

THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW. OUTLINE OF REGULATORY IMPACT ON SALES GUARANTEES INTRODUCED BY DIRECTIVE 99/44/EC

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1. Introduction

On 10 October 2011, the European Commission published a Communication—entitled ‘A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market’.¹ This Communication, working under certain assumptions² highlights the need to remove existing obstacles by targeting the substantive law. The Commission expressed its intention to act on the most widespread contract, that of sales. In fact the Proposal for a Common European Sales Law (hereinafter ‘CESL’) provides for a comprehensive set of uniform rules of contract law governing the entire lifecycle of the contract of sale. This body of rules should be part of the national law of each Member State as a ‘second regime’ of contract law, specifically for those contracts that are frequently used in cross-border trade and which urgently require a solution to the barriers it faces. The regime will be common to all Member States; the parties will be able to choose it as the applicable law under the principle of contractual freedom by means of an opt-in system. It will give rise to a complete set of common rules for sales for the benefit in particular, but not exclusively, for online purchases.³

Linked to the above-mentioned Communication is the CESL⁴ whose objective is made clear in the preamble; it underscores the importance of eliminating differences

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¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions - A Common European Sales Law To Facilitate Cross-Border Transactions in the Single Market [2011] COM (2011) 636 final.

² The existing contract law creates barriers, discourages traders from venturing into new markets and simultaneously discourages consumers from making purchases in other Member States.

³ The Communication states that the body of rules must have the following features: i) a contract law regime common to all Member States, ii) an optional regime, iii) focus on ‘sales’ contracts, iv) a regime limited to cross-border contracts, v) a regime focused on contracts between businesses and consumers (B2C) and those between companies (B2B) in which at least one party is an SME, vi) Identical set of consumer protection rules, vii) a comprehensive set of contract law rules, and viii) a regime having an international dimension.

⁴ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] COM (2011) 635 final 2011/0284 (COD); For some first comments: Donadio, ‘Diritto contrattuale comunitario e “optional instrument”: una valutazione preventiva’ in *Contratto/Impresa e Europa* (2011) 649; Patti F.P., ‘Le clausole abusive e l’ ‘optional instrument’ nel percorso dell’armonizzazione in Europa’ in *Contratto/Impresa e Europa* (2011) 662; Rocco, ‘L’istituzione di uno

between contract laws, additional transaction costs, and other complexities characteristic of cross-border transactions. The general objective of improvement of the internal market is made clear, through facilitating the development of cross-border trade for businesses and cross-border purchases for consumers. How may this objective be attained? One solution is by putting in place autonomous and uniform rules of contract law, including consumer protection rules. The CESL, therefore, must provide for completely harmonised rules to ensure a high level of consumer protection across the European Union (hereinafter 'EU') with the result that it will no longer be necessary to identify the mandatory rules for consumer protection for transactions between businesses and consumers (hereinafter 'B2C').

In short, after years of 'minimum harmonisation', we are witness to a turning point for European private law; conceiving a model that is uniform, even if optional, and which is directed at guaranteeing equal status to all systems, to all citizens and all jurists in the EU.⁵

It is outside the scope of this paper to deal with matters relating to the legal basis of the Proposal and those relating to its self-standing⁶ character, even though they remain, without any trace of doubt interesting and relevant. The author will attempt to analyse the rules of the proposed regulation which are foreseen to have some impact on legislation on guarantees in the sale of consumer goods, already the subject of harmonisation with Directive 99/44/EC,⁷ and on the Consumer Rights Directive.⁸

strumento opzionale di diritto contrattuale europeo' in *Contratto/Impresa e Europa* (2011) 798; Hesselink, How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation (2012) *ERPL* 1, 195-212 <<http://ssrn.com/abstract=1950107>> accessed March 2012; expressing a negative opinion of the Proposal for Regulation: Eidenmueller and others, 'The Proposal for a Regulation on a Common European Sales Law: Shortcomings of the Most Recent Textual Layer of European Contract Law' (SSRN, 25 January 2012) <<http://ssrn.com/abstract=1991705>> accessed March 2012, whose abstract reads that '[w]hat is needed is a broad and thorough debate on the scope, forms and contents of contract law harmonization in Europe rather than the speedy legislative enactment of a flawed product'; Whittaker, *The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties* (Oxford Legal Studies Research Paper No. 10/2012) <<http://ssrn.com/abstract=2006786>> accessed March 2012.

⁵ In the same sense also the Directive on consumer rights of 2011.

⁶ Among the contributors: Hesselink (n 4), the Commission's approach presents itself as innovative and in the author's opinion also convincing although there are some aspects that might be improved; for others, see Laure Lestienne-Sauvé, 'La directive européenne de 2011 sur les droits des consommateurs et le droit européen des contrats' (2012) 4 *Semaine Juridique Entreprise et Affaires* 1072, according to which '[p]our notre part, le règlement nous paraît source de confusion plus que de clarté. Il sera sans doute difficile pour les parties de comprendre le fonctionnement d'un système d'application facultative, et tout aussi difficile d'en obtenir une mise en oeuvre harmonieuse sur l'ensemble du territoire européen'. Eidenmueller and others (n 4) and Whittaker (n 4) also express a negative opinion of the Proposal for Regulation.

⁷ Directive 1999/44/EC of the European Parliament and of the Council on some aspects of sales and guarantees of consumer goods [1999] L 171/12; for an analysis of the subject see: Feltkamp and Vanbossele, 'The Optional Common European Sales Law: Better Buyer's Remedies for Seller's Non-performance in Sale of Goods?' (2011) 6-2011 *ERPL*, 873-905.

⁸ Directive 2011/83/EU of the Parliament and the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and

2. The Guarantee of Conformity in Directive 99/44/CE

The system of guarantees and remedies in consumer sales has undergone great innovations with the entry into force and implementation of Directive 99/44/EC, which was intended to harmonise the law of EU countries dealing only with 'certain aspects of the sales and guarantees of consumer goods.' The Directive's objective was to increase cross-border relations by ensuring that consumers could be certain that the level of protection foreseen in their own country could also apply to cross border purchases, and businesses are not discouraged from marketing their products or services across the entire EU by having to comply with different rules in each Member State.⁹

Despite its rather 'modest' title, Directive 99/44 immediately presented itself as an important and ambitious text that without a doubt, once put into effect, brought substantial changes in favour of consumers to the regulations of the Member States.

Among the most important changes, one has to mention the introduction of a legal guarantee of compliance (the seller's obligation to deliver goods in accordance with the contract),¹⁰ a hierarchy of remedies which favours keeping the contract in force against its termination (primary: repair and replacement; secondary: termination of the contract and price reduction),¹¹ a set duration of guarantee for two years from delivery of goods,¹² and finally having regulated although not exhaustively, the commercial guarantee, differentiating it from the so-called legal one.¹³

The expectation of the 'seller's obligation to deliver goods in conformity with the contract' for consumer sales introduced a separate and autonomous obligation with respect to that of delivery in the strict sense (pure and simple);¹⁴ in fact, the performance by the seller is deemed to be complete only if the goods supplied conform to the contract, and the so-called primary remedies, that is, repair and replacement, rise to the remedies for non-performance with the result that the seller will be contractually obliged to intervene free of charge on the good to restore its conformity, because if not he would be non-performing.¹⁵

repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA [2011] L 304/64.

⁹ For a more in-depth treatment see Capilli, 'La vendita di beni di consumo' in *Annali della Università Telematica Giustino Fortunato* 2010/2011 (Giappichelli 2011) (contribution updated to November 2011).

¹⁰ (n 8) art 2.

¹¹ *Ibid.*, art 3.

¹² *Ibid.*, art 5.

¹³ *Ibid.*, art 6.

¹⁴ Salvat, 'La garantie spéciale de conformité et l'obligation générale de délivrance conforme : quel choix d'action pour l'acheteur ?' (2006) *Contrats, conc. consom.*, 18.

¹⁵ In that sense, Amadio, 'Proprietà e consegna nella vendita dei beni di consumo' (2004) *Riv. Dir. civ.*, 138. The Court of Justice, in the first judgment (case *Quelle*, C-404/06) that took up Directive 99/44 and

3. The Proposal for Regulation on a Common European Sales Law

A careful review of the CESL allows its consideration as a true hybrid of both European law and national law. It was drawn up in fact, as an optional instrument applicable only to cross-border sales (with the possibility for Member States to also provide for its applicability to domestic sales under Article 4 of the CESL)¹⁶ concluded between B2C or between businesses (hereinafter 'B2B') where at least one party is a small and medium-sized enterprise (hereinafter 'SME') and only if there is an agreement between the parties. Moreover, in B2C contracts, decisions will be valid only if the consent of the consumer is given by an explicit statement expressed distinctly from the agreement to conclude the contract.

Compared with Directive 99/44/EC, the first datum to be evaluated regards its applicability. The Directive was introduced to harmonise the law of the Member States with particular regard to sales between traders and consumers, while the CESL would have a wider applicability as it is directed at the standardisation of sales law, foreseeing standards for both sales between traders and consumers, as well as for sales between traders. So with its coming into force, the CESL would introduce, even in sales between traders, remedy systems that until now have been conceived and designed only to protect the consumer. In any case, reading the CESL reveals some substantial differences between the remedies for consumer protection and those which protect the buyer-trader.

For further clarification, it is necessary to take into consideration the rules contained in part four of the CESL dealing with the obligations and remedies of the parties to the sales contract or contract to supply digital content: by preliminarily recalling the definition of a sales contract and of a contract to sell to consumers contained in the text of the CESL.

The 'sales contract' means any contract under which the trader, being the seller, transfers or undertakes to transfer the ownership of the goods to another person being the buyer, and the latter pays or undertakes to pay the price thereof. This 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. On the other hand, 'consumer sales contract' is defined as a sales contract where the seller is a trader and the buyer is a consumer.¹⁷ So the difference relates to the parties to that contract; in consumer sales the buyer is a consumer, understood as a physical

in particular its correct transposition in Germany, stated that when the seller delivers non-compliant goods, he does not properly carry out the obligation accepted in the sales contract and must therefore bear the consequences of such improper performance of that contract. For a comment: Capilli, 'La direttiva sulla vendita di beni di consumo al vaglio della Corte di Giustizia' in *Contratti* (2008), 734; Conti and Foglia, 'Vendita e garanzie dei beni di consumo' (2008) *Corr. Giur.* 6, 863 A.

¹⁶ It is possible that, once the proposal is approved, it would have to be chosen by the Member Countries to avoid distortive effects that could cause real discrimination between domestic enterprises and those of other Member Countries.

¹⁷ The definitions are related in Article 2 of the Regulation.

person acting for purposes which are outside his the activities of his trade, business, craft or profession.¹⁸

No reference to conformity of goods is made in the definition of sales contract.¹⁹ It was instead correctly inserted in the part relative to the seller's obligations.²⁰ Article 87 in fact establishes that there is non-performance in case the delivery of goods or supply of digital content does not conform to the contract,²¹ and Article 91 indicates among the seller's obligations that of ensuring that the goods or the digital content are compliant with the contract provisions.²²

The seller's obligation (whether dealing with B2B or B2C sales) is consequently two-pronged; the seller is held responsible not only for the delivery of goods, but must also ensure conformity of goods against the contract. Thus, the optional instrument extends the concept of conformity of goods with the contract to sales between traders that the Directive 99/44/EC had set forth for sales to consumers.²³

The lack of conformity, however, is only one of the kinds of non-performance identified in Article 87 of the CESL which are specifically linked to the delivery of goods and digital content;²⁴ specifically Article 87 (c). The additional assumptions relate to the failure or delay in delivery of property; the failure or delay in delivery of digital content; the failure or delay in payment of the price, and any other circumstance in which execution of the activity does not conform to the contract provisions.

Articles 87 and 91 are rather innovative when compared to Directive 99/44. They regulate on the one hand contractual non-performance and on the other the seller's obligations. Article 99 takes up what has been enacted by Directive 99/44 on the notion of conformity. It establishes that conformity must be evaluated using the

¹⁸ The same definition of consumer is found in the Directive on consumer rights.

¹⁹ Feltkamp and Vanbossele (n 8) 879.

²⁰ It has been repeatedly noted that with the introduction of Directive 99/44/EC the seller's obligation has been enriched in content, since he is not only obliged to deliver goods, but also to deliver goods compliant to the contract.

²¹ Art 87 (c) and (d).

²² The issue related to the provision in the proposal of bringing together goods and digital content will not be lingered over here. On this point, please refer to Feltkamp and Vanbossele, (n 8) 882-883, who point out that 'it follows from the definition of sales contract that it only applies to the sale of goods defined as corporeal movables. The notion corporeal movables itself is not further defined. [...] In the meantime, the Proposal for regulation includes digital content. [...] The proposed approach is, in our view, confusing and complex. In view of the objective of having a user-friendly, clear, and comprehensive text, a clarification is necessary as to whether digital content is to be considered a good or not and to dedicate a separate chapter to digital content'.

²³ In Italy in particular, there would be an important development in consideration of the fact that ensuring compliance in sales among traders is not foreseen in the rules of the Civil Code which provide for the regulation of warranty for defects, lack of promised quality and the guarantee of proper functioning.

²⁴ Feltkamp and Vanbossele (n 8) 892.

contract as the parameter; it sets precise criteria which the goods or digital content must satisfy in order to be deemed to be in conformity. They 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.

Article 100 also foresees that the goods or digital content are in compliance if they:

- (i) are 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;
- (ii) are fit for the purposes for which goods or digital content of the same description would ordinarily be used, and possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;
- (iii) are 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; are supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive; 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 possess such qualities and performance capabilities as the buyer may expect.

To determine what the consumer may reasonably expect regarding digital content one must check whether or not the digital content was supplied in exchange for the payment of a price.²⁵

It appears that Article 99 dictates that conformity criteria apply for all types of goods, while Article 100 indicates criteria based on the individual specificities of the goods sold. However, it seems that there are no significant differences compared with the instructions under the Directive 99/44.

It must further be noted that Article 99 paragraphs 3 and 4 foresee the imperativeness of the above-mentioned rules only when dealing with sales to consumers.

Article 101 ultimately lays down specific rules for B2C sales, and establishes that any lack of conformity resulting from an incorrect installation must be considered as non-conformity of goods or of digital content. This defect can arise as many times as the goods or the digital content have been installed by the seller or under his responsibility, or if the goods or digital content are intended to be installed by the

²⁵ That is to say, the buyer can not complain that digital content does not meet expectations in case it was free, except for having a right to recover damages sustained by his other goods.

consumer and the incorrect installation is due to an insufficiency in the installation instructions.²⁶ This rule too is in line with Directive 99/44.

4. The Passing of Risk

The CESL then passes on to identify the relevant time for determining compliance with the passing of risk to the buyer, an effect that would happen²⁷ when the buyer takes delivery of the goods or the documents representing them, or of the digital content.

The issue of the passing of risk has been addressed by those who had dealt with Directive 99/44 exactly because there was no reference contemplated there, giving rise to uncertainty as in the case of delayed delivery of goods. From this point of view, important new features are covered in the proposed regulation that try to provide a solution (and today the Consumer Rights Directive gives an answer in that sense) in contracts between traders, identifying the moment of transfer of risk with that of delivery or other acquisition of possession. So when the transportation of goods is provided for, the passing of risk will coincide with the delivery of goods to the first carrier. In consumer sales contracts, 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. When the supply of digital content is not provided 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.

On this point, Article 20 of the Consumer Rights Directive reflects what is indicated in the CESL and provides that,

[i]n contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods. However, the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier.

Since this is a maximum harmonisation Directive which should not leave any room for manoeuvre to Member States, it could be argued that on the issue of passing of risk in contracts of sales to consumers, the CESL and the national law will be placed on the same plane, dealing in both cases with imperative rules.

²⁶ It will certainly be difficult to assess in which cases a real insufficiency in installation instructions can arise.

²⁷ As specified in chapter 14 of the regulation, art 142 CESL.

5. The Regulation of Remedies for Buyer Protection

Chapter 11 of the CESL specifically regulates remedies for buyer protection in general and prescribes different rules based on the qualification of the buyer (trader or consumer). In general the remedies for buyer protection consist of:

- (a) requiring performance, in particular the execution of a specific performance, repair or replacement of the goods or digital content;
- (b) refusing to perform the buyer's own obligations;
- (c) terminating the contract and claiming the return of any price already paid;
- (d) reducing the price, and finally
- (e) claiming compensation for damages.

However, the CESL does not appear to establish a rigid hierarchy for these remedies,²⁸ which is not the case in the Italian Consumer Code (Article 130). Relative to Directive 99/44, it should be noted however, that the CESL provides for the possibility to refuse to perform one's own obligations and for compensation for damages.

The CESL takes a different approach and provides that the remedies are not mutually exclusive and can be combined in the case of supply of digital content provided free of charge; the buyer may not avail himself of the remedies specified in Article 106,²⁹ but can only request compensation for any damages caused to his goods from the lack of conformity of digital content, and so damage happening to hardware, software, and data. Loss of earnings caused to the buyer because of the damage sustained is excluded from compensation.

6. The Right of Cure by the Seller

The provision on the 'right of cure'³⁰ due by the seller is also notable. It consists in the possibility that the vendor, who has offered performance in advance and who has received communication of the goods' difference with respect to the contract, offers a

²⁸ In contrast to what was provided for in Directive 99/44/EC and the implementing rules, see for example Article 130 of the Italian consumer code.

²⁹ Art 106 reads '[i]n the case of non-performance of an obligation by the seller, the buyer may: a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter; b) withhold the buyer's own performance under Section 4 of this Chapter; c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17; d) reduce the price under Section 6 of this Chapter; e) claim damages under Chapter 16'.

³⁰(n 8) Art 109; in this sense Feltkamp and Vanbossele (n 8) 893 speak of a 'second chance'. On the issue: Schneider, 'The seller's right to cure under the uniform commercial code and the United Nations Convention on contracts for the international sale of goods' (1989) 7 1 *Arizona Journal of International and Comparative Law*, 69-103, <<http://ssrn.com/abstract=1935487>> accessed March 2012; Yovel, 'The Seller's Right to Cure a Failure to Perform in International Sales' (2005) *Nordic Journal of Commercial Law*, 1-19, <<http://ssrn.com/abstract=906604>> accessed March 2012, which analyses the right of cure of the seller in the CISG and in the PECL.

new and conforming tender within the term set for performance.³¹ This is not a novel remedy in sales contracts concluded between traders, given that both the United Nations Convention on Contracts for the International Sale of Goods (hereinafter 'CISG') and the Principles of European Contract Law (hereinafter 'PECL') provide for this remedy. However, the CESL extends the application of this right to include B2C sales, exception being that the consumer will be able to make use of remedies without the right of cure being, so to speak, 'objected to'. In all other cases, the seller who has offered a service that differs from the contract can propose to correct it at his own expense without unjustified delay, starting from the moment when he has received communication about it. In this way, substantially, the seller is allowed to choose the method to remedy the defect of conformity, to the extent that the buyer will be able to reject the offer of cure only in clearly determined cases, that is, if:

- (a) a cure cannot be effected promptly and without significant inconvenience to the buyer;
- (b) the buyer has reason to believe that the seller's future performance cannot be relied on, or
- (c) delay in performance would amount to a fundamental non-performance.³²

If the trader is held liable to cure a defect in a sales contract with a consumer, it is foreseen that the latter can choose between repair and replacement provided that the chosen remedy is not unlawful or impossible nor burdens the seller with disproportionate costs when compared to the alternative remedy, taking into account the value the goods would have had in the absence of lack of conformity, the extent of the defect, and the alternative remedy that could be carried out without significant inconvenience to the consumer.

Furthermore, if the consumer has requested the cure of the lack of conformity, that is, he has required performance through repair or replacement, he cannot try other remedies, except in case the trader fails to make the repair or replacement within a reasonable time³³ and in any case not exceeding thirty days.³⁴ This provision suggests that in sales between traders, the evaluation of a reasonable term is different than in sales with consumers, which is set in advance at a maximum of thirty days. Nothing rules out that this term can also be taken as a parameter for B2B sales.³⁵

³¹ Raising doubts about the non-application to sales to consumers of the right of cure of the seller in the same way that is foreseen for sales between traders, Feltkamp and Vanbossele (n 8) 895, note that 'the right to cure for the seller seems to find its justification in the principle of good faith and fair dealing and the desire to uphold contractual relations where possible and appropriate. Placed in that context, we do not see why the same rule would not apply in case the buyer is a consumer, especially where the Optional Common European Sales Law formulates the duty to act in accordance with good faith and fair dealings as a general principle that applies also to consumers and where for related services the right to cure applies.'

³² See (n 31).

³³ The time within which to proceed with the cure must be 'reasonable' which means that it will depend on a number of factors that must be evaluated on a case by case basis.

³⁴(n 4) art 111 (5).

Compared to Directive 99/44, it appears favourable to have a fixed term to avoid discretionary evaluation. It should be noted that on the subject, Italian jurisprudence has long aligned itself with this term of duration.³⁶

7. Burden of Notification and Examination

It appears from reading the rules contained in the CESL that although, as has been noted above, a hierarchy of remedies is not explicitly established, the possibility of using other remedies is precluded once the buyer has made his choice between repair and replacement. The buyer is allowed, however, the possibility to withhold performance pending the term for providing for repair or replacement of the non-compliant goods and to request the right to recover damages for delay and for those caused or not attained by cure.³⁷

It is only for contracts between traders that the CESL provides for additional burdens of verification of goods within a reasonable term and in any case not more than fourteen days from the date of delivery of the goods, supply of digital content, or provision of related services, and it always requires the communication of the lack of conformity within a reasonable term.³⁸ The right to rely on a lack of conformity is 'lost' if it is not communicated to the seller within two years from the moment in which the goods have been delivered to him.

Doubt is raised by the fact that the CESL does not foresee burdens of examination and notification even for B2C contracts. It is submitted that in view of the duty of good faith and fairness which the parties are held in the execution of the contract, it would be appropriate to include such duties. On the other hand, the fact that the CESL does not include any obligation to either verify or notify could turn out to be a double-edged sword for the consumer, who would find himself in difficulty when having to prove the existence of the defect at the time of delivery, or at the passing of risk.

The CESL does not contain, therefore, any reference to any time limit within which the lack of conformity should be reported, in contrast to Directive 99/44/EC in which the legislature had indicated as two months the period within which the consumer has the burden to report the defect to the seller, under penalty of forfeiture. One must remember that based on Directive 99/44/EC and the Italian implementing legislation (as an example, but the same applies for other Member States), the lack of conformity is presumed if it emerges within six months from delivery of the goods, thus causing a reversal of the burden of proof on the seller who must demonstrate that the goods

³⁵ It is a matter to evaluate on a case by case basis.

³⁶ Jurisprudence on the fairness of the term: Trib. Roma 20779/2010 which considered a term of over sixty days in any case not fair, as objectively excessive, not considering Christmas and New Year's holidays; Trib. Roma 22357/2010 (unpublished) which considered not fair the time lapse (of three months) by which the offer of repair was received and even considering that for the purpose of evaluating fairness, the difference found in the specific case had required an evaluation by the parent company; Trib. Roma 24571/2010 (unpublished) which considered not fair the term of fifteen days for the repair of a breakdown such as that to the control unit of the automatic transmission and of the motor.

³⁷ *Ibid.*, art 109 (7).

³⁸ *Ibid.*, art 122.

were in conformity at the time of delivery.³⁹ However, the term of six months may be too short a time for certain goods.⁴⁰ It would therefore be hoped for that the Community legislature would revise that part of the Proposal in light of the criticism that had already been raised in the review of Directive 99/44.⁴¹ The rules regarding conformity and remedies would also apply to the case of related services.

8. Termination for Non-Performance

Termination for non-performance is governed by Article 114 and following articles, and provides in general the basic rule under which the buyer may request termination if the seller's non-performance is grave. The CESL prescribes a specific rule in case of non-performance due to lack of conformity, establishing that such lack is not necessarily serious, but must not be insignificant. The problem at this point will be to evaluate in which cases the lack of conformity can be deemed to be insignificant or otherwise. It would therefore be opportune for the legislature to specify the criteria to determine the significance of non-performance, keeping in mind the CESL's self-standing nature. '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'.⁴²

9. Delay in Delivery

Delay in delivery is a case of non-performance of the contract and is regulated by Article 115. First of all, it is not clear if it applies to all sales, that is, B2B and B2C, in view that the expression used, 'delay in delivery which is not in itself fundamental' is rather ambiguous and enunciates subjective criteria. There is again a lack of guidance for interpreting the 'not fundamental' nature of the delay set in Article 87 of the CESL. From one point of view, it is as though another 'second chance' of the right of cure for the seller were introduced, which appears to conflict with the protection granted to consumers if this should be considered to extend to consumer sales.

The possibility of the failure or delay in delivery is not provided for in Directive 99/44/EC and its regulation represents an advantage for the consumer as long as the rule does not remain indeterminate as it is in the CESL.

10. Anticipated Non-performance

Equally worth mentioning is the expectation of 'termination for anticipated non-performance.' Article 116 of the CESL foresees that the buyer, whether a trader or a consumer, can terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that performance will not take place, and if that non-performance would be such as to justify termination.

³⁹ Ibid., Art 102 (5).

⁴⁰ Already with Directive 99/44 similar criticisms have been raised.

⁴¹ See Capilli (n 9) and (n 15).

⁴² Art 114 (2).

There is a provision that the exercise of the remedy of termination must be communicated to the seller under penalty of losing the right itself.⁴³ That provision (that is, the loss of the right to terminate) nevertheless, does not apply to sales to consumers, which means that in general the consumer must also communicate the termination of the contract, yet does not lose that right if he fails to communicate the termination within the time foreseen by Article 119.⁴⁴

11. Compensation for Damages

Compared to Directive 99/44, which leaves it to the Member State to regulate, the CESL not only provides for compensation of damages among the remedies for buyer protection, but prescribes a precise framework where the compensable damage includes future damages that the debtor could foresee and sets⁴⁵ criteria to determine such an amount. In fact, the CESL specifies that '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 of which the creditor has been deprived.'⁴⁶ In the context of the regulation set forth for interest on delayed payment, it is likewise foreseen that the creditor can obtain compensation for damages for every other damage.

12. The Prescription

One must turn towards the provisions regulating prescription. The CESL sets a number of terms, a short period of prescription of two years, a long period of ten years, and a specific term in case of damages for personal injury of thirty years. Significant criticism has been put forward from several sides because the point in time when the term starts running is particular to the term in question, as it apparent from a reading of Article 180, according to which '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,' while '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.'

The CESL, besides differentiating the starting of the terms, regulates the cases of suspension, delay and interruption, as well as the effects and the agreements to derogate from the fixed term, reducing or increasing it.

So, if from the consumer's point of view such a regime limitation could appear favourable, relative to that provided for by Directive 99/44 and also compared to what is provided for by some national systems, the same cannot be said for the trader who

⁴³ Ibid., arts 118 and 119.

⁴⁴The proposal is silent about the method by which communication should be made, which means that such communication could also be oral.

⁴⁵ (n 4) art 160.

⁴⁶ (n 4) art 160.

could be discouraged by the choice of optional regime exactly because of those provisions.

13. Conclusions and Reflections

Europe is changing rapidly, both from an economic and legal⁴⁷ point of view, and it must equip itself with innovative legal instruments. The process of European legislation is also evolving due to the evidence of potential harmful economic effects arising from differences in the legislation of Member States.⁴⁸

For some time academia has pushed toward a uniform European civil law and businesses have called for greater standardisation of national laws, and it must be noted that the European legislature is using two different ways to unify European law. The first is through the Consumer Rights Directive to be implemented by Member States by 2013⁴⁹ and which aims to standardise the field of distance selling and sales concluded away from business premises in which consumers have a greater need of protection, and the other by the CESL, an optional instrument which should clarify the law of sales and which contains the rules on guarantees and remedies to protect consumers.

One wonders whether it is correct to proceed in this way, knowing that the process has started and is unlikely to be stopped.⁵⁰

One can not underestimate that the optional instrument, which has the evident purpose of reviving the economy, despite being heavily based on existing consumer law,⁵¹ is different because it aims to regulate the sales contract in general by encompassing both sales between traders and consumers and sales between traders.

The implementation of the CESL must not be read in necessarily negative and critical terms, but rather that proceeding towards the standardisation of contract law seems to be the solution to be maintained. Nevertheless, even if wanting to proceed in that way, the text of the CESL cannot be adopted as it is, but corrective actions must necessarily be taken. In addition to what has already been identified in previous sections, we highlight the opportunity to clearly differentiate between the rules that only apply to sales between consumers and traders and those applicable to sales between traders. The text, in fact, must present itself as easy to read and interpret given its self-standing nature.

⁴⁷ For a more in-depth treatment see Micklitz, 'La mano invisibile del diritto privato europeo in materia normativa. La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolamentazione' *Seminari del Consiglio Nazionale Forense* (2008-2009) (Istituto Poligrafico e Zecca dello Stato 2010) 125-182.

⁴⁸ *Ibid.*, 136.

⁴⁹ Directive 83/2011/EU.

⁵⁰ Probably the use of two different instruments is directed to making sure that with the standardisation that should be determined following the implementation of the Directive on consumers in the Member Countries, it will be easier to choose the optional instrument as applicable law.

⁵¹ For the part that concerns us here, the close link with Directive 99/44 is evident.

From the analysis of the provisions of the Proposal for regulation having the purpose of guarantees and remedies in sales to consumers, furthermore, the need emerges to introduce some modifications to those provisions whose content seems so indefinite as to be able to hinder its application.

We must reflect on the fact that if we want to be European citizens, we must be able to count on a right that unites us all⁵² by providing the same rights and duties and thinking only about the true importance of European economic changes that can be attained by legislation in which the benefits, the critical points and the effects can be well thought out.

It is finally noted that the absolute lack within the CESL of rules related to the manner of dispute resolution for consumers in cross-border transactions. Even though the Proposal for a Regulation of the European Parliament and the Council on the resolution of consumer disputes online (Regulation on ODR for consumers) of 29 November 2011⁵³ and the Proposal for a Directive of the European Parliament and the Council on alternative dispute resolution for consumers amending Council Regulation (EC) n. 2006/2004 and Directive 2009/22/EC (Directive on ADR for consumers) of 29 November 2011⁵⁴ have been published, the current lack of rules in this area constitutes a further obstacle to the internal market. One must, therefore, linger on this aspect as providing adequate protection, that it is not enough only to provide for instituting uniform rules of rights, but it is necessary to introduce uniform rules regarding their justiciability.⁵⁵

⁵² Dealing with these aspects, Hesselink, 'The Case for a Common European Sales Law in an Age of Rising Nationalism' (2012) (Amsterdam Law School Research Paper No. 2012-19) and (Centre for the Study of European Contract Law Working Paper Series No. 2012-01) <<http://ssrn.com/abstract=1998174>> accessed March 2012.

⁵³ COM(2011) 794 definitive.

⁵⁴ COM(2011) 793 definitive.

⁵⁵ Alpa, 'I rimedi di diritto privato nella normativa di derivazione comunitaria' *Seminari del Consiglio Nazionale Forense* (2008-2009) (Istituto Poligrafico e Zecca dello Stato 2010) 207.