is effective only if it is given within: <ol style="list-style-type: none"> <li>(a) six months in case of mistake; and</li> <li>(b) one year in case of fraud, threats and unfair exploitation;</li> </ol> <p>after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely.</p> </li> </ol>	<p style="text-align: center;"><i>Article 53</i> <i>Notice of avoidance</i></p> <ol style="list-style-type: none"> <li>1. Avoidance is effected by notice to the other party.</li> <li>2. A notice of avoidance is effective only if it is given within: <ol style="list-style-type: none"> <li>(a) six months in case of mistake; and</li> <li>(b) one year in case of fraud, threats and unfair exploitation;</li> </ol> <p>after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely.</p> </li> </ol>	
<p style="text-align: center;"><i>Article 53</i> <i>Confirmation</i></p> <p>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.</p>	<p style="text-align: center;"><i>Article 54</i> <i>Confirmation</i></p> <p>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.</p>	
<p style="text-align: center;"><i>Article 54</i> <i>Effects of avoidance</i></p> <ol style="list-style-type: none"> <li>1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.</li> </ol>	<p style="text-align: center;"><i>Article 55</i> <i>Effects of avoidance</i></p> <ol style="list-style-type: none"> <li>1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.</li> </ol>	

<p>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.</p> <p>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 17.</p>	<p>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.</p> <p>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.</p>	
<p style="text-align: center;"><i>Article 55</i> <i>Damages for loss</i></p> <p>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.</p>	<p style="text-align: center;"><i>Article 56</i> <i>Damages for loss</i></p> <p>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.</p> <p>2. <b>Claims for damages shall be subject to the provisions in Chapter 15 Section 3, with appropriate adaptations.</b></p>	<p>Clarification that the rules on the foreseeability of loss, on contributory negligence etc apply.</p>

<p style="text-align: center;"><i>Article 57</i> <i>Choice of remedy</i></p> <p>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.</p>	<p style="text-align: center;"><i>Article 57</i> <i>Choice of remedy</i></p> <p>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.</p>	
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Part III Assessing what is in the contract		
	Chapter 6 Interpretation	
<p><i>Article 58</i> <i>General rules on interpretation of contracts</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.</li> <li>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 to it.</li> </ol> <p><i>Article 12</i> <i>Unilateral statements or conduct</i></p>	<p><i>Article 58</i> <i>General rules on interpretation of contracts</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where one party intended an expression used in the contract, <b>or equivalent conduct referred to in Article 14(2)</b>, 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 <b>or equivalent conduct</b> is to be interpreted in the way intended by the first party.</li> <li>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, <b>in the light of the matters mentioned in Article 59 and the contract as a whole, to the expressions or equivalent conduct used by the</b></li> </ol>	<p>(1) Conduct as an equivalent to statements is missing here, while being stressed in Article 12 CESL and at other places.</p> <p>(2) It is necessary to make it clear that the view of a third party may count only as far as it relates to what the parties have actually said, written or done.</p>

<ol style="list-style-type: none"> <li>1. A unilateral statement indicating intention is to be interpreted in the way in which the person to whom it is addressed could be expected to understand it.</li> <li>2. Where the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the person making the statement.</li> <li>3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.</li> <li>4. ...</li> <li>5. Any reference to a statement referred to in this Article includes a reference to conduct which can be regarded as the equivalent of a statement.</li> </ol> <p style="text-align: center;"><i>Article 60</i> <i>Reference to contract as a whole</i></p> <p>Expressions used in a contract are to be interpreted in the light of the contract as a whole.</p>	<ol style="list-style-type: none"> <li>4. <b>The rules in this Chapter apply to the interpretation of an offer, acceptance or other unilateral statement indicating intention with appropriate adaptations.</b></li> </ol>	<p><b>(3)</b> It is preferable to have the rule on interpretation of unilateral statements in this Chapter, which is titled "Interpretation". This is where the user will most probably expect to find it and will look for it. As Article 12 CESL more or less restates the rules applicable to contracts, albeit with different words, it is sufficient to say that the rules in the Chapter apply with appropriate adaptations.</p>
<p style="text-align: center;"><i>Article 59</i> <i>Relevant matters</i></p> <p>In interpreting a contract, regard may be had, in particular, to:</p>	<p style="text-align: center;"><i>Article 59</i> <i>Relevant matters</i></p> <p>In <b>assessing the meaning of expressions or equivalent conduct</b> regard may be had, in particular,</p>	<p><b>(1)</b> The use of preliminary negotiations as an aid to interpretation is time-consuming and costly where disputes arise. In the light of</p>

<ul style="list-style-type: none"> <li>(a) the circumstances in which it was concluded, including the preliminary negotiations;</li> <li>(b) the conduct of the parties, even subsequent to the conclusion of the contract;</li> <li>(c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;</li> <li>(d) usages which would be considered generally applicable by parties in the same situation;</li> <li>(e) practices which the parties have established between themselves;</li> <li>(f) the meaning commonly given to expressions in the branch of activity concerned;</li> <li>(g) the nature and purpose of the contract; and</li> <li>(h) good faith and fair dealing.</li> </ul>	<p>to:</p> <ul style="list-style-type: none"> <li>(a) <b>any commonly understood</b> meaning given to expressions in the branch of activity concerned;</li> <li>(b) the nature and purpose of the contract;</li> <li>(c) the circumstances in which it was concluded ■;</li> <li>(d) the conduct of the parties, <b>both prior to and</b> subsequent to the conclusion of the contract;</li> <li>(e) <b>any</b> interpretation <b>which the parties have previously</b> given to expressions identical or similar to those used in the contract, <b>and any practices established between</b> the parties;</li> <li>(f) <b>any relevant general</b> usages;</li> <li>(g) good faith and fair dealing.</li> </ul>	<p>these practical disadvantages, when weighed against the limited benefit to be derived from them, it would be better to remove this reference.</p> <p><b>(2)</b> The remainder of the revisions are intended to render the draft clearer and more concise.</p>
<p style="text-align: center;"><i>Article 61</i> <i>Language discrepancies</i></p> <p>Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.</p>	<p style="text-align: center;"><i>Article 60</i> <i>Language ■</i></p> <p>Where a contract ■ is in two or more language versions <b>unless one is expressed as being</b> authoritative, ■ the version in which the contract was originally drawn up is to be treated as the authoritative one.</p>	<p>Revisions have been made to render the rule more succinct.</p>

<p><i>Article 63</i> <i>Preference for interpretation which gives contract terms effect</i></p> <p>An interpretation which renders the contract terms effective prevails over one which does not.</p>	<p><i>Article 61</i> <i>Preference for interpretation which gives contract terms effect</i></p> <p>An interpretation which renders the contract terms effective prevails over one which does not.</p>	
<p><i>Article 62</i> <i>Preference for individually negotiated contract terms</i></p> <p>To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.</p> <p><i>Article 65</i> <i>Interpretation against supplier of a contract term</i></p> <p>Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.</p>	<p><i>Article 62</i> <b>Not</b> <i>individually negotiated contract terms</i></p> <ol style="list-style-type: none"> <li>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 ■.</li> <li>2. Where, in a contract which does not fall under Article <b>63</b>, 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.</li> </ol>	<p>Article 62 CESL has been merged with Article 65. There should only be one article dealing with terms that have not been individually negotiated.</p>
<p><i>Article 64</i> <i>Interpretation in favour of consumers</i></p> <ol style="list-style-type: none"> <li>1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless</li> </ol>	<p><i>Article 63</i> <i>Interpretation in favour of consumers</i></p> <p>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.</p>	

<p>the term was supplied by the consumer.</p> <p>2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	■	Cf ELI Article 9 (3).
	<b>Chapter 7 Contents and effects</b>	
	<b>SECTION 1 HOW CONTRACT TERMS ARE ASCERTAINED</b>	
<p><i>Article 66</i> <i>Contract terms</i></p> <p>The terms of the contract are derived from:</p> <ul style="list-style-type: none"> <li>(a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;</li> <li>(b) any usage or practice by which parties are bound by virtue of Article 67;</li> <li>(c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and</li> <li>(d) any contract term implied by virtue of Article 68.</li> </ul>	<p><i>Article 64</i> <i>Contract terms</i></p> <p>The terms of the contract are derived from:</p> <ul style="list-style-type: none"> <li>(a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;</li> <li><b>(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;</b></li> <li>(c) any usage or practice by which parties are bound by virtue of Article 65;</li> <li>(d) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and</li> </ul>	<p>It is necessary to state that the information provided under Chapter 2 forms part of the contract terms and is not only implied by virtue of Article 69 (ELI Article 67) under the restrictive conditions mentioned therein. This is particular true of information concerning the characteristics of what is to be supplied.</p>

	(e) any contract term implied by virtue of Articles <b>66 or 67</b> .	
<p><i>Article 67</i> <i>Usages and practices in contracts between traders</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.</li> <li>3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law</li> </ol>	<p><i>Article 65</i> <i>Usages and practices in contracts between traders</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.</li> <li>3. Usages and practices do not bind the parties to the extent to which they conflict with <b>the agreement of the parties</b> or any mandatory rules of the Common European Sales Law.</li> </ol>	<p><b>(1)</b> There is no good reason, consistent with freedom of contract, why usages should prevail over contract terms which have been individually negotiated.</p> <p><b>(2)</b> Additionally, as originally drafted the provision did not make sense as usages are simply a means for determining the contractual terms.</p>
<p><i>Article 69</i> <i>Contract terms derived from certain pre-contractual statements</i></p> <ol style="list-style-type: none"> <li>1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless: <ol style="list-style-type: none"> <li>(a) the other party was aware, or could be expected to have been aware</li> </ol> </li> </ol>	<p><i>Article 66</i> <i>Contract terms derived from certain pre-contractual statements</i></p> <ol style="list-style-type: none"> <li>1. Where the trader, <b>or a person engaged in advertising or marketing for the trader, publicly</b> 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: <ol style="list-style-type: none"> <li>(a) the other party was aware, or could be</li> </ol> </li> </ol>	<p><b>(1)</b> As statements made individually should be dealt with under Article 67 (ELI Article 64) Article 69 is now restricted to statements made publicly.</p> <p><b>(2)</b> The former paragraph 2 can easily be integrated into paragraph 1 in order to reduce complexity.</p>

<p>when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or</p> <p>(b) the other party's decision to conclude the contract could not have been influenced by the statement.</p> <p>2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.</p> <p>3. 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.</p> <p>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.</p>	<p>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</p> <p>(b) the other party's decision to conclude the contract could not have been influenced by the statement.</p> <p>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.</p> <p>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.</p>	
<p><i>Article 68</i></p> <p><i>Contract terms which may be implied</i></p> <p>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</p>	<p><i>Article 67</i></p> <p><i>Contract terms which may be implied</i></p> <p>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</p>	

<p>or any rule of the Common Sales Law, an additional contract term may be implied, having regard in particular to:</p> <ul style="list-style-type: none"> <li>(a) the nature and purpose of the contract;</li> <li>(b) the circumstances in which the contract was concluded; and</li> <li>(c) good faith and fair dealing.</li> </ul> <p>2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.</p> <p>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.</p>	<p>or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:</p> <ul style="list-style-type: none"> <li>(a) the nature and purpose of the contract; <b>and</b></li> <li>(b) the circumstances in which the contract was concluded.■</li> </ul> <p>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■.</p> <p>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.</p>	
<p style="text-align: center;"><i>Article 73</i> <i>Determination of price</i></p> <p>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.</p>	<p style="text-align: center;"><i>Article 68</i> <i>Determination of price</i></p> <p>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.</p>	



<p style="text-align: center;"><i>Article 74</i> <i>Unilateral determination by a party</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>The parties may not exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p style="text-align: center;"><i>Article 69</i> <i>Unilateral determination by a party</i></p> <ol style="list-style-type: none"> <li>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.</li> <li><b>In contracts between a trader and a consumer</b>, the parties may not, <b>to the detriment of the consumer</b>, exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p>This article constrains freedom of contract to too great an extent in respect of B2B contracts. It ought therefore to be revised accordingly.</p>
<p style="text-align: center;"><i>Article 75</i> <i>Determination by a third party</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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</li> </ol>	<p style="text-align: center;"><i>Article 70</i> <i>Determination by a third party</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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</li> </ol>	<p>A definition of 'court' is of general relevance and should be included</p>

<p>reasonable price, or a reasonable term is substituted.</p> <p>3. For the purpose of paragraph 1 a 'court' includes an arbitral tribunal.</p> <p>4. 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.</p>	<p>reasonable price, or a reasonable term is substituted. ■</p> <p>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.</p>	<p>in the definitions.</p>
<p><i>Article 72</i> <i>Merger clauses</i></p> <p>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.</p> <p>2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.</p> <p>3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.</p> <p>4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p><i>Article 71</i> <i>Merger clauses</i></p> <p>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.</p> <p>2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.</p> <p>3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.</p> <p>4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	

	<p><b>SECTION 2      CONTRACTS BETWEEN A TRADER AND A CONSUMER</b></p>	
<p><i>Article 70</i> <i>Duty to raise awareness of not individually negotiated contract terms</i></p> <ol style="list-style-type: none"> <li>Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.</li> <li>For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.</li> <li>The parties may not exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p><i>Article 72</i> <i>Duty to raise awareness of not individually negotiated contract terms <b>in contracts with consumers</b></i></p> <ol style="list-style-type: none"> <li>Contract terms supplied by <b>a trader</b> and not individually negotiated within the meaning of Article 8(1)(e) may be invoked against <b>a consumer</b> only if the <b>consumer</b> was aware of them, or if the <b>trader</b> took reasonable steps to draw the <b>consumer's</b> attention to them, before or <b>at the time</b> the contract was concluded.</li> <li>For the purposes of this Article, <b>■</b> contract terms are not sufficiently brought to the consumer's attention <b>unless they are presented:</b> <ol style="list-style-type: none"> <li><b>in a conspicuous way, which is suitable to attract the consumer's specific attention;</b></li> <li><b>in an accessible way, which allows the consumer to take adequate notice of their content before the contract is concluded; and</b></li> <li><b>in a way comprehensible to the</b></li> </ol> </li> </ol>	<p><b>(1)</b> It is not apposite to render this Article of general application. It is an issue of consumer protection, and one which cannot properly be extended to traders, whether the trader is an SME or otherwise. It is not apposite as traders are to be expected to read agreements, including any small print.</p> <p><b>(2)</b> A positive definition of what steps must be taken to bring contractual terms to a consumer's attention is required in order to eliminate uncertainty.</p>

	<p>consumer, without prejudice to the transparency requirement under Article 80.</p> <p>■</p>	<p>(3) Cf ELI Article 9 (3).</p>
<p><i>Article 71</i> <i>Additional payments in contracts between a trader and a consumer</i></p> <p>1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.</p> <p>2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p><i>Article 73</i> <i>Additional payments in contracts between a trader and a consumer</i></p> <p>1. In a contract between a trader and a consumer, <b>no</b> contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation■ is ■binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment.</p> <p>2. <b>Any additional payment made by a consumer unless the obligation to pay is binding, consistently with paragraph 1, is recoverable by the consumer.</b></p> <p>■</p>	<p>(1) The revision renders this clause clearer. There is no need to include the sub-clause on default options as the article is intended to cover all clauses for additional payments. It should be drafted simply to draw out that point.</p> <p>(2) The final sentence in paragraph 1 deals with the consequence of breach of paragraph 1. It should properly therefore be set out in a separate paragraph.</p> <p>(3) Cf ELI Article 9 (3).</p>

	<b>SECTION 3     OTHER SPECIFIC CONTRACT TERMS</b>	
	<p style="text-align: center;"><b>Article 74</b> <b><i>Conditional rights and obligations</i></b></p> <ol style="list-style-type: none"> <li>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).</li> <li>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.</li> <li>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.</li> </ol>	A rule on conditions is missing from the CESL.
<p style="text-align: center;"><b>Article 78</b> <b><i>Contract terms in favour of third parties</i></b></p> <ol style="list-style-type: none"> <li>1. The contracting parties may, by the contract, confer a right on a third party. The third party</li> </ol>	<p style="text-align: center;"><b>Article 75</b> <b><i>Contract terms in favour of third parties</i></b></p> <ol style="list-style-type: none"> <li>1. The contracting parties may, by the contract, confer a right on a third party. The third party</li> </ol>	

<p>need not be in existence or identified at the time the contract is concluded but needs to be identifiable.</p> <p>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.</p> <p>3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:</p> <p>(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</p> <p>(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.</p> <p>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.</p> <p>5. The contracting parties may remove or modify the contract term conferring the right if this is</p>	<p>need not be in existence or identified at the time the contract is concluded but needs to be identifiable.</p> <p>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.</p> <p>3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:</p> <p>(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</p> <p>(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.</p> <p>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.</p> <p>5. The contracting parties may remove or modify the contract term conferring the right if this is</p>	
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<p>done before either of them has given the third party notice that the right has been conferred.</p>	<p>done before either of them has given the third party notice that the right has been conferred. <b>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.</b></p>	<p>This rule was copied from Article 9:303 DCFR because there is no reason why the parties should not be able to change the contract later where there was no need to protect the third party's reliance.</p>
<p style="text-align: center;"><i>Article 77</i> <i>Contracts of indeterminate duration</i></p> <ol style="list-style-type: none"> <li>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 not exceeding two months.</li> <li>2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p style="text-align: center;"><i>Article 76</i> <i>Contracts of indeterminate duration</i></p> <ol style="list-style-type: none"> <li>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■.</li> <li>2. In relations between a trader and a consumer <b>the period under paragraph 1 shall not exceed two months.</b></li> <li>3. The parties may not■ exclude the application of this Article or derogate from or vary its effects.</li> </ol>	<p>It is inappropriate to bind any party, including traders, to a contract for a period without any temporal limitation. The two month period should, however, only apply to consumer contracts.</p>

	<b>Chapter 8 Unfair contract terms</b>	
	<b>SECTION 1 GENERAL PROVISIONS</b>	
<p><i>Article 79</i> <i>Effects of unfair contract terms</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.</li> </ol>	<p><i>Article 77</i> <i>Effects of unfair contract terms</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.</li> </ol>	
<p><i>Article 80</i> <i>Exclusions from unfairness test</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.</li> </ol>	<p><i>Article 78</i> <i>Exclusions from unfairness test</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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 <b>80</b>.</li> </ol>	



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.	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.	
<p><i>Article 81</i> <i>Mandatory nature</i></p> <p>The parties may not exclude the application of this Chapter or derogate from or vary its effects.</p>	<p><i>Article 79</i> <i>Mandatory nature</i></p> <p>The parties may not exclude the application of this Chapter or derogate from or vary its effects.</p>	
	<p><b>SECTION 2    UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN A TRADER AND A CONSUMER</b></p>	
<p><i>Article 82</i> <i>Duty of transparency in contract terms not individually negotiated</i></p> <p>Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language.</p>	<p><i>Article 80</i> <i>Duty of transparency in contract terms not individually negotiated</i></p> <p>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.</p>	
<p><i>Article 83</i> <i>Meaning of "unfair" in contracts between a trader and a consumer</i></p> <p>1. In a contract between a trader and a consumer, a contract term supplied by the</p>	<p><i>Article 81</i> <i>Meaning of "unfair" in contracts between a trader and a consumer</i></p> <p>1. In a contract between a trader and a consumer, a contract term supplied by the trader which</p>	

<p>trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.</p> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) whether the trader complied with the duty of transparency set out in Article 82;</li> <li>(b) the nature of what is to be provided under the contract;</li> <li>(c) the circumstances prevailing during the conclusion of the contract;</li> <li>(d) to the other contract terms; and</li> <li>(e) to the terms of any other contract on which the contract depends.</li> </ul>	<p>has not been individually negotiated ■ 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.</p> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) whether the trader complied with the duty of transparency set out in Article 80;</li> <li>(b) the nature of what is to be provided under the contract;</li> <li>(c) the circumstances prevailing during the conclusion of the contract;</li> <li>(d) to the other contract terms; and</li> <li>(e) to the terms of any other contract on which the contract depends.</li> </ul>	
<p style="text-align: center;"><i>Article 84</i></p> <p style="text-align: center;"><i>Contract terms which are always unfair</i></p> <p>A contract term is always unfair for the purposes of this Section if its object or effect is to:</p> <ul style="list-style-type: none"> <li>(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</li> </ul>	<p style="text-align: center;"><i>Article 82</i></p> <p style="text-align: center;"><i>Contract terms which are always unfair</i></p> <p>A contract term is always unfair for the purposes of this Section if its object or effect is to:</p> <ul style="list-style-type: none"> <li>(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</li> </ul>	

<p>trader or of someone acting on behalf of the trader;</p> <p>(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;</p> <p>(c) limit 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;</p> <p>(d) 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;</p> <p>(e) 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;</p> <p>(f) 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;</p>	<p>trader or of someone acting on behalf of the trader;</p> <p>(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;</p> <p>(c) limit 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;</p> <p>(d) 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;</p> <p>(e) 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;</p> <p>(f) 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;</p>	
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<p>(g) provide that the consumer is bound by the contract when the trader is not;</p> <p>(h) require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for conclusion of the contract;</p> <p>(i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;</p> <p>(j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;</p> <p>(k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.</p>	<p>(g) provide that the consumer is bound by the contract when the trader is not;</p> <p>(h) 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;</p> <p>(i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;</p> <p>(j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;</p> <p>(k) determine that non-individually negotiated contract terms within the meaning of Article 8(1)(e) prevail or have preference over contract terms which have been individually negotiated.</p>	
<p><i>Article 85</i></p> <p><i>Contract terms which are presumed to be unfair</i></p> <p>A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:</p> <p>(a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;</p> <p>(b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-</p>	<p><i>Article 83</i></p> <p><i>Contract terms which are presumed to be unfair</i></p> <p>A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:</p> <p>(a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;</p> <p>(b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-</p>	

<p>performance by the trader of obligations under the contract;</p> <p>(c) 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;</p> <p>(d) 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;</p> <p>(e) 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;</p> <p>(f) 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;</p> <p>(g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;</p>	<p>performance by the trader of obligations under the contract;</p> <p>(c) 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;</p> <p>(d) 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;</p> <p>(e) 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;</p> <p>(f) 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;</p> <p>(g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;</p>	
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<p>(h) 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;</p> <p>(i) 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;</p> <p>(j) 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;</p> <p>(k) 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</p>	<p>(h) 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;</p> <p>(i) 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;</p> <p>(j) 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;</p> <p>(k) 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</p>	
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<p>prices vary is explicitly described;</p> <p>(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;</p> <p>(m) allow a trader to transfer its rights and 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;</p> <p>(n) 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;</p> <p>(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;</p> <p>(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;</p> <p>(q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the</p>	<p>prices vary is explicitly described;</p> <p>(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;</p> <p>(m) 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;</p> <p>(n) 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;</p> <p>(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;</p> <p>(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;</p> <p>(q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the</p>	<p>The rule under (m) has raised much concern among the legal community as it has been understood as saying you cannot transfer, e.g., the trader's right to receive the purchase price (which is guaranteed by the law in many Member States).</p>
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<p>consumer against claims by the trader;</p> <p>(r) 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;</p> <p>(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;</p> <p>(t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;</p> <p>(u) 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;</p> <p>(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;</p> <p>(w) 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.</p>	<p>(r) 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;</p> <p>(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;</p> <p>(t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;</p> <p>(u) 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;</p> <p>(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;</p> <p>(w) 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.</p>	



	<b>SECTION 3     UNFAIR CONTRACT TERMS IN CONTRACTS BETWEEN TRADERS</b>	
<p style="text-align: center;"><i>Article 86</i> <i>Meaning of “unfair” in contracts between traders</i></p> <p>1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:</p> <ul style="list-style-type: none"> <li>(a) it forms part of not individually negotiated terms within the meaning of Article 7; and</li> <li>(b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.</li> </ul> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) the nature of what is to be provided under the contract;</li> <li>(b) the circumstances prevailing during the conclusion of the contract;</li> <li>(c) the other contract terms; and</li> <li>(d) the terms of any other contract on which the contract depends.</li> </ul>	<p style="text-align: center;"><i>Article 84</i> <i>Meaning of “unfair” in contracts between traders</i></p> <p>1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:</p> <ul style="list-style-type: none"> <li>(a) it ■was not individually negotiated■; and</li> <li>(b) it ■grossly deviates from good commercial practice, contrary to good faith and fair dealing.</li> </ul> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) the nature of what is to be provided under the contract;</li> <li>(b) the circumstances prevailing during the conclusion of the contract;</li> <li>(c) the other contract terms; and</li> <li>(d) the terms of any other contract on which the contract depends.</li> </ul>	<p>Revisions have been made to render the language more concise.</p>

	<b>Part IV Obligations of the parties</b>  <b>Ex Articles 89-90, Chapters 10, 12 and 14 and Sections 1-3 of Chapter 15</b>	
	<b>Chapter 9 Obligations of the parties to a sales contract</b>	
	<b>SECTION 1 THE SELLER'S OBLIGATIONS</b>	
<p><i>Article 91</i> <i>Main obligations of the seller</i></p> <p>The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must:</p> <ul style="list-style-type: none"> <li>(a) deliver the goods or supply the digital content;</li> <li>(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;</li> <li>(c) ensure that the goods or the digital content are in conformity with the contract;</li> <li>(d) ensure that the buyer has the right to use the digital content in accordance with the contract; and</li> <li>(e) deliver such documents representing or</li> </ul>	<p><i>Article 85</i> <i>Main obligations of the seller</i></p> <p>1. The seller of goods or ■of digital content ■ must:</p> <ul style="list-style-type: none"> <li>(a) deliver the goods or supply the digital content;</li> <li>(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;</li> <li>(c) ensure that the goods or the digital content are in conformity with the contract;</li> <li>(d) ensure that the buyer has the right to use the digital content in accordance with the contract; and</li> </ul>	<p><b>(1)</b> In the CESL, Part IV on the obligations and remedies of the parties starts in Chapter 9 with definitions of non-performance, fundamental and excused non-performance, with change of circumstances and with a rule generalising certain specific rules in Part IV to other cases.</p> <p>Users are thus confronted right from the outset with extremely abstract rules that are relevant only where something has gone seriously wrong or, in very exceptional circumstances, before getting to know anything about obligations which arise in the average case.</p> <p>This is not user friendly, particularly for consumers. To remedy this it is</p>

<p>relating to the goods or documents relating to the digital content as may be required by the contract.</p>	<p>(e) deliver such documents representing or relating to the goods or ■digital content as may be required by the contract.</p> <p>2. <b>The provisions relating to delivery apply accordingly to the supply of digital content.</b></p>	<p>suggested that the draft should be brought more closely in line with the lifecycle of a contract. It should therefore start with the ‘normal’ content of contractual obligations.</p> <p><b>(2)</b> In line with the approach taken in ELI Article 2(b) the term ‘seller’ should, from the outset, refer as well to suppliers of digital content.</p> <p><b>(3)</b> It is necessary to clarify that the term ‘delivery’ includes the supplying of digital content. This is required, amongst other things, for the purpose of rules on the passing of risk.</p>
<p style="text-align: center;"><i>Article 94</i> <i>Method of delivery</i></p> <p>1. Unless agreed otherwise, the seller fulfils the obligation to deliver:</p> <p style="padding-left: 40px;">(a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or 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;</p> <p style="padding-left: 40px;">(b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to</p>	<p style="text-align: center;"><i>Article 86</i> <i>Method of delivery</i></p> <p>1. Unless agreed otherwise, the seller fulfils the obligation to deliver:</p> <p style="padding-left: 40px;">(a) in the case of a consumer sales contract ■which is a distance or off-premises contract or 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;</p> <p style="padding-left: 40px;">(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</p>	<p><b>(1)</b> See the much simplified terminology used in Article 2(b) and throughout the rest of the ELI draft.</p> <p><b>(2)</b> As the CESL stands, there is a certain discrepancy between the terms and concepts used in the rules on delivery and the rules on the passing of risk.</p> <p>However, the two must necessarily coincide, otherwise situations might arise where a seller has fulfilled all its</p>

<p>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</p> <p>(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.</p> <p>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.</p> <p style="text-align: center;"><i>Article 142</i> <i>Passing of risk in a consumer sales contract</i></p> <p>1. ...</p> <p>4. 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, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.</p>	<p>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</p> <p>(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.</p> <p>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, <b>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.</b></p>	<p>obligations under the contract but risk nevertheless does not pass, or where risk has passed but the trader still needs to fulfil its obligation to deliver.</p> <p>It seems preferable to have the provisions on delivery in one place. Reference can then be made in the provisions on the passing of risk, to the rules on delivery.</p>
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<p style="text-align: center;"><i>Article 96</i> <i>Seller's obligations regarding carriage of the goods</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	<p style="text-align: center;"><i>Article 87</i> <i>Seller's obligations regarding carriage of the goods</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	

	<p style="text-align: center;"><b>Article 88</b> <b>Retention of title</b></p> <p><b>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.</b></p>	<p>It needs to be clearly stated in the CESL that the obligation to transfer ownership of goods does not apply in full where a retention-of-title clause has been agreed upon.</p>
	<p style="text-align: center;"><b>SECTION 2 CONFORMITY OF THE GOODS AND DIGITAL CONTENT</b></p>	
<p style="text-align: center;"><b>Article 99</b> <b>Conformity with the contract</b></p> <p>1. In order to conform with the contract, the goods or digital content must:</p> <ul style="list-style-type: none"> <li>(a) be of the quantity, quality and description required by the contract;</li> <li>(b) be contained or packaged in the manner required by the contract; and</li> <li>(c) be supplied along with any accessories, installation instructions or other instructions required by the contract.</li> </ul>	<p style="text-align: center;"><b>Article 89</b> <b>Conformity with the contract</b></p> <p>1. In order to conform with the contract, the goods or digital content must:</p> <ul style="list-style-type: none"> <li>(a) be of the quantity, quality and description required by the contract;</li> <li>(b) be contained or packaged in the manner required by the contract; and</li> <li>(c) be supplied along with any accessories, installation instructions or other instructions required by the contract.</li> </ul>	

<p>2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 100, 101 and 102, save to the extent that the parties have agreed otherwise.</p> <p>3. In a consumer sales contract, any agreement derogating from the requirements of Articles 100, 102 and 103 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.</p> <p>4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of paragraph 3 or derogate from or vary its effects.</p>	<p>2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles <b>90 to 92</b>, save to the extent that the parties have agreed otherwise.</p> <p>3. In a consumer sales contract, any agreement derogating from the requirements of Articles <b>90 and 92</b> 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.</p> <p>■</p>	<p>Cf ELI Article 9(3).</p>
<p><i>Article 100</i> <i>Criteria for conformity of the goods and digital content</i></p> <p>The goods or digital content must:</p> <p>(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</p>	<p><i>Article 90</i> <i>Criteria for conformity of the goods and digital content</i></p> <p>The goods or digital content must:</p> <p>(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</p>	

<p>judgement;</p> <p>(b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;</p> <p>(c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;</p> <p>(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;</p> <p>(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;</p> <p>(f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69; and</p> <p>(g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.</p> <p style="text-align: center;"><i>Article 103</i> <i>Limitation on conformity of digital content</i></p>	<p>judgement;</p> <p>(b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;</p> <p>(c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;</p> <p>(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;</p> <p>(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;</p> <p>(f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Articles <b>64(b) and 66</b>; and</p> <p>(g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect ■regard is to be had, <b>inter alia</b>, to whether or not the <b>goods or</b> digital content <b>were</b> supplied in exchange for the payment of a price.</p>	<p><b>(1)</b> Subparagraph (g) should be clarified so that the existence of a price is not the sole aspect that needs to be taken into account.</p> <p><b>(2)</b> The rule in Article 103 regarding the limitation on conformity of digital content should be deleted. It tends to mislead rather than clarify. Where the parties have agreed that digital</p>
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<p>Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.</p> <p style="text-align: center;"><i>Article 104</i> <i>Buyer's knowledge of lack of conformity in a contract between traders</i></p> <p>In a contract between traders, the seller is not liable for any lack of conformity of the goods if, the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity.</p>		<p>content must be delivered in their latest version, or where this has been stated by the trader during negotiations, or where this may be expected by the buyer, the fact that updated digital content has become available after the conclusion of the contract must be relevant.</p> <p><b>(3)</b> Equally, Article 104 is extremely misleading and should be deleted. The fact that the buyer knew or could not have been unaware of the lack of conformity at the time the contract was concluded should not mean that the buyer loses all remedies. Normally, where the buyer knows about the non-conformity and nevertheless makes the contract this will be so because the buyer reasonably believes the non-conformity will be cured before delivery.</p>
<p style="text-align: center;"><i>Article 101</i> <i>Incorrect installation under a consumer sales contract</i></p> <p>1. 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:</p>	<p style="text-align: center;"><i>Article 91</i> <b>■</b><i>Installation under a consumer sales contract</i></p> <p>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:</p> <p style="text-align: center;">(a) the goods or the digital content were installed by the seller or under the</p>	<p><b>(1)</b> It is surprising to find a rule on non-conformity in the Chapter on the sellers' obligations. At the very least the heading should be changed. Further reformulation should be considered.</p>

<p>(a) the goods or the digital content were installed by the seller or under the seller's responsibility; or</p> <p>(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.</p> <p>2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p>seller's responsibility; or</p> <p>(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.</p> <p>■</p>	<p>(2) Cf. ELI Article 9(3).</p>
<p><i>Article 102</i> <i>Third party rights or claims</i></p> <p>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.</p> <p>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:</p> <p>(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 place of business or in contracts between a trader and a consumer the</p>	<p><i>Article 92</i> <i>Third party rights or claims</i></p> <p>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.</p> <p>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:</p> <p>(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 <b>habitual residence</b> ■ indicated by the <b>buyer</b> at the time of the</p>	<p>(1) The term 'habitual residence' is used in relation to both traders and consumers, and the same is the case, for instance, in the Rome I and Rome II Regulations. The terminology should be consistent throughout the instrument.</p>

<p>consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and</p> <p>(b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.</p> <p>3. In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>4. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>5. 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.</p>	<p>conclusion of the contract; and</p> <p>(b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.</p> <p>3. ■ Paragraph 2 does not apply where</p> <p>(a) <b>the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer;</b></p> <p>(b) <b>in a contract between traders</b>, 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</p> <p>(c) <b>in a contract</b> 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.</p> <p>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.</p>	<p>(2) Even in a contract between traders and consumers the trader should not be liable where a right or claim raised by a third party results from the trader's compliance with designs etc furnished by the buyer.</p>
<p><i>Article 105</i></p>	<p><i>Article 93</i></p>	

<p><i>Relevant time for establishing conformity</i></p> <ol style="list-style-type: none"> <li>1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter 14.</li> <li>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.</li> <li>3. In a case governed by point (a) of Article 101(1) 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 point (b) of Article 101(1) it is to be read as a reference to the time when the consumer had reasonable time for the installation.</li> <li>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.</li> <li>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.</li> </ol>	<p><i>Relevant time for establishing conformity</i></p> <ol style="list-style-type: none"> <li>1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter <b>10</b>.</li> <li>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.</li> <li>3. In a case governed by Article <b>91(a)</b> 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 <b>91(b)</b> it is to be read as a reference to the time when the consumer had reasonable time for the installation.</li> <li>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.</li> <li>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.</li> </ol>	
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	<b>SECTION 3 THE BUYER'S OBLIGATIONS</b>	
<p><i>Article 123</i> <i>Main obligations of the buyer</i></p> <p>1. The buyer must:</p> <ul style="list-style-type: none"> <li>(a) pay the price;</li> <li>(b) take delivery of the goods or the digital content; and</li> <li>(c) take over documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.</li> </ul> <p>2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.</p>	<p><i>Article 94</i> <i>Main obligations of the buyer</i></p> <p>1. The buyer must:</p> <ul style="list-style-type: none"> <li>(a) pay the price, <b>unless the goods or digital content are not supplied in exchange for a price;</b></li> <li>(b) take delivery of the goods or the digital content; and</li> <li>(c) take over documents representing or relating to the goods or ■relating to the digital content as may be required by the contract.</li> </ul> <p>2. Point <b>(b)</b> of paragraph 1 does not apply to contracts for the supply of digital content ■ not supplied <b>on a tangible medium.</b></p>	<p>This Article can be simplified.</p> <p>Furthermore, the imposition of an obligation on a buyer to take delivery of digital content not supplied on a tangible medium because such digital content might cause harm to the buyer's computer is unjustifiable. The buyer must have a right to reject it (while possibly remaining under an obligation to pay the price).</p>
<p><i>Article 129</i> <i>Taking delivery</i></p> <p>The buyer fulfils the obligation to take delivery by:</p> <ul style="list-style-type: none"> <li>(a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and</li> </ul>	<p><i>Article 95</i> <i>Taking delivery</i></p> <p>1. The buyer fulfils the obligation to take delivery by:</p> <ul style="list-style-type: none"> <li>(a) doing all the acts which could be expected in order to enable the seller</li> </ul>	<p>The clarification in the proposed new paragraph 2 is needed in order to achieve a sufficiently high level of consumer protection and to avoid uncertainty.</p>

<p>(b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.</p>	<p>to perform the obligation to deliver; and</p> <p>(b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.</p> <p>2. <b>In a distance or off-premises contract, in particular, physical absence of the consumer 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.</b></p>	<p>The new rule is clearly preferable to the solution under Article 142(3) CESL according to which the risk passes in distance and off-premises contracts only where a buyer takes physical possession. This rule is too narrow because it fails to protect consumers from other negative consequences that non-performance of the obligation to take delivery might entail. It is conversely too broad in that it protects consumers in cases where a specific date and time had been agreed upon.</p>
<p><i>Article 130</i> <i>Early delivery and delivery of wrong quantity</i></p> <p>1. ....</p> <p>2. 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.</p> <p>3. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.</p> <p>4. If the buyer retains the excess quantity it is treated as having been supplied under the</p>	<p><i>Article 96</i> <i>Delivery of wrong quantity</i></p> <p>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.</p> <p>2. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.</p> <p>3. If the buyer retains the excess quantity it is treated as having been supplied under the contract and must be paid for, <b>where a price</b></p>	<p>This Article can be simplified.</p>

<p>contract and must be paid for at the contractual rate.</p> <p>5. In a consumer sales contract paragraph 4 does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.</p> <p>6. This Article does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.</p>	<p><b>was agreed upon</b>, at the contractual rate.</p> <p>4. In a consumer sales contract paragraph 3 does not apply if the <b>consumer</b> reasonably believes that the <b>trader</b> has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.</p> <p>■</p>	
	<p><b>SECTION 4    PASSING OF RISK</b></p>	
<p><i>Article 140</i> <i>Effect of passing of risk</i></p> <p>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.</p>	<p><i>Article 97</i> <i>Effect of passing of risk</i></p> <p>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.</p>	
<p><i>Article 141</i> <i>Identification of goods or digital content to contract</i></p> <p>The risk does not pass to the buyer until the goods or the digital content are clearly identified as the</p>	<p><i>Article 98</i> <i>Identification of goods or digital content to contract</i></p> <p>The risk does not pass to the buyer until the goods or the digital content are clearly identified as the</p>	

goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.	goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.	
<p style="text-align: center;"><i>Article 142</i> <i>Passing of risk in a consumer sales contract</i></p> <ol style="list-style-type: none"> <li>1. In a consumer sales contract, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied.</li> <li>2. In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.</li> <li>3. Except where the contract is a distance or off-premises contract, paragraphs 1 and 2 do not apply where the consumer fails to perform the obligation to take over the goods or the digital content and the non-performance is not excused under Article 88. In this case, the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed.</li> </ol>	<p style="text-align: center;"><i>Article 99</i> <i>Passing of risk in a consumer sales contract</i></p> <ol style="list-style-type: none"> <li>1. In a consumer sales contract, the risk passes at the time when the consumer <b>takes delivery, within the meaning of Article 86</b>, of the goods or the tangible medium on which the digital content is supplied.</li> <li>2. <b>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 been taken unless the non-performance is ■excused under Article 122 or the consumer is entitled to withhold taking of delivery pursuant to Article 136.</b></li> </ol> <p style="text-align: center;">■</p>	<p>(1) As has been explained supra (at Article 86) the rules on passing of risk should be brought into line with the definition of ‘delivery’. It does not make sense to have a non-mandatory Article 86, i.e. to allow the parties, for instance, to agree on constructive delivery, but nevertheless to deny the passing of risk. Therefore, it is sufficient to refer to the definition of delivery.</p> <p>(2) According to ELI Article 85(2), delivery includes supply of digital content. Therefore, paragraph (2) becomes superfluous.</p> <p>(3) There is no justification for excluding distance and off-premises contracts. Rather, clarification of what a consumer owes in such cases is necessary (cf ELI Article 95(2)).</p> <p>(4) Furthermore, it is also necessary to clarify that the right to withhold performance of the obligation to take delivery, which is made for contracts between traders, also may apply to consumer sales contracts.</p> <p>(5) The rule in paragraph (4) is</p>



<p>4. 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, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.</p> <p>5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>		<p>included in the definition of ‘delivery’ in ELI Article 86.</p> <p><b>(6)</b> For the deletion of paragraph (5) cf ELI Article 9(3).</p>
<p style="text-align: center;"><i>Article 143</i> <i>Time when risk passes</i></p> <p>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.</p> <p>2. Paragraph 1 is subject to Articles 144, 145 and 146.</p> <p style="text-align: center;"><i>Article 144</i> <i>Goods placed at buyer’s disposal</i></p> <p>1. If the goods or the digital content are placed at the buyer’s disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to</p>	<p style="text-align: center;"><i>Article 100</i> <b><i>Passing of risk in contracts between traders</i></b></p> <p>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.</p> <p>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 <b>136</b>.</p> <p>3. <b>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,</b></p> <p style="padding-left: 40px;">(a) if the seller is not bound to hand over</p>	<p>The rules on the passing of risk in a contract between traders could be restructured for the sake of simplicity.</p>

<p>Article 113.</p> <p style="text-align: center;"><i>Article 145</i> <i>Carriage of the goods</i></p> <ol style="list-style-type: none"> <li>1. This Article applies to a contract of sale which involves carriage of goods.</li> <li>2. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.</li> <li>3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.</li> <li>4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.</li> </ol> <p style="text-align: center;"><i>Article 146</i> <i>Goods sold in transit</i></p> <ol style="list-style-type: none"> <li>1. This Article applies to a contract of sale which involves goods sold in transit.</li> <li>2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.</li> <li>3. If at the time of the conclusion of the contract</li> </ol>	<p>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;</p> <p>(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.</p> <p>4. <b>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</b> 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■.</p>	
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the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.		
	<b>Chapter 10      Obligations of the parties to a related service contract</b>	<p>To speak of ‘service provider’ and ‘customer’ instead of ‘seller’ and ‘buyer’ renders the text unnecessarily complex and leads to confusion, not least because the parties are necessarily the same.</p> <p>The same terminology should, it is suggested, be used throughout the whole instrument.</p>
	<b>SECTION 1      THE SELLER’S OBLIGATIONS</b>	
<p><i>Article 148</i> <i>Obligation to achieve result and obligation of care and skill</i></p> <ol style="list-style-type: none"> <li>1. The service provider must achieve any specific result required by the contract.</li> <li>2. ...</li> <li>3. ...</li> <li>4. 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</li> </ol>	<p><i>Article 101</i> <i>Obligation to achieve result ■</i></p> <ol style="list-style-type: none"> <li>1. The <b>seller</b> must achieve any specific result <b>stated in</b> the contract <b>explicitly</b>.</li> <li>2. <b>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:</b> <ol style="list-style-type: none"> <li>(a) <b>the result envisaged was one which the buyer could reasonably be expected to have envisaged; and</b></li> </ol> </li> </ol>	<p>The rules on related services in the CESL fail to afford the consumer sufficient protection.</p> <p>It is quite common for traders to only offer services on the basis of an obligation of care and skill even where it was clear that the motive for the consumer to order the service was to achieve a specific result and</p>

<p>the contract as required by Article 101.</p> <p>5. ...</p>	<p>(b) <b>the buyer had no reason to believe that there was a substantial risk that the result would not be achieved by the service.</b></p> <p>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 91.</p>	<p>achievement of the result was within the trader's control. Likewise, it is quite common for traders to offer a list of particular measures at a fixed price without disclosing to the consumer that taking these measures will not suffice for the achievement of the result envisaged. Therefore, the rule in Article IV. C. – 2:106 DCFR was adopted.</p>
<p><i>Article 148</i> <i>Obligation to achieve result and obligation of care and skill</i></p> <p>1. ...</p> <p>2. In the absence of any express or implied contractual obligation to achieve a specific result, the service provider 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.</p> <p>3. In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:</p> <p>(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the</p>	<p><i>Article 102</i> <i>Obligation ■ of care and skill</i></p> <p>1. In the absence of any ■ obligation to achieve a specific result, the <b>seller</b> 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.</p> <p>2. In determining the reasonable care and skill required of the <b>seller</b>, regard is to be had, among other things, to:</p> <p>(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the <b>buyer</b>;</p> <p>(b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar</p>	

<p>customer;</p> <p>(b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and</p> <p>(c) the time available for the performance of the related service.</p> <p>4. ...</p> <p>5. 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.</p>	<p>damage from occurring; and</p> <p>(c) the time available for the performance of the related service.</p> <p>3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of <b>this Article</b> or derogate from or vary its effects.</p>	
<p><i>Article 149</i> <i>Obligation to prevent damage</i></p> <p>The service provider 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.</p>	<p><i>Article 103</i> <i>Obligation to prevent damage</i></p> <p>The <b>seller</b> 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. <b>This is without prejudice to any general duty to prevent injury, damage or loss which a party owes to the other party.</b></p>	<p>Without this clarification there is the danger of an argument <i>e contrario</i>.</p>
<p><i>Article 151</i> <i>Obligation to provide invoice</i></p> <p>Where a separate price is payable for the related service, and the price is not a lump sum agreed at</p>	<p><i>Article 104</i> <i>Obligation to provide invoice</i></p> <p>Where a separate price is payable for the related service, and the price is not a lump sum agreed at</p>	

the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.	the time of conclusion of the contract, the <b>seller</b> must provide the <b>buyer</b> with an invoice which explains, in a clear and intelligible way, how the price was calculated.	
<p style="text-align: center;"><i>Article 152</i> <i>Obligation to warn of unexpected or uneconomic cost</i></p> <p>1. The service provider must warn the customer and seek the consent of the customer to proceed if:</p> <ul style="list-style-type: none"> <li>(a) the cost of the related service would be greater than already indicated by the service provider to the customer; or</li> <li>(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 service provider.</li> </ul> <p>2. A service provider who fails to obtain the consent of the customer 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.</p>	<p style="text-align: center;"><i>Article 105</i> <b>■Unexpected ■cost</b></p> <p>1. <b>The seller must warn the buyer and ask the buyer whether he intends to exercise his right under Article 108 to decline performance if:</b></p> <ul style="list-style-type: none"> <li>(a) the cost of the related service would be greater than already indicated by the <b>seller</b> to the <b>buyer</b>; or</li> <li>(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 <b>seller</b>.</li> </ul> <p>2. A <b>seller</b> who fails to <b>warn and ask the buyer</b> 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.</p> <p>3. <b>In a contract between a trader and a consumer, the trader is only entitled to a price exceeding the estimate given to the</b></p>	<p>Under the Proposal, it is not clear what the seller must or can do where the buyer neither consents to the further performance nor declines performance. The rule has been redrafted in order to clarify that it is the buyer who must become active and exercise his right to decline performance.</p> <p>The rules on related services in the CESL fail to afford sufficient consumer protection with respect to unexpected costs.</p> <p>Where a contract has already been concluded, and particularly where the seller has already started to provide the service under the contract, the customer's right to decline further performance (Article 158 CESL) is not sufficiently helpful. It is not because the consumer will have to pay the</p>

	<p><b>consumer before the conclusion of the contract where</b></p> <p>(a) <b>the increase is due to an impediment within the consumer's control; and</b></p> <p>(b) <b>the trader could not be expected to take the possibility of such an impediment into account when making the estimate.</b></p>	<p>price or a significant part of the price and will get nothing in return. The consumer must have a right against the seller to secure the result envisaged at the price indicated in advance.</p> <p>ELI Article 19(2)(b) requires the trader to make an estimate, and in particular indicate a maximum.</p>
	<b>SECTION 2 THE BUYER'S OBLIGATIONS</b>	
<p><i>Article 153</i> <i>Payment of the price</i></p> <ol style="list-style-type: none"> <li>1. The customer must pay any price that is payable for the related service in accordance with the contract.</li> <li>2. The price is payable when the related service is completed and the object of the related service is made available to the customer.</li> </ol>	<p><i>Article 106</i> <i>Payment of the price</i></p> <p>The <b>buyer</b> must pay any price that is payable for the related service in accordance with the contract.■</p>	<p>Paragraph (2) is integrated into Chapter 11 on performance of obligations.</p>
<p><i>Article 154</i> <i>Provision of access</i></p> <p>Where it is necessary for the service provider to obtain access to the customer's premises in order to perform the related service the customer must</p>	<p><i>Article 107</i> <i>Provision of access</i></p> <p>Where it is necessary for the <b>seller</b> to obtain access to the customer's premises in order to perform the related service the <b>buyer</b> must provide such access</p>	

provide such access at reasonable hours.	at reasonable hours.	
	<b>SECTION 3     DECLINE OF PERFORMANCE BY THE BUYER</b>	
<p style="text-align: center;"><i>Article 158</i> <i>Customer's right to decline performance</i></p> <ol style="list-style-type: none"> <li>1. The customer may at any time give notice to the service provider that performance, or further performance of the related service is no longer required.</li> <li>2. Where notice is given under paragraph 1: <ol style="list-style-type: none"> <li>(a) the service provider no longer has the right or obligation to provide the related service; and</li> <li>(b) the customer, 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.</li> </ol> </li> <li>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.</li> </ol>	<p style="text-align: center;"><i>Article 108</i> <i>Buyer's right to decline performance</i></p> <ol style="list-style-type: none"> <li>1. The <b>buyer</b> may at any time give notice to the <b>seller</b> that performance, or further performance, of the related service is no longer required.</li> <li>2. Where notice is given under paragraph 1: <ol style="list-style-type: none"> <li>(a) the <b>seller</b> no longer has the right or obligation to provide the related service; and</li> <li>(b) the <b>buyer</b>, 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.</li> </ol> </li> <li>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.</li> </ol>	



	<b>Chapter 11      Performance of obligations</b>	
	<b>SECTION 1      GENERAL</b>	
<p style="text-align: center;"><i>Article 93</i> <i>Place of delivery</i></p> <p>1. Where the place of delivery cannot be otherwise determined, it is:</p> <p style="padding-left: 40px;">(a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence at the time of the conclusion of the contract;</p> <p style="padding-left: 40px;">(b) in any other case,</p> <p style="padding-left: 80px;">(i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier;</p> <p style="padding-left: 80px;">(ii) where the contract does not involve carriage, the seller's place</p>	<p style="text-align: center;"><i>Article 109</i> <i>Place of <b>performance</b></i></p> <p>1. Where the place of <b>performance of an obligation</b> cannot be otherwise determined it is:</p> <p style="padding-left: 40px;">(a) <b>in the case of an obligation to pay, the residence of the party entitled to receive payment;</b></p> <p style="padding-left: 40px;">(b) in the case of <b>an obligation to deliver or supply in</b> a consumer sales contract ■which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence■;</p> <p style="padding-left: 40px;">(c) <b>in the case of an obligation to deliver in any other type of sale,</b> where the contract involves carriage of the goods by a carrier or series of carriers, the nearest collection point</p>	<p>Paragraph (3) is the solution in UPICC 6.1.6 and DCFR III-2:101 (3). It makes more sense than to stick to the place of residence at the time of conclusion of the contract, if that place is no longer the place of residence.</p>

<p>of business at the time of conclusion of the contract.</p> <p>2. If the seller has more than one place of business, the place of business for the purposes of point (b) of paragraph 1 is that which has the closest relationship to the obligation to deliver.</p> <p><i>Article 125</i> <i>Place of payment</i></p> <p>1. Where the place of payment cannot otherwise be determined it is the seller's place of business at the time of conclusion of the contract.</p> <p>2. If the seller has more than one place of business, the place of payment is the place of business of the seller which has the closest relationship to the obligation to pay.</p>	<p>of the first carrier; ■</p> <p>(d) <b>in the case of an obligation to return, the place of performance of the obligation to deliver;</b></p> <p>(e) <b>in the case of any other obligation, the residence of the party obliged to perform.</b></p> <p>2. If a <b>party</b> has more than one <b>residence</b>, the <b>residence</b> for the purposes of ■ paragraph 1 is that which has the closest relationship to the obligation■.</p> <p>3. <b>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.</b></p>	
<p><i>Article 95</i> <i>Time of delivery</i></p> <p>1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered without undue delay after the conclusion of the contract.</p> <p>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 not later than 30 days from the</p>	<p><i>Article 110</i> <i>Time of <b>performance</b></i></p> <p>1. <b>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.</b></p> <p>2. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or</p>	

<p>conclusion of the contract.</p> <p><i>Article 126</i> <i>Time of payment</i></p> <p>1. Payment of the price is due at the moment of delivery.</p> <p><i>Article 153</i> <i>Payment of the price</i></p> <p>1. The price is payable when the related service is completed and the object of the related service is made available to the customer.</p>	<p>the digital content <b>without undue delay, but</b> not later than 30 days from the conclusion of the contract.</p> <p>3. <b>For goods or digital content</b>, payment of the price is due at the moment of delivery. <b>For related services</b>, the price is payable when the related service is completed and the object of the related service is made available to the customer.</p> <p>4. <b>Advance payment by a consumer may not be asked for unless the requirements of Article 26 are fulfilled.</b></p>	
<p><i>Article 124</i> <i>Means of payment</i></p> <p>1. Payment shall 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 .</p> <p>2. A seller 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 seller may enforce the original obligation to pay if the order or promise is not honoured.</p> <p>3. The buyer's original obligation is extinguished if the seller accepts a promise to pay from a third party with whom the seller has a pre-</p>	<p><i>Article 111</i> <i>Means of payment</i></p> <p>1. Payment <b>of money due may</b> 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.</p> <p>2. A <b>party entitled to receive payment</b> 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 <b>party</b> may enforce the original obligation to pay if the order or promise is not honoured.</p> <p>3. The <b>original obligation</b> is extinguished if the <b>party entitled to receive payment</b> accepts a</p>	<p>Although monetary payments are normally made by the buyer, this rule may apply equally to, for instance, the payment of damages by the seller. It is therefore preferable to refer to 'party'.</p>

<p>existing arrangement to accept the third party's promise as a means of payment.</p> <p>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</p>	<p>promise to pay from a third party with whom the <b>party entitled to receive payment</b> has a pre-existing arrangement to accept the third party's promise as a means of payment.</p> <p>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.</p>	
	<p><b>Article 112</b> <b>Costs of performance</b></p> <p><b>The costs of performing an obligation are borne by the party required to perform.</b></p>	<p>Even though this rule states something that is self-evident for most obligations it is a necessary rule for obligations such as the obligation to return after termination.</p>
	<p><b>SECTION 2      MODIFIED PERFORMANCE</b></p>	
<p><b>Article 126</b> <b>Time of payment</b></p> <p>1. The seller may reject an offer to pay before payment is due if it has a legitimate interest in so doing.</p> <p><b>Article 130</b> <b>Early delivery and delivery of wrong quantity</b></p>	<p><b>Article 113</b> <b>Early performance</b></p> <p>1. A <b>party</b> may reject a <b>tender of performance made by the other party</b> before <b>performance</b> is due if it has a legitimate interest in so doing.</p> <p>2. <b>A party's acceptance of early performance does not affect the time fixed for the performance by the other party of any</b></p>	<p>It may be helpful to make it clear that even where one party accepts early performance this does not entail that the recipient has to perform earlier.</p>

<p>2. If the seller delivers the goods or supplies the digital content before the time fixed, the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.</p>	<p><b>reciprocal obligation.</b></p>	
<p style="text-align: center;"><i>Article 92</i> <i>Performance by a third party</i></p> <p>1. A seller may entrust performance to another person, unless personal performance by the seller is required by the contract terms.</p> <p>2. A seller who entrusts performance to another person remains responsible for performance.</p> <p>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.</p> <p style="text-align: center;"><i>Article 127</i> <i>Payment by a third party</i></p> <p>1. A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.</p> <p>...</p> <p style="text-align: center;"><i>Article 150</i> <i>Performance by a third party</i></p> <p>1. A service provider may entrust performance to</p>	<p style="text-align: center;"><i>Article 114</i> <i>Performance <b>entrusted to another</b></i></p> <p>1. A <b>party</b> may entrust performance to another person, unless personal performance by the <b>party</b> is required by the contract terms.</p> <p>2. <b>A party</b> who entrusts performance <b>of an obligation</b> to another person remains responsible for performance.</p> <p>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.</p>	

<p>another person, unless personal performance by the service provider is required.</p> <p>2. A service provider who entrusts performance to another person remains responsible for performance.</p> <p>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.</p>		
<p style="text-align: center;"><i>Article 127</i> <i>Payment by a third party</i></p> <p>1. The seller cannot refuse payment by a third party if:</p> <ul style="list-style-type: none"> <li>(a) the third party acts with the assent of the buyer; or</li> <li>(b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time that payment is due.</li> </ul> <p>2. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.</p>	<p style="text-align: center;"><i>Article 115</i> <i>Performance by a third party</i></p> <p>1. <b>The party entitled to receive performance</b> cannot refuse performance by a third party if <b>personal performance by the party obliged to perform is not required by the contract terms and</b></p> <ul style="list-style-type: none"> <li>(a) the third party acts with the assent of the <b>party obliged to perform</b>; or</li> <li>(b) the third party has a legitimate interest in <b>performing</b> and the <b>party obliged to perform</b> has failed to <b>perform</b> or it is clear that <b>this party</b> will not <b>perform</b> at the time that <b>performance</b> is due.</li> </ul> <p>2. Where the <b>party entitled to receive performance</b> accepts <b>performance</b> by a third party in circumstances not covered by</p>	

	<p>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.</p>	
	<p><b>SECTION 3    EFFECTS OF PERFORMANCE</b></p>	
	<p style="text-align: center;"><b>Article 116</b> <b><i>Extinctive effect of performance</i></b></p> <p>1. <b>Full performance extinguishes the obligation if it is:</b></p> <ul style="list-style-type: none"> <li>(a) <b>in accordance with the terms regulating the obligation; or</b></li> <li>(b) <b>of such a type as by law to afford the party obliged to perform a good discharge.</b></li> </ul> <p>2. <b>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.</b></p>	<p>A rule on the extinctive effect of performance is clearly missing from the CESL. Such a rule is however indispensable because the parties are otherwise, particularly in cases of third party performance, unable to rely on being relieved from the obligation under the applicable national law.</p>

<p style="text-align: center;"><i>Article 128</i> <i>Imputation of payment</i></p> <ol style="list-style-type: none"> <li>1. Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.</li> <li>2. If the buyer does not make a notification under paragraph 1 the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.</li> <li>3. An imputation under paragraph 2 is not effective if it is to an obligation which is not yet due or is disputed.</li> <li>4. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated: <ol style="list-style-type: none"> <li>(a) the obligation which is due or is the first to fall due;</li> <li>(b) the obligation for which the seller has no or the least security;</li> <li>(c) the obligation which is the most burdensome for the buyer;</li> <li>(d) the obligation which arose first.</li> </ol> <p>If none of those criteria applies, the payment</p> </li> </ol>	<p style="text-align: center;"><i>Article 117</i> <i>Imputation of <b>performance</b></i></p> <ol style="list-style-type: none"> <li>1. Where a <b>party</b> has to <b>perform several obligations of the same nature and makes a performance which</b> does not suffice to <b>extinguish all of the obligations</b>, the party may at the time of <b>performance</b> notify the <b>other party</b> of the obligation to which the <b>performance</b> is to be imputed.</li> <li>2. If the <b>party obliged to perform</b> does not make a notification under paragraph 1 the <b>other party</b> may, by notifying the <b>party that is obliged to perform</b> within a reasonable time, impute the performance to one of the obligations. <b>Such an imputation</b> is not effective if it is to an obligation which is not yet due or is disputed.</li> <li>3. In the absence of an effective imputation by either party, the <b>performance</b> is imputed to that obligation which satisfies one of the following criteria in the sequence indicated: <ol style="list-style-type: none"> <li>(a) the obligation which is due or is the first to fall due;</li> <li>(b) the obligation for which the <b>party entitled to receive performance</b> has no or the least security;</li> <li>(c) the obligation which is the most burdensome for the <b>party obliged</b>;</li> </ol> </li> </ol>	<p>This article raises problems where not all obligations are obligations which arise under the CESL.</p>
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<p>is imputed proportionately to all the obligations.</p> <p>5. The payment may be imputed under paragraph 2, 3 or 4 to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.</p> <p>6. In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.</p>	<p>(d) the obligation which arose first.</p> <p>If none of those criteria applies, the <b>performance</b> is imputed proportionately to all the obligations.</p> <p>4. The <b>performance</b> may be imputed under paragraph 2 <b>or 3</b> to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the <b>performance</b> could be imputed in accordance with those paragraphs.</p> <p>5. <b>In the case of an obligation to pay</b>, a payment <b>is</b> to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the <b>party entitled to receive payment</b> makes a different imputation.</p>	
	<p style="text-align: center;"><b>Article 118</b> <b>Performance not due</b></p> <p>1. <b>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').</b></p> <p>2. <b>Subject to paragraphs 3 and 4, the rules on restitution in Chapter 16 apply with appropriate adaptations.</b></p> <p>3. <b>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</b></p>	<p>The CESL does not contain any rule on restitution of performance that was not due. Consequently this issue would be dealt with under the law otherwise applicable according to the Rome I Regulation. This is unfortunate as it will lead to a divergence of results.</p> <p>The CESL should therefore be revised to include a rule on performance not due.</p>

	<p><b>returned in full, and the recipient</b></p> <p>(a) <b>did not know and could not be expected to know that it was not entitled to receive the performance; or</b></p> <p>(b) <b>did not deliberately accept the performance.</b></p> <p>4. <b>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.</b></p>	<p>Such a rule would have to take into account that it is, in the first instance, up to the performing party to check whether performance was really due.</p> <p>A recipient who in good faith or who, like the recipient of an unsolicited service or unsolicited digital content supplied online, has not deliberately accepted the performance must be protected.</p> <p>In other respects (fruits, use etc) the rules in the Chapter on restitution should apply accordingly.</p>
<p><i>Article 90</i> <i>Extended application of rules on payment and on goods or digital content not accepted</i></p> <p>1. Article 97 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.</p> <p><i>Article 97</i> <i>Goods or digital content not accepted by the buyer</i></p> <p>1. A seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery</p>	<p><i>Article 119</i> <i>Performance not accepted ■</i></p> <p>1. <b>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.</b></p> <p>2. <b>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</b></p>	

<p>must take reasonable steps to protect and preserve them.</p> <p>2. The seller is discharged from the obligation to deliver if the seller:</p> <ul style="list-style-type: none"> <li>(a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or</li> <li>(b) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer.</li> </ul> <p>3. The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.</p>	<p>preserve them.</p> <p>3. The <b>tendering party</b> is discharged from the obligation to deliver <b>or return</b> if <b>that party</b>:</p> <ul style="list-style-type: none"> <li>(a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the <b>other party</b>, and notifies the <b>other party</b> of this; or</li> <li>(b) sells the goods or the digital content on reasonable terms after notice to the <b>other party</b>, and pays the net proceeds to the <b>other party</b>.</li> </ul> <p>4. The <b>tendering party</b> is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.</p>	
	<p><b>SECTION 4    PERFORMANCE MORE ONEROUS</b></p>	
<p style="text-align: center;"><i>Article 89</i> <i>Change of circumstances</i></p> <p>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.</p>	<p style="text-align: center;"><i>Article 120</i> <i>Change of circumstances</i></p> <p>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.</p>	

<p>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.</p> <p>3. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.</li> </ul> <p>4. Paragraphs 1 and 2 apply only if:</p> <ul style="list-style-type: none"> <li>(a) the change of circumstances occurred after the time when the contract was concluded;</li> <li>(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</li> <li>(c) the aggrieved party did not assume, and cannot reasonably be regarded as</li> </ul>	<p>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.</p> <p>3. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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.</li> </ul> <p>4. Paragraphs 1 to 3 apply only if:</p> <ul style="list-style-type: none"> <li>(a) the change of circumstances occurred after the time when the contract was concluded;</li> <li>(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</li> <li>(c) <b>the party relying on the change of circumstances</b> did not assume, and cannot</li> </ul>	<p>(1) The term '<i>aggrieved party</i>' is very misleading in this context.</p>
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<p>having assumed, the risk of that change of circumstances.</p> <p>5. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.</p>	<p>reasonably be regarded as having assumed, the risk of that change of circumstances. ■</p>	<p><b>(2)</b> '<i>Court</i>' is now included in the list of general definitions.</p>
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	<b>Part V Remedies for Non-Performance</b>  <b>Ex Articles 87 + 88, Chapters 11, 13, 16, Section 4 of Chapter 15)</b>	
	<b>Chapter 12 Availability of remedies for non-performance</b>	<p>It is clearly advantageous for the rules on remedies for non-performance to be in one place. Those advantages are that to do so:</p> <p>is more in line with the aim of reflecting the lifecycle of a contract, helps save unnecessary duplication of rules for general remedies such as termination,</p> <p>is much more user-friendly as the rules also apply directly to related services, rather than with appropriate adaptations and complex modifications, and</p> <p>avoids gaps in the case of non-performance of other than primary obligations arising from the contract</p>

<p style="text-align: center;"><i>Article 87</i> <i>Non-performance and fundamental non-performance</i></p> <p>1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:</p> <ul style="list-style-type: none"> <li>(a) non-delivery or delayed delivery of the goods;</li> <li>(b) non-supply or delayed supply of the digital content;</li> <li>(c) delivery of goods which are not in conformity with the contract;</li> <li>(d) supply of digital content which is not in conformity with the contract;</li> <li>(e) non-payment or late payment of the price; and</li> <li>(f) any other purported performance which is not in conformity with the contract.</li> </ul> <p>2. Non-performance of an obligation by one party is fundamental if:</p> <ul style="list-style-type: none"> <li>(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;</li> </ul>	<p style="text-align: center;"><i>Article 121</i> <i>Non-performance and fundamental non-performance</i></p> <p>1. Non-performance of an obligation is <b>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.</b></p> <p>2. Non-performance of an obligation by a party is fundamental if:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.</li> </ul>	<p>The list in Article 87(1) CESL seems to suggest that non-performance only refers to the main obligations of the parties under the contract. However, a case of non-performance may also occur, for instance, where a party fails to pay damages or to make restitution. ELI Article 121 is therefore drafted in a more open and general way (see also ELI Article 123).</p>
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<p>or</p> <p>(b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.</p>		
<p><i>Article 88</i> <i>Excused non-performance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	<p><i>Article 122</i> <i>Excused non-performance</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	



<p style="text-align: center;"><i>Article 106</i> <i>Overview of buyer's remedies</i></p> <p>...</p> <p>4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.</p> <p>5. ...</p> <p>6. Remedies which are not incompatible may be cumulated.</p> <p style="text-align: center;"><i>Article 131</i> <i>Overview of seller's remedies</i></p> <p>1. ...</p> <p>2. If the buyer's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.</p> <p>3. . .</p> <p>4. Remedies which are not incompatible may be cumulated.</p>	<p style="text-align: center;"><i>Article 123</i> <i>Remedies for non-performance</i></p> <p>1. <b>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.</b></p> <p>2. <b>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, such as obligations arising from remedies effectively exercised.</b></p> <p>3. Remedies which are not incompatible may be cumulated.</p>	<p>The fact that remedies under Part IV must also be available for non-performance of other than primary obligations mentioned in Chapters 9 and 11 (e.g. obligations to return or to pay damages) should be made explicit.</p> <p>In order not to confuse the user however, the text should be revised in order to make it clear that this concerns only particular remedies as it would not make sense, for instance, to allow for a price reduction if an obligation to pay damages fails to be performed.</p>
<p style="text-align: center;"><i>Article 106</i> <i>Overview of buyer's remedies</i></p> <p>1. ...</p> <p>5. The buyer may not resort to any of the</p>	<p style="text-align: center;"><i>Article 124</i> <i>Non-performance attributable to creditor</i></p> <p><b>A party</b> may not resort to any of the remedies <b>■</b> to the extent that <b>it</b> caused the <b>other party's</b> non-performance <b>or its effects. In assessing the extent to</b></p>	<p><b>(1)</b> This rule can be generalised as it is the same for all remedies.</p> <p><b>(2)</b> There has been some criticism,</p>

<p>remedies referred to in paragraph 1 to the extent that the buyer caused the seller's non-performance.</p> <p>...</p> <p style="text-align: center;"><i>Article 131</i> <i>Overview of seller's remedies</i></p> <p>...</p> <p>3. The seller may not resort to any of the remedies referred to in paragraph 1 to the extent that the seller caused the buyer's non-performance.</p> <p>...</p> <p style="text-align: center;"><i>Article 162</i> <i>Loss attributable to creditor</i></p> <p>The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.</p>	<p><b>which a party has caused the other party's non-performance regard may be had, inter alia, to the degree it was to blame.</b></p>	<p>in particular as far as damages are concerned, that the rule in the CESL seems to provide for a simple mathematical exercise, deducting the amount caused by the creditor from the overall damage caused. This could lead to the unwanted effect that a creditor who has, by way of very minor carelessness, caused 50% of the damage would only get 50% compensation even where the other party was wilfully causing the damage.</p>
<p style="text-align: center;"><i>Article 108</i> <i>Mandatory nature</i></p> <p>In a contract 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 effect before the lack of conformity is brought to the trader's attention by the consumer.</p>	<p style="text-align: center;"><i>Article 125</i> <i>Mandatory nature</i></p> <p>In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of <b>Chapters 12 to 15</b>, or derogate from or vary <b>their</b> effect before the <b>non-performance</b> is brought to the <b>non-performing party's</b> attention by the <b>other party</b>.</p>	<p>The rule in Article 108 CESL should be generalised. It is of particular importance to ensure that the parties do not derogate from the rules on the seller's remedies if this would be to the detriment of the consumer.</p>

	<b>Chapter 13      The seller's remedies</b>	
<p style="text-align: center;"><i>Article 131</i> <i>Overview of seller's remedies</i></p> <p>1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:</p> <ul style="list-style-type: none"> <li>(a) require performance under Section 2 of this Chapter;</li> <li>(b) withhold the seller's own performance under Section 3 of this Chapter;</li> <li>(c) terminate the contract under Section 4 of this Chapter; and</li> <li>(d) claim interest on the price or damages under Chapter 16.</li> </ul> <p>2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.</p> <p>3. ...</p> <p>4. ...</p> <p style="text-align: center;"><i>Article 157</i></p>	<p style="text-align: center;"><i>Article 126</i> <i>Overview of seller's remedies</i></p> <p>In the case of a non-performance of an obligation by the buyer, the seller may, <b>where the specific requirements for the respective remedies are met</b>, do any of the following:</p> <ul style="list-style-type: none"> <li>(a) require performance under <b>Article 127</b>;■</li> <li>(b) withhold the seller's own performance under <b>Section 1 of Chapter 15</b>;</li> <li>(c) terminate the contract under <b>Section 2 of Chapter 15</b>■; and</li> <li>(d) claim interest on the price or damages under <b>Sections 3 and 4 of Chapter 15</b>.</li> </ul> <p>■</p>	<p><b>(1)</b> There are good arguments for starting with the buyer's remedies. However, for presentational reasons, the ELI draft starts with the seller's remedies. It does so because this allows the buyer's remedies to be set out seriatim, starting with the first Section of Chapter 14 and ending with the last Section of Chapter 15.</p> <p><b>(2)</b> It should be clarified at the head of the list of remedies, that further requirements (such as absence of excuse or that the non-conformity is not insignificant) may be found in the relevant Sections.</p> <p><b>(3)</b> The rule in Article 131(2) CESL has been omitted. As far as damages are concerned, absence of an excuse is mentioned as a requirement in the Section/Chapter on damages anyway. In addition to</p>

<p style="text-align: center;"><i>Remedies of the service provider</i></p> <ol style="list-style-type: none"> <li>1. In the case of a non-performance by the customer, the service provider has, with the adaptations set out in paragraph 2, the same remedies as are provided for the seller in Chapter 13, namely: <ol style="list-style-type: none"> <li>(a) to require performance;</li> <li>(b) to withhold the service provider's own performance;</li> <li>(c) to terminate the contract; and</li> <li>(d) to claim interest on the price or damages.</li> </ol> </li> <li>2. Chapter 13 applies with the necessary adaptations. In particular Article 158 applies instead of Article 132 (2).</li> </ol>		<p>this, for other remedies (e.g. termination) the list in Article 131 does not mention the full range of extra requirements. As far as specific performance is concerned, there is no justification for excluding it where non-performance is excused. The notion of excuse fails to sit comfortably with the obligation to pay the price, and as far as taking of delivery is concerned sufficient protection is afforded by Article 132(2).</p>
<p style="text-align: center;"><i>Article 132</i> <i>Requiring performance of buyer's obligations</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. 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</li> </ol>	<p style="text-align: center;"><i>Article 127</i> <i>Requiring performance of buyer's obligations</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>2. 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</li> </ol>	<p>The rule in Article 132 CESL has raised much concern because it might potentially mean that in mass contracts a buyer never has to fulfil its contractual obligations and may always say that the seller could have sold the goods to someone else. It should therefore be clarified that the seller's right to claim</p>

<p>made a reasonable substitute transaction without significant effort or expense.</p> <p><i>Article 157</i> <i>Remedies of the service provider</i></p> <p>1. ...</p> <p>2. Chapter 13 applies with the necessary adaptations. In particular Article 158 applies instead of Article 132 (2).</p>	<p>significant effort or expense. <b>The seller's right to require damages for the buyer's non-performance remains unaffected.</b></p> <p>3. <b>In the case of a related service,</b> Article 108 applies instead of <b>paragraph (2).</b></p>	<p>damages remains unaffected.</p>
	<p><b>Chapter 14      The buyer's remedies</b></p>	
	<p><b>SECTION 1      GENERAL PROVISIONS</b></p>	
<p><i>Article 106</i> <i>Overview of buyer's remedies</i></p> <p>1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:</p> <p>    (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;</p> <p>    (b) withhold the buyer's own</p>	<p><i>Article 128</i> <i>Overview of buyer's remedies</i></p> <p>1. In the case of non-performance of an obligation by the seller, the buyer may, <b>where the specific requirements for the respective remedies are met</b>, do any of the following:</p> <p>    (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 2 of this Chapter;■</p>	<p><b>(1)</b> Clarification that further requirements (such as absence of excuse or that the non-conformity is not insignificant) may be found in the relevant Sections is necessary.</p> <p><b>(2)</b> The order of remedies has been changed in line with the new structure.</p> <p><b>(3)</b> The rule in the CESL that the</p>

<p>performance under Section 4 of this Chapter;</p> <p>(c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;</p> <p>(d) reduce the price under Section 6 of this Chapter; and</p> <p>(e) claim damages under Chapter 16.</p> <p>2. If the buyer is a trader:</p> <p>(a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and</p> <p>(b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.</p> <p>3. If the buyer is a consumer:</p> <p>(a) the buyer's rights are not subject to cure by the seller; and</p> <p>(b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.</p> <p>4. If the seller's non-performance is excused, the buyer may resort to any of the remedies</p>	<p>(b) reduce the price under Section 3 of this Chapter;</p> <p>(c) withhold the buyer's own performance under Section 1 of Chapter 15;</p> <p>(d) terminate the contract under Section 2 of Chapter 15■; and</p> <p>(e) <b>require</b> damages under <b>Section 3 of Chapter 15</b>.</p> <p>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 <b>Article 129</b>. If the buyer is a consumer the buyer's rights are ■ subject to cure by the <b>trader only</b></p> <p>(a) <b>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></p> <p>(b) <b>in a contract for a related service except in the case of incorrect installation of goods or digital content; and</b></p> <p>(c) <b>where the consumer notifies the trader of the lack of conformity more than six months after risk has passed to the consumer.</b></p> <p>3. If the buyer is a trader the buyer's rights to rely on lack of conformity are subject to the</p>	<p>consumer's remedies are never subject to cure by the seller is much too crude and leads to unacceptable results in contracts for the sale of goods to be manufactured according to the consumer's specifications or which are clearly personalised.</p> <p><b>(4)</b> It must also be borne in mind that the rule in Article 174(1)(c) CESL, which is designed to provide a kind of balance for potentially excessive consumer protection concerning the right to cure, leads to too much uncertainty and may ultimately deter consumers from exercising their rights. It seems preferable to have a clear rule, e.g. that normally no payment arises for use upon termination, with termination subject to cure if the buyer seeks relief after more than six months.</p> <p><b>(5)</b> Paragraph 4 is superfluous because the requirement that non-performance is not excused is</p>
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<p>referred to in paragraph 1 except requiring performance and damages.</p> <p>5. ...</p> <p>6. ...</p> <p style="text-align: center;"><i>Article 107</i> <i>Limitation of remedies for digital content not supplied in exchange for a price</i></p> <p>Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1). The buyer may only claim damages under point (e) of Article 106 (1) for loss or damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.</p> <p style="text-align: center;"><i>Article 155</i> <i>Remedies of the customer</i></p> <p>1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely:</p> <ul style="list-style-type: none"> <li>(a) to require specific performance;</li> <li>(b) to withhold the customer's own performance;</li> </ul>	<p>requirements of examination and notification set out in <b>Articles 130 and 131</b>.</p> <p>4. Where <b>goods, digital content or services are</b> not supplied in exchange for the payment of a price, <b>the supply of personal data or other benefit, the buyer is not entitled to any remedy other than</b> damages under <b>Section 3 of Chapter 15</b> for personal injury or for damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of <b>what was supplied</b>, except for any gain of which the buyer has been deprived by <b>damage to property</b>.</p>	<p>mentioned in the Section on damages, in line with the fact that specific requirements for other remedies are also to be found in the relevant Sections.</p> <p>As far as the exclusion of specific performance in cases of excuse is concerned, this is a rule that was already found in the PECL and DCFR. However, it fails to make sense in the CESL, as there is simply no justification for excluding specific performance where non-performance is excused. Where specific performance would be impossible or excessively onerous it is excluded by Article 110 CESL (Article 132 ELI).</p> <p><b>(6)</b> The rule in Article 107 CESL restricts the buyer's remedies too much. There is no reason why a trader who promises a consumer digital content as a 'gift', but gets personal data, an early order or similar benefits in return, should not be liable for repair or replacement. It goes without saying that there cannot be price reduction where there is no price. A rule like the one in Article 107 is appropriate only where the digital content is really free, as, for example, with Adobe Reader.</p>
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<ul style="list-style-type: none"> <li>(c) to terminate the contract;</li> <li>(d) to reduce the price; and</li> <li>(e) to claim damages.</li> </ul> <p>2. Without prejudice to paragraph 3, the customer's remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.</p> <p>3. In the case of incorrect installation under a consumer sales contract as referred to in Article 101 the consumer's remedies are not subject to a right of the service provider to cure.</p> <p>4. The customer, if a consumer, has the right to terminate the contract for any lack of conformity in the related service provided unless the lack of conformity is insignificant.</p> <p>5. Chapter 11 applies with the necessary adaptations, in particular:</p> <ul style="list-style-type: none"> <li>(a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;</li> <li>(b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and</li> <li>(c) Article 156 applies instead of Article 122.</li> </ul>		
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<p style="text-align: center;"><i>Article 109</i> <i>Cure by the seller</i></p>	<p style="text-align: center;"><i>Article 129</i> <i>Cure by the seller</i></p>	
<ol style="list-style-type: none"> <li>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.</li> <li>2. In cases not covered by 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.</li> <li>3. An offer to cure is not precluded by notice of termination.</li> <li>4. The buyer may refuse an offer to cure only if:               <ol style="list-style-type: none"> <li>(a) cure cannot be effected promptly and without significant inconvenience to the buyer;</li> <li>(b) the buyer has reason to believe that the seller's future performance cannot be relied on; or</li> <li>(c) delay in performance would amount to a fundamental non-performance.</li> </ol> </li> <li>5. The seller has a reasonable period of time to effect cure.</li> <li>6. The buyer may withhold performance pending</li> </ol>	<ol style="list-style-type: none"> <li>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.</li> <li>2. <b>Without prejudice to</b> 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.</li> <li>3. An offer to cure is not precluded by notice of termination.</li> <li>4. The buyer may refuse an offer to cure only if:               <ol style="list-style-type: none"> <li>(a) <b>the remedies of the buyer who is a consumer are not subject to cure by the seller under paragraph (2) of Article 128;</b></li> <li>(b) cure cannot be effected promptly and without significant inconvenience to the buyer;</li> <li>(c) the buyer has reason to believe that the seller's future performance cannot be relied on; or</li> <li>(d) delay in performance would amount to a fundamental non-performance.</li> </ol> </li> </ol>	<p>This clarification is now clearly missing under the new structure.</p>

<p>cure, but 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.</p> <p>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.</p> <p style="text-align: center;"><i>Article 155</i> <i>Remedies of the customer</i></p> <p>1. ...</p> <p>5. Chapter 11 applies with the necessary adaptations, in particular:</p> <p style="padding-left: 40px;">(a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;</p> <p style="padding-left: 40px;">(b) , , ,</p>	<p>5. The seller has a reasonable period of time to effect cure. <b>In contracts between a trader and a consumer, the reasonable period must not exceed 30 days.</b></p> <p>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.</p> <p>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.</p>	
<p style="text-align: center;"><i>Article 121</i> <i>Examination of the goods in contracts between traders</i></p> <p>1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related</p>	<p style="text-align: center;"><i>Article 130</i> <i>Examination of the goods in contracts between traders</i></p> <p>1. In a contract between traders the buyer is expected to examine the goods <b>or digital content or the effect produced by a related service</b>, 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</p>	<p>Now that the rules on sale of goods, supply of digital content, and provision of related services are merged, this clarification is clearly missing</p>

<p>services.</p> <p>2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.</p> <p>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.</p>	<p>content or provision of related services.</p> <p>2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.</p> <p>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.</p>	
<p><i>Article 122</i> <i>Requirement of notification of lack of conformity in sales contracts between traders</i></p> <p>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.</p> <p>2. The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later.</p> <p>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 at which the goods were</p>	<p><i>Article 131</i> <i>Requirement of notification of lack of conformity in ■contracts between traders</i></p> <p>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. <b>However, the buyer may still reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.</b></p> <p>2. The time starts to run when the goods <b>or digital content</b> are supplied <b>or the service completed</b> or when the buyer discovers could be expected to discover the lack of conformity, whichever is later. <b>This</b> does not apply in respect of the third</p>	<p><b>(1)</b> Article 122 CESL could benefit from some redactional improvements and adaptations.</p> <p><b>(2)</b> The rule in Article 44 CISG should be adopted.</p>

<p>actually handed over to the buyer in accordance with the contract.</p> <p>4. Where the parties have agreed that the goods 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.</p> <p>5. Paragraph 2 does not apply in respect of the third party claims or rights referred to in Article 102.</p> <p>6. The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.</p> <p>7. 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.</p> <p style="text-align: center;"><i>Article 156</i> <i>Requirement of notification of lack of conformity in related service contracts between traders</i></p> <p>1. In a related service contract between traders, the customer may rely on a lack of conformity only if the customer gives notice to the service provider within a reasonable time specifying the nature of the lack of conformity.</p> <p>2. The time starts to run when the related service</p>	<p>party claims or rights referred to in Article 92.</p> <p>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 <b>of delivery</b>.</p> <p>4. Where the parties have agreed that the goods <b>or digital content</b> 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.</p> <p>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.</p>	
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<p>is completed or when the customer discovers or could be expected to discover the lack of conformity, whichever is later.</p> <p>3. The service provider is not entitled to rely on this Article if the lack of conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the customer.</p>		
	<p><b>SECTION 2     REQUIRING PERFORMANCE</b></p>	
<p style="text-align: center;"><i>Article 110</i> <i>Requiring performance of seller's obligations</i></p> <p>1. The buyer is entitled to require performance of the seller's obligations.</p> <p>2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.</p> <p>3. Performance cannot be required where:</p> <ul style="list-style-type: none"> <li>(a) performance would be impossible or has become unlawful; or</li> <li>(b) the burden or expense of performance would be disproportionate to the benefit that</li> </ul>	<p style="text-align: center;"><i>Article 132</i> <i>Requiring performance of seller's obligations</i></p> <p>1. The buyer is entitled to require performance of the seller's obligations <b>including</b> the remedying free of charge of a performance which is not in conformity with the contract.</p> <p>2. Performance cannot be required where:</p> <ul style="list-style-type: none"> <li>(a) performance would be impossible or has become unlawful;</li> <li>(b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain; <b>or</b></li> <li>(c) <b>performance would be of such a personal character that it would be</b></li> </ul>	<p>This clarification, which was found in the PECL and DCFR, should not</p>

the buyer would obtain.	unreasonable to enforce it.	be omitted.
<p style="text-align: center;"><i>Article 111</i></p> <p><i>Consumer's choice between repair and replacement</i></p> <p>1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) 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:</p> <ul style="list-style-type: none"> <li>(a) the value the goods would have if there were no lack of conformity;</li> <li>(b) the significance of the lack of conformity; and</li> <li>(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.</li> </ul> <p>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.</p>	<p style="text-align: center;"><i>Article 133</i></p> <p><i>Consumer's choice between repair and replacement</i></p> <p>1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article <b>132</b> 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:</p> <ul style="list-style-type: none"> <li>(a) the value the goods would have if there were no lack of conformity;</li> <li>(b) the significance of the lack of conformity; and</li> <li>(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.</li> </ul> <p>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.</p> <p>3. <b>This Article and Article 134 do not apply to related services.</b></p>	

<p style="text-align: center;"><i>Article 155</i> <i>Remedies of the customer</i></p> <p>1. ...</p> <p>5. Chapter 11 applies with the necessary adaptations, in particular:</p> <p style="padding-left: 20px;">(a) ...</p> <p style="padding-left: 20px;">(b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and ...</p>		
<p style="text-align: center;"><i>Article 112</i> <i>Return of replaced item</i></p> <p>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.</p> <p>2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.</p>	<p style="text-align: center;"><i>Article 134</i> <i>Return of replaced item</i></p> <p>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.</p> <p>2. The <b>rights and obligations of the parties with regard to the replaced item are governed by the rules of Chapter 16 on Restitution.</b></p>	<p>Article 112 CESL needs a reference to the Chapter on Restitution, otherwise there are too many gaps.</p>

	<b>SECTION 3    PRICE REDUCTION</b>	
<p style="text-align: center;"><i>Article 120</i> <i>Right to reduce price</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	<p style="text-align: center;"><i>Article 135</i> <i>Right to reduce price</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	



	<b>Chapter 15      General remedies</b>	
	<b>SECTION 1    RIGHT TO WITHHOLD PERFORMANCE</b>	
<p style="text-align: center;"><i>Article 113</i> <i>Right to withhold performance</i></p> <ol style="list-style-type: none"> <li>1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.</li> <li>2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues.</li> <li>3. 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 seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.</li> </ol>	<p style="text-align: center;"><i>Article 136</i> <i>Right to withhold performance</i></p> <ol style="list-style-type: none"> <li>1. A <b>party</b> who is to perform at the same time as, or after, the <b>other party</b> performs has a right to withhold performance until the <b>other party</b> has tendered performance or has performed.</li> <li>2. A <b>party</b> who is to perform before the <b>other party</b> performs and who reasonably believes that there will be non-performance by the <b>other party</b> when the <b>other party's</b> performance becomes due may withhold performance for as long as the reasonable belief continues. <b>However, the right to withhold performance is lost if the other party gives an adequate assurance of due performance or provides adequate security.</b></li> <li>3. <b>A party who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the other party as soon as is reasonably practicable and is liable for any loss caused to the other party by a breach of that duty.</b></li> <li>4. The performance which may be withheld under this Article is the whole or part of the</li> </ol>	<p>In line with the rules in the DCFR, the right to withhold for the other party's anticipated non-performance should be subject to certain requirements and restrictions. In particular, there can be no right to withhold where the other party gives adequate assurance or security. There must also be a duty of notification.</p>

<p style="text-align: center;"><i>Article 133</i> <i>Right to withhold performance</i></p> <ol style="list-style-type: none"> <li>1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.</li> <li>2. A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer'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 buyer gives an adequate assurance of due performance or provides adequate security.</li> <li>3. 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 buyer's obligations are to be performed in separate parts or are otherwise divisible, the seller may withhold performance only in relation to that part which has not been performed, unless the buyer's non-performance is such as to justify withholding the seller's performance as a whole.</li> </ol>	<p>performance to the extent justified by the non-performance. Where the <b>other party's</b> obligations are to be performed in separate parts or are otherwise divisible, the <b>party entitled to withhold performance</b> may <b>do so</b> only in relation to that part which has not been performed, unless the <b>other party's</b> non-performance is such as to justify withholding the <b>first party's</b> performance as a whole.</p>	

	<p style="text-align: center;"><b>SECTION 2    TERMINATION</b></p>	<p>The rules on termination in the CESL are in need of total redrafting. Not only are they scattered about the whole instrument (Articles 8, 9(2) to (4), 114 to 119, 134 to 139, 147(2), 172(3)), but there are also inconsistencies which are so fundamental as to require an entirely new approach.</p>
<p style="text-align: center;"><i>Article 114</i> <i>Termination for non-performance</i></p> <p>1. A buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87 (2).</p> <p>2. ...</p> <p style="text-align: center;"><i>Article 134</i> <i>Termination for fundamental non-performance</i></p> <p>A seller may terminate the contract within the meaning of Article 8 if the buyer's non-performance under the contract is fundamental within the meaning of Article 87 (2).</p>	<p style="text-align: center;"><i>Article 137</i> <i>Termination for <b>fundamental</b> non-performance</i></p> <p>A party may terminate the <b>contractual relationship</b>■</p> <p>(a) if the <b>other party's</b> non-performance under the contract is fundamental within the meaning of Article <b>121</b> (2); or</p> <p>(b) ■if the <b>other party</b> has declared <b>in advance</b>, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.</p>	<p>As far as the grounds for termination are concerned it seems more user-friendly to combine the two grounds that require fundamental non-performance in one rule.</p> <p>Article 114(1) and (2) CESL have little in common, and combining the two is apt to mislead.</p>

<p style="text-align: center;"><i>Article 116</i> <i>Termination for anticipated non-performance</i></p> <p>A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.</p> <p style="text-align: center;"><i>Article 136</i> <i>Termination for anticipated non-performance</i></p> <p>A seller may terminate the contract before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.</p>		
<p style="text-align: center;"><i>Article 115</i> <i>Termination for delay in delivery after notice fixing additional time for performance</i></p> <ol style="list-style-type: none"> <li>1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.</li> <li>2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay.</li> </ol>	<p style="text-align: center;"><i>Article 138</i> <i>Termination for delay in delivery after notice fixing additional time for performance</i></p> <ol style="list-style-type: none"> <li>1. ■In a case of delay in <b>performance</b> which is not in itself fundamental <b>a party may terminate the contract if the party</b> gives notice fixing an additional period of time of reasonable length for performance and the <b>other party</b> does not perform within that period.</li> <li>2. ■In relations between a trader and a consumer, the additional time <b>under paragraph (1) for payment of the price by the consumer must not be less than 30 days. Notice may be given</b></li> </ol>	<p>The rule on notice in paragraph (3) would more properly be included in the rule on notice of termination.</p>

<p>3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</p> <p style="text-align: center;"><i>Article 135</i></p> <p style="text-align: center;"><i>Termination for delay after notice fixing additional time for performance</i></p> <p>1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.</p> <p>2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article 167(2).</p> <p>3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</p> <p>4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p><b>before the date when payment is due.</b></p>	
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<p style="text-align: center;"><i>Article 114</i> <i>Termination for non-performance</i></p> <ol style="list-style-type: none"> <li>1. ...</li> <li>2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.</li> </ol>	<p style="text-align: center;"><i>Article 139</i> <i>Termination <b>by the consumer</b> for a lack of conformity</i></p> <p>In a consumer sales contract ■, where there is a non-performance because the goods, <b>digital content or services</b> do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is <b>minor</b>.</p>	<p>'Minor' is the terminology used by Directive Mo 1999/44/EC, and there is no reason for changing it.</p>
<p style="text-align: center;"><i>Article 9</i> <i>Mixed-purpose contracts</i></p> <ol style="list-style-type: none"> <li>1. Where, in a contract falling under paragraph 1, the obligations of the seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination for non-performance of a part to which a part of the price can be apportioned, the buyer and customer may terminate only in relation to that part.</li> <li>2. Paragraph 2 does not apply where the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.</li> </ol>	<p style="text-align: center;"><i>Article 140</i> <i>Scope of right to terminate</i></p> <ol style="list-style-type: none"> <li>1. Where the <b>non-performing party's</b> obligations under the contract are not divisible ■ the <b>party entitled to terminate</b> may <b>only</b> terminate the <b>contractual relationship</b> as a whole.</li> <li>2. Where the <b>non-performing party's</b> obligations under the contract are to be performed in separate parts, <b>or on a continuous basis</b>, or are otherwise divisible, <b>then</b>: <ol style="list-style-type: none"> <li>(a) if there is a ground for termination for non-performance of a part to which a part of the <b>counter-performance</b> can be apportioned, the <b>party entitled to terminate</b> may terminate only in relation to this part;</li> <li>(b) the <b>party entitled to terminate</b> may</li> </ol> </li> </ol>	<p><b>(1)</b> Article 172(3) CESL, which refers to Article 8(2), cannot be reconciled with Articles 9, 117 and 137. They follow two equally possible but mutually exclusive approaches to the nature of termination. Articles 9, 117 and 137 are based on the concept of partial termination and full restitution for the affected parts of the contract. Article 172(3) relies on the concept of total termination of the contract and partial restitution just for particular parts.</p> <p><b>(2)</b> Similarly, Article 9 for mixed-purpose contracts with a sales component and a services component cannot be reconciled</p>

<p>3. Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole.</p> <p style="text-align: center;"><i>Article 117</i> <i>Scope of right to terminate</i></p> <p>1. Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.</p> <p>2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.</p> <p>3. Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.</p> <p style="text-align: center;"><i>Article 137</i></p>	<p>terminate the <b>contractual relationship</b> as a whole only if <b>that party</b> cannot <b>reasonably</b> be expected to accept performance of the other parts <b>or there is a ground for termination in relation to the contractual relationship</b> as a whole.</p>	<p>with Article 147(2) for ancillary 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 ancillary service contract, but not <i>vice versa</i>, so that a customer who terminates the service contract cannot get rid of the sales contract.</p>
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<p style="text-align: center;"><i>Scope of right to terminate</i></p> <ol style="list-style-type: none"> <li>1. Where the buyer's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part.</li> <li>2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.</li> <li>3. Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.</li> </ol> <p style="text-align: center;"><i>Article 147</i> <i>Application of certain general rules on sales contracts</i></p> <ol style="list-style-type: none"> <li>1. The rules in Chapter 9 apply for the purposes of this Part.</li> <li>2. Where a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated.</li> </ol> <p style="text-align: center;"><i>Article 172</i> <i>Restitution on avoidance or termination</i></p> <ol style="list-style-type: none"> <li>1. ...</li> </ol>		
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<p>2. ...</p> <p>3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 8 (2), unless the nature of the contract is such that part performance is of no value to one of the parties.</p>		
<p style="text-align: center;"><i>Article 118</i> <i>Notice of termination</i></p> <p>A right to terminate under this Section is exercised by notice to the seller.</p> <p style="text-align: center;"><i>Article 138</i> <i>Notice of termination</i></p> <p>A right to terminate the contract under this Section is exercised by notice to the buyer.</p> <p style="text-align: center;"><i>Article 135</i> <i>Termination for delay after notice fixing additional time for performance</i></p> <p>3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period</p>	<p style="text-align: center;"><i>Article 141</i> <i>Notice of termination</i></p> <p>1. A right to terminate under this Section is exercised by notice to the <b>other party</b>.</p> <p>2. Where the notice <b>under Article 138</b> provides for automatic termination if the <b>other party</b> does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</p>	

without further notice.		
<p style="text-align: center;"><i>Article 119</i> <i>Loss of right to terminate</i></p> <ol style="list-style-type: none"> <li>1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.</li> <li>2. Paragraph 1 does not apply: <ol style="list-style-type: none"> <li>(a) where the buyer is a consumer; or</li> <li>(b) where no performance at all has been tendered.</li> </ol> </li> </ol> <p style="text-align: center;"><i>Article 139</i> <i>Loss of right to terminate</i></p> <ol style="list-style-type: none"> <li>1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the lack of conformity.</li> <li>2. A seller loses a right to terminate by notice under Articles 136 unless the seller gives</li> </ol>	<p style="text-align: center;"><i>Article 142</i> <i>Loss of right to terminate</i></p> <ol style="list-style-type: none"> <li>1. <b>A party entitled to terminate</b> 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 <b>party</b> became aware, or <b>if the party is a trader</b> could be expected to have become aware, of the non-performance, whichever is later.</li> <li>2. Paragraph 1 does not apply ■ where no performance at all has been tendered.</li> </ol>	<p>Article 139 CESL seems to be unclear in both meaning and rationale. It might be a somewhat distorted copy of Article 64 CISG.</p> <p>In particular, it is unclear why a seller who has accepted late payment by the buyer, or payment in a currency other than the one agreed upon in the contract, or late taking of delivery, should be entitled to termination within a reasonable period of time.</p>

<p>notice of termination within a reasonable time after the right has arisen.</p> <p>3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.</p>		
<p style="text-align: center;"><i>Article 8</i> <i>Termination of a contract</i></p> <p>1. To ‘terminate a contract’ means to bring to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.</p> <p>2. Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance or for anticipated non-performance, the terminating party is also entitled to damages in lieu of the other party’s future performance.</p> <p>3. The effects of termination on the repayment of the price and the return of the goods or the digital content, and other restitutionary effects, are governed by the rules on restitution set out in Chapter 17.</p>	<p style="text-align: center;"><i>Article 143</i> <i>Effects of termination</i></p> <p>1. <b>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.</b></p> <p>2. <b>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.</b></p> <p>3. <b>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.</b></p> <p>4. <b>The obligation to return what a party has received by the other party’s performance under the terminated contract or part of the contract</b> and other restitutionary effects are governed by the rules on restitution set out in Chapter 16.</p>	<p>Reformulations and adaptations are made in order to render the Article clearer and more user-friendly.</p>

	<b>SECTION 3 DAMAGES</b>	
<p><i>Article 159</i> <i>Right to damages</i></p> <ol style="list-style-type: none"> <li>1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.</li> <li>2. The loss for which damages are recoverable includes future loss which the debtor could expect to occur.</li> </ol>	<p><i>Article 144</i> <i>Right to damages</i></p> <ol style="list-style-type: none"> <li>1. A <b>party</b> is entitled to damages for loss caused by the non-performance of an obligation by the <b>other party</b>, unless the non-performance is excused.</li> <li>2. The loss for which damages are recoverable includes future loss which the <b>aggrieved party</b> could expect to occur.</li> <li>3. <b>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 void.</b></li> </ol>	<p>This clarification is useful as such a clause would be held to be inadmissible. This would be the case even for B2B contracts. The clarification could be made either in Chapter 8 or here.</p>
<p><i>Article 160</i> <i>General measure of damages</i></p> <p>The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor 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 creditor has suffered and gain</p>	<p><i>Article 145</i> <i>General measure of damages</i></p> <p>The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the <b>aggrieved party</b> into the position in which <b>this party</b> 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 <b>aggrieved party</b> has suffered and gain of</p>	

of which the creditor has been deprived.	which <b>this party</b> has been deprived.	
<p><i>Article 161</i> <i>Foreseeability of loss</i></p> <p>The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.</p>	<p><i>Article 146</i> <i>Foreseeability of loss</i></p> <p>The <b>non-performing party</b> is liable only for loss which <b>this party</b> foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.</p>	
<p><i>Article 163</i> <i>Reduction of loss</i></p> <ol style="list-style-type: none"> <li>1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.</li> <li>2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.</li> </ol>	<p><i>Article 147</i> <i>Reduction of loss</i></p> <ol style="list-style-type: none"> <li>1. The <b>non-performing party</b> is not liable for loss suffered by the <b>aggrieved party</b> to the extent that the <b>aggrieved party</b> could have reduced the loss by taking reasonable steps.</li> <li>2. The <b>aggrieved party</b> is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.</li> </ol>	
<p><i>Article 164</i> <i>Substitute transaction</i></p> <p>A creditor 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.</p>	<p><i>Article 148</i> <i>Substitute transaction</i></p> <p>An <b>aggrieved party</b> 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.</p>	

<p style="text-align: center;"><i>Article 165</i> <i>Current price</i></p> <p>Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.</p>	<p style="text-align: center;"><i>Article 149</i> <i>Current price</i></p> <p>Where the <b>aggrieved party</b> has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the <b>aggrieved party</b> may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.</p>	
	<p style="text-align: center;"><i>Article 150</i> <i>Stipulated payment for non-performance</i></p> <ol style="list-style-type: none"> <li>1. <b>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.</b></li> <li>2. <b>The aggrieved party may recover damages for any further loss.</b></li> <li>3. <b>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.</b></li> </ol>	<p>A similar rule was included in the Feasibility Study (as in the PICC, PECL and DCFR). It is very important in practice and must not be omitted.</p>
		<p>The rules on interest for late payments must be made much</p>

	<b>SECTION 4 INTEREST ON LATE PAYMENTS</b>	simpler and more user-friendly.
<p><i>Article 166</i> <i>Interest on late payments</i></p> <p>1. Where payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate specified in paragraph 2.</p> <p>2. The interest rate for delayed payment is:</p> <p>(a) where the creditor'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;</p> <p>(b) where the creditor'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.</p>	<p><i>Article 151</i> <i>Interest on late payments</i></p> <p>1. Where payment of a sum of money is <b>overdue</b>, the <b>aggrieved party</b> is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate specified in paragraph 2.</p> <p>2. The interest rate for <b>overdue</b> payment <b>in general</b> is:</p> <p>(a) where the <b>aggrieved party's</b> 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;</p> <p>(b) where the <b>aggrieved party's</b> 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</p>	<p>(1) Overdue is the correct terminology and ties in with 'payment is due'.</p> <p>(2) There is no sufficient justification for having a rule according to which the only case where an excuse does not count is that of trader who is delaying making a payment other than a price (e.g. making restitution). This creates incoherence and confusion for no good reason.</p>

<p>3. The creditor may recover damages for any further loss.</p> <p style="text-align: center;"><i>Article 171</i> <i>Mandatory nature</i></p> <p>The parties may not exclude the application of this Section or derogate from or vary its effects.</p> <p style="text-align: center;"><i>Article 168</i> <i>Rate of interest and accrual</i></p> <p>1. Where a trader delays the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused by virtue of Article 88, interest is due at the rate specified in paragraph 5 of this Article.</p> <p>2. ...</p>	<p style="text-align: center;">percentage points.</p> <p>3. Where a trader delays the payment of a price <b>another six percentage points are added to the rate due under paragraph 2.</b></p> <p>4. The <b>aggrieved party</b> may recover damages for any further loss.</p> <p>5. The parties may not exclude the application of this Section or derogate from or vary its effects.</p>	
<p style="text-align: center;"><i>Article 167</i> <i>Interest when the debtor is a consumer</i></p> <p>1. When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 166 only when non-performance is not excused.</p> <p>2. Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.</p>	<p style="text-align: center;"><i>Article 152</i> <i>Interest when the <b>non-performing party</b> is a consumer</i></p> <p>1. When the <b>non-performing party</b> is a consumer, ■ interest does not start to run <b>unless</b> ■ the <b>aggrieved party</b> has given notice to the <b>consumer</b> specifying the obligation to pay interest and its rate <b>and the payment has been overdue for at least fourteen days.</b> Notice may be given before the date when payment is due.</p> <p>2. A term of the contract which fixes a rate of interest higher than that provided in Article <b>151</b>,</p>	<p>There is no real justification for consumers only to be liable for interest on late payment 30 days after receipt of notice. This situation brings advantages but also results in a potential significant disadvantage where, for example, notice is given at the time the contact is concluded and the goods are delivered four weeks later as interest would accrue from a point in time two days after delivery.</p>



<p>3. A term of the contract which fixes a rate of interest higher than that provided in Article 166, or accrual earlier than the time specified in paragraph 2 of this Article is not binding to the extent that this would be unfair according to Article 83.</p> <p>4. Interest for delay in payment cannot be added to capital in order to produce interest.</p> <p>5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p>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 81.</p> <p>3. Interest for delay in payment cannot be added to capital in order to produce interest.</p> <p>■</p>	<p>This aspect is worthy of a note to the EU institutions. The solution proposed in ELI Article 152 is just one of several possible solutions.</p>
<p style="text-align: center;"><i>Article 168</i> <i>Rate of interest and accrual</i></p> <p>1. Where a trader delays the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused by virtue of Article 88, interest is due at the rate specified in paragraph 5 of this Article.</p> <p>2. Interest at the rate specified in paragraph 5 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:</p> <p style="padding-left: 40px;">(a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or</p> <p style="padding-left: 40px;">(b) 30 days after the date of receipt of</p>	<p style="text-align: center;"><i>Article 153</i> <i>Delayed payment of a price by a trader</i></p> <p>1. Where a trader delays the payment of a price ■ interest at the rate specified in <b>Article 151 paragraphs 2 and 3</b> 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:</p> <p style="padding-left: 40px;">(a) 30 days after the date when the <b>non-performing party</b> receives the invoice or an equivalent request for payment; or</p> <p style="padding-left: 40px;">(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 <b>party obliged to</b></p>	

<p>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 debtor has received an invoice or equivalent request for payment.</p> <p>3. 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 170.</p> <p>4. The period for payment determined under paragraph 2 cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.</p> <p>5. The interest rate for delayed payment is:</p> <p>(a) where the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the interest rate applied by the European Central Bank to its most recent main refinancing operation</p>	<p><b>pay</b> has received an invoice or equivalent request for payment.</p> <p>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 <b>152</b>.</p> <p>3. The period for payment determined under paragraph <b>1</b> cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article <b>152</b>.</p> <p>4. <b>■Without prejudice to Article 151 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.</b></p>	
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<p>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 eight percentage points;</p> <p>(b) where the creditor'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 eight percentage points.</p> <p>6. The creditor may recover damages for any further loss.</p> <p style="text-align: center;"><i>Article 169</i> <i>Compensation for recovery costs</i></p> <p>1. Where interest is payable in accordance with Article 168, the creditor is entitled to obtain from the debtor, 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 creditor's recovery costs.</p> <p>2. The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph 1 and incurred due to the debtor's late payment.</p>		
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<p style="text-align: center;"><i>Article 170</i> <i>Unfair contract terms relating to interest for late payment</i></p> <ol style="list-style-type: none"> <li>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 not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.</li> <li>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 creditor than the time, period or rate specified in Articles 167 or 168, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 169 is presumed to be unfair.</li> <li>3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.</li> </ol>	<p style="text-align: center;"><i>Article 154</i> <i>Unfair contract terms relating to interest for late payment</i></p> <ol style="list-style-type: none"> <li>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 not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.</li> <li>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 <b>151</b>, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article <b>153 paragraph 4</b> is presumed to be unfair.</li> <li>3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.</li> </ol>	
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Part VI    Restitution		
Ex Part VIII		
	Chapter 16    Restitution	<p>The restitutionary regimes for withdrawal, avoidance and termination in the CESL have little in common.</p> <p>The withdrawal regime is very detailed and focuses on issues such as place and time of restitution, reimbursement of costs. It omits issues like fruits, improvements, interest etc.</p> <p>The avoidance and termination regime on the other hand imitates the style of 19<sup>th</sup> Century continental civil codes. It is fixated on issues like natural and legal fruits, substitutes, different types of expenses, etc.</p> <p>There is no sufficient justification for this striking difference in the regulatory approach. The ELI draft therefore seeks to revise the restitution chapter on the basis of the rules of restitution after withdrawal.</p>

<p style="text-align: center;"><i>Article 172</i> <i>Restitution on avoidance or termination</i></p> <p>1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party.</p> <p>2. ...</p> <p style="text-align: center;"><i>Article 177</i> <i>Mandatory nature</i></p> <p>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.</p> <p style="text-align: center;"><i>Article 44</i> <i>Obligations of the trader in the event of withdrawal</i></p> <p>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 41. ...</p>	<p style="text-align: center;"><i>Article 155</i> <i>Restitution on avoidance or termination</i></p> <p>1. Where a contract <b>or part of a contract</b> is avoided <b>or</b> terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party <b>under the affected contract or part of the contract.</b></p> <p>2. <b>Restitution must be made</b> without undue delay and in any event not later than fourteen days from <b>notification of the avoidance or termination. Where the recipient is a consumer</b>, this deadline is met if the consumer <b>takes the necessary steps</b> before the period of fourteen days has expired.</p> <p>3. <b>Where a contract or part of a contract is invalid or not binding under the Common European Sales Law for reasons other than avoidance or termination, this Chapter applies with appropriate adaptations.</b></p> <p>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 <b>before notice of avoidance or termination is given.</b></p>	<p><b>(1)</b> Termination under the CESL frequently concerns only part of a contract. It does so either because performance was to be made in separate parts or because the contract was otherwise divisible, e.g. where performance was to be made on a continuous basis and termination is only for the future.</p> <p>It is therefore necessary to revise the CESL to make it clear that restitution concerns only the affected parts of a contract.</p> <p><b>(2)</b> There is no justification for having a rule on time of performance for restitution upon withdrawal and for performance of the obligation to deliver, but not for restitution upon avoidance and termination.</p> <p><b>(3)</b> At various places throughout the CESL a rule states that a contract is invalid or not binding, for example where a contract which is concluded by telephone has not been signed by the</p>
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<p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <p>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 41, 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.</p> <p>...</p> <p style="text-align: center;"><i>Article 108</i> <i>Mandatory nature</i></p> <p>In a contract 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 effect before the lack of conformity is brought to the trader's attention by the consumer.</p>		<p>consumer, Article 19(4), or where the consumer has not explicitly acknowledged that the order implies an obligation to pay, Article 25(2). In these situations, the Chapter on restitution should apply by analogy.</p> <p><b>(4)</b> For good reasons, Article 108 allows parties to derogate from the rules on remedies even after, in a consumer contract, lack of conformity is brought to the trader's attention. Without this clarification it is very difficult for parties to reach a settlement. The same must apply concerning the Chapter on restitution, which, from a functional point of view, is part of the rules on parties' remedies.</p>
<p style="text-align: center;"><i>Article 44</i> <i>Obligations of the trader in the event of withdrawal</i></p> <p>1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue</p>	<p style="text-align: center;"><i>Article 156</i> <i>Payments received</i></p> <p>1. The <b>seller</b> must reimburse all payments received from the <b>buyer</b>,■ using the same means of payment as the <b>buyer</b> used for the</p>	<p>(1) The rule on reimbursement of payments should clarify, as Article 44 does, that the seller must normally use the same means of payment as the buyer.</p>

<p>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 41. 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.</p> <p>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.</p> <p>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.</p> <p>4. ...</p> <p style="text-align: center;"><i>Article 174</i> <i>Payment for use and interest on money received</i></p> <p>1. ...</p> <p>2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 166, where :</p>	<p>initial transaction, unless the <b>buyer</b> has expressly agreed otherwise and provided that <b>the buyer</b> does not incur any fees as a result of such reimbursement.</p> <p>2. <b>In the case of avoidance or termination by the buyer, reimbursement includes the costs of delivery and any other additional charges and costs.</b></p> <p>3. <b>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 157(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.</b></p> <p>4. <b>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 153, where:</b></p> <p style="padding-left: 40px;">(a) the <b>other party</b> is obliged to pay for use; or</p> <p style="padding-left: 40px;">(b) the <b>seller</b> gave cause for the contract to be avoided because of fraud, threats or unfair exploitation.</p>	<p>(2) The rule should also clarify that, in the case of termination by the buyer, reimbursement should include the costs of delivery and any other additional charges and costs.</p> <p>(3) Article 44(3) on restitution upon withdrawal provides right to withhold reimbursement on the part of the seller. A similar rule should be included in the Chapter on restitution upon avoidance or termination. This is particularly important as termination is, in consumer contracts, very easily available under the CESL and the seller often has no possibility to ascertain whether there has in fact been a lack of conformity.</p>
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<p>(a) the other party is obliged to pay for use; or</p> <p>(b) the recipient gave cause for the contract to be avoided because of fraud, threats and unfair exploitation.</p> <p>3. For the purposes of this Chapter, a recipient is not obliged to pay ... interest on money received in any circumstances other than those set out in paragraphs 1 and 2.</p>		
<p style="text-align: center;"><i>Article 44</i> <i>Obligations of the trader in the event of withdrawal</i></p> <p>...</p> <p>4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.</p> <p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <p>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</p>	<p style="text-align: center;"><i>Article 157</i> <i>Goods delivered</i></p> <p>1. <b>The buyer of goods</b> must send back the goods or hand them over to the <b>seller</b> or to a person authorised by the <b>seller</b>. <b>The seller is under an obligation to take the goods back unless the parties agree otherwise.</b></p> <p>2. <b>In the case of avoidance or termination by the buyer 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.</b></p> <p>3. <b>The buyer</b> who has made use of goods <b>or derived fruits</b> must pay the other party the monetary value of that use <b>or return these fruits only</b> where the <b>buyer</b> caused the ground for avoidance or termination <b>or was</b>, prior to the start of <b>the relevant</b> period, <b>■</b>aware of the</p>	<p>(1) A rule on who has to bear the cost of returning goods after avoidance or termination is absent from the CESL. Likewise, there should be a rule on the buyer's right to withhold. It does not make sense to oblige the buyer to send back the goods where the buyer cannot be sure he will ever receive reimbursement.</p> <p>(2) Fruits and use must be dealt with in the same way as there is no sufficient justification to differentiate between them.</p>

<p>the contract to the trader in accordance with Article 41, 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.</p> <p>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 that the consumer has to bear them.</p> <p>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 17 (1).</p> <p>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.</p> <p>5. ...</p> <p>6. ...</p> <p>7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p> <p style="text-align: center;"><i>Article 172</i></p>	<p>ground for avoidance or termination.■</p> <p>4. <b>The buyer is liable under Section 3 of Chapter 15 for not being able to return the goods, including fruits where relevant, or for any diminished value of the goods to the extent that diminishment in value exceeds depreciation through regular use. Liability shall not exceed the price agreed for the goods.</b></p>	<p><b>(3)</b> It is more efficient to leave the issue of buyer's liability to the Chapter on damages, as this will ensure, <i>inter alia</i>, that</p> <p>the buyer is normally liable unless non-performance of the obligation to return is excused;</p> <p>the buyer is not liable to the extent that loss or depreciation of the goods were caused by the seller, in particular by the goods not being in conformity with the contract;</p> <p>the buyer is not liable to the extent that the goods were actually worth less than the market price, e.g. due to their non-conformity;</p> <p>the relationship between the rules on restitution and the Chapter on damages is clear.</p> <p>It is not, however, appropriate to make the buyer pay for more than the price of the goods, unless the buyer is liable on other grounds (e.g. for fraud).</p>
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<p><i>Restitution on avoidance or termination</i></p> <ol style="list-style-type: none"> <li>1. ...</li> <li>2. The obligation to return what was received includes any natural and legal fruits derived from what was received.</li> </ol> <p><i>Article 173</i> <i>Payment for monetary value</i></p> <ol style="list-style-type: none"> <li>1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.</li> <li>2. The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.</li> <li>3. ...</li> <li>4. ...</li> <li>5. Where the recipient has obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for avoidance or termination, the other party</li> </ol>		
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<p>may choose to claim the substitute or the monetary value of the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods or digital content when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute. ....</p> <p style="text-align: center;"><i>Article 174</i></p> <p><i>Payment for use and interest on money received</i></p> <ol style="list-style-type: none"> <li>1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where: <ol style="list-style-type: none"> <li>(a) the recipient caused the ground for avoidance or termination;</li> <li>(b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or</li> <li>(c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.</li> </ol> </li> <li>2. ...</li> <li>3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received ... in any circumstances other than those set out in</li> </ol>		
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<p>paragraphs 1 and 2.</p>		
<p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <p>6. The consumer is not liable for the cost for:</p> <ul style="list-style-type: none"> <li>(a) ...</li> <li>(b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where: <ul style="list-style-type: none"> <li>(i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);</li> <li>(ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or</li> <li>(iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).</li> </ul> </li> </ul> <p>7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p>	<p style="text-align: center;"><i>Article 158</i> <i>Digital content</i></p> <ol style="list-style-type: none"> <li>1. <b>Digital content received is deemed to be returnable:</b> <ul style="list-style-type: none"> <li>(a) <b>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></li> <li>(b) <b>where it is otherwise clear that the recipient who sends back a tangible medium cannot have retained a usable copy of the digital content; or</b></li> <li>(c) <b>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.</b></li> </ul> </li> <li>2. <b>The buyer of digital content which is returnable within the meaning of paragraph 1 fulfils its obligation to return by:</b> <ul style="list-style-type: none"> <li>(a) <b>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></li> </ul> </li> </ol>	<p>The CESL does not address the specificities of digital content in an appropriate manner. Rather, the consumer/buyer is always under an obligation to pay the monetary value under the avoidance and termination regime, even where, for instance, a sealed CD can be returned or where the trader can block the buyer's account. This seems to be the case even where the seller has caused the ground for avoidance or termination.</p> <p>ELI Article 158 differentiates between cases where the further use of digital content on the part of the buyer can be prevented, including cases where a tangible medium is still sealed or where the trader uses a DRM scheme, and cases where this is not possible.</p>

<p style="text-align: center;"><i>Article 173</i> <i>Payment for monetary value</i></p> <p>1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. ...</p> <p>2. ...</p> <p>3. ...</p> <p>4. In a case of digital content the monetary value of what was received is the amount the consumer saved by making use of the digital content. ...</p> <p>5. In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made.</p>	<p>(b) <b>returning any tangible medium in accordance with Article 157; and</b></p> <p>(c) <b>paying the monetary value of any use made of the digital content where the buyer caused the ground for avoidance or termination or was, prior to the start of the relevant period, aware of the ground for avoidance or termination.</b></p> <p>3. <b>The buyer of digital content which is not returnable within the meaning of paragraph 1 must pay the monetary value of the digital content, which shall be calculated on the basis of the total price agreed in the contract. In the case of avoidance or termination by the buyer the buyer is not liable to pay unless to the extent that there is a saving on his part.</b></p>	
<p style="text-align: center;"><i>Article 45</i> <i>Obligations of the consumer in the event of withdrawal</i></p> <p>...</p> <p>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</p>	<p style="text-align: center;"><i>Article 159</i> <i>Related services</i></p> <p>1. <b>The buyer who has received related services must pay to the seller</b> an amount which is in proportion to what has been provided before the <b>contract was avoided or terminated</b>, in comparison with the full coverage of the contract.</p> <p>2. The proportionate amount to be paid by the <b>buyer</b> to the <b>seller</b> shall be calculated on the basis of the total price agreed in the contract</p>	

<p>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.</p> <p>6. The consumer is not liable for the cost for:</p> <ul style="list-style-type: none"> <li>(a) the provision of related services, in full or in part, during the withdrawal period, where: <ul style="list-style-type: none"> <li>(i) the trader has failed to provide information in accordance with Article 17(1) and (3); or</li> <li>(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);</li> </ul> </li> <li>(b) ...</li> </ul> <p>7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p>	<p><b>unless the buyer can show that this price was excessive.</b></p> <p>3. <b>In the case of avoidance or termination by the buyer, liability of the buyer shall not exceed the amount the buyer saved by receiving the related service.</b></p>	
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<p style="text-align: center;"><i>Article 173</i> <i>Payment for monetary value</i></p> <ol style="list-style-type: none"> <li>1. Where what was received, including fruits where relevant, cannot be returned ... the recipient must pay its monetary value. ...</li> <li>2. ...</li> <li>3. Where a related service contract is avoided or terminated by the customer after the related service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the related service. ....</li> <li>4. In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made.</li> </ol>		
<p style="text-align: center;"><i>Article 175</i> <i>Compensation for expenditure</i></p> <ol style="list-style-type: none"> <li>1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.</li> </ol>	<p style="text-align: center;"><i>Article 160</i> <i>Equitable modification</i></p> <p>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 <b>incurred expenditure in reliance on the contract and whether the party</b> did not cause, or lacked knowledge of, the ground for avoidance or termination.</p>	<p>Cases of expenditure incurred are so intricate that it may not be appropriate to have a hard and fast rule.</p> <p>The rule in Article 175 CESL, for example, could in a case of necessary but futile expenditure, lead to the strange result that a recipient who was in bad faith is better off than a recipient who was in good faith (because the</p>



<p>2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.</p> <p style="text-align: center;"><i>Article 176</i> <i>Equitable modification</i></p> <p>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 did not cause, or lacked knowledge of, the ground for avoidance or termination.</p>		<p>expenditure did not benefit the other party). Expenditure should therefore be dealt with under the flexibility clause.</p>
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	Part VII Prescription	
	Ex Part VIII	
	Chapter 17 Prescription	
	SECTION 1 GENERAL PROVISION	
<p><i>Article 178</i> <i>Rights subject to prescription</i></p> <p>A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.</p>	<p><i>Article 161</i> <i>Rights subject to prescription</i></p> <p>A right to enforce performance of an obligation, and any right ancillary to such a right, <b>including any remedy for non-performance except withholding performance,</b> are subject to prescription by the expiry of a period of time in accordance with this Chapter.</p>	<p>It is still unclear within the CESL whether remedies for non-performance are subject to prescription. Article 185 does not solve the problem as it deals with the effects of prescription.</p>
	SECTION 2 PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT	
<p><i>Article 179</i> <i>Periods of prescription</i></p> <ol style="list-style-type: none"> <li>1. The short period of prescription is two years.</li> <li>2. The long period of prescription is ten years or,</li> </ol>	<p><i>Article 162</i> <i>Periods of prescription</i></p> <ol style="list-style-type: none"> <li>1. The short period of prescription is <b>three</b> years.</li> <li>2. The long period of prescription is ten years or, in</li> </ol>	<p>The short period of prescription is 2 years. This is in contrast to: 3 years in the DCFR (Book III Chapter 7) and the UNIDROIT Principles (Chapter 10); and 4</p>

<p>in the case of a right to damages for personal injuries, thirty years.</p>	<p>the case of a right to damages for personal injuries, thirty years.</p> <p>3. <b>Prescription takes effect when either of the two periods has expired, whichever is the earlier.</b></p>	<p>years in the 1974 UN Convention on the Limitation Period in the International Sale of Goods. The proposed 2 year period is too short; a 3 year period is preferable</p> <p>The relationship between the two periods should also be clarified in order to prevent misunderstanding.</p>
<p><i>Article 180</i> <i>Commencement</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	<p><i>Article 163</i> <i>Commencement</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	

	<b>SECTION 3      EXTENSION OF PERIODS OF PRESCRIPTION</b>	
<p style="text-align: center;"><i>Article 181</i></p> <p><i>Suspension in case of judicial and other proceedings</i></p> <ol style="list-style-type: none"> <li>1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.</li> <li>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.</li> <li>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.</li> <li>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</li> </ol>	<p style="text-align: center;"><i>Article 164</i></p> <p><i>Suspension in case of judicial and other proceedings</i></p> <ol style="list-style-type: none"> <li>1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.</li> <li>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.</li> <li>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.</li> <li>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</li> </ol>	

<p>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.</p>	<p>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.</p>	
<p><i>Article 182</i> <i>Postponement of expiry in the case of negotiations</i></p> <p>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.</p>	<p><i>Article 165</i> <i>Postponement of expiry in the case of negotiations</i></p> <p>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.</p>	
<p><i>Article 183</i> <i>Postponement of expiry in case of incapacity</i></p> <p>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.</p>	<p><i>Article 166</i> <i>Postponement of expiry in case of incapacity</i></p> <p>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.</p>	

	<b>SECTION 4 RENEWAL OF PERIODS OF PRESCRIPTION</b>	
<p><i>Article 184</i> <i>Renewal by acknowledgement</i></p> <p>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.</p>	<p><i>Article 167</i> <i>Renewal by acknowledgement</i></p> <p>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. <b>In this case, the long period of prescription will not expire before the renewed short period.</b></p>	<p>If, e.g., in year 9 1/2 the debtor acknowledges the debt, the creditor should have 3 years and not merely 1/2 year.</p>
	<p><i>Article 168</i> <i>Period for a right established by legal proceedings</i></p> <ol style="list-style-type: none"> <li>1. <b>Where a right is established by judgment a new period of prescription of ten years begins to run.</b></li> <li>2. <b>The same applies to a right established by an arbitral award or other instrument which is enforceable as if it were a judgment.</b></li> <li>3. <b>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.</b></li> </ol>	<p>This rule is clearly missing.</p>

	<b>SECTION 5      EFFECTS OF PRESCRIPTION</b>	
<p><i>Article 185</i> <i>Effects of prescription</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	<p><i>Article 169</i> <i>Effects of prescription</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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.</li> </ol>	
	<b>SECTION 6      MODIFICATION BY AGREEMENT</b>	
<p><i>Article 186</i> <i>Agreements concerning prescription</i></p> <ol style="list-style-type: none"> <li>1. The rules of this Chapter may be modified by</li> </ol>	<p><i>Article 170</i> <i>Agreements concerning prescription</i></p> <ol style="list-style-type: none"> <li>1. The rules of this Chapter may be modified by</li> </ol>	

<p>agreement between the parties, in particular by either shortening or lengthening the periods of prescription.</p> <p>2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.</p> <p>3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.</p> <p>4. The parties may not exclude the application of this Article or derogate from or vary its effects.</p> <p>5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.</p>	<p>agreement between the parties, in particular by either shortening or lengthening the periods of prescription.</p> <p>2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.</p> <p>3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.</p> <p>4. The parties may not exclude the application of this Article or derogate from or vary its effects.</p> <p>5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.</p>	
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Part VIII Final provisions		
Ex Regulation		
	Chapter 18 Application in the Member States	
<p><i>Regulation Article 4</i> <i>Cross-border contracts</i></p> <ol style="list-style-type: none"> <li>1. The Common European Sales Law may be used for cross-border contracts.</li> <li>2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.</li> <li>3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if: <ol style="list-style-type: none"> <li>(a) 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; and</li> <li>(b) at least one of these countries is a</li> </ol> </li> </ol>	<p><i>Article 171</i> <i>Restriction to cross-border contracts</i></p> <ol style="list-style-type: none"> <li>1. <b>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.</b></li> <li>2. For the purposes of this Regulation, <ol style="list-style-type: none"> <li>(a) a contract between traders is a cross-border contract if the parties have their habitual residence in different countries■; and</li> <li>(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■.</li> </ol> </li> <li>3. Where the contract is concluded in the course of</li> </ol>	<p>(1) For general remarks on the drawbacks of the cross-border requirement see explanations at Article 3.</p> <p>(2) The Proposal requires at least one of the traders to have its habitual residence in a Member State, thereby preventing, for example, a Swiss and a Chinese trader who have chosen the law of a Member State as the law governing their contract, from using the CESL. There is no justification for this limitation, and it should be abandoned.</p> <p>(3) The minimum EU link for B2C contracts, as formulated in the Proposal, is arguably designed to protect traders</p>

<p>Member State.</p> <p>4. For the purposes of this Regulation, 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.</p> <p>5. 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.</p> <p>6. 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.</p> <p><i>Regulation Article 13</i> <i>Member States' options</i></p> <p>A Member State may decide to make the Common European Sales Law available for:</p> <p>(a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing</p>	<p>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.</p> <p>4. <b>In cases not covered by paragraph 4</b>, 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.</p> <p>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.</p>	<p>against foreign mandatory law. However, it fails to do so as even where the residential address, the billing address or the delivery address of the consumer are within the EU/EEA, the foreign mandatory law may prevail by virtue of Articles 6(2) or 9(2) of the Rome I Regulation where the consumer's habitual residence is outside the EU/EEA. This holds true all the more where a forum in a third country is available and that country's rules of conflict of laws have a similar effect or even prohibit any choice of the applicable law in consumer contracts (as is the case e.g. in Switzerland). The minimum EU link can therefore as well be abandoned, which would further simplify the process of choosing the CESL.</p> <p><b>(3)</b> The order of paragraphs 4 and 5 (now 3 and 4) should be reversed, as paragraph 4 applies only where a case is not already covered by paragraph 5 (now 3).</p>
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address, are located in that Member State; ...		
<p><i>Regulation Article 14</i> <i>Communication of judgments applying this Regulation</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> </ol>	<p><i>Article 172</i> <i>Communication of judgments applying this Regulation</i></p> <ol style="list-style-type: none"> <li>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.</li> <li>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.</li> </ol>	
<p><i>Regulation Article 15</i> <i>Review</i></p> <ol style="list-style-type: none"> <li>3. 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</li> </ol>	<p><i>Article 173</i> <i>Review</i></p> <ol style="list-style-type: none"> <li>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</li> </ol>	

<p>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.</p> <p>4. 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.</p>	<p>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.</p> <p>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.</p>	
<p><i>Regulation Article 16</i> <i>Entry into force and application</i></p> <p>1. This Regulation shall enter into force on the 20th day following that of its publication in the <i>Official Journal of the European Union</i>.</p> <p>2. It shall apply from <i>[6 months after entry into force]</i>.</p> <p>This Regulation shall be binding in its entirety and directly applicable in the Member States.</p>	<p><i>Article 174</i> <i>Entry into force and application</i></p> <p>1. This Regulation shall enter into force on the 20th day following that of its publication in the <i>Official Journal of the European Union</i>.</p> <p>2. It shall apply from <i>[6 months after entry into force]</i>.</p> <p>This Regulation shall be binding in its entirety and directly applicable in the Member States.</p>	

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