

THE DRAFT COMMON EUROPEAN SALES LAW:
TOWARDS AN ALTERNATIVE SALES LAW?

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SALES LAW: TOWARDS AN
ALTERNATIVE SALES LAW?

A Belgian Perspective

Ignace CLAEYS
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(editors)



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FOREWORD

The EU Member States are on the verge of having their sales law (and beyond) supplemented with a vast new set of rules.

On 11 October 2011, the European Commission published a proposal for a regulation on an optional Common European Sales Law (the ‘REG CESL’). The main purpose of this proposal is to bring more uniformity throughout Europe among the laws of the EU Member States concerning the sale of goods, in an overall aim to break down remaining barriers to competition and to boost cross border trade.

According to the European Commission, the 27 sets of national rules lead to additional transaction costs, a lack of legal certainty for businesses and a lack of consumer confidence, thus hampering cross border trade throughout Europe.

To overcome this, the REG CESL provides a legal framework for cross border sales transactions (with a possibility for Member States to expand to domestic sales transactions) in an annex that concerns movable goods in a ‘business-to-business’ and ‘business-to-consumer’ context (the ‘CESL’).

The remit of the matters addressed by the CESL is broad. The proposed 186 articles govern the lifecycle of a sales contract, including the supply of digital content and services related to sales and the supply of digital content. They cover the contract’s coming into being (pre-contractual information duties, validity and making of a binding contract, content), performance during its life (rights and obligations of the parties), consequences of non-performance (remedies) and more general issues such as good faith performance, interpretation, change of circumstances, force majeure and prescription. When compared to Belgian law, the proposed provisions relate not only to matters that are specifically provided for sales contracts, but also to matters that are part of the law of obligations generally applicable to any type of contract.

The REG CESL also contains proposals for the elaboration of a database for the exchange of information on judgements, as well as the establishment of an expert group to develop model contract terms.

Although introduced by way of a directly applicable regulation, the framework provided by CESL is optional, implying that both parties to the sales contract have to explicitly opt for its application. Once opted for, certain provisions of the CESL are mandatory in 'business-to-consumer' relations.

To the extent Belgian law is to be supplemented with a set of rules governing sales transactions that will co-exist as an optional regime besides the already existing framework(s), the question arises whether these rules will be sufficiently 'attractive' to see them applied in practice. What changes do the new rules imply compared to the existing legal framework? How does it affect the legal position of the seller or the buyer? Will companies and consumers effectively be inclined to opt for this set of rules instead of the Belgian common sales law, the rules regarding sales to consumers or the rules contained in the Vienna convention? How do these rules integrate in and interact with the general Belgian law of obligations?

A response to these questions requires a careful examination of the different provisions contained in the CESL and a comparison to Belgian law. The Centre for Law of Obligations of the University of Ghent and the Research Unit Business & Contracts of the Free University of Brussels took up this challenge and organized on 14 September 2012 an academic conference where the content of the different provisions of the CESL were thoroughly and critically examined from particularly a Belgian law perspective. The in-depth analyses of the experts are bundled in this publication.

The work starts with a general explanation by M.W. HESSELINK on the purpose, the scope of application and the functioning of the CESL. I. CLAEYS then assesses some key aspects of the structure, the underlying principles of the CESL and how the CESL would integrate in Belgian law. The subsequent contributions take, one by one, a closer look into the different matters addressed in the CESL. Thus this book contains an analysis of the provisions on pre-contractual information (J. DELVOIE and S. RENIERS), the valid conclusion of the sales contract (L. CORNELIS), the right of withdrawal and unfair terms (R. STEENNOT), the rights and obligations of the seller and the buyer (R. DE WIT), the remedies of the buyer and the seller (R. FELTKAMP & F. VANBOSSELE), termination and restitution (J. BAECK), damages (J. BAECK), and prescription and change of circumstances (D. PHILIPPE).

Within the general purpose of the conference and the boundaries of the matters attributed to each, the authors enjoyed their scientific freedom to determine the specific goal and method of their contribution. This explains some enriching differences of approach and interpretation.

While the dialogue and discussions on the text proposal are currently still on-going this set of analyses aims at providing a constructive contribution to the discussions.

This publication was made possible by the appreciated effort of the authors and the precious support of the administrative staff of the Ghent University (in particular Gandaius Permanente Vorming), of the Brussels University and of the publisher. The editors warmly thank all concerned persons for their participation, support and assistance. Finally the editors especially thank Prof. L. Cornelis and Prof. R. Steennot for their precious input for and support during this project and to Michaël de Potter for elaborating the index.

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LIST OF COMMON ABBREVIATIONS

B2B	business to business
B2C	business to consumer
C2C	consumer to consumer
CC	Belgian Civil Code
CESL	Common European Sales law, Annex I of the REG CESL
CISG	United Nations Convention on contracts for the International Sale of Goods, done at Vienna on 11 April 1980
CJEU	Court of Justice of the European Union
Consumer Rights Directive or CRD	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, <i>OJ L</i> 304, 22/11/2011/6
DCFR	Draft Common Frame of Reference, CH. VON BAR, <i>et al</i> (eds.), <i>Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference</i> , Outline Edition, Munich, Sellier, 2009, also available at http://ec.europa.eu/justice/policies/civil/ docs/dcfr_outline_edition_en.pdf
E-Commerce Act	Act of 11 March 2003 on certain legal aspects of infor- mation society services (<i>‘Wet betreffende bepaalde juridische aspecten van de diensten van de informatie- maatschappij’</i> / <i>‘Loi sur certains aspects juridiques des services de la société de l’information’</i>), <i>Belgian State Gazette</i> 17 March 2003
E-Commerce Directive	Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, <i>OJ L</i> 178, 17 July 2000
ELI Statement	Statement of the European Law institute on the Proposal for a Regulation on a Common European Sales Law available at: http://www.european-

	lawinstitute.eu/fileadmin/user_upload/p_eli/ Publications/S-2-2012_Statement_on_the_Proposal_ for_a_Regulation_on__a_Common_European_Sales_ Law.pdf
EC	European Commission
EU	European Union
MPCPA	Market Practices and Consumer Protection ACT of 6 April 2010 (' <i>Wet betreffende marktpraktijken en consumentenbescherming</i> ' / ' <i>Loi relative aux pratiques du marché et à la protection du consommateur</i> '), <i>Belgian State Gazette</i> 12 April 2010
PECL	Principles of European Contract Law, H. BAELE and O. LANDO (eds.), <i>Principles of European Contract l-Law, Parts I and II, prepared by the Commission on European Contract Law</i> , The Hague, Kluwer Law International, 2000.
REG CESL	Proposal of 11 October 2011 for a regulation of the European Parliament and of the Council on a common European sales law, 2011/0284 (COD), SEC (2011) 165 final, available at http://ec.europa.eu/justice/contract/ files/common_sales_law/regulation_sales_law_en.pdf
Rome I Regulation	Regulation (EC) N° 593/2008 of 17 June 2008 on the law applicable to contractual obligations, <i>OJ L</i> 4 July 2008, 177/6
Rome II Regulation	Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), <i>OJ L</i> 199, 31 July 2007
TFEU	Treaty on the Functioning of the European Union
UCTD	Directive 93/13/ECC of the Council of 5 April 1993 on unfair terms in consumer contracts, <i>OJ L</i> 95, 21 April 1993

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