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AK Position Paper

# Proposal for a Regulation on a Common European Sales Law (CESL)

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# About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

**Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
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Director

# Executive Summary

In its opinion of February 2011 on the Green Paper on "Policy options for progress towards a European Contract Law for Consumers and Businesses" the Austrian Federal Chamber of Labour (AK) already objected to a binding form of the European contract law instrument. The AK would like to reaffirm this approach with regard to the Regulation on a Common European Sales Law, which has now been presented by the Commission.

**The most important points of the opinion:**

- The **EU Consumer Rights Directive** has just come into force. Its declared aim is to promote cross-border trade. Further measures will only be decided once this civil rights package has been implemented and evaluated. In addition, the EU Directive on consumer rights created to a large extent full harmonisation. Hence, significant parts of a Sales Law have been unified EU-wide.

- The **demand analysis of the European Commission** is also lacking conclusiveness in respect of other aspects. It is for example not only uncertainty with respect to the applicable law, which prevents consumers from concluding a cross-border contract. They are particularly worried about failing with regard to enforcing the law.

- Also difficult to comprehend are the **transaction costs** for traders based on the current conflict of law regime established by ROME I, which have been estimated by the European Commission, or the **enormous burst of growth for EU-wide trade** on introducing a Common European Sales Law, which has been forecast

- The **basis of competence** of Article 114 TFEU and the compliance with the principles of subsidiarity and proportionality have to be questioned.

- The introduction of a Common European Sales Law leads to a **mixture of several legal systems,** as general judicial institutions, such as legal capacity, cannot be regulated, and are subject to applicable law in accordance with ROME I. This situation, but also the fact that the Common European Sales Law is new legal territory, will entail significant legal uncertainty and make it more difficult for consumers to gain access to justice.

- The introduction of an optional contract law instrument will result in consumers **losing the protection of better (national) regulations.**

- Whether traders accept a 28th Contract Law Regulation stands and falls with its level of consumer protection. If it is high, other legal systems will be given preference. This is reflected in the draft of a Common European Sales Law, as it is **lacking a consistent high level of consumer protection.** In particular in respect of the **unfair terms,** the CESL is far less favourable for Austrian consumers than the current legal

position. Consumer protection, if at all, is strengthened almost incidentally.

- A **free, well-considered choice of the 28th Contract Law Regulation** by consumers cannot take place: they are only left with the option of deciding against the purchase. If consumers want to purchase a product, they have to accept the at best unfavourable Common European Sales Law.

- Advertising the Common European Sales Law as a **reliable quality mark** may turn out to be **deceptive,** as in the end the details and the terms and conditions of the concrete contract decide on its potential for conflict.

- The **standardised information notice** too might lead consumers down the wrong path. A high level of protection in respect of individual legal aspects does not say anything about the general favourability of a legal system.

# The AK position in detail

## I. General remarks

### 1. Implementation of the Consumer Rights Directive a priority

The EU Directive 2011/83 on consumer rights came into force in November 2011. It is the particular aim of this Directive to make a weighty contribution to promoting cross-border trade. The implementation period for the Member States has been set at 2 years. Hence, it should go without saying that the actual implementation, first practical experiences and their evaluation must be awaited before tackling another big ground-breaking project, which is also not without problems in respect of the legal system. Apart from that, the EU Directive on consumer rights is to a large extent based on the concept of full harmonisation. The Member States' room for manoeuvre regarding the implementation is limited to the scope, which is very narrowly defined in the Directive, but has the potential to be enlarged, a small number of parts at a minimum level of harmonisation and sporadic regulatory options.

Hence, the **legal issues** that are **essential for the conclusion of a contract,** in particular all pre-contractual and contractual information requirements and any other requirements concerning the conclusion of a contract, which traders come across in cross-border trading, but also the right to withdraw, all modalities relating to its exercise as well as the reverse transaction of the contract after withdrawal, **will be fully harmonised EU-wide.** In this respect, the ground has been taken from under the arguments of the European Commission in favour of a Common European Sales Law.

The original plan of revising the civil law consumer acquis also included **Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees** as well as **Directive 1993/13 on unfair terms in consumer contracts.** However, in these fields, it had not been possible to realise a common denominator on the basis of full harmonisation between the Member States, hence, the revision of these Directives was deferred. This compromise made the adoption of the EU Consumer Rights Directive only possible in the first place. Now, the draft of a Common European Sales Law just takes up these disputed regulations without any significant revaluation, and in doing so ignores a difficult political decision-making process as well as the reservations of the Member States.

**2. No compelling and conclusive arguments for the introduction of a Common European Sales Law**

Reservations by consumers concerning cross-border trade are not based on insecurity in respect of applicable law.

Practical experiences, which are available to AK-consumer protection experts, show that there are many reasons for the consumer resistance in cross-border trade

The European Commission time and time again promoted the project of an optional contract law instrument by pointing out that consumer resistance in respect of cross-border trade was primarily a result of consumers feeling insecure about the applicable law. **Practical experiences,** as they are available to consumer protection experts of the AK, point in a different direction resp. they show that **completely different and a wide range of different concerns are decisive factors.** Apart from the basic insecurity relating to unknown providers, the growing fear of fraud based on the increase of dubious online offers, language barriers, data security problems and the fact that not all of the population has access to the Internet, the more difficult out of court and the judicial enforcement across the border are all also playing a decisive role in cases of conflict.

In its Communication, the Commission states in respect of contract-related obstacles that 44 % of consumers declare that uncertainty regarding their rights relating to a purchase in other EU countries prevents them from making a purchase; however, what is not mentioned is the fact that this Eurobarometer also reveals that **59 % do not make a cross-border purchase because they are worried about scams or frauds.**

Experience shows that consumers are not concerned with the issue of applicable law, in particular not prior to concluding a contract. They **normally assume that their national law will apply** or that a **certain level of minimum protection within the EU is guaranteed.** This is also confirmed by advice centres. Whilst they are constantly confronted with the question as to how reliable a cross-border provider or offer is and their support in cases of dispute is requested, applicable law is normally not an issue consumers raise in advance.

The **experiences with UN Sales Law** as a transnational contract law are already sobering. For example, this agreement is not widely applied by traders. It must also be criticised in this context that only traders were consulted who are already engaged in cross-border transactions or planning to do so in future. Hence, the reasons why only domestically active traders are refraining from cross-border activities have been ignored. Taking a closer look at the results, it turns out that **only 10 % of the traders asked regard the difficulties in finding foreign legislation as a significant obstacle.** Even though the

likelihood of traders wanting to apply a potential EU Sales Law is regarded as very probable (e.g. Germany at 41 %), only 18 % of German traders regard foreign consumer contract laws as a great barrier and **60 %** even rate this circumstance **as an insignificant or minimum obstacle.** Hence, the results referred to definitely put a question mark on the urgency and importance of introducing an EU Sales Law.

### 3. ROME I described in a wrong way

The explanations on the proposal for an EU Regulation on a Common European Sales Law do not present the effect of Article 6 of ROME I correctly. It is not true that the consumer law will apply to cross-border trade from the outset. This would only be the case, if the company does not exercise a choice of law. Fact is that most companies exercise a choice of law, in most cases in favour of their domestic legal systems. However, this choice of law does not lead to mandatory protective measures in the consumer's state of residence being completely buried. They are only relevant when they are more favourable, primarily in cases of dispute.

### 4. Transaction costs

The level of additional transaction costs should also be treated with caution. They are based on **estimates** of possible savings by the economy upon the introduction of an optional contract law instrument, whereby **more than half of the traders have not given any relevant details.** These estimates were obviously based on the assumption that the Agreement has to be transposed in all 27 legal systems. However, this approach is flawed as it does not take the regime of ROME I into consideration and thereby - as already mentioned - ignores the fact that traders are already able to choose applicable law. Apart from that, it has not been clarified whether differentiations have been made between the estimated translation costs and the costs for the software to identify the consumer's state of residence and additional costs, which would be incurred in any case. Because every time companies want to place their products on the markets of foreign language Member States and be successful in doing so, consumers must be able to consult the website in the respective national languages

**5. Alleged additional revenue for EU-wide trade**

The other arguments of the European Commission in respect of creating an optional instrument have to be questioned. For example, in its pro campaign for the introduction of a Common European Sales Law, the European Commission has also floated the suggestion that this would provide EU-wide trade with up to 26 billion additional revenue. Fact is that the trade has "missed out" on this revenue before: **if at all, there might be a shift of turnover** from national trade towards cross-border trade. The trading volume remains the same as people can only spend what they have available.

**6. Basis of competence, subsidiarity and proportionality**

The planned introduction of a Common European Sales Law also addresses important issues concerning common competencies. The European Commission uses **Article 114 TFEU** as a basis of competence. However, in accordance with the **judgment of the ECJ in respect of a European Cooperative Society** (ECJ 2.5.2006, C-436/03) **Article 352 TFEU** is probably the **more suitable basis.** This rule regarding competency would require a unanimous decision by the Council. Article 114 TFEU is aimed at "adopting the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

However, the planned Regulation does not affect an approximation of laws; the regime of the Common European Sales Law leaves national law untouched. According to the European Commission, it shall be available as a second optional contract law instrument alongside national law.

**The principles of subsidiarity and proportionality** must also be observed when an optional contract law instrument is created. Hence, the planned measure must not only be particularly necessary, but also suitable to significantly promote the internal market. However, as already mentioned, so far no clear and concrete evidence exists for any of the two implications. Sometimes, one could even get the opposite impression, especially if one considers the associated legal uncertainty for all participants by choosing a 28th contract law instrument, the follow-up costs in cases of dispute for legal advice and court proceedings increasingly resulting from this, and the conclusion of contract, which is far slower because of the obligation to adhere to requirements of form and information.

The legal uncertainty will increase with the 28th Contract Law Regulation

**7. Introduction of a Common European Sales Law brings disadvantages for consumers**

With regard to the situation of cross-border law enforcement, the introduction of a Common European Sales Law by making a choice within the scope of private autonomy will do consumers a disservice. Because **legal uncertainty will increase with the 28th Contract Law Regulation.**

One of the logical consequences of introducing new legal matters is the **significant requirement of clarifying jurisdiction,** a process, which will take years and decades. The Common European Sales Law is new legal territory and must be interpreted autonomously, taking the principles of European Union law into account. In many cases, the ECJ will have the last word, thereby significantly prolonging the duration of the proceedings. In this context, one must also raise the question concerning the **limits of the capacities of the Court of Justice.** Under these conditions, both the personnel situation and the financial endowment of the ECJ would have to be increased significantly.

However, a high level of legal uncertainty is also generated by the fact that based on the choice of optional instrument, **an extremely complex and in many cases inestimable** mixture of different legal systems is created in **practice,** which will confront the courts with huge challenges. The Common European Sales Law shall **only regulate direct contract law issues, and not general judicial institutions,** such as representation/proxy, legal capacity or unlawfulness. The applicable law is again subject to ROME I - either by choice of law or by specified conflict of law connections. Hence, some parts of such a contract would have to be evaluated and treated in accordance with aspects and principles under EU law, whilst other parts would be subject to national law. Given this scenario, it is unavoidable - even if it completely contradicts the harmonisation efforts of the European Commission - that the courts have a closer look at European law, influenced by their respective national legal traditions and contract laws and that they will take completely different decisions on certain issues.

It is also obvious that the problem of increasing legal uncertainty because of the 28th contract law regime will not only affect consumers. Traders will also have a struggle on their hands. The question of high transaction costs in cases of dispute for legal advice and court proceedings would not only affect consumers, but also - under changes auspices - traders.

**8. Right of choice of consumers does not work**

It has already been pointed out in context with the Green Paper on policy options for progress towards a Common European Sales Law that this project tends towards depriving consumers of better consumer protection standards. Traders will not be very interested in the Common European Sales Law if it provides a high level of consumer protection.

The consumers have actually no choice in respect of applicable law

In turn, consumers have **actually no choice** in respect of applicable law. Traders specify their choice and apply - if at all - the optional contract law instrument. If consumers want to purchase a product, they have no choice but to conclude the contract on the basis of Common European Sales Law. They are not provided with an alternative.

However, it must also be emphasised that even under the theoretical assumption of a free choice, an average consumer would not succeed in detecting a possibly less favourable legal position, which is the consequence of traders applying the optional contract law instrument, or to **carry out** a **favourability comparison.** The standardised information notice - even if meant well - is of no help. In fact, the consumer would have to seek professional legal advice. But who wants to be concerned with issues in respect of applicable law when making a simple purchase, such as buying books, CDs, textiles or a camera online?

In addition, in particular with regard to cross-border online trading **there is already quite an array of reference data,** which the AK consumer protection experts are making available to consumers to prepare them for the conclusion of a contract on the net: for example, consumers are to check whether a provider includes his full address on his homepage, whether his product or service are adequately described or whether questions remain unanswered, whether there are references to hidden costs, whether large advance payments are requested and whether secure forms of payment are provided. To lumber consumers on top of this with the requirement to check the issue of the best applicable law might in the end turn out to be counterproductive for cross-border trade.

**9. ROME I - the better protection regulation from the consumer's point of view**

The reason why ROME I provides better consumer protection is clear as it is **more closely related to real life.** Consumers do not have to worry prior to concluding a contract which applicable law is better for them. The **safety net of the favourability principle** has been set up just for this case of conflict. As by way of exception no choice of law has been made, the consumer can at least be sure that he will be able to cope with a problem occurring on the basis of the law of their native country he is familiar with, without the

requirement and the additional effort to familiarize himself with an unknown not yet legal system, which has not been brought before the supreme court.

The standardised information notice may also raise false expectations by consumers

**10. Risk of being misled by advertising quality mark**

The introduction of an optional contract law instrument and its **promotion as a "reliable quality mark"** by the European Commission associated with it might mislead consumers, as the option of the 28th Contract Law Regulation and its standard say very little about the consumer friendliness of the concrete contract. In the end, content and terms and conditions, on the basis of which a company is able to control that its interests are met, decide about the potential for conflict. Promoting the instrument as a "reliable quality mark" will also become a problem, if national law resp. mandatory national protective measures would better protect consumers on a case-by-case basis than the Common European Sales Law.

The **standardised information notice** may also raise **false expectations** by consumers as only sporadic positive regulations, for example in connection with warranties, may be misunderstood as pars pro toto, when in fact the Common European Sales Law may fair worse in a favourability comparison concerning the level of protection with the national legal system of consumers.

**11. Potential effects on other contract types**

Which **effects resp. prejudices** the European Sales Law project might have **on other contract types, such as employment or rental agreements,** has not been considered or included at all. However, it is to be feared that those general contract law provisions, which will form the basis for purchase contracts, will be applied to the entire European contract or civil law in a next step.

From the point of view of the AK, a particular sensitive aspect would be a direct transfer on the **employment law** sector. Above all, we see a problem in **reducing the short limitation period.** Even if the two-year limitation period laid down in the draft on EU Sales Law is not applicable to employment relationships, one has to be concerned that sometime in the future a harmonisation of the limitation periods will be aimed at and that in the end the short limitation period will generally be two years.

With regard to enforcing the employment law one can see that the majority of claims - including current remuneration (such as remuneration differences due to incorrect classification, overtime

compensation etc.) are only asserted after the termination of the employment relationship. Currently these claims are subject to the three-year limitation period. Cutting this period would reduce the claims of many employees. Looking at it from this perspective one should aim at generally retaining the short limitation period of three years (also see page 21).

## II. On the Proposal of an EU Regulation on a Common European Sales Law in detail

### 1. On Article 2

**Laying down the definitions** in the EU Regulation and the suspensory effect resulting from the Common European Sales Law has a negative impact. Actually, in respect of this the Consumer Rights Directive is only subject to minimum harmonisation; hence the Member States are able to maintain or even create more protection. Laying down the definitions is now tearing gaps in the existing consumer protection: hence, above all, the consumer definition resp. the suspensory effect of the CESL no longer permits to also extend safeguards to persons who concluded a so-called foundation business or who have become extraordinary members of associations. **Extending the protection provided by consumer law provisions** to these constellations has in the past proved to be a particularly important addition to sensible consumer protection. The cases are quite frequent in practice: for example when direct sales companies advertise for and recruit consumers as freelance employees for goods with the primary target to conclude a contract with these employees themselves in respect of such goods.

Article 2 (q) includes the **definition of the 'off-premises contract',** which is important for the Common European Sales Law. According to this, contracts, which have been concluded during an excursion, are also regarded as doorstep transactions. Here, the Regulation combines elements from two definitions of the Consumer Rights Directive, namely the general definition of the term trader and of doorstep transactions. However, in doing so, the definition is **unacceptably abridged:** the definition only declares that the excursion is organised by the trader, or, where the trader is a legal person, by the natural person representing the trader. That way, general contracts, which are organised by third parties, have been excluded. This contradicts the clear intention of the Directive and significantly reduces the protection of consumers, as in particular in case of **promotional tours, organiser and product presenter are often two different entities.** Here too, the far-reaching suspensory effect is demonstrated when the Common European Sales Law is applied.

The agreement of the Common European Sales Law is facultative

Apart from that, the definitions correspond to a large extent with the EU Consumer Rights Directive. One finds the occasional linguistic inaccuracy and the isolated content-related deviation. For example, the **term 'loss'** has been introduced. However, a better choice would have been the term **'damage'.** As harm suffered is strictly speaking not a loss, but a possible form of damage.

The **provision of digital content** is also similar to the EU Consumer Rights Directive. However, one has to note in this context that the optional contract law instrument is restricted to "contracts of sale of goods"; services are only included if they are closely associated with a contract of sale. Hence, these requirements should also be applied to digital products. The fact that a great growth potential is assumed in respect of marketing digital content and that the intention therefore is to deal with this sector at the same time is not a good reason to leave a chosen legal path and to extend the scope relating to digital content to all other service contracts. Apart from that, it would appear to be sensible to deal with the issue of **providing digital content** separately and comprehensibly and **to take account of its particularities by introducing specific regulations** - regulations, which generally elevate the EU-wide standards to a minimum standard and whose validity does not depend on the fact whether they are chosen by the undertaking.

**2. On Article 3**

The agreement of the Common European Sales Law is **facultative.** It can be applied within the framework of a spatial, factual and personal scope, defined by the Regulation. But what happens if there are **excessive "agreements",** which are not covered by the scope? Does one have to assume their ineffectiveness or does a non-contestable contractual agreement exist? Choosing the 28th contract law regime in respect of consumer transactions is only not an option in cases where the Common European Sales Law is only applied to consumers either partially or selectively, and when the formal requirements, the reference and the use and the provision of the standardised information notice, have not been adhered to. Imposing invalidity in other cases should also be enshrined in the Regulation for purposes of clarification. Otherwise it would be up to traders to extend the scope at their own discretion.

**3. On Article 4**

The **criteria for defining a cross-border contract** differ, depending on whether it concerns a relation between traders or a relation between consumer and trader. The criterion for the relation between traders is that both parties to the contract have their general place of abode

in different states. Things look a bit different with regard to the relation between consumer and trader: according to this, a cross-border contract does not only exist when the consumer resides in another state. Such a condition is **also** assumed if the **delivery or billing address is in a different state** from the state of residence of the trader.

The fact that the Common European Sales Law may apply to all cross-border contracts, without differentiating the sales channel must also be dealt with

However, the Common European Sales Law may also apply to those cases where an Austrian consumer is dealing with a trader registered in Austria, and where the contract includes a particular side agreement concerning a delivery abroad. Hence, these criteria should be carefully examined.

**4. On Article 8**

The application of the Common European Sales Law requires an **agreement of the parties to the contract.** With regard to the relation between consumer and trader it has to be made expressly and separately. These efforts by the European Commission to protect consumers have to be rated positively. However, in spite of this they are not able to compensate for the general dilemma: **consumers do not have an equal decision alternative;** they are not able to conclude a contract on the basis of another legal system, but only refrain from making the purchase.

One must also consider that in accordance with the **Consumer Rights Directive high demands** have already been placed on cross-border trade, in particular in respect of information. The special requirements of form and obligations of the trader pursuant to Article 8 and 9 are substantial with regard to the additional choice of the Common European Sales Law and may have a negative impact on the interest of traders to use this option. Apart from that, such a **flood of information** targeted at consumers might eventually lead to the fact that due to their quantity, information and warnings are no longer absorbed, thereby missing their target.

The fact that the Common European Sales Law may apply to all cross-border contracts, without differentiating the sales channel must also be dealt with. Hence, **doorstep transactions and contracts concluded by telephone** are also included. In particular in this context, consumers are always at risk of being caught off-guard. The European Commission seems to be aware of this in respect of contracts concluded by telephone; the consent of consumers on applying the Common European Sales Law must be given in writing. However, it is inconsequent that something similar has not been envisaged for doorstep transactions. Practice shows that these situations make it easy to elicit a consenting signature from consumers without them being aware of what they

have actually signed. Another solution would be to apply the Common European Sales Law only to online trading.

**5. On Article 9**

The 28th contract law regime is only agreed between traders and consumers when its application has been pointed out in advance and when consumers have been provided with a **standardised information notice.** If the trader has failed or if the communication medium does not allow for the provision of the required information on concluding the contract, for example in cases of contracts concluded by telephone, the agreement on the application of the 28th contract law regime only becomes binding when the trader has provided both information on the application and the information notice and when the consumer has given his explicit consent.

Article 9 (2) states that the information notice shall, "if given in electric form, contain a **hyperlink"** by which it can be accessed. It might also include the address of a **website,** through which the text can be obtained free of charge. This regulation is not only vague in linguistic terms. What is probably meant is that the reference on applying the Common European Sales Law is provided by the trader in electronic form and that it at the same time contains a hyperlink or an Internet address, by which the information notice can be obtained or read. However, this only describes a form of providing access to information, which according to its wording would not be adequate.

A hyperlink or an internet address do not "deliver" (or convey) the information notice. The obligation to provide or convey the reference and the standardised information notice is similar to the requirement in Directive 1997/7 on the protection of consumers in respect of distance contracts respectively the requirement standardised in the Consumer Rights Directive that consumers have to "receive" confirmation of other contractual information. However, the jurisdiction in this context obliges providers to ensure that the **confirmation will actually reach the consumer** (compare for example German Federal Court of Justice I ZR 66/08 from 29.4.2010).

In general - as already mentioned - the obligation of the trader to provide customers with a **standardised information notice** is well intended; **however, its content is not of real assistance when considering options.** The information notice only gives a very general impression and reduces the favourability comparison to an observation of

individual provisions of the Regulation, such as warranty. As a result, even the standardised information notice may lull consumers into a false sense of security.

Applying the dispositive law, the concrete contract may be completely consumer-unfriendly; it may have a generous warranty period, because it does not concern a long-lasting product, it might be insignificant or raise a problem, concerning which national law provides consumers with better protection, such as the Austrian law in respect of automatic contract renewal clauses.

An application of the Common European Sales Law at national level is rejected in respect of the relation between consumer and trader

**6. On Article 10**

**Imposing penalties for breach of specific requirements** only refers to the requirement set out in Articles 8 and 9 concerning the agreement on the application of the Common European Sales Law and the provision of the standardised information notice and does therefore not go far enough. **Penalties should also apply when traders exceed the scope of the Regulation.** What is therefore needed is a clear general provision that traders applying the Common European Sales Law, have to comply with the framework conditions and obligations laid down in the Regulation and that they are not permitted to restrict or exclude them by using deviating or restrictive provisions when structuring the concrete contract.

**7. On Article 11**

Article 11 requires that the Common European Sales Law also regulates a **liability for culpa in contrahendo** if the contract is concluded subsequently. However, ROME II defines the liability for culpa in contrahendo as non-contractual independent of the fact whether the contract is subsequently concluded or not, and lays down the relevant provisions for the respective applicable law. This seems to result in a **collision with ROME II.** The collision standard of ROME II in respect of culpa in contrahendo, the Article 12, also refers with regard to the applicable law - even when the contract is not concluded - to the Common European Sales Law, because it is the law "which would have governed the contract if it had been concluded". The wording of Article 11 contradicts this.

**8. On Article 13**

An **application** of the Common European Sales Law at national level is rejected **in respect of the relation between consumer and trader.** This would give traders not only the choice to apply the Common European Sales Law; it would also provide them with the opportunity of withdrawing from a national level of consumer protection which is less favourable for them.

## III. On the Proposal of a Common European Sales Law (CESL):

From the few options, which the Directive grants the Member States, only a small number are used in favour of consumers, others are not

With regard to the CESL itself, the AK only comments on individual particular aspects that are relevant to consumer concerns. As already outlined in the general remarks, the realisation of a Common European Sales Law project is associated with great **long-term legal uncertainty.** All **legal definitions and institutions** are **new; some of them are still vague** and have to be refined by a legal framework. The introduction of the CESL creates parallel legal systems. This will result in great confusion among consumers and other legal practitioners. The unequal treatment of the same legal situations also creates an unacceptable **area of tension between the CESL, other EU consumer acquis and other national legal systems.** The CESL does not want to regulate civil law-relevant issues in connection with purchase contracts, associated service contracts and contracts concerning the provision of digital content. However, time and again there is a lack of clarity concerning individual issues as to whether these are **unregulated areas,** where the respective applicable law in accordance with ROME I applies or whether they are **deliberate omissions. In some cases,** CESL also entails **serious disadvantages** for consumers compared to the current legal position. In particular in respect of the **Clause Law,** the CESL has a significantly lower level of protection than the corresponding regulations of Austrian law. Compared to this, the CESL, primarily in respect of warranty rights, only sporadically contains more favourable provisions for consumers. However, in the opinion of the BAK these do not compensate for the disadvantages.

### 1. Incorporation of the Consumer Rights Directive

The Consumer Rights Directive is to a large extent fully harmonised. Hence, the CESL adopts the majority of these regulations. **From the few options, which the Directive grants the Member States, only a small number are used in favour of consumers, others are not.** Not fully harmonised are in particular the definitions and the pre-contractual information requirements for all other contracts, which are not concluded by distance or off-premises contracts.

Options, which the CESL uses in favour of consumers concern among other **contracts concluded by telephone.** For example, it is required for contracts concluded by telephone that the con-

tract only comes into effect when consumers also sign a written version of the contract or have given their written consent for the conclusion of the contract. This is definitely required from a consumer point of view as practice has shown that telephone sales are still too easily achieved by dubious providers in spite of the tightened legal position since 2011 concerning cold calling in Austria. Apart from that, this solution does not provide a more close-meshed safety net for consumers. It is also an advantage that this creates a clear state of evidence, which in the end prevents unnecessary proceedings.

Occasionally, the CESL also goes beyond the Consumer Rights Directive. For example, **Article 45** states that the consumer is not liable to pay any compensation for the use of goods during the withdrawal period. This right supplements the Directive regulation, where the consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw. In both cases it is up to the trader to avoid these unpleasant consequences. This regulation too is generally to be welcomed.

The CESL also makes restrictive use of the decision options for the Member States and scope with regard to national implementation. The **general information requirements for each contract** in Article 5 have not been fully harmonised in the Consumer Rights Directive. Hence its Paragraph 4 states that Member States may adopt or maintain additional pre-contractual information requirements. These include for example mandatory safety notes for the trader, which are based on the basis of the Equipment and Product Safety Act. The adoption of this regulation by the CESL creates a problematic suspensory effect in respect of additional information requirements. Whilst it is possible for contracts, which are not based on the CESL, to add additional or to retain existing information requirements, possible protective regulations for consumers have no impact on contracts that are based on the CESL. Further national consumer protection is then limited to those consumers who have concluded purely Austrian contracts and to cross-border contracts, where the CESL does not apply.

The Consumer Rights Directive excludes **purchases from vending machines** and the **delivery of food, beverages or other everyday household items,** which are supplied on a regular basis, from its scope. Member States can regulate these sectors autonomously. The CESL includes these into its field of application and requires that the information requirements of the trader and the right to withdraw of consumers shall not apply to these. Hence, this issue too might result in different levels of protection compared to national law applicable to other contracts.

In Article 27, the Consumer Rights Directive also regulates the **unsolicited supply of goods.** It requires - as did the old Distance Selling Directive - that consumers in respect of such supplies shall be exempt from the duty to provide consideration. This civil law sanction is to protect consumers effectively against being coerced into concluding a contract on the basis of unsolicited supply of goods. Consumers are not obliged to retain such goods and may even discard them. Even using these goods cannot be interpreted as a conclusion of contract. **Article 130 (4) CESL** only regulates a **minor aspect of the actual problem:** in general, the buyer has to pay when he/she retains the excess quantity of what has been ordered. It generally applies to the relation between consumer and trader that no payment has to be made if the seller intentionally and without error delivers a quantity in excess of what has been ordered. However, the main problem remains unregulated. It is not quite clear in this context whether this simply concerns a legal issue, which has not been regulated by the CESL, and where one can refer back to the respective applicable law in accordance with ROME I or whether this is a deliberate omission at the expense of consumers. Due to the fact that Article 35 (3) of the CESL regulates the possible acceptance of the offer by sending an acceptance and Article 130 (4) regulates the unsolicited supply of excess quantity, one could easily derive the concluding treatment of this issue from this. By the same token, the CESL has put its declared focus on concluded contracts. For reasons of clarity and legal certainty, including a provision in CESL, which corresponds to the regulation of the Consumer Rights Directive, would have been appropriate.

Apart from that, the CESL - even though also the Consumer Rights Directive leaves room for such an option - does not impose **any linguistic requirements in respect of the contract and its part,** such as an installation or operating instructions, with regard to distance contracts and doorstep transactions. However, as already mentioned consumers refrain from concluding contracts online, because they are hampered by language barriers.

2. Unfair contract terms

The CESL also contains regulations on **unfair contract terms concerning the relation between consumer and trader** (in particular in Chapter 8). Inevitably they orientate themselves to a large extent on the existing Directive 13/1993 on unfair terms in consumer contracts. This Directive is a minimum directive. Hence, so far Austria has

It is entirely possible that individual clauses are legible and comprehensible, but that their context is difficult to recognise

been able to maintain her far more consumer-friendly and stricter law without a problem. The introduction of an optional sales law instrument would now in respect of the unfair contract terms result in a **drastic reduction of the level of consumer protections for Austrian consumers,** who want to make cross-border purchases and are only able to use this possibility on the basis of the CESL. Not only the fact that Austrian standards are going much further and that they would be eliminated by the application of the CESL; Austrian law also includes some important legal remedies that are completely unknown to the CESL.

### 3. Duty of transparency

The description of transparency in **Directive 13/1993** is different from the proposed CESL. According to this, all (written) contract terms have to be drafted in plain and intelligible language. In its corresponding **Article 82,** the CESL requires that they have to be drafted in plain and intelligible language. However, it is **entirely possible that individual clauses are legible and intelligible, but that their context is difficult to recognise,** as they might have been used in different places or are "hidden" somewhere else, making any interaction difficult to identify for an average consumer. The Supreme Court has established a comprehensive legal framework, which specifies the individual effects of the duty of transparency, such as the requirement of recognisability and intelligibility, the requirement to point out certain legal consequences in a part of the contract, the requirement of clarity and definiteness, the requirement of differentiation, the requirement of accuracy and the requirement of completeness. It is to be feared that this broad understanding of the duty of transparency does no longer apply to contracts based on the CESL.

What is even more serious in this context is the fact that a lack of transparency does not render a clause unfair per se and thereby ineffective, but that the **issue of transparency has been made part of the controlling unfairness** (Article 83). Apart from transparency, further criteria have to be applied to examine the nature of what is provided under the contract, the circumstances prevailing during the conclusion of the contract, the other contract terms and terms of any other contracts on which the contract depends. In doing so, the CESL disregards the current EU minimum standard in respect of consumer protection. Such a restrictive application of the duty of transparency would put consumers at a significant disadvantage. In particular in Austrian law, the duty of transparency, which was separately introduced when Directive 13/1993 was implemented, has gained great significance in respect of

jurisdiction and consumer protection. Mandatory Austrian regulations would be eliminated if the CESL was chosen.

The first proposal for a Consumer Rights Directive in the EU had already planned to revise the chapter on unfair contract terms and to impose full harmonisation

**4. Validity control**

With **§ 864a Austrian Civil Code [ABGB],** Austrian law also provides a special regulation in form of a **validity control of contract terms.** According to this regulation, unusual provisions in pre-formulated General Terms and Conditions and contract form sheets will not become part of the contract when they unfavourable for consumers and if consumers cannot be expected to anticipate this regulation. This provision is to provide protection against being caught off-guard by unexpected terms and conditions. **The CESL does not include a similar provision.** However, due to the fact that the CESL regulates the Clause Law, Austrian consumers, who conclude a contract on the basis of the CESL, would no longer benefit from this special protective provision.

**5. Individually negotiated terms**

The first proposal for a Consumer Rights Directive in the EU had already planned to revise the chapter on unfair contract terms and to impose full harmonisation. Then, the AK had criticised the general approach in respect of controlling the content of contract terms, namely the exclusive restriction to terms, which were not individually negotiated. Now, this criticism has to be repeated in respect of the CESL. Consumers are normally in a weaker position than traders; hence contract negotiations are not taking place on equal terms. Therefore, confronted with such situations one has to assume a limited free will on behalf of consumers. Hence, Austria has a large number of **banned terms (§ 6 (1) Consumer Protection Act [KSchG])** in respect of **action to be taken against unfairness,** independent of these terms being pre-formulated or individually negotiated.

The CESL provided sporadic regulations in respect of individually negotiated contract terms, for example in Article 62, which deals with the preference of such terms. However, Chapter 8 on unfair contract terms between trader and consumer only refers to pre-formulated terms. This makes it obvious that concerning this issue the CESL does simply not provide any protection for consumers. Austrian consumers, who are only able to undertake cross-border transactions on the basis of the CESL Agreements, are definitely in a less favourable legal position.

**6. Content control**

The structure of the content control on the basis of the general term in the CESL, of Article 83, does **not** correspond **with the high Austrian standard of protection** concerning this issue. The unfairness control shall take a wide range of different circumstances into account, such as the requirement of good faith and fair dealing as well as all aspects of the conclusion of the contract, the other contract terms and the terms of any other contract on which the contract depends. This implies certain relativisations as this approach would for example also allow to distinguish between more or less informed consumers.

Compared to Austrian law, many terms banned by the CESL are not only formulated differently; they also provide consumers with a lower level of protection

**Immediately ineffective** in the CESL are **only the terms of the Black List in Article 84. Article 85** of the CESL describes a **Grey List** of banned terms, where unfairness is only presumed, but which leave the consumer to provide the burden of proof. The Black List contains eleven banned terms. Hence, Austrian law imposes significantly more such regulations on per se ineffective terms and is therefore stricter. This concerns **regulations of terms, which are highly relevant in practice,** for example on automatic contract renewals in case of normally fixed-term contracts, shifting the burden of proof at the expense of consumers, exclusion or restriction of retention or contract avoidance rights or price or performance changes after the contract has been concluded.

Compared to Austrian law, many terms banned by the CESL are not only formulated differently; they also provide consumers with a lower level of protection. In this context one should mention the **banned clause on automatic contract renewal.** According to Austrian law, in order for an automatic contract renewal to become effective, the trader has to comply with several requirements. The trader is in particular obliged to alert consumers before the automatic contract renewal comes into effect and to grant consumers appropriate time to declare that they are not interested in renewing the contract. Apart from that, unfairness is not only presumed, i.e. the trader is able to resist this, but it already exists when these criteria are not observed. The CESL (just as the Directive) only requires in **Article 85 (h)** that consumers are able to reject an automatic contract renewal and that the period for cancelling the contract does not begin at an unreasonably early deadline. Hence, the protection provided by the Austrian terms does much further.

Something similar applies for example to **subsequent price changes. Article 85 (k)** of the CESL (just as the Directive) only requires that consumers may withdraw from the contract, but only when

the increased amount is too high in relation to the agreed price. In contrast, the Austrian law imposes very strict requirements on a subsequent adaptation of the contract. For example, the contract price can only be increased when the reasons for the price change have been specified in the contract and when they are objectively justified, and if the increase is not at the discretion of the trader. Apart from that, price reductions have to be dealt with under the same agreed regime. The Austrian ban on terms comes directly into effect when these requirements are not complied with; ineffectiveness is not only presumed. Here too the main emphasis is on comprehensive consumer protection. It has also been taken into account that in respect of many contracts, in particular contracts in respect of services of general interest, rental agreements, loan agreements etc., where consumers have a particular interest in their continued existence, a right to withdraw from the contract does not provide adequate protection.

In respect of the **subsequent performance changes** mentioned in **Article 85 (j)** the CESL also makes it easier for traders than the Austrian Clause Law. It is only required that the trader provides a valid reason for the performance change. If this is the case, consumers would have to put up with significant performance changes without being able to contest them. In contrast, Austrian law provides the additional safety net of "minor" changes for consumers; everything, which cannot be rated as minor, cannot subsequently be passed on to consumers.

Another banned term of the CESL, **Article 85 (n),** requires that traders, where what has been ordered is not available, are allowed **to supply an equivalent without informing the consumer.** The requirement is that the trader informs the consumer of this situation (e.g. if necessary in their General Terms and Conditions) and that he has also pointed out that consumers must bear the cost of returning if they do not want to retain the goods. This ban too shows that consumer protection with regard to the unfair contract terms in the CESL **is worse than under Austrian law.** In Austria, such an agreement - unless it had been negotiated individually - would also be measured whether it is deemed acceptable for consumers, in particular, if it was minor and objectively justified. Looked at it from this angle, it is not possible to burden consumers with returning costs.

**Some banned terms** are **unclear and vague.** For example, **Article 85 (v)** requires that it shall not be allowed to "impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration". Does

that mean that the trader is generally allowed to put obstacles in the way of consumers when a contract of indeterminate duration is terminated, provided they are not excessive? Apart from that, the **relation** of this regulation to Article **77** is unclear, as this requires for the relation between consumer and trader that such a contract may be allowed to be terminated by either party by giving a reasonable period of notice not exceeding two months. According to this, no further requirements should be possible; the period of termination can only be more favourable.

Inaccuracies and ambiguities in respect of this issue have also crept in compared to the Directive on certain aspects of the sale of consumer goods and associated guarantees

**7. Warranty**

The CESL adopts the minimum standards of the existing Directive 44/1999 on certain aspects of the sale of consumer goods and associated guarantees; however, in some aspects it goes beyond the required standard. It requires for the relation between consumer and trader that consumers will be able **to choose freely right from the start all legal remedies of warranty - repair, exchange, price reduction and modification.** With regard to modification only the insignificance of the defect (Article 114) provides a restriction. The warranty period continues to be **2 years;** however, it has a flexible start. It begins with the **recognisability of the defect.** Hence, hidden defects may possibly also be claimed long after the purchase, giving consumers the opportunity to provide evidence of the existence of a hidden defect. These are without a doubt **improvements,** at least from the point of view of Austrian consumers. They are also continuously quoted by the EU Commission in connection with the question of the level of consumer protection provided by the CESL. Additional requirements brought forward by consumer protection organisations, such as **extending the assumption period** for defects, were **not taken up** by the CESL.

Inaccuracies and ambiguities in respect of this issue have also crept in compared to the Directive on certain aspects of the sale of consumer goods and associated guarantees. For example, Article 100 lays down the **criteria for conformity of the goods.** With regard to public precontractual statements and concrete statements made to the contract partner, this Article refers to Article 69. However, if certain requirements are met, traders are not bound to this: for example if they have not made the declaration themselves, if they were not aware of it or if they could not be expected to be aware of it. In accordance with the Warranty Directive, the burden of proof regarding these circumstances lies with the trader. However, this has not been made clear in Article 69.

Apart from individual positive aspects in the general part, such as a ban on compound interest, there are also some regulations, which are very painful from a consumer's point of view

Apart from that, the criteria for conformity of the goods does not exist, if goods are not suitable for the purpose requested by the consumer on concluding the contract. However, if the circumstances show "that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skills and judgment" (Article 100), the seller is no longer obliged to take action. The Warranty Directive assumes slightly different criteria. It is aimed towards the concrete knowledge of the lack of conformity on behalf of consumers resp. towards that they could not reasonably expect the criteria for conformity of the goods would be met. With regard to this point, the formulation of the Directive is more precise.

A differentiation concerning the warranty is made with regard to **service contracts, which are associated with purchase contracts** and thereby fall within the scope of the CESL. The same favourable warranty terms apply if the service contract concerns the incorrect installation as defined in Article 101; but not if it concerns other service contracts. In this case another regime applies, for example the trader shall be given the opportunity to "remedy" the situation; hence, he will be granted a kind of improvement priority. Apart from that, an obligation to notify defects coupled with a loss of rights has been required: consumers lose their warranty rights, if they do not meet this obligation "within a reasonable period". These **different levels of protection** are incomprehensible. Why are consumers not deemed to be worthy of protection in the same way, in particular where purchase and service contract are closely linked? Apart from that, such double standards are difficult to understand for legal practitioners and especially for consumers, which makes them difficult to comply with.

**Other general regulations**

Apart from individual positive aspects in the general part, such as a ban on compound interest, there are also some regulations, which are very painful from a consumer's point of view.

Laesio enormis

The CESL requires that the essential part of the contract and thereby the price are not subject to any content control. With regard to excessive prices, the CESL only provides a legal remedy, a provision of unfair exploitation in Article 51. This only applies to very extreme cases of shifting the balance between performance and price and involves a number of additional requirements

on behalf of the disputing party. Austrian law knows another legal remedy against unjustified prices, the laesio enormis or reduction of the real value by half. However, it can only be applied if price and performance are grossly disproportionate (fixed); however, it has the advantage that no other subjective elements have to exist on the side of the disputing party. With regard to contracts, which were concluded on the basis of the CESL, consumers would no longer be able to assert this right if they had concluded strongly inflated contracts. In practice, the legal remedy plays an important role in the relation between consumer and trader, in particular in respect of dubious traders, a role, which the AK does not want to be jeopardised.

Avoidance on grounds of error

The CESL will make it more difficult for consumers in case of avoidance on grounds of error, as they have to notify the trader's error. The period to do this is 6 months; in case of malice, threat and violation of moral principles 1 year, but we know from experience that such formal requirements in the relation between consumer and trader are often at the expense of uninformed consumers. In Austria, a "notification" of avoidance on grounds of error is not provided for. The right can be asserted within 3 years in case of simple error, and within 30 years in case of malice or threat. The decision whether the contract is cancelled because of error or whether the contract will be adjusted is determined by the CESL on the basis whether the reason for the dispute only refers to "individual contract terms". In turn, this approach is "balanced", if retaining the contracts would not be reasonable for the disputing party. The Austrian solution of a differentiation between a significant and an insignificant error, depending whether the error refers to a main issue of the conclusion of the contract or only to a side issue, is less laborious and more accurate.

Limitation period

The general limitation period provisions - except outstanding debts of traders - also result in a significant worsening of the situation for Austrian consumers. The short limitation period in the CESL is 2 years. However, in Austria compensation claims only become statute-barred 3 years from knowing the damage and the party causing the damage. Apart from that, the long limitation period is normally 30 years and not 10 years as provided for by the CESL. In the CESL, the long limitation period for compensation begins with the action on which the right is based on not as in Austria only when the damage occurs.

Estimate of costs

Article 152 of the CESL is also not without problems. No differentiation - as under Austrian law - is made between a binding and a non-binding estimate of costs with regard to significant overruns of costs. Apparently, a warning given by the trader always enables him, even in the case of a previous binding estimate of costs, to pass such cost overruns on to consumers. Apart from that it is not required that these costs - as under Austrian law - are considerable and could have been expected, but either considerable (in the sense of disproportionality of the associated services to the value of the goods or digital content) or unforeseeable. This actually also renders § 5 (2) KSchG obsolete, which proposes that an estimate of costs in relation between consumer and trader is binding, unless there is express provision to the contrary.

Modified acceptance

It is also necessary to scrutinize individual regulations of the CESL in connection with the conclusion of a contract. Article 38 for example regulates that "a reply which gives a definite assent to an offer is an acceptance even if it states or implies different contract terms, provided that these do not materially alter the terms of the offer". Only if the other contract partner objects to the additional or different terms without undue delay, this declaration will be treated as a new offer. From the point of view of the AK, such regulations are unreasonable for the average consumer, as one cannot expect that he will carefully examine the small print to detect whether it contains something which was not agreed in the first place.

The AK is once again in favour of refraining from introducing a Common European Sales Law and urges the Federal Ministry of Justice to consider the concerns voiced within the scope of another discussion process in Brussels.

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