



The Consumer Voice in Europe

Common European Sales Law

The Commission's proposal for a regulation
(COM(2011) 635 final)

BEUC's preliminary position

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Summary

On October 11 2011, the European Commission published a proposal for a regulation on a Common European Sales Law (hereafter CESL).

In this paper, BEUC provides an overview of the consumer concerns as to the Commission's proposal as well as specific comments on the provisions included in the so-called 'chapeau' of the regulation, which refers to the *modus operandi* of the Common European Sales Law, namely:

- **Objective and subject-matter** (Article 1): The proposal states that traders can rely on a single set of rules when operating across borders under the CESL, however we consider this unachievable with the proposed Regulation, firstly due to rules on conflicts of laws (see Annex B to this paper) and secondly because the scope of the proposed CESL does not and cannot include all relevant elements.

- Personal, material and territorial **scope of application** (Articles 2 on definitions and Articles 4-6): Firstly, it is important to understand that the proposed regulation would create legislation for issues already governed by EU law. The EU would be regulating twice on exactly the same subject matters. Secondly, the proposal not only overlaps existing EU consumer law to a large degree, but deviates from this *acquis* on essential points for example, in relation to the Consumer Rights Directive¹ (see Annex A of this paper). Consequently, BEUC considers it inappropriate to introduce a **second layer of EU legislation for issues already regulated by EU legislation** since this would lead to diverging results in precisely the same fields of EU law and thus increase legal complexity and uncertainty.

- **Agreement on the use** of the CESL (Articles 8 and 9): Application of the CESL is subject to specific formal requirements which do not ensure meaningful consent from the consumer's side on the application of the CESL. The information notice included in Annex II of the proposal only provides information related to certain elements of the CESL, but does not allow consumers to understand the practical implications of this new regime particularly where there is displacement of better standards of protection. Furthermore, BEUC considers that a consumer's agreement to renounce better mandatory protection applicable under the Rome I regulation could be judged unfair on the basis of the 1993 Unfair Contract Terms directive² (or even on the basis of the proposed CESL) and/or the request to agree to this an unfair practice according to the 2005 Unfair Commercial Practices directive³.

¹ Directive 2011/83/EU, 25 October 2011.

² Directive 1993/13/EEC, 5 April 1993.

³ Directive 2005/29/EC, 11 May 2005.

- **Consequences of the use of the CESL** (Article 11) and interplay with Private International Law rules (Rome I regulation⁴): According to the proposal, once the CESL is agreed to be applied, its rules will preclude national, mandatory, consumer contract law. BEUC considers this concept not practicable:

First, it is incompatible with the rationale of another EU law, namely Article 6(2) of the Rome I regulation which aims to guarantee the application of higher standards of consumer protection.

Secondly, on a technical level, in the case of a choice of law by the trader, the agreement on CESL could preclude better protection under the law chosen by the trader, but if 6(2) of the Rome I regulation would be applicable, the agreement on CESL could in our opinion not preclude the better protection of the consumer's domestic law. This is because the equivalence test of Article 6, paragraph 2 of the Rome I regulation - which continues to apply according to the proposed regulation's recital 12 - must not be exercised between the two countries' CESLs, but instead between the CESL (of the law chosen by the trader) and the consumer country's law.

Consequently, the proposed regulation's objective cannot be fulfilled and the envisaged relationship between the Rome I regulation and the CESL is unworkable.

BEUC and its members consider an 'optional' contract law regime, parallel to existing national consumer law, to be an inappropriate way forward for the regulation of consumer rights. This is for the following reasons:

- The proposal does not correspond to the needs of the main market players in Europe, namely consumers and SMEs. BEUC contends that the Impact Assessment accompanying the CESL proposal failed to prove the Commission's economic case.
- The CESL will complicate the legal environment in the EU significantly. European consumers would be faced with a situation in which different rules and therefore different levels of protection apply to the same product.
- The Consumer Rights Directive, which will be transposed by the Member States within the next two years provides maximum harmonisation of the majority of the relevant elements with respect to online contracts. This means that the European Commission's main target of facilitating cross-border business-to-consumer contracts (b2c) has already been dealt with in terms of approximation of laws.

⁴ Regulation (EC) 593/2008, 17 June 2008.

- An optional contract law regime applicable to consumer contracts would give traders the possibility to decide which level of consumer protection consumers would benefit from by choosing to apply either the CESL or 'normal', national rules according to their own commercial interests.
- The level of protection in the proposal's annex has not matched higher standards in numerous Member States. For example, in the field of unfair contract terms and on specific issues related to legal guarantees (e.g. the burden of proof, payment for use). In Annex A to this paper we list several examples of reductions of existing consumer rights as a result of the application of the CESL.
- BEUC and its members are convinced that there is no proven need to change the traditional, successfully employed, regulatory tools in this field. We should continue to build up and modernise EU consumer contract law by robust and binding legislation, which can be a mix of minimum and full harmonisation according to certain criteria, but not 'optional' by any means.
- Digital content is an area in which the current situation is causing consumer detriment, as clearly shown by two recent Commission studies. More legal certainty and modern consumer protection is needed at EU level. The CESL proposal includes modern rules in this field, but they will only be applicable if businesses think it advantageous for them. This is another example of the major flaw due to the 'optional' nature of the proposal.

Conclusions and the way forward

Based on the analysis and reasons set out in this paper, BEUC concludes that:

- Optional regulation is inappropriate for consumer contracts. Our in-depth analysis of the relevant policy-based, economic and legal factors clearly evidences that an optional instrument would result in detriment to consumers which far outweighs the (purported) and uncertain economic benefits;
- If European consumers do not benefit from it and European businesses do not see a need for it (see below point I.1.), the proposed approach should be re-evaluated and alternative ways forward discussed;
- There is no need for a new instrument on consumer sales laws, as the 2011 Consumer Rights Directive, the 1999 Consumer Sales directive and the 1993 Unfair Contract Terms directive already provide a solid EU legal framework; should remaining divergences in national law pose problems for business, these problems can be overcome by other, "lighter" means;

- Standard European contracts for consumer e-commerce transactions (jointly agreed by business and consumer representatives) would be a better, less intrusive, less costly and much more swiftly applicable solution. In addition these should be combined with Alternative Dispute Resolution (ADR) mechanisms. BEUC has made a first proposal for an EU model contract⁵ and is further developing this project. Institutional backing would be desirable;
- Annex I of the proposed CESL could serve as a useful toolbox for legislation and standard contracts (if improved and tailored more specifically to consumer contracts);
- Business education about distance selling rules and the impact of the Rome I regulation should be initiated to reach out to all SMEs.
- Additional measures as listed in the Commission's new 2012 e-commerce strategy (improve broadband access, enable better enforcement of consumer law, promote reliable and efficient payment and delivery systems and so on) should be launched and implemented.
- Thus far, directives have been successfully used in consumer law and if necessary, this approach should be continued. Specifically, a new directive on digital products should be put forward by the European Commission.

⁵ "Optional Soft Law Instrument on EU Contract Law for Businesses and Consumers", Study for BEUC by Geraint Howells, Hans-W. Micklitz and Norbert Reich, available at www.beuc.eu (Ref.: X/2011/078 - 04/07/2011).

I - General comments

The European Commission proposal for a Common European Sales Law (the so-called 'optional instrument') consists of a regulation introducing a set of rules for the purchase of goods, digital products and certain related services which can be chosen by the parties to govern their contracts. This 'optional' regime would co-exist alongside national laws and thus generate a parallel system of contract law rules in each Member State. The proposed regulation would cover consumer contracts (b2c) and purely commercial contracts (b2b).

The proposal is comprised of two parts: the 'chapeau' rules, which set out the scope and functioning of the proposed regime; and secondly, Annex I, the substantive part of the proposal, namely the rights and obligations of the parties.

The consequence of the application of the Common European Sales Law if the parties have opted for its application is, that for the issues falling within the scope of the instrument, national domestic contract law legislation would be no longer applicable. This would have a major impact on consumer rights as mandatory, national standards of protection would be set aside.

Thus the Commission's new approach of creating optional legislation to co-exist with national law means that **national legislation itself becomes optional**. Consequently, **business would be given the possibility to avoid the national consumer law of the consumers' or their own country** should it be more suitable for them to use the optional European contract law. This is an entirely new development in consumer legislation, one which BEUC considers wrong.

Below we list the reasons why the proposed solution is the incorrect approach⁶.

1) The Commission's case does not reflect the reality of the Single Market

BEUC asserts that the Commission's economic case has not been proven - for a detailed critical analysis of the Commission's Impact Assessment, please see our position paper⁷. This concern is also shared by UEAPME - the SMEs' umbrella organisation in Brussels⁸. On the contrary, **the Commission's own data reveals that for neither businesses (in particular SMEs), nor for consumers, do diverging rules of national contract laws present a significant obstacle to cross-border trade.**

The existing legal framework on applicable law for cross-border business-to-consumer contracts - Article 6(2) of the Rome I regulation⁹ - already allows businesses to make a choice of law, whether it be their own law or that of another Member State, in a consumer contract. In addition, the wide extent of EU consumer law harmonisation achieved over the last 25 years in the field of consumer contract law, particularly with the recently adopted Consumer Rights

⁶ Please also refer to our document 'BEUC's 10 reservations on the optional instrument' (Ref.: BEUC/X/2011/118) available at www.beuc.eu

⁷ BEUC's comments on the Commission's Impact Assessment for the proposal of a Common European Sales Law, available at www.beuc.eu (Ref.: X/2011/118 - 22/11/2011).

⁸ UEAPME position on the proposal for a regulation of the European Parliament and of the Council of a Common Sales Law COM(2011) 635 final (general remarks), available at www.ueapme.com

⁹ Regulation (EC) No. 593/2008 of 17 June, 2008 on the law applicable to contractual obligations (Rome I).

Directive¹⁰ (hereafter 'CRD'), which uniforms key areas of distance contracts, including online, makes the CESL redundant for b2c transactions.

From the consumer perspective, **the main factor preventing consumers from benefitting fully from the Internal Market is the lack of effective redress:** questions like "What to do if things go wrong?" "How do I get my money back?" are the major consumer concerns. In 2010, 62% of online consumers did not buy across a border because they were afraid of fraud, 59% did not know what to do if problems arose and 49% were worried about delivery¹¹.

The proposal on CESL will not solve any of the most relevant issues which need to be tackled to promote cross-border transactions among consumers and businesses. Most business stakeholders agree with us on this point, in particular SME representatives¹².

The European Commission should focus its efforts on providing consumers with efficient means of redress and modernising payment systems. Important steps in this context are the recent legislative proposals on Alternative Dispute Resolution¹³ and Online Dispute Resolution¹⁴; as well as the recent Communication on e-commerce¹⁵.

2) The European Commission has proposed a new legislative technique, one which is inappropriate for regulating consumer rights

The rationale of consumer law is to provide mandatory protection to the consumer as the weaker party of the contract. Consumer contracts are typically contracts of "adhesion", meaning the business imposes them in a standardised form. The consumer is not on a level playing field with the business and cannot negotiate the content of the contract.

With the proposed CESL, businesses would be able to choose between national, mandatory consumer laws and the optional regime, thereby offering consumers a certain level of consumer protection which may be below the consumers' national standards (or those of the business' country).

The dilemma is obvious: if the regulation would indeed match the highest national protections in order to avoid a reduction of consumer rights, this would not be attractive for most businesses; therefore they would not use the optional instrument. Business representatives have already expressed strong concerns in relation to the level of consumer protection as proposed by the Commission and have called for "a more balanced approach"¹⁶. If, on the other hand, the final

¹⁰ Directive 2011/83/EU, 25 October 2011.

¹¹ Consumer Market Scoreboard, 5th Edition

¹² See BEUC's joint letter with UEAPME sent to Permanent Representatives of the Member States on 25 October, 2011 (Ref.: X/2011/113 - 25/10/11) available at www.beuc.eu and UEAPME's position on the European Commission 'Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses' available at www.ueapme.com

¹³ COM(2011) 793/2, 29 November, 2011.

¹⁴ COM(2011) 794/2, 29 November, 2011.

¹⁵ COM(2011) 942, 11 January, 2012.

¹⁶ For example, BusinessEurope in its recent position paper on the Commission's proposal (10/02/2012) indicated that "The Common Sales Law will have to provide the highest level of consumer protection if consumers are to opt out of their national consumer protection rules. This could cause an imbalance with respect to business interests, increase compliance costs and thus not provide business with a useful legal instrument". Similarly, UEAPME (19/01/2012) stressed: "The balance between the protection of consumers and the protection of businesses, which is absolutely vital for an optional instrument to be successful, is absolutely lacking (...)".

regulation would provide optional rules on an “average” level, European consumers in many countries would then be worse off than under current legislation if the optional instrument were to be used.

Another source of concern is **the future of the consumer *acquis*** and the development of consumer rights in the European Union.

In contrast to b2b contracts, in the field of business to consumer contracts the EU has built a large *acquis* over the last three decades. Some decision-makers now refer to the experience of the CRD negotiations as an example that harmonisation in the field of consumer contract law has failed and consequently there is a need to explore new forms of harmonisation, such as optional regimes¹⁷. Yet on the contrary, the CRD did not fail as it harmonises the essential elements for online distance contracts.

BEUC is convinced there is no need to change the traditional regulatory tools which have been successfully employed in this field. We can and should continue to progress and modernise EU consumer contract law by robust and binding legislation, which can be a mix of minimum and full harmonisation according to certain criteria, but not optional.

BEUC drew the European Commission’s attention to these elements¹⁸. Despite this, we do not believe the views of the stakeholders most concerned by this initiative (i.e. consumers and SMEs)¹⁹ have been properly taken into account or adequately addressed.

The relationship between the proposed CESL and the EU consumer law *acquis* is problematic. The European Commission in its Communication accompanying the proposal stated that the CESL and EU consumer law will be developed in tandem²⁰. According to Article 15 of the proposal, the European Commission will submit a report 5 years after the application of the CESL, however there is no indication as to how future consumer legislation will be linked to the CESL (if any) and how coherence between traditional (i.e. “non –optional”) and optional legislation can be ensured. The proposal integrated most provisions of the CRD, but some important deviations can be identified. How will a homogeneous interpretation of the CRD and the CESL be ensured? What happens if the consumer *acquis* is updated? Will the CESL be updated too? If the proposed CESL is amended, will the respective consumer law directives be amended also?

¹⁷ See Speech of Vice-President Viviane Reding, “The optional Common European Sales Law – Seizing the opportunity!” (SPEECH/11/742) and speech of MEP Diana Wallis (ALDE, UK) at the Conference ‘European Contract Law - unlocking the internal market potential for growth’, 9–10 November, 2011, Warsaw.

¹⁸ See BEUC response to the public consultation on the Commission’s Green Paper on ‘European Contract law, Towards a European Contract Law for Consumers and Businesses?’, (Ref.: X/2011/008 - 31/01/11); letter sent to Mrs Françoise Le Bail, DG Justice Director General, on 27 October, 2010 (Ref.: X/088/2010 - 21/12/10), letter addressed to Mrs. Paraskevi Michou, Director, DG Justice, on 30 March, 2011 (Ref.: X/2011/080 - 06/07/2011); BEUC’s response to the European Commission Expert Group’s Feasibility Study for a Future Instrument in European Contract Law (Ref.: X/2011/072 - 28/06/2011); letter sent to the Permanent Representatives to the EU on 12 July, 2011 (Ref.: X/2011/083 - 13/07/11) available at www.beuc.eu

¹⁹ See ‘*An optional instrument’ is not what consumers and SMEs need*, joint letter with UEAPME & CNUe sent to MEPs on 1 June, 2011, (Ref.: X/2011/086 - 15/07/11), and *Common European Sales Law - Justice and Home Affairs Council Meeting, 28 October, 2011*; joint letter with UEAPME sent to Permanent Representatives of the Member States on 25 October, 2011, (Ref.: X/2011/113 - 25/10/11), available at www.beuc.eu

²⁰ COM(2011) 636 final, 11 October 2011, point 2.3.

Finally, related to the question whether the proposed CESL can really simplify the legal environment, one has to underline that traders can partly deviate from the CESL rules, the contract terms of traders will differ quite much. This will be a source of many disputes. As traders are not obliged to translate their contract terms into the consumer countries' language, it will be very difficult and expensive for consumers to get advice.

3) Digital products - modern rules and good consumer protection "à la carte" for businesses

The proposal includes rules on the selling of digital content (such as music, video, software etc. bought online in digital form). The current EU consumer law *acquis* either does not cover these kinds of products, for example in relation to legal guarantees, or is not specific enough to address particular problems. Despite the fact the new Consumer Rights Directive will provide some improvement in this field, national legislations are currently not clear enough and not updated, which leads to legal uncertainty and consumer detriment as a result. Consequently, a European harmonisation initiative is urgently needed in order to promote the online Single Market.

The recently published European Commission studies²¹ on consumer experiences with and the legal environment for digital content, show consumer detriment in the EU due to consumer problems with digital products amounts to €63 billion per year²².

With the Commission proposal of a sales law, such modern rules for digital products would be available, but only if businesses selling these products think it useful and advantageous for them.

An online business which sells digital content across borders will be able to decide between modern European rules or national legislation, which is often unclear in terms of consumer rights in this sector. As a result, businesses may well avoid using the CESL if it contains specific obligations and nobody will oblige them to apply these better standards. At the end of the day, consumers will not benefit from the modern rules so urgently needed.

4) Level of consumer protection in the proposed Annex I

Regarding the level of consumer protection, the European Commission highlights that in its opinion it is very high, thereby proving trustworthy for consumers²³. BEUC does not agree with this.

²¹ Europe Economics (2011), "Digital content services for consumers: Assessment of problems experienced by consumers" and University of Amsterdam (2011), 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts' available at :

http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm

²² Page 145 of the Europe Economics' study.

²³ "Providing the same high level of consumer protection in all Member States: Consumers will be able to rely on the Common European Sales Law as a mark of quality", European Commission, MEMO/11/680, 11 October, 2011.

Our on-going comparative analysis of the proposed Annex I with national laws shows that the CESL provides a variable level of protection, depending on which element of law is concerned and what level of protection is provided in the respective national law. In each country analysis, very different results can be found.

Furthermore, BEUC underlines that an “overall” perspective on the level of protection on the proposed text in Annex I is not an appropriate approach for an accurate evaluation. This approach hazards the consequences of a dilution and/or reduction of important national consumer standards. For example, the fact that some important elements of the text are at a relatively high level of consumer protection, while the protections against unfair contract terms are lower than many national standards, must not lead to the conclusion that the “overall” level of protection is good enough. Protection against unfair contract terms is *the* safety net for consumers in nearly all contractual aspects and thus is of key importance.

Secondly, the level of protection must not be assessed in relation to the minimum harmonisation standards of the consumer *acquis*, but in relation to national laws. The minimum harmonisation directives were agreed by EU legislators precisely because they did not preclude better protection levels of national laws. This should be borne in mind.

We have produced a draft comparative grid (see Annex A to this paper) in order to show how and in which areas of law the proposed text would undermine national standards. Our conclusion is that the Commission’s claim that the level of protection is in all instances equal or higher than national protection²⁴ is inaccurate.

Before legislators begin discussions on Annex I of the CESL, the Commission should submit a comprehensive analysis on all aspects of importance to consumers. We understand that the Commission’s Expert Group has already assessed the proposed text twice, but we believe that independent third party expertise is necessary. BEUC is ready to support such an analysis with all the expertise of our member organisations.

Please find below some examples of where the CESL falls short of a high level of consumer protection (for more examples and details see Annex A to this paper):

- With regarding to unfair contract terms, the proposed text has a number of important flaws, such as the limited scope of the “unfairness test”, the definition of “unfairness”, the lists of always unfair and presumably unfair clauses etc.
- With regard to legal guarantees, the proposal provides some good points, for example the full choice of remedies for consumers, but on some aspects consumers have better rights under national legislation (e.g. specific rights which are missing in the proposal such as the right to receive a temporary replacement of the product if the repair takes more than 15 days in Greece or the right to ‘self-help’²⁵ which exists in Poland, Hungary and Latvia).
- Moreover, consumers’ long standing requests to address serious and pertinent problems with legal guarantee rules, such as the need to extend the time period for the reversal of the burden of proof when there is a lack of

²⁴ Oral statement of the Commission addressed to the European Parliament’s Legal Affairs Committee (JURI).

²⁵ This right concerns the repair of a defective product by the consumer at the trader’s expenses.

conformity, have not been taken on board. On the contrary, the proposed text would deprive Portuguese consumers of their very well-functioning and highly valued rights in this respect.

- More importantly, the proposed rules on payment for use (Article 174(c)) would introduce a general rule allowing the trader to make 'a deduction for use' under certain conditions when a consumer terminates a contract in case of a lack of conformity. BEUC considers this provision to be very disadvantageous in b2c contracts. The European Court of Justice has already indicated in the leading *Quelle* case²⁶ that when exercising of the right of replacement provided for in the Sales of Goods Directive²⁷, the consumer cannot be asked to pay compensation for use of the defective products. The proposal thus overrules consumer-friendly CJEU case law.

5) *The CESL would significantly complicate the legal environment*

As already indicated by both consumers and business representatives, this proposal would generate more legal uncertainty and confusion. European consumers would have to deal with two regimes (CESL and national law) and will be faced with a situation in which different rules might apply to the same product. They will have to bear in mind how, and under which conditions, they have bought the product in order to know which rules apply.

The CESL will create more complexity for small businesses, who already struggle with one set of rules.

6) *The CESL's interplay with EU conflict of law rules (in particular Article 6(2) of the Rome I regulation) is unworkable and creates legal uncertainty*

Firstly, the entire idea of creating a 'second regime' within each national legal system (recital 9 of the proposal) by an EU regulation is doubtful. Article 288 TFEU states that a regulation is of general and direct application in all Member States, however it is a Union's legal act to be applied by market players or national authorities, but it *does not become national law*. Yet the derogative effect of CESL on national law in the frame of Rome I is only possible if the CESL qualifies as national law. This fundamental issue, which we understand is controversial, requires further examination. However, additional fundamental conceptual questions need to be looked at, disrobed below.

The proposed CESL aims at making Article 6(2) of the Rome I regulation redundant. Recital 10 of the proposal stipulates that the choice of the optional instrument does not amount to a choice of law in the sense of the Rome I regulation, but is (only) a choice within the national law between the two sets of rules: the CESL qualifying as a national law and the traditional, national law. The CESL is thus designed as a 'second regime', which becomes national law in each Member State and therefore would render, according to Recital 12, the rules of Rome I of "no practical importance" for the issues covered by the Common European Sales Law.

²⁶ C-404/06, *Quelle AG. v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, 17 April, 2008, paragraphs 41 and 43.

²⁷ Directive 1999/44/EC, 25 May 1999.

However, this concept raises many questions in relation to the existing EU and national international private law regimes. Below we focus on two aspects:

- a) The proposed CESL cannot preclude the application of mandatory rules of the consumer's country of residence

BEUC is of the opinion that the preclusion of mandatory, national consumer provisions by the CESL is **incompatible with the objective of Article 6(2) of Rome I regulation**. The latter regulation, adopted in 2008, seeks to protect the consumer by granting them, under certain conditions, application of the better standards of protection among the two applicable legal regimes (the law chosen by the trader and the legislation of the country where the consumer has their habitual residence).

The Common European Sales Law would not comply with this objective unless its application would lead to the same result as the application of Article 6(2) of the Rome I regulation: it would need to offer the same (or a higher) level of protection in order to virtually displace the 'normal' or 'first regime' of national legislation. This however will not be the case, as outlined above (see point 1. 5 above on the level of protection). Consequently, the application of the proposed CESL would clearly contradict the EU legislators' objective according to which the Rome I regulation was adopted.

Furthermore, the agreement on the application of the CESL (Article 8 of the proposed regulation) is an ex-ante waiver by the consumer of the (potentially better protection granted under Article 6(2) of the Rome I regulation.

If the result is that consumers were deprived of rights that would have come into play according to the application of Article 6(2) of Rome I, would such an agreement ever be valid under the unfair contract term legislation? We consider that such an agreement could be void under the unfair contract and the unfair commercial practices EU legislation. In addition, since the CESL applies via the application of the Rome I regulation and most often probably through the choice of law made by the trader, the derogative effect of the national mandatory consumer protection rules can apply in our opinion only vis-à-vis that legal regime, not in relation to other legal systems designated by article 6(2) Rome I namely the legislation of the country of the consumer's habitual residence (provided that the 'targeted activities' condition applies).

As a consequence of these different legal grounds, BEUC believes that the CESL cannot preclude the mandatory rules of the consumer's home country, if Article 6, paragraph 2 of Rome I is applicable. The proposed regulation would not function in the envisaged way.

- b) The CESL would significantly increase the density of options in conflict of law rules

Instead of simplifying the current system of Private International Law, which already allows businesses to make a valid choice of law of a single, national legal system as the legal basis for a consumer contract, the CESL would significantly complicate cross-border transactions.

In Annex B of this paper we have provided different scenarios of the interplay between the CESL, Private International Law and the resulting complexity.

The multilayer system which would follow from the CESL leads to many more scenarios in which a judge/ ADR body/business/ consumer would have to deal with combined with legal uncertainty and confusion for all concerned.

Rome II regulation

Another problematic issue in the field of Private International Law under the Commission's proposal is that of *culpa in contrahendo*. Article 11 of the proposal indicates the CESL shall govern compliance with the remedies applicable to the breach of pre-contractual information duties, provided that the contract was actually concluded. This solution seems to be difficult to reconcile with Article 12 of the Rome II regulation which applies to damage which arises before the conclusion of the contract, irrespective of whether the contract was effectively concluded or not.

In addition, Recital 27 of the proposal states "the issue whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law". Here there could be a legislative overlap, because if the national law establishes that contractual and extra-contractual liability can be pursued together, then it is possible that different rules from the CESL and national laws would apply to the same facts.

Similarly, the proposal is unclear as to damages resulting from defective products. Apparently the proposal covers only damages as a result of non-performance of an obligation (e.g. lack of conformity), but the reference to the 30 year prescription period for a right to damages after personal injuries (Article 179) shows a potential conflict of legislations.

II - Specific comments on the proposed Articles in the chapeau

Below we provide specific comments on the chapeau of the proposed regulation (Article 1–16) such as its material, personal and territorial scope of application, the optional character, the self-standing nature and the interplay with conflict of law rules, the formal requirements for the validity of the agreement on the use of the CESL and Member States' options to extend its scope of application.

Article 1 - Objective and subject-matter

Article 1(2) of the proposal states that the CESL enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions. As shown above, we believe this cannot be achieved with the proposed regulation, first for reasons of conflict of law rules and secondly, because the scope of the proposed CESL cannot include all relevant elements.

In many circumstances the parties will still need to refer to national legislations. Recital 27 of the proposal includes a non-exhaustive list of matters outside the scope of the CESL (legal personality, invalidity of a contract arising from the lack of capacity, illegality of immorality, language of the contract, matters of non-discriminations, plurality of debtors and creditors, change of parties, transfer of ownership, IPR, etc.) and in which a reference to conflict of law rules, and consequently to national laws, would be necessary.

Article 2 -Definitions

The CESL aims to be applicable to both business-to-consumer and business-to-business contracts. In relation to the former, the personal scope of application is established by the definitions of "trader" and "consumer" contained in Article 2 e) and f) of the proposal respectively.

Definition of "consumer" (Article 2 (f))

The proposal has adopted the traditional, narrow definition of consumer of the *acquis*: *"a consumer means any natural person who is acting for purposes which are outside that person's trade, business, craft or profession."*

This definition does not take into account that the CRD indicates in Recital 17²⁸ that the protection granted in the directive can be extended to 'dual purpose' contracts (a contract concluded partly for private and partly for professional purposes). It would create incoherence between the CRD and the CESL as parties who are considered consumers in the CRD may not benefit from consumer law protection if the CESL is chosen.

²⁸ "(17) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer."

Definition of “trader” (Article 2 (e))

In relation to the definition of a “trader” the proposal also deviates from the CRD by adopting a narrower definition. In this sense, Article 2(e) of the proposal does not specify that legal entities can be privately or publicly owned and it excludes the extension to 3rd parties acting in the trader’s name or on his behalf (Article 2(2) of the CRD).

This last point could be explained by the fact that representation is excluded from the scope of the CESL and therefore national law still applies (see Recital 27 of the proposal). However, that solution will raise more confusion as to which legal regime(s) should apply if the contract is concluded under the CESL by somebody acting on behalf of the trader. It could be also used to exonerate the trader from his obligations if for example it is established that there was no representation and consequently the obligations arising from the contract based on the CESL apply only to the 3rd party who acted on behalf of the trader without sufficient powers.

In practical terms, this would work against consumers who may have thought the 3rd party was actually the trader (or may have presumed they had sufficient representative powers) because they would not be able to claim the application of the rules of the CESL against the trader if there were more protective than the national legislation (see also Recital 20).

These examples regarding definitions show the consequential risk of diverging legal systems governing the same legal issues should the CESL be introduced.

Article 3 : Optional character

Article 3 outlines the ‘optional’ nature of the CESL by stating that the “parties may agree that the Common European Sale Law governs their cross-border contracts...”

As mentioned above, it is important to underline that consumer contracts are contracts of adhesion for the mass market. Typically, contract terms are not negotiated by the parties, meaning consumers are unable to influence the content of contractual terms. Agreement by the parties to use the CESL gives rise to a series of fundamental questions including scrutiny of a “fairness control” of such an agreement under national unfair contract terms law, its capacity (if applicable) to justify the preclusion of the better mandatory protection in the consumers’ home country, the fate of the contract in case of a non-valid agreement etc., issues which are all **unanswered** by the proposed regulation (see points below on Article 8, 9 and 11).

Article 4 - Territorial scope

Article 4 of the proposal sets out that the CESL may be used for cross-border contracts, without prejudice Member States’ option in Article 13 to extend application to domestic contracts. In order to satisfy the cross-border nature of the contract, paragraph 3 states that for business-to-consumer contracts it is sufficient for “either the **address indicated by the consumer**, the **delivery address of the goods** or the **billing address** located in a country other than the country of the trader’s habitual residence” and “at least one of these countries (to be) a Member State.”

This provision introduces a new concept of b2c, cross-border contracts which deviates from the traditional elements used to establish the cross-border nature of a contractual relationship. For example, in the Rome I regulation the conflict of laws in a consumer contract generally derives from the habitual residence of the parties (located in different Member States)²⁹. A similar solution can be found in the Brussels I regulation (*domicile*³⁰), the European Small Claims Procedure (*domicile* or *habitual residence*³¹) or in the Regulation on Consumer Protection Cooperation (*residence of the consumer*³²).

This broader concept of cross-border consumer contracts, that would include many contracts which are currently considered to be domestic or include contracts simply because of elements randomly appearing during the conclusion of the contract, would bring confusion in relation to the application of conflict-of-laws rules. This is relevant particularly also in relation to the different regimes made by the proposed regulation regarding to contracts concluded between parties located in the EU or in third countries (Recital 14): For example, a consumer from a Member State concludes a contract with a company located in a Member State, but indicates that the good should be delivered to a third country. In this case, does the agreement on the use of the CESL amount to a choice of law? Or does it qualify as a choice within the trader's national law due to the cross-border nature of the contract given by the delivery address? It is undefined in the proposal which of the elements should prevail if they are in contradiction.

Article 5 - Material scope

According to Article 5 of the proposal, the CESL would apply to (i) sales contracts; (ii) contracts for the supply of digital content and (iii) related service contracts.

i) Sales contracts

Consumer sales are one of most developed areas of the *acquis communautaire*. For the last 25 years, all relevant areas of daily business-to-consumer practices have been harmonised by providing robust consumer protection legislation across Europe. In addition, the recently adopted Consumer Rights Directive fully harmonises key elements of distance selling including online contracts. Consequently, after its transposition by Member States, differences among national consumer laws most relevant for online contracts will be mainly limited to two

²⁹ There are two exceptions which could apply in case the conditions of Article 6(1) are not met. First, "where it is clear from the circumstances that the contract is manifestly more closely connected with a country other than that indicated in paragraph 1 or 2 of Article 4 (seller or the service provider habitual residence), the law of that other country should apply (Article 4(3) Rome I). Second, "where the law applicable cannot be determinate pursuant to paragraphs 1 and 2 of Article 4 (seller or service provider habitual residence), the contract shall be governed by the law of the country which is most closely connected (Article 4(4) Rome I)."

³⁰ See section 4 on jurisdiction over consumer contracts of Regulation 44/2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I).

³¹ "For the purposes of this Regulation, a cross-border case is one in which at least **one of the parties is domiciled or habitually resident** in a Member State other than the Member State of the court or tribunal seised." Article 3(1) of Regulation 861/2007 of 11 July 2007 establishing a European Small Claims Procedure.

³² 'Intra-Community infringement' means any act or omission contrary to the laws that protect consumers' interests, as defined in (a), that harms, or is likely to harm, the collective interests of **consumers residing** in a Member State or Member States other than the Member State where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found" Article 3(b) of Regulation 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

areas but that were already harmonised as minimum standards: legal guarantees and unfair contract terms. A new instrument on consumer sales is not necessary and doubles existing EU law.

ii) Contracts for the supply of digital content

The inclusion of digital content is a clear example of the proposal's structural problems. The current legal uncertainty in Member States on questions related to digital products (e.g. music, movies, software files) shows that there is a clear case for further EU harmonisation in this field (see point I. 3 above)

While Member States' laws do cover digital content in principle, the Commission's own evidence clearly shows a high degree of legal uncertainty exists on how to apply traditional contract law principles to such kinds of products; this uncertainty is not good for business and the 'Digital Single Market'. But it is significantly detrimental for European consumers, who are not adequately protected³³.

The CESL proposes some positive rules: the definition of 'conformity to the contract' and the conformity criteria for goods are applicable to digital content (Articles 99 and 100). In addition, the trader is held liable for damages to the buyer's property (including hardware, software and data) due to lack of conformity of the digital content not supplied in exchange for a price (Article 107). In contrast, the proposed rules are not far-reaching enough - for example on unfair terms in digital content contracts. The proposal has not taken into account those situations where consumers face contractual and technical restrictions in the exercise of rights recognised under copyright law (e.g. private copying), or which limit the functionality and interoperability of the digital content with software and hardware, for example in application of Technical Protection Measures³⁴.

Despite the fact that these rules on digital products are already a step in the right direction on how to clarify and strengthen this field, BEUC is strongly convinced that an optional CESL is not the right instrument to address these protection, as businesses could decide whether to apply them or not 'à la carte'. The European Commission should instead propose a new directive which would complement the CRD by providing, *inter alia*, specific rules in the field of legal guarantees and unfair contract terms for digital products. BEUC will soon present a proposal on this issue.

iii) Related service contracts

The proposal also covers services related to the sale of goods such as installation and maintenance. This is an area that has not been harmonised at European level and consequently national laws differ.

BEUC pointed out to the European Commission that an in-depth assessment of the existing national mandatory provisions in the Member States regulating business-to-consumer service contracts (e.g. what consumers are entitled to do in cases of a lack of conformity with a service contract,)³⁵ was needed. However, this aspect was missing in the proposal's Impact Assessment³⁶.

³³ See study of Europe Economics.

³⁴ See BEUC's proposal for amendments to the Consumer Rights Directive (Ref.: X/072/2010 - 05/10/2010) and BEUC's position paper 'Digital Products, How to Include Them in the Proposal for a Consumer Rights Directive' (Ref.: X/060/2010 - 06/09/10), available at www.beuc.eu

³⁵ See BEUC's response to the European Commission Expert Group's Feasibility Study for a Future Instrument in European Contract Law, available at www.beuc.eu (Ref.: X/2011/072 - 28/06/2011).

³⁶ In Annex VIII (analysis of impacts of major substantive provisions of a common sales law) there is only a reference to the consumer's rights to after sales services, but not on the rights of consumers in b2c service contracts.

For non-performance of a related service, the proposal provides the same remedies as in sales contracts (Article 155), but subject to the trader's 'right to cure' - with the exception of termination in case of an incorrect installation (Article 101).³⁷ These rules would be disadvantageous to consumers compared to national laws where such a right is more restricted or conditioned.

Another example for potential negative consequences for consumers is article 152, on the obligation to warn of unexpected or uneconomic costs of services, which could preclude better consume specific rules and in addition could be derogated from by the trader in the general contract terms.

Article 6 - Exclusion of mixed-purpose contracts

Article 6 explicitly excludes mixed-purpose contracts (including other elements than those indicated in Article 5) and contracts where the trader grants, or promises to grant, the consumer a deferred payment credit, loan or other financial accommodation. This would create problems with those better protections in national law, those which allow the consumer to withdraw from both the sales and the services contract if the sales contract can be cancelled. This is the case in the German legislation for contracts of sales or services connected to a loan contract³⁸.

Again this example shows the inherent conceptual problem with drawing an artificial borderline between what is covered by the material scope of a "second" regime such as the CESL and what is not.

Articles 8 and 9 - Agreement on the use of the CESL and notification of its use

In business-to-consumer contracts, the agreement on the use of the CESL is subject to two formal requirements established in Articles 8 and 9 of the proposal.

First, it is necessary that the consumer agrees to the application of the optional regime in a statement separate to the agreement to conclude the contract. According to Recital 23, the aim of this provision is to ensure the consumer gives an informed choice.

Secondly, the trader is obliged to draw the consumer's attention to the intended application of the CESL by notice of Annex II (stipulated in Article 9(1)) in which the main consumer rights under the optional instrument are described.

BEUC considers that it is not possible for the average consumer to make an informed choice when there is none: for consumers not wishing to contract under the CESL the only option is not to buy and to find another seller offering similar sales conditions but operating under national legislation. Obviously, the choice is not always available (if there is only one supplier of a product) and as matter of

³⁷ Such a right to cure is unknown in many countries (e.g. AT, CZ, PL, SI, SK) or varies significantly. For example, in Denmark cure is permitted unless the creditor will suffer serious inconvenience while in the Netherlands such a right is conditioned to payment of damages for the non-performance. Other legislations also allow the right to cure, but only until the creditor has exercised his or her right to terminate the contract (FI, SE, ES) or before the time allowed for the performance has expired (PT, UK).

³⁸ Article 358 (2) BGB establishes: *"If the consumer has effectively revoked his declaration of intention to enter into a consumer loan contract, he also ceases to be obliged by his declaration of intention to enter into a contract connected to that consumer loan contract for the supply of goods or for the provision of a service"*.

practice, it might not be a choice even if there are multiple suppliers. The proposed concept would put an enormous burden on consumers and falls short of behavioural economic analysis that show that people do not look into the complex legal system and notices.

Consumer agreeing on the application of the CESL will not be aware of the rights they might be giving up under their national legislations. This (probably unconscious) renouncement from better protections might not only concern the national mandatory provisions specifically dedicated to consumers but also general contract law rules that are more beneficial to the weaker party of the contractual relationship.

The notice's content (Annex II of the proposed regulation) is trivial and cannot ensure consumers are aware of their rights under the optional regime, nor could a hyperlink on the trader's website which makes the CESL available, free of charge as indicated in article 9(2).

Finally, the proposed regulation does not set out the consequences of a lack of agreement on the use of the CESL. For example, if the trader omits to provide the information notice to consumer, is the contract still valid but under the national law? What if the sales conditions are more beneficial to consumers under the CESL, but the agreement is not valid, can the consumer nevertheless rely on the protection granted by the optional regime?

Article 11 - Consequences of the use of the CESL

Article 11 establishes the self-standing character of the 'optional' regime by providing that only the CESL shall govern the matters addressed in its rules.

This provision needs to be read together with Article 4(2) of the Annex I on the interpretation of the CESL:

"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."

According to these two provisions, issues not specifically covered but falling within the (material) scope of the CESL should be solved without any reference to national laws. This raises questions in areas where such a distinction is not evident, e.g. in Unfair Commercial Practices. For example, under Belgian and Luxemburgish law, the consumer can avoid a contract concluded as a result of an unfair commercial practice and keep the goods or services without any obligation to pay. Since commercial practices are, *a priori*, outside the scope of the CESL, should this situation be solved under the CESL if, for example, Article 48 (mistake) is relevant, or with reference to the national legislation?

In addition, the self-standing nature of the CESL raises serious problems with regard to its future interpretation *vis-à-vis* national laws. When provisions in the CESL have to be interpreted by national courts which already exist in national legislation as a 'first regime', due to the implementation of the consumer *acquis*, which is particularly relevant for the Consumer Rights Directive. Will the national courts have to stick to the limits of the self-standing character of the CESL? As a consequence, we can expect the drifting apart of the EU consumer law *acquis* from the CESL consumer contract provisions as a "second regime". From a consumer policy point of view, such a development cannot be desirable.

Annex A: Assessment of key substantive law issues of the CESL proposal

Reference: CRD = consumer rights directive (Directive 2011/83/EU); "Chapeau" rules = Article 1 - 16 of the proposed regulation on CESL

DISCLAIMER: This table is work in progress and will be further amended and completed. We have listed examples of national law to our best knowledge, but further research is necessary to provide the full picture.

Issue	Proposed CESL rule	Reduction of existing rights
Definition of consumer	- Exclusion of dual purpose contracts from the consumer definition (article 2(f) of the 'chapeau')	The definition of the "consumer" deviates from the CRD (recital 17) to the detriment of consumers by not including contracts concluded for proposes partly within and partly outside the person's trade. Currently several Member States extend consumer protection to these kinds of contracts (DE, DK, FI, SE, NO). Under the CESL, consumers would not be protected by consumer law in such cases. In addition, some Member States (AT, BE, CZ, DK, EL, ES, FR, HU, PL) apply consumer protection rules also to other persons or entities that are in a similar position as consumers in terms of lack of bargaining power and expertise (NGOs, start up business, etc). If these persons would contract under the CESL, they would loose the protection they are granted under national law.
Definition of trader	- Exclusion of third parties acting on behalf of the trader (article 2(e) of the 'chapeau')	The definition of the trader deviates from article 2(2) of the CRD Third parties acting on behalf or in the name of the trader are not included in the proposed CESL. Consequently, the consumer would be faced with high legal uncertainty as to which laws apply if the trader was represented.
Unfair Contract Terms	- The general clause of "unfairness" (article 83)	Due to the definition proposed in CESL, the level of protection would be reduced compared to the existing laws in many MS: for example, the requirement of a 'significant' imbalance in the parties' rights and obligations as well as the introduction of the notion of 'good faith' results in less flexibility in comparison to many national standards and a higher

		threshold for assessing the eventual unfairness of a contract term. ³⁹
	- Exception from the unfairness control: the circumstances occurring after the conclusion of the contract (article 83 (2) (c)) cannot be taken into account;	There will be a reduction of rights compared to the existing legislations in the Nordic countries (e.g. DK, SE).
	- Exclusion of the control of the main subject matter of the contract and adequacy of the price (article 80 (2))	This would lead to a reduction of rights compared to the existing laws in AT, DK, GR, LV, LU, SI, ES, SE.
	- Exclusion of individually negotiated terms (article 2(d) of chapeau and 82)	This would lead to a reduction of rights compared to the existing legislations in at least 10 MS: BE, CZ, DK, FI, FR, LV, LU, MT, SE, SI.
	<p>- The black (Article 84) and grey (Article 85) lists of unfair clauses are long in relation to some countries, but short for other countries; they pose manifold problems:</p> <ul style="list-style-type: none"> • the grey list (trader can claim that the clause is fair) includes clauses which are black (always unfair, no defence of trader possible) under national laws, • important clauses are missing, • and the content of clauses is not as strict as in some MS which can be of essential importance and have high practical relevance 	<p>Examples (non exhaustive!): in Austria and Greece only one black list of contract terms exists; in French law several clauses of the grey list of Article 84 of the CESL proposal are black, such as the following clauses named in Article 85 annex I, CESL: (a), (b), (f), (i), (j), (k), (l), and (v), or for example the Belgian law includes clauses in Article 74, clauses 14° and 17°, Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur, which are not included in Article 85 annex I of the proposed CESL .</p> <p>In Austria, certain black listed clauses which are highly relevant in practice, such as clauses regarding the automatic prolongation of a contract or price increases after conclusion of the contract, are much stricter (more protective) than the version in CESL (for example Art 85 lit k, h, j and n). A significant reduction of protection through the use of CESL would be the consequence.</p>
Legal guarantees	- Consumers are liable to pay for the 'use' of a defective product under certain conditions (article 174)	In most countries such a rule is not known and may not apply under general Civil Law principles. Only very few MS have such a provision for consumer contracts. In addition, the provision is contradicting case law of the CJEU (<i>Quelle</i>) stating that when exercising the right of replacement, the consumer cannot be obliged to pay compensation for the use of the defective products. The proposed CESL dos not follow this line to the detriment of the consumer.

³⁹ For a more detailed analysis see: BEUC's response to the European Commission Expert Group's Feasibility Study for a future instrument in European contract law (Ref.: X/2011/072 - 28/06/2011) available at www.beuc.eu

	- Preclusion of specific rights existing in national law	Consumers in HU, LV and PL would be prevented from the so-called right to self-help; and consumers in GR from the right to a temporary replacement if repair takes more than 15 days.
	- Termination of a contract in case of a minor defects is not possible (article 114(2))	There would be a potential reduction of rights compared to the existing legislations in the UK and IE (under general sales law).
	- A 6-month period for reversal of burden of proof (article 105 (2))	There would be a fundamental reduction of rights compared to the existing legislation in PT, which provides for a 2-year period of reversal of the burden of proof.
Right of withdrawal	- Preclusion of the ban on payment during the cooling-off period in off-premises contracts (article 44 (1))	Article 9(3) of the CRD allows Member States to maintain such a ban. There would be a reduction of rights compared to the existing legislation in FR.
Related service contracts	- In case of non-performance the trader has a "right to cure" (article 155) (with the exception of incorrect installation (article 101))	This could deteriorate the position of the consumer in relation to existing legislation in countries where such a right does not exist (AT, CZ, PL, SI SK) or it is conditioned. For example in NL the creditor may refuse performance if the defaulting debtor does not offer payment of due damages simultaneously and in DK, ES, FI, PT, and SE it applies only before the buyer has not terminated the contract or becomes entitled to terminate because of late performance.
Cost estimates	According to Art 152, the traders is obliged to warn if the costs of a service would be greater than already indicated or would be uneconomic	This rule is problematic in relation to cost estimates, which are very important to consumers; the rule would allow the trader to move exceeding costs on the consumer (if the consumer agrees). However in some countries (like in AT) cost estimates can be binding and cannot be exceeded. The CESL rule would be disadvantageous in such cases for the consumer.
Prescription periods	Limit of 'short' prescription period to 2 years and 'long' period 10 years	This would also lead to a significant reduction of consumer rights in some countries where those prescription periods are longer, especially in the case of contractual damages. For example, in AT the short period is 3 years and the long period 30 years, in FR, GR and PT it is 20 years and 10 years in BE. Also in relation to IE and UK legislations, while the proposed periods are longer, the obligation to notify within 2 years of knowledge of

		claim effectively reduces the liability period from 6 years to 2 years.
Avoidance	- Notification of avoidance on grounds of mistake within 6 months and 1 year for fraud, threats and unfair exploitation (article 52)	There would be a reduction of rights compared to the existing legislation for example in AT where such a notification is not provided and the right can be assessed within 3 years in case of simple mistake and 30 years in case of fraud and threat. Similarly in BE the period is of 10 years and likewise in FR 5 years for both mistake and fraud.

Annex B: Interplay of Private International Law and CESL

This grid shows different scenarios how the proposed CESL would interact with Private International Law based on a simulation of the most typical case scenarios of cross-border consumer contracts; it illustrates that the proposed CESL would significantly complicate cross-border transactions.

Reference: MS = Member State / RI = Rome I regulation / PIL = Private International Law / CESL = Common European Sales Law

Trader's location	Choice of law?	Agreement on CESL?	Consumer's country	Other international element (article 4(3) chapeau)?	Directed activity?	Result: applicable law	
MS A	Yes, MS A	-	MS B	-	Yes	Article 6(2) RI = Law of MS A + better protection granted by Law of MS B	Current system
MS A	Yes, MS A	-	MS B	-	No	Article 3 RI ⁴⁰ = Law of MS A	
MS A	No	-	MS B	-	Yes	Article 6(1) RI = Law of MS B	
MS A	No	-	MS B	-	No	Article 4 (1) (a) = Law of MS A	
Third country	Yes, third country	-	MS B	-	Yes	Article 2 + article 6(2) RI ⁴¹ = Laws of third country + better protection granted by Law of MS B	
MS A	Yes, MS A	Yes	MS B	No	Yes	CESL + Article 6(2) RI = CESL + Laws of MS A + better protection granted by Law of MS B ⁴²	With CESL
MS A	No	Yes	MS B	No	No	CESL + Article 4 RI = CESL + Law of MS A for issues not covered by CESL (derogative effect)	
MS A	No	Yes	MS B	No	Yes	CESL + Article 6(1) RI = CESL	

⁴⁰ Rome Convention (80/934/ECC) in case of Denmark.

⁴¹ Provided that the competent court is that of a country where Rome I regulation is applicable (all Member States except for Denmark). If that is not the case, then the national rules of PIL of the third country apply.

⁴² As explained above in point I.6., BEUC considers that for consumer contracts, the derogative effect of CESL applies only in relation to the national law of the Member State chosen by the trader (in our grid: Member State A, typically the country of the trader). The agreement to use CESL could only preclude the application of the law of MS A, but in our opinion NOT the application of the mandatory provisions of the consumers country if Art 6 paragraph 2 of the Rome I regulation applies.

						+ Law of MS B for issues not covered by CESL (derogative effect)
MS A	Yes, MS A	Yes	MS A	Delivery address in MS C	No, same country	CESL? (if MS A has not opted-in for domestic application)
MS A	No	Yes	MS A	Delivery address in third country	No, same country	CESL? or only article 4 RI (Law of the country where the trader has his habitual residence – MS A)
Third country	Yes, third country	Yes	MS A	No	Yes	Two possible solutions: a) action pursued in third country; application of PIL of the third country b) action pursued in MS: Article 6(2) RI applies but without the derogative effect?
MS A	No	Yes	Third country	Delivery address in MS C	No	CESL + RI (if competent court in a MS) or PIL of third country
Third country	No	Yes	MS C	No	Yes	CESL + RI (if competent court in a MS) or PIL of third country

END