THE CONTENT AND STRUCTURE OF THE CESL

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I. Content of the CESL – General Remarks

The CESL contains some general principles that are included in the provisions of Section 1 of Chapter 1, such as (i) the principle of freedom of contract, according to which the parties are free to conclude a contract and determine its content; (ii) the principle of acting in accordance with good faith and fair dealing; and (iii) the principle of co-operation by the parties in order to perform their contractual obligations (Articles 1–3 of the CESL). Moreover, Article 6 of the CESL provides for a principle of freedom of form (a contract, statement or any other act need not to be made or evidenced by a particular form unless otherwise stated in the CESL)[1].

There are two very important provisions relating to the application of the CESL. The first one is Article 4(1) and (2) of the CESL which regulate the interpretation of the provisions of the CESL and determine how the gaps within the scope of the CESL should be filled out (see below). Paragraph 1 of that Article provides that the CESL should be interpreted autonomously and in accordance with its objectives and the principles underlying it. The second important provision for the application of the CESL arises from Article 9 of the CESL concerning the so-called mixed-purpose contract[2]. A mixed-purpose contract means that a contract provides both for the sale of goods or the supply of digital content and for the provision of related services. Under Article 9(1) of the CESL the rules of Part IV (Chapters 9 to 14) apply to the obligations and remedies of the parties related to

[1] About these principles see more: M. Schauer, Einleitende Bestimmungen (Teil I CESL – Entwurf), in: *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts*, Wendehorst, Zöchling-Jud (Hrsg), Wien 2012, p. 54 – 58.

[2] See more: M. Schauer, *Einleitende Bestimmungen* (Teil I CESL – Entwurf), p. 51 – 53.

the sale of goods or the supply of digital content and the rules of Part V (Chapter 15) apply to the obligations and remedies related to services. The application of the CESL to the mixed-purpose contracts is based on the theory of combination.

I.1. Issues that are Regulated by the CESL

The issues that are regulated by the CESL may be divided into three groups: (i) the issues which are related to the conclusion of the contract and its content; (ii) the issues which are related to the performance of the obligations by both parties; and (iii) the issues which are related to remedies in case of non-performance, including the problem of prescription of claims and other rights.

It has to be underlined that the definitions are not provided in the Annex I that contains the provisions of the CESL, but are rather regulated in the Regulation (see Article 2). These definitions are relevant not only for the application of the Regulation, in particular for the determination of scope of application and the agreement on the use of the CESL, but also for the interpretation and the application of the provisions of the CESL. The Regulation contains such definitions as: contract; contract of sale; consumer sales contract; distance and off-premises contract; consumer and trader; loss; damages; digital content etc. Only some terms are defined in Section 2 of Chapter 1 of the CESL. There are definitions of not individually negotiated contract terms (see Article 7(1) of the CESL), termination of a contract (see Article 8(1) of the CESL), and notice (see Article 10(1) of the CESL).[3]

The definition of a consumer is similar to the one contained in the Directive on the consumer rights. The definition of the trader is different from the one in that Directive, because the definition in the Regulation does not include reference to a person acting in the name or on behalf of the trader. The reason is that the CESL does not regulate representation of another

[3] The criteria of splitting the legal definitions between two places are not clear, see M. SCHAUER, *Einleitende Bestimmungen* (Teil I CESL – Entwurf), p. 45.

party (see below). The definition of loss[4] indicates that the notion of loss covers both economic and non-economic loss. The non-economic loss includes only pain and suffering. Other forms of non-economic loss, such as impairment of the quality of life and loss of enjoyment, are excluded from the notion of non-economic loss. The reason for such exclusion is the limited scope of application of the Regulation. Under the Regulation, the CESL applies only for a sale contract, a contract for supply of the digital content and the contracts for some services related to both contracts mentioned before (see Article 5 of the Regulation). In particular, the CESL does not apply to a package travel contract in which the problem of compensation for non-economic loss, such as impairment of the quality of life and loss of enjoyment, arose (see the judgment of the Court of Justice of the EU in the case *Simone Leitner* from 12 March 2002). The scope of non-economic loss which might be compensated should be limited. This limitation does not exclude that the suffered party may claim the damages on the basis of national tort law which would be applicable under the Rome II Regulation, if such applicable law allows for compensation of such loss.

The CESL regulates the issues relating to conclusion of the contract[5]. There are provisions on the pre-contractual information requirements (Chapter 1, Articles 13–29 of the CESL), including the pre-contractual information required in the contract between the traders and the contract concluded by electronic means; the provisions on the conclusion of contract (Chapter 3, Articles 30–39 of the CESL) which regulate conclusion of contract by the offer and its acceptance; the provisions on the right to withdraw in distance and off-premises contracts between a trader and a consumer (Chapter 4, Articles 40–47 of the CESL); the provisions on the defects in consent (Chapter 5, Articles 48–57 of the CESL), including the provisions

[4] See the critique of this definition presented by B. A. Koch, *Schadensersatz und Rückabwicklung* (Teile VI and VII CESL – Entwurf), in: Am Vorabend eines Gemeinsamen Europäischen Kaufrechts, Wendehorst, Zöchling-Jud (Hrsg), Wien 2012, p. 226 – 227.

[5] See more: B. Lurger, *Zustandekommen eines bindenden Vetrages* (Teil II CESL:-Entwurf), Am Vorabend eines Gemeinsamen Europäischen Kaufrechts, Wendehorst, Zöchling-Jud (Hrsg), Wien 2012, p. 63 – 85; E. Terryn, *Contract Formation – An Illustration of the Difficult Interface with the National Law and Enforcement*, and A. Veneziano, *Conclusion of the contract*, both in: Towards a European Contract Law, Schulze, Stuyck (ed.), Munich 2011, p. 81 - 95.

on mistake, fraud, threats and unfair exploitation and their consequences; the provisions on the interpretation of the contract and other statements (Chapter 6, Articles 58–65 of the CESL), on the content of the contract (Chapter 7, Articles 66–78 of the CESL) and on the unfair contract terms (Chapter 8, Articles 79–86 of the CESL).

The issue of performance of the obligations is regulated by Chapter 10 (Articles 91–105 of the CESL) which addresses the seller's obligations, by Chapter 12 (Articles 123–130 of the CESL) which relates to the buyer's obligations, and by Chapter 14 (Articles 140–146 of the CESL) which addresses the passing of risk. The obligations of the parties in a service contract are regulated by Chapter 15 (Articles 148–154 of the CESL). It is to be stressed that some issues, such as for example performance by a third party or time and place of performance are regulated two or even three times separately for the performance of the obligations by the seller, the buyer and the service provider (see Articles 92, 127 and 150 of the CESL on the performance by third party; Articles 93 and 125 of the CESL on the place of performance; Articles 95 and 126 of the CESL on time of performance). This is a consequence of the structure of the CESL adopted in the Regulation (see below). The provisions of general applicability are those on restitution in Chapter 17 (Articles 172–177 of the CESL) that apply to the performance of obligations in case of avoidance or termination a contract. However it is not clear what regulation should apply in case of non-performance of the restitution obligation[6].

The issues of non-performance and available remedies in case of non-performance[7] are regulated in different places, partially commonly for all cases of non-performance, and partially separately for non-

[6] It seems that if the buyer is obliged to return the goods to the seller the provisions on the buyer's remedies apply mutatis mutandis to this obligation; if the seller is obliged to pay back the price to the buyer the provisions on the seller's remiedies apply mutatis mutandis to this obligation.

[7] See more: A. Schopper, *Verpflichtungen und Abhilfen der Parteien eines Kaufvertrages oder eines Vertrages über die Bereitstellung digitaler Inhalte* (Teil IV CESL-Entwurf), in: Am Vorabend eines Gemeinsamen Europäischen Kaufrechts, Wendehorst, Zöchling-Jud (Hrsg), Wien 2012, p. 107 – 145 and F. Zoll, *The Influence of the Chosen Structure of the Draft for the Optional Instrument on the Functioning of the System of Remedies*, in: Towards a European Contract Law, Schulze, Stuyck (ed.), Munich 2011, p. 151-160.

performance of the seller's obligations, of the buyer's obligations and of the service provider's and customer's obligations. The regulation of general applicability are the provisions of Chapter 9 (Articles 87–90 of the CESL) which define the notion of non-performance, excused non-performance and regulate the change of circumstances, the provisions of Chapter 16 (Articles 159–171 of the CESL) on damages and interest and the provisions of Chapter 18 (Articles 178–186 of the CESL), including in addition the provisions on computation of time in Article 11 of the CESL. Moreover, one should take into account Article 8 of the CESL on termination of a contract and Article 9(2) of the CESL. Article 8 of the CESL provides for some rules on the effects of termination. Additionally, Article 9(2) of the CESL generally states that if the obligations of the seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then the buyer and customer may terminate such contract only in relation to the part to which there is a ground for termination. However, if the buyer or the customer cannot be expected to accept performance of other parts or if the obligations of the seller and service provider under the contract are not divisible, then the party who is entitled to terminate a contract may terminate it as a whole. Additionally, the party may terminate the contract as a whole, regardless of whether the obligations may be divisible or not, if the non-performance is of such nature that it justifies termination of the contract in relation to both parts (see Article 9(3) and (4) of the CESL).

Separately, the CESL regulates the remedies in case of non-performance of the obligations with respect to the buyer (Chapter 11, Articles 106–122 of the CESL), to the seller (Chapter 13, Articles 131–139 of the CESL) and to the customer and the service provider (Chapter 15, Articles 155-158 of the CESL). The provisions on the customer's and the service provider's remedies refer to the provisions of Chapter 11 and Chapter 13 with some adaptations set out in Article 155(2)–(5) and Article 157(2) of the CESL.

I.2. Issues Outside the Scope of the CESL

There are many issues that are mainly regulated in the civil codes but that are outside of the scope of the CESL. Those issues should be distinguished from the issues that fall within the scope of the CESL but are not expressly

addressed by it. Last mentioned issues are to be settled in accordance with the objectives and the principles underlying the provisions of the CESL without recourse to any national law which would be applicable to the relationship governed by the CESL (see Article 4(2) of the CESL). The following example illustrates closer this problem. There is a question whether the buyer may reject performance tendered by the seller if the goods sold are not in conformity with the contract. The CESL does not regulate expressly this issue, however it is obvious that this issue falls within the scope of regulation of the CESL. This issue may be settled taking into account different provisions of the CESL. Particularly, under Article 130(1) and (2) the buyer must take delivery tendered by the seller before the time fixed or in less quantity of goods than that provided for in the contract, unless the buyer has a legitimate interest in refusing to do so. In other cases of performance that is not tendered in conformity with the contract (e.g. if the goods sold are defected) the buyer should have the same right to refuse to take delivery of the goods that are not in conformity with the contract. The buyer has legitimate interest to do so because in case of lack of conformity he or she may require a replacement or repair of the defected goods (see Article 111 of the CESL) or even he or she may terminate the contract unless the lack of conformity is insignificant (see Article 114 of the CESL). So, if the buyer might take delivery, and after that he or she might require the replacement, the buyer should also have the right to refuse to take delivery in order to force the seller to deliver the goods in conformity with the contract.

The issues that are outside the scope of the CESL are to be settled by the applicable law of the Member State indicated by the provisions of private international law (see recital 27 of the Regulation). Mainly, those are the provisions of the Rome I Regulation 593/2008 of 18 June 2008 on the law applicable to contractual obligations. In a contract between a trader and a consumer, in principle the applicable law would be the law of the country where the consumer has his or her habitual residence (Article 6(1) of the Rome I Regulation). However, for the transfer of title this would generally be the law where the goods were located at the time of the conclusion of the contract, under the "*lex rei sitae*" rule mostly accepted in the legal systems of the EU Member States. It means that sometimes three different legal systems would govern the relationship if the CESL were chosen by

the parties: (i) the provisions of the CESL; (ii) the applicable law relating to the contractual obligations, which would govern the issues that are outside the scope of application of the CESL, indicated by the Rome I Regulation; and (iii) the applicable law relating to the transfer of title indicated by national private international law.

The CESL does not regulate issues such as: infringement of fundamental rights; capacity to act; representation; plurality of the parties; set off; change of parties (assignment of claim and substitution of new debtor); and contracts concluded in favour of a third party.

There are different reasons why the CESL does not regulate those issues. First of all the Expert Group which has prepared the so-called feasibility study published on 3 May 2011 had no time to elaborate all those issues within twelve months. The Expert Group had to select the problems and focus its attention on the most important ones. Such issues as the change of party or the conclusion of a contract in favour of a third party are really not very important from the perspective of every day's transactions. Also, if one assumes that the CESL would govern mainly e-commerce transaction, the problem of plurality of the parties does not seem to be crucial. The European Commission required the proposal of the CESL to be user-friendly and therefore not to be too extensive. The CESL may be also further developed in the future if the discussion on the proposal presented by the European Commission indicates that it is needed. Finally, the EU has no competence to regulate all areas covered by private law. For example, the problem of capacity to act is one of such problems that cannot be regulated by European law in a limited way only for cross-border transactions. Another very sensible issue which was discussed by the Expert Group is the problem of infringement of fundamental rights. It is related to such spheres as morality and system of values in the society of each Member State. Has the EU competence to regulate such problem? Of course, the CESL should probably indicate certain consequences of this infringement, but the real problem is when do the parties infringe those fundamental rights? Should the consequences depend on the fault of the parties? Should the parties intend this infringement? Is there such an infringement if the content of the contract infringes those fundamental rights or also if such infringement is an effect of the contract?

II. Selected Issues

II.1. Pre-contractual Information Duties and Right to Withdraw in Distance and Off–Premises Contracts (B2C contracts)

The assumption during the work of the Expert Group was that the CESL should be harmonised with the new Directive on consumer rights. It is important to ensure the high level of consumer protection comparable with the one provided by the Directive. The practical problem was that the work on the Directive and the work on the draft of the CESL were in progress at the same time. However, the CESL provides similar provisions on pre-contractual information duties and the right to withdraw in distance and off–premises contracts[8] as those provided by the Directive on consumer rights. Under the CESL, a trader has to inform a consumer about the main characteristics of the goods, digital content or related services to be supplied, the total price and additional charges and costs, the identity and address of the trader, the contract terms, the rights of withdrawal and so on (see Article 13 of the CESL). This information must be provided in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer. The next articles specify the details of information about the price, charges and other costs (Article 14 of the CESL), the identity and address of the trader (Article 15 of the CESL), the contract terms (Article 16 of the CESL), the right of withdrawal (Article 17 of the CESL). Other provisions provide for some additional requirements with regard to off-premises contracts (Article 18 of the CESL), distance contracts (Article 19 of the CESL) and contracts other than distance and off-premises contracts (Article 20 of the CESL). This information must be supplied in a correct and not misleading way (Article 28(1) of the CESL). The party who has failed to comply with any duty imposed by these provisions is liable for any loss caused to the other party by such failure. The consumer is not liable to pay the additional charges and other costs if the trader has not informed him about them in accordance with Article 17(2) of the CESL. In case where the conditions for mistake or fraud are fulfilled, the other party may avoid the contract

[8] See more: H. Beale, G. Howells, *Pre-contractual Information Duties in the Optional Instrument*, in: Towards a European Contract Law, Schulze, Stuyck (ed.), Munich 2011, p. 49 – 62 and B. Lurger, *Zustandekommen eines bindenden Vetrages*, p. 67 – 72.

giving a notice to the party who is liable for the mistake or fraud (see Articles 48, 49 and 52 of the CESL).

A consumer has generally a right to withdraw from the contract within fourteen days after the day on which the consumer has taken delivery or the day of the conclusion of the contract if the contract is for related services or for supply of the digital content not on a tangible medium (see Article 40(1) and Article 42 of the CESL). Articles 44-46 of the CESL regulate the obligations of the parties in the event of withdrawal and its effect to the ancillary contracts.

II.2. Unfair Contract Terms

It was discussed during the work on the draft of the CESL whether the CESL should regulate only the problem of unfair terms in the contract between a trader and a consumer or whether the CESL should be extended to the control of unfair terms in contracts between traders. The Expert Group accepted the last view for two reasons. Firstly, sometimes it is difficult to establish the identity of the other party (in other words, whether the other party is a consumer or a trader). It is in particular a problem when the parties conclude a distance contract. Secondly, the issue of protection of the weaker party exists also in contracts between traders, in particular if one of the parties is an SME and the other one is a large international company. However, the proposal of the CESL presented by the European Commission does not follow this view and limits the application of the provisions of Sections 2 and 3 of this Chapter to the contract term not individually negotiated in the meaning of Article 7 of the CESL.

The provisions of Chapter 8 distinguish between the issues of consumer protection and the protection of one party if the contract is concluded between traders. The differences concern two questions: (i) the test of unfairness and its criteria and (ii) the existence of the list of so-called “black” and “grey” unfair contract terms. In both contracts that is in contracts between traders and in contracts between a trader and a consumer, the contract terms not individually negotiated are generally subjected to an unfairness test (Article 83(1) and Article 86(1)(a) of the CESL).

In a contract between a trader and a consumer, a contract term which has not been individually negotiated is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing (Article 83(1) of the CESL). In assessing the unfairness of a contract term one should take into account the criteria provided in Article 83(2) of the CESL. Additionally, Article 84 of the CESL provides for a list of 11 contract terms which are always unfair and Article 85 of the CESL provides the presumption that 23 contract terms mentioned therein are unfair and not binding on the consumer unless the trader proves otherwise.

Under Article 86(1) of the CESL, in a contract between traders a contract term which has not been individually negotiated is unfair if it is of such a nature that its use grossly deviates from good commercial practice contrary to good faith and fair dealing. It is amazing that this provision does not indicate in which manner such contract term may deviate from good commercial practice contrary to good faith and fair dealing. The feasibility study prepared by the Expert Group stated that such contract term should bring significant disadvantages to the other party. The European Commission has given up this requirement.

Similarly to Article 83(2) of the CESL, Article 86(2) of the CESL provides for similar criteria for assessing the unfairness of a contract term in a contract between traders. The only difference is that Article 86(2) of the CESL does not mention the requirements provided in Article 82 of the CESL which addresses contracts between a trader and a consumer. Article 82 of the CESL regulates the trader's duty to draft the contract terms supplied by him and communicate them to the consumer in plain and intelligible language.

The "back" list of unfair terms provided by Article 84 of the CESL and the "grey" list of unfair terms provided by Article 85 of the CESL are applied only to the contract between a trader and a consumer.

In both contracts that is in contracts between traders and between a trader and a consumer, a contract term assessed as unfair is not binding on the

other party. Other contract terms remain binding if the contract can be maintained without the unfair contract term (Article 79 of the CESL).

II.3. Conformity with the Contract

The CESL requires that a seller has to deliver the goods or supply the digital content in conformity with the contract (Article 91(c) of the CESL). Article 99(1) of the CESL states that the goods or the digital content must be of the quantity, quality and description as required by the contract, be contained or packaged in the manner required by the contract and be supplied together with any accessories, installation instructions and other documents required by the contract. Additionally, Article 99(2) of the CESL indicates that the goods or digital content must meet the requirements of Articles 100, 101 and 102 unless the parties agree otherwise (however Article 99(3) of the CESL limits the parties' freedom in a consumer sales contract because the parties' agreement which derogates from the requirements of Articles 100, 102 and 103 to the detriment of the consumer is only valid if it was concluded at the same time when the consumer sales contract and the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract at the time of its conclusion).

Article 100 of the CESL provides the criteria for the assessment of the conformity with the contract. Article 101 of the CESL specifies that the incorrect installation results in lack of conformity. Article 102 of the CESL extends the meaning of conformity with the contract and requires that the goods sold must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party. Paragraph 2 of Article 102 defines precisely what intellectual property right the goods or digital content must be free from. It is to be stressed that the CESL settles the problem of non-conformity with the contract because of existence of third party rights. This problem was discussed with respect to the Directive 99/44 on consumer sales. Another difference in comparison to this Directive is that the provisions of the CESL do not provide for a presumtion of conformity with the contract, like the one used in Article 2(2) of the Directive. This presumption resulted in ambiguity as to its meaning.

The goods sold and the digital content supplied must be in conformity with the contract at the time when the risk passes to the buyer under the provisions of Chapter 14 (Articles 140–146 of the CESL). If the goods sold or the digital content supplied are installed by the seller, the goods or the digital content must be free from any lack of conformity caused by the incorrect installation at the time when the installation is completed. In cases where the consumer has to install the goods sold or the digital content supplied, Article 105(3) of the CESL refers to the time when the consumer had reasonable time for the installation.

Article 105(2) of the CESL provides a presumption according to which any lack of conformity which becomes apparent within six months after passing the risk to the consumer, is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity. If the digital content must be subsequently updated by the trader, the digital content has to remain in conformity with the contract throughout the duration of the contract (Article 105(4) of the CESL). However, Article 103 of the CESL states that the digital content is not considered as non conforming with the contract only because of the updated digital content has become available after the conclusion of the contract.

II.4. Remedies in Case of Non-Performance of Obligations

Article 87(1) of the CESL defines very broadly non-performance of an obligation as any failure to perform, including non-delivery, non-supply and not payment, delayed delivery or supply and late payment, delivery of goods or supply of digital content which are not in conformity with the contract and any other performance which is not proper under the contract.

In case of non-performance the creditor (buyer or seller) may generally choose from different remedies indicated in Article 106(1) or Article 131(1) of the CESL. Similar remedies are provided in Article 155(1) and Article 157(1) of the CESL in a contract for related services. These are: (i) specific performance, including repair or replacement of the goods or the digital content and payment, (ii) withholding one's own performance,

(iii) termination of the contract, (iv) reduction of price and (v) claim for damages. The preconditions for exercising these remedies are different and they depend on who the parties to the contract are and the kind of contract. In a consumer sales contract a consumer does not have to examine the goods sold and notify the lack of conformity to the seller. The seller has also no right to cure (Article 106(3) of the CESL). However, in a contract for related services between a trader and a consumer the consumer's remedies are subject to a right of the trader to cure (Article 155(2) of the CESL) with one exception. If the trader is obliged under a consumer sales contract to install the goods sold or the digital content supplied, the consumer's remedies are not subject to a right to cure (Article 155(3) of the CESL). In the opposite case, in a contract between traders, the buyer who is a trader or a customer may exercise any remedy except withholding its own performance, only if the other party does not offer to cure, or the trader may refuse an offer to cure because of one of the reasons indicated in Article 109(4) of the CESL. In a contract of sale or a contract for supply of digital content between traders the buyer must examine the goods sold or the digital content supplied within a period of no longer than 14 days from the date of delivery of the goods or supply of the digital content and notify the seller about the lack of conformity. The examination of the goods sold or the digital content supplied and the notification about the lack of conformity are to be made according to the provisions of Chapter 11 Section 7 of the CESL (Articles 121–122). In a contract for related services between traders the requirement of notification about lack of conformity is regulated by Article 156 of the CESL that applies instead of Article 122 of the CESL.

Another important difference between the rules on the remedies available to a consumer and a trader in case of non-performance of the obligations by the other party is that the trader, regardless of whether the trader is a buyer or a seller, loses the right to terminate the contract if the notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of non-performance, whichever is later (Article 119(1) and Article 139(1) of the CESL). Such right to terminate a contract by the consumer may be subject to prescription under Articles 178 and Article 179 of the CESL.

The remedies available to the creditor may be cumulated unless they are incompatible (Article 106(6) and Article 131(4) of the CESL). Thus, the buyer may generally require performance (for example reparation of the defected goods) and claim damages caused by non-performance. However, it would not be allowed to terminate a contract and require performance at the same time or claim damages and reduce the price (if damages cover the diminished value of the goods sold).

III. Structure of the CESL

The structure of such a regulation as the CESL should be transparent and logical. It should also be adequate to the scope of its application. The European Commission required from the Expert Group additionally that a draft of the CESL should be user-friendly. Analysing this problem one may come to a conclusion that the structure of the draft of the CESL is not similar to other regulations. The reason is not only that projects such as the PECL or the UNIDROIT Principles govern the general issues with regard to the conclusion of a contract, its performance and the responsibility for non-performance and they do not regulate any specific type of contract. Contrary to them, the CESL, just as for example the DCFR, governs specific types of contracts (contract of sale, contract for the supply of digital content and contract of services related to both those contracts). However, the DCFR is based on the traditional concept according to which first there is the general part followed by a special part. Such a general part form books I to III of the DCFR, then there are books III to VII which govern the different specific contracts and the relationships arising from benevolent intervention in another's affairs, torts and unjustified enrichment. Books VIII to X are related to property law (acquisition and loss of ownership of goods, proprietary security rights on movable assets and trust). So the DCFR is similar to many European civil codes. The scope of application of the CESL is limited to specific types of contracts mentioned above. This is a difference in comparison to the DCFR that covers more types of contracts and additionally other relationships. However, this does not explain the differences in the structure of these regulations.

The CESL presents a new approach. The structure of the CESL may be divided into three parts: (i) part one – general provisions on the conclusion of the contract, its content and general rules on the responsibility for non-performance (Chapters 2 to 9), then (ii) part two – specific provisions on the performance and the non-performance of the contract of sale, the contract for the supply of digital content and the contract for related services (Chapters 10 to 15), and finally (iii) part three – again the general provisions on some remedies as damages and interest, on restitution and prescription. The result of this structure is that some issues are regulated two or even three times (as mentioned above) in different places. Such structure does not allow for extension of the CESL to other types of contracts without repetition of some regulations related to performance and non-performance of the obligations as it is in the current proposal[9].

Traditionally, the general rules on performance and non-performance are regulated in the general part of the law of obligations and such approach is presented in the DCFR. Because of that these general rules may apply to different types of contract. Moreover, the extension of the scope of application does not require insertion of the new provisions on the issues which are already regulated in the general part. Of course, one may say that for non-lawyers it may be easier to use the CESL because they find in the second part of the CESL express rules on performance and remedies in case of non-performance of the obligations by the other party. But in order to apply these provisions from part two, other rules set forth in the provisions in other parts also need to be taken into account. For example, if one considers whether the seller is liable for non-performance and which remedies may be exercised by the buyer, it is necessary to establish whether such non-performance was excused or not, and whether it was a fundamental non-performance or not. The definition of excused non-performance can be found in Article 88(1) of the CESL, i.e. not in the same part of the CESL (precisely in Chapter 11) where the provisions on the buyer's remedies are located. The definition of fundamental non-performance can be found in Article 87 of the CESL, i.e. not in the same

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9 This is also underlined by H. SCHULTE-NÖLKE, *Scope and Function of the Optional Instrument on European Contract Law*, in: Towards a European Contract Law, Schulze, Stuyck (ed.), Munich 2011, p. 40.

part of the CESL. This means that the buyer must take into account Articles 87 and 88 of the CESL, because these provisions allow him to establish what remedies he may exercise and under which conditions, however both of these provisions are located in another part of the CESL. Therefore, the advantage from the new structure of the CESL is not really huge. Moreover, it may bring about problems concerning the application of the provisions on performance and non-performance to obligations regulated in other parts of the CESL (particularly provisions on restitution of performance in case of termination or avoidance of the contract and withdrawal from the contract).

SUMMARY

The Content and Structure of the CESL

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The article analyses the content of a draft of the Common European Sales Law (COM 635/2011) and its structure. The author outlines the issues which are regulated by the CESL. He indicates the issues which are outside the scope of the CESL and he attempts to explain the reasons behind it. Those issues are to be settled by the applicable law of the Member State indicated by the provisions of private international law. The article also discusses how the CESL may be applied if an issue is within the scope of the CESL but it is not expressly addressed by it. The regulation of the CESL with regard to issues such as: pre-contractual information duties, unfair contract terms, the notion of conformity with the contract and the remedies in case of non-performance of the obligation is presented in more detail.

The object of the analysis is also the structure of the draft of the CESL. It is not similar to other regulations, such as for example the PECL or the DCFR. The provisions of the CESL may be divided into three parts: (i) part one – general provisions on the conclusion of the contract, its content

and general rules on the responsibility for non-performance (Chapters 2 to 9), then (ii) part two – specific provisions on the performance and the non-performance of the contract of sale, contract for the supply of digital content and contract for related services (Chapters 10 to 15), and finally (iii) part three – again the general provisions on some remedies as damages and interest, on restitution and prescription (Chapters 16 to 18).

The result of this structure is that there is a double regulation of some issues in different places. Such structure does not permit for an easy extension of the CESL to other types of contracts. Moreover, it may cause problems with the application of the provisions on performance and non-performance to other obligations arising from the provisions of other parts of the draft, such as the provisions on restitution. Therefore, the advantage from the new structure of the CESL does not seem to be really huge.

RESÜMEE

Inhalt und Struktur des CESL

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In dem Beitrag werden der Inhalt und die Struktur des Entwurfs über dem Gemeinsamen Europäischen Kaufrecht (KOM 2011/635) analysiert. Der Verfasser stellt die Themen vor, die innerhalb des CESL reguliert werden, sowie auch die, die vom CESL nicht reguliert werden, und versucht eine Erklärung hierfür zu geben. Diese, im CESL nicht geregelten Fragen werden von dem durch das internationale Privatrecht angerufene Recht des Mitgliedstaates beantwortet. Die Abhandlung befasst sich auch mit der Frage, wie das CESL angewendet werden kann, sollte ein Thema vom CESL nicht ausdrücklich geregelt werden, aber dennoch in den Anwendungsbereich der Verordnung fallen. Fragen wie vorvertragliche Informationspflichten, unfaire Vertragsbestimmungen, der Begriff der Vertragsmäßigkeit und Abhilfen bei Nichterfüllung einer Verpflichtung, werden detailliert behandelt.

Der Gegenstand der Analyse ist auch die Struktur des GEKR, die im Vergleich zur Struktur der anderen Instrumente, wie zum Beispiel PECL oder DCFR, anders geartet ist. Die Vorschriften des GEKR kann man in drei Gruppen einteilen: erster Teil, allgemeine Vorschriften über den Vertragsschluss, dessen Inhalt und allgemeine Regeln über die Haftung für die Nichterfüllung (Kapitel 2 bis 9), dann zweiter Teil, die besondere Regelung über die Erfüllung und Nichterfüllung des Kaufvertrages, des Vertrages zur Lieferung des digitalen Inhalts sowie des zu diesen gebundenen Dienstvertrages (Kapitel 10 bis 15), und endlich dritter Teil, wieder die allgemeinen Vorschriften über bestimmte Abhilfen wie Entschädigung und Zinsen, über die Rückabwicklung und die Verjährung (Kapitel 16 bis 18).

Diese Struktur bewirkt, dass bestimmte Fragen mehrmals an verschiedenen Stellen geregelt werden. Wegen dieser Struktur erlaubt das GEKR keine leichte Ausdehnung auf andere Vertragstypen. Außerdem kann diese Struktur bestimmte Probleme bei der Anwendung der Vorschriften über die Erfüllung und Nichterfüllung mit sich bringen. Deshalb sind die Vorteile der neuen Struktur nicht allzu groß.