

CCBE Position on Contract Rules for Online Purchases of Digital Content

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

Following the [EU's Digital Single Market Strategy](#) adopted by the Commission on 6 May 2015 and establishing an approach to address the most important barriers that currently hinder cross-border e-commerce, the CCBE wishes to provide its views in relation to a possible instrument dealing with contract rules for online purchases of **digital content**. As regards contract rules for online purchases of **tangible goods**, the CCBE wishes to refer to its [position](#) of April 2015 on the revision of the proposed Common European Sales Law.

1. Type of Legal Instrument

According to the CCBE, the goal to be achieved by the Commission on the basis of its "Digital Single Market"-Strategy will best be achieved by a **Regulation**¹.

Even though the CCBE has favoured the proposed Common European Sales Law (CESL)² in the past and came out in support of the Optional Instrument, the CCBE now feels that such instrument would not adequately serve the ambitious goal of the "Digital-Single-Market"-Strategy. There will be far too many traders and consumers that would not enter into a contract on the basis of such optional instrument, as they will claim to not know the new legal and commercial implications of such law. Thus, they are inclined to not choose it, but rather opt out.

¹ For the Austrian, Danish, Finnish, Norwegian and Swedish delegations it is not obvious that a regulation would be the best instrument to deal with this matter. A regulation would de-emphasize national contract law. This would lead to further problems with harmonisation within the field of national contract law. These delegations are clearly in favor of an optional instrument. But if the European Commission strives for a regulation, it would be a good thing to include the contract rules for digital contents and tangible goods in an already existing legal framework (sales law/consumer law) and not to create another legal instrument in parallel. This development increases legal fragmentation.

² The UK delegation reiterates its previous position on the CESL. In particular neither the Law Society of England & Wales nor the Bar Council of England & Wales supported CESL and they both endorse the position of the French, German, UK, Austrian, Dutch and Finnish governments as expressed in the joint letter to the Commission to withdraw the proposed CESL (28 Nov 14).

The Austrian, Danish, Finnish, Norwegian and Swedish delegations hold the opinion that if the European Commission goes for a regulation, the scope shall be limited to b2c-transactions. If the European Commission decides to propose an (non-binding) optional instrument, they could agree on an extension of the scope to b2b-transactions. But in the case of a binding and directly applicable regulation we oppose widening the scope to b2b-transactions.

2. Basic Scope

The CCBE is in favour of a Regulation for contracts dealing with digital content. The CCBE believes that Recital No 19 of the Consumer Rights Directive 2011/83/EU³ offers an adequate and reliable basis for a **definition** of the scope of “digital content” to be used for any new Regulation dealing with sales contracts of “digital content”.

As in the past, the CCBE is in favour of a Regulation not limiting its scope to **business-to-consumer (b2c) transactions**, but rather to extend it to **business-to-business (b2b) transactions**.⁴

A further argument in support of the inclusion of the b2b-sales is that the legal problems relating to the use of platforms require legal solutions that will be derived from the b2c-rules of the new Regulation in an adequate way.

Moreover, the goal of a “Digital Single-Market”-Strategy will not be achieved and market growth will not be adequately developed, if the Commission left the legal rules to be applied for b2b-transactions to the regimes of the Member States. Such one-sided approach would severely hamper the speedy and efficient development of this growing and expanding market.

Therefore, the CCBE does neither favour nor advocate the solution that the scope of the new Regulation would be restricted to **SMEs**.⁵

It follows that the CCBE is also in favour of expanding the scope of this new Regulation to **domestic transactions** and not limit it to cross-border contracts.⁶ In this respect the CCBE is aware that there might be some concerns in this respect as to the validity of the legal basis of such an all-embracing instrument and thus calls on the Commission to carefully evaluate any possible restrictions based on the rules of the Treaty on the Functioning of the European Union (TFEU).⁷

3. Type of Contract

There seems to be an element of a service contract („using due care“) in addressing the specifics of contracts on digital content, but by and large the **sales elements** do prevail. Moreover, the contract must also contain an element of “licensing” (IP-Relevance). The service element is subordinated; the solution offered in Art. 3 Sec. 2 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) seems a perfect example in this respect.

But the issue of transferability must be carefully addressed.

4. Conformity of Content

The issues concerning conformity and non-conformity will primarily be determined – in a very similar way as in **sales contracts** - by the specific description of the content to be supplied by the seller. Lacking any such specific description, it seems appropriate to determine any issues of non-conformity by applying an objective standard, e.g. fitness for ordinary purpose.

³ Recital 19 of Directive No 2011/83/EU stipulates that “Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means”.

⁴ The UK delegation reiterates its position on the CESL. Moreover, while the UK delegation has no objection to enhanced consumer rights in relation to “digital content”, it does not believe that a mandatory Regulation should extend to B2B transactions.

⁵ See footnote 4.

⁶ The Austrian, Danish, Finnish, Norwegian and Swedish delegations disagree that the regulation shall be applied on national contracts (cross-border or not).

⁷ The UK Consumer Rights Act received Royal Assent on 26 March 2015. This addresses, *inter alia*, “digital content”. There would therefore seem to be no reason for, and a risk of conflict arising from, applying any Regulation domestically in the UK.

5. Remedies

In case of any non-conformity of the digital content delivered to the buyer (be it a consumer or a trader), the buyer shall be entitled to avail himself of the following **hierarchy of remedies**:

- Replacement within a short time after notification without charge to the buyer;
- In b2c-contracts there will be no obligation of the buyer to pay for the use of any non-conforming content sold;
- Reduction of price, if the buyer so wishes; but no restitution;
- Duty to notify of any defect as soon as it has become apparent only in b2b-transactions;
- The right to withhold performance;
- Damages – the amount of damages shall be determined by the foreseeability test; loss of profit shall be included also in b2c-transactions; claims for pain and suffering shall be excluded.

In case the buyer has exercised its right of replacement, price reduction or damage claim, the seller then shall be entitled to take recourse against the supplier pursuant to the rule laid down in Art. 4 Consumer Sales Directive.

6. Prescription

As proposed in the Consumer Sales Directive – thus restricted to **b2c-transactions** – a period of **six months** after delivery and a rebuttable presumption of non-conformity shall apply⁸, if non-conformity has become apparent during that period.

The prescription period shall run for three years after the non-conformity has become apparent and had been notified to the seller; there shall be a final limitation period of five years⁹, after the contract has been concluded.

In **b2-b-transactions** there is a preference to insert a warranty period of three years, commencing on the date the contract had been concluded.¹⁰

7. General Conditions of Contract and Validity Test

It is important to incorporate **Chapter VIII of CESL** into the new Regulation as the rules listed therein are appropriate, both for b2c- and b2b-transactions.

This includes: A definition of general (standard) contract terms, a definition of a contract term that has been individually negotiated („influenced“ by the other party), a general rule on validity for **b2c-transactions** and a „black“ and a „grey list“ of examples of unfair terms.

In b2b-transactions the general validity test of standard contract terms, as shown in Art. 86 CESL, (based on Art. 3 of the Late Payment Directive 2011/7/EC) should be applied. The rule shall state that any gross deviation of the respective standard contract term from the principles of good faith and fair dealing and good commercial practise is to be held invalid.¹¹

⁸ CJEU June 4, 2015 – C-497/13.

⁹ The Belgian delegation favours a shorter period of two years.

¹⁰ The Austrian, Danish, Finnish, Norwegian and Swedish delegations see no need to extend the warranty period up to three years. Two years are more than sufficient.

¹¹ The UK delegation does not support the proposal for a Regulation. The UK delegation also does not support any mandatory application of these rules to B2B transaction. But, in relation to the proposed content of rules in relation to control of the content of non-negotiated terms, the UK delegation would observe that the content of Art 86 CESL is broadly similar to the equivalent tests already applicable under the laws of the United Kingdom as provided for the Unfair Contract Terms Act 1977, where the yardstick is “reasonableness”.

8. Level of Consumer Protection – Home State Rule

A high level of consumer protection must be granted to the benefit of the consumer (Art. 114 Sec. 3 TFEU).

The CCBE advocates that the level of consumer protection, as provided for in **Art. 6 Rome I** should be upheld. The parties therefore in a b2c-transaction shall not be free to agree, that the rule of the home state (of the provider/seller) shall prevail and it is left to the consumer to find out the discrepancies between these rules and the rules on consumer protection of its own home state. The CCBE is convinced that such approach would be grossly to the detriment of the consumer and is unacceptable.¹²

9. Model contract terms

In order to stimulate the “Digital Single Market”-Strategy it seems highly desirable to call upon the Commission to draft standard contract terms, both for b2c and for b2b-transactions to be used by all parties interested in rules that are equitable and offer satisfactory protection to both, the consumer and the trader.

These rules shall be qualified as “soft law”, but have been cleared by the Commission and thus have received an official stamp of approval without thereby necessarily binding the courts, a reservation that should be expressly communicated to the general public. Nevertheless, any deviation of such “model contract terms” shall not be considered to be invalid.

¹² The UK delegation has no objection to this proposal, but reiterates that it does not support the policy of a mandatory Regulation.