

## 12 DO WE REALLY NEED SPECIAL PROVISIONS FOR BUSINESS-TO-CONSUMER SALES?\*

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### 12.1 THE QUESTION

This paper aims at questioning generally whether, and if so to what extent, there is really a need to introduce special legal provisions in regard to business-to-consumer (B2C) sales contracts. In other words, the purpose of this contribution is to find out if the buyer in a B2C contract needs to be protected more than a buyer in a business-to-business (B2B) contract. In order to answer this question, some legal systems designed to be applied only to B2B or to B2C sales contracts are compared below. The legal orders are chosen among those drafted to be applied in different countries aiming at law unification.

For B2B sales contracts, the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) seems to serve this purpose well. Its scope of application comprises only B2B sales, and it has a broad application throughout the world.<sup>1</sup> For B2C sales contracts, the European Union (EU) law with its long history of consumer protection dating back into the 1970s<sup>2</sup> seems to be a good candidate for an analysis. The 1999/44/EC Directive of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive)<sup>3</sup> is meanwhile implemented in all 28 Member States and can serve as a starting point for comparison. Some recent decisions of the European Court of Justice seeking for a uniform interpretation of this Directive are keeping the sales contract in the centre of discussions.

EU law is further very suitable for a comparison given that in addition to the Consumer Sales Directive, an ambitious project was launched in 2011 drafting a Regulation on a Common European Sales Law<sup>4</sup> which covers provisions designed to regulate cross-border

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\* All web pages were last accessed in July 2015.

1 As of July 2015, there are 83 contracting states to the CISG (<[www.uncitral.org](http://www.uncitral.org)>).

2 Cf. on the history of consumer protection in the European Union, S. Weatherill, *EU Consumer Law and Policy*, 2nd edn, Edward Elgar, Cheltenham, 2013, pp. 5 *et seq.*

3 OJ 1999, L 171/12.

4 Provisions of the draft Regulation will be cited as, e.g. Art. 1 Regulation, provisions of the Annex I on Common European Sales Law as, e.g. Art. 1 CESL.

B2B as well as B2C sales contracts.<sup>5</sup> In its grounds and objectives for this project, the European Commission had stated that:

The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.

Even though the CESL will not come into force in its current form, the EU Commission has announced that a ‘modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market’ is in the pipeline.<sup>6</sup> Be that as it may, the CESL is still an important comparative legal text that was prepared for 28 EU Member States in order to regulate cross-border sales. Besides, the CESL is by its coverage broader than the Consumer Sales Directive and includes provisions on contract formation, interpretation, obligations and remedies of the parties to a sales contract, damages, interest, restitution and prescription, which makes it more yielding for a comparison. Below, it will be evaluated together with the Sales Directive.

Finally, in addition to these two sets of law unification projects, the national sales law provisions and jurisprudence of some countries will be taken into consideration given that examples from case law might facilitate a better understanding of the arguments raised.

## 12.2 DEFINITION OF A CONSUMER

Before discussing how much protection consumers need in a sales contract, the definition of ‘consumer’ should be given. According to Article 1(2)(a) of the Consumer Sales Directive, a consumer ‘shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession’. In fact, consumer contracts are defined very homogenously throughout EU legislation.<sup>7</sup> The CISG

5 COM(2011) 635 final, Brussels, 11 October 2011. Cf. for a detailed and comparative analysis of the CESL G. Dannemann & S. Vogenauer (Eds.), *The Common European Sales Law in Context, Interactions with English and German Law*, Oxford University Press, Oxford, 2013; R. Schulze (Ed.), *Common European Sales Law (CESL)*, Nomos Verlag, Baden-Baden, 2012; See also the special issue of the *Common Market Law Review*, Vol. 50, 2013, special issue 1/2 on the CESL.

6 <[www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/](http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/)>.

7 Cf. Art. 2 Draft Regulation; Art. 2(1), 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

is also not far from this description even though it prefers to circumscribe it the other way round: sales contracts concerning goods bought for personal, family or household use are not covered by the Convention.<sup>8</sup>

In practice, it is often unproblematic to determine when a consumer sales contract is existent. However, dual-purpose contracts can cause difficulties regarding subsumption. Recently, the EU Consumer Rights Directive<sup>9</sup> has taken over the definition of the European Court of Justice<sup>10</sup> and characterized these types of contracts in its recitals as follows:

[...] in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.<sup>11</sup>

This approach seems to be suitable to be applied as a general principle.<sup>12</sup>

Another problematic issue is the burden of proof. That is, the need to decide which of the parties has to prove that a consumer or business sales is concluded. Neither the CISG nor the EU legislation offers a clear-cut answer to this problem. Therefore, the general rule will apply and the party alleging the existence of a consumer sales contract and the application of special protective rules will have to prove that the goods were destined to be used personally. However, the threshold for such proof is not going to be high if, for example, one laptop is bought and delivered at the home of the buyer. These facts indicate already a consumer sales contract. Now, it will be the seller's turn to prove, as stated, for example in Article 2(a) CISG, that she<sup>13</sup> 'at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought' for personal, family or household use. Vice versa, if the buyer orders ten laptops to be delivered at its law office, a proof of this being a consumer sales contract can hardly be brought.

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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, OJ 2011, L 304/64.

8 I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010, Art. 2, Paras. 4 *et seq.*

9 *Cf. supra* note 7.

10 Judgement of 2 January 2005 in *Case 464/01 Johann Gruber v. BayWa AG*, [2005] ECR I, 441.

11 Directive 2011/83/EU, No. 17.

12 *Cf. also* on the issue H. W. Micklitz & N. Reich, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, EUI Working Paper LAW 2012/04, Florence, pp. 12-13. The European Parliament in its 'European Parliament legislative resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' suggested to adopt this definition also for the CESL, *cf.* Amendment No. 32.

13 In order to balance the use of gender in this contribution, the seller is referred to in the feminine form (she, her) and the buyer/consumer in the masculine form (he, his).

### 12.3 NON-SALES-SPECIFIC PROTECTION OF THE BUYER/CONSUMER IN THE CESL

Looking at the Draft Regulation on CESL, one can immediately notice three major blocks devoted to the protection of consumers in sales contracts, which are in fact not particularly sales specific: Chapter 2 on pre-contractual information, Chapter 4 on the right of withdrawal and Chapter 8 on unfair contract terms. Below it will be very shortly discussed why such protection is granted:

- **Pre-contractual information requirements:** The problem of information asymmetry in consumer contracts is a well-known phenomenon.<sup>14</sup> Especially, certain contract conclusion methods like distance or so-called doorstep contracts are typical examples creating such asymmetry situations. In a doorstep situation (off-premises contract), a consumer is in a position where he cannot bargain freely and has no chance to compare the offered goods with other goods in the market. In a distance contract, he cannot evaluate the goods as good as he would when shopping in business premises since he is only served a picture of them. Mandatory information requirements try to balance this lack of information. CESL Chapter 2, Articles 13-22 are addressing this problem by providing a long list of information for off-premises and distance sales contract. Most of these requirements are parallel to those stipulated already in the 2011 Consumer Rights Directive.<sup>15</sup>
- **Right to withdraw from the contract in 14 days:** Even though information asymmetries can sometimes be bridged by mandatory information duties,<sup>16</sup> the two means of contract formation (on distance or at the doorstep) have also an inherent moment of exogenous or endogenous distortion of consumer preferences.<sup>17</sup> For distance sales, the 2011 Consumer Rights Directive states that “the consumer is not able to see the goods before concluding the contract, [therefore] he should have a right of withdrawal”.<sup>18</sup> This rather suggests a problem of information. However, with distance contracts, it is also an endogenous problem. Internal, psychological effects play a role given that the inhibition

14 S. Grundmann, W. Kerber & S. Weatherill (Eds.), *Party Autonomy and the Role of Information in the Internal Market*, de Gruyter, Berlin, 2001; G. Howells, A. Janssen & R. Schulze (Eds.), *Information Rights and Obligations, A Challenge for Party Autonomy and Transactional Fairness*, Ashgate, Aldershot, 2005; H. Fleischer, *Informationsasymmetrie im Vertragsrecht: eine rechtsvergleichende und interdisziplinäre Abhandlung zur Reichweite und Grenzen vertragsschlußbezogener Aufklärungspflichten*, C.H. Beck, München, 2001.

15 Cf. *supra* note 7.

16 However, confer for a very critical appraisal of information duties O. Ben-Shahar & E. Schneider, *More Than You Wanted to Know, The Failure of Mandated Disclosure*, Princeton University Press, Princeton, 2013.

17 See, in detail, H. Eidenmüller, ‘Why Withdrawal Rights?’, *European Review of Contract Law*, No. 1, 2011, pp. 1-24, who is critical in regard of a mandatory withdrawal right in case of distance contracts. Parallel also G. Wagner, ‘Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights’, in A. Ogus & W. H. van Boom (Eds.), *Juxtaposing Autonomy and Paternalism in Private Law*, Hart Publishing, Oxford, 2011, pp. 9-42 at pp. 26-27.

18 Recitals Para. 37.

threshold as to contracting is much lower in comparison to shopping in business premises. On Internet, one can conclude sales contracts 24/7 without even the need of leaving home or workplace. Under the influence of never-ending advertisements to shop, the consumer needs a cooling-off period in which he can freely get away from contracts concluded under such circumstances. In case of doorstep contracts, the distortion of consumers' contract decision is much more evident. Exogenous factors like 'surprise, time pressure, psychological entrapment, the inability to easily terminate contract negotiations, and other manipulative tactics'<sup>19</sup> might all contribute to a contract conclusion which the consumer will regret minutes later. The right to withdraw from the contract under such circumstances gives the consumer exactly that option that he was not granted at the door: not to be bound by any contract.<sup>20</sup>

- **Control of unfair contract terms:** Finally, the CESL gives protection to consumers whenever the terms of the sales contract have not been individually negotiated and they are unfair. This is the case if the terms introduced by the seller cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer and contrary to the good faith principle (Article 83 CESL).<sup>21</sup> A list of contract terms which are considered to be always unfair ('black list', Article 84 CESL), and a list with terms which are only presumed to be unfair ('grey list', Article 85 CESL) is provided too. In case of the latter, the party using standard terms can still prove that the challenged provision is fair in the context of the whole contract. Any unfair term is not binding on the consumer while the rest of the contract remains valid (Article 79 CESL). The need to protect against standard contract terms is mainly also an issue of information asymmetry. As Schäfer and Leyens put it very clearly:

The cost of acquiring information regarding the contents of standard terms routinely exceeds the anticipated gain. It is therefore rational to ignore the clause contents. As a consequence of this rational ignorance also a competition among issuers for the best terms will fail. The users of standard terms will rather engage in a competition for the most unfair terms (race to the bottom).<sup>22</sup>

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19 Eidenmüller, 2011, *supra* note 17, pp. 1-24 at p. 14.

20 The right to withdraw was already granted with the first Directive on doorstep contracts in 1985 and the Directive on distance contracts in 1997. Both directives were repealed with the 2011 Consumer Contracts Directive, *see supra* note 7.

21 *Cf.* also Art. 3 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L95/29.

22 H. B. Schäfer & P. Leyens, 'Judicial Control of Standard Terms and European Private Law', in P. Larouche & F. Chirico (Eds.), *Economic Analysis of the DCFR*, Sellier European Law Publishers, Munich, 2010, pp. 97 *et seq.* at p. 118.

To give an example: for a consumer who buys a vacuum cleaner, it will never be worthwhile to seek for better standard terms given that maybe 1 in 10.000 cleaners will be defective. The possibility of the standard terms being applied is so low that it is economically not rational for a consumer to seek for a vacuum cleaner of the same qualities for better terms. Due to this rational ignorance on the side of the consumers, standard terms never become a parameter in competition, and the result is, in the words of Akerlof, a ‘market for lemons’.<sup>23</sup> Another control mechanism has to intervene. This mechanism is the collective action mechanism introduced already by the Directive 93/13 on unfair contract terms. Consumer organizations and the like are vested with rights to sue against the user of unfair standard contract terms in order to prevent the continued application of these terms in consumer contracts.<sup>24</sup>

Now, looking at these major areas of consumer protection in the CESL, two statements can be made:

- First, these parts of the CESL are based to a great extent on the existent EU Directives on consumer rights of 2011<sup>25</sup> and on unfair contract terms of 1993.<sup>26</sup>
- Second, none of these problem areas are specific to a sales contract. In fact, the protection provided in the relevant directives is for all contract types, not only for sales contracts. Contract conclusions on distance or off-premises are means of marketing and can be practiced for all kinds of contracts. Parallel to that, employment of standard contract terms is also not a sales contract-specific phenomenon – all consumer contracts where non-negotiated terms are used need to be controlled.

Therefore, as an intermediary result, it can be stated that some major areas of protection granted to the consumer/buyer in the CESL are not regarding problems related particularly to a sales contract.<sup>27</sup>

#### 12.4 SALES-SPECIFIC PROTECTION OF THE BUYER/CONSUMER IN THE CESL

In this section, selected topics from the CESL and the Consumer Sales Directive will be examined in order to ascertain when specifically the buyer/consumer in a sales contract is protected more than in a B2B sales contract. The comparison will be made with the

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23 G. Akerlof, ‘The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism’, *Quarterly Journal of Economics*, Vol. 84, 1970, pp. 488 *et seq.*; *cf.* also Wagner, 2011, *supra* note 17, pp. 9-42 at p. 29.

24 N. Reich *et al.*, *European Consumer Law*, 2nd edn, Intersentia, Cambridge, 2014, p. 378 *et seq.*

25 *See supra* note 7.

26 *See supra* note 20.

27 *Cf.* also Micklitz & Reich, 2012, *supra* note 12, p. 30.

CISG provisions and those of the CESL on B2B sales. Under each heading, it will also be discussed whether the protection granted is really needed or not.

#### 12.4.1 *Definition of Lack of Conformity*

The lack of conformity definition of Article 2 Consumer Sales Directive and Articles 99-100 CESL, which are applicable to B2C as well as B2B sales, are mainly paralleling Article 35 CISG on conformity of the goods.<sup>28</sup> The goods must comply with the description given by the seller and possess the same qualities and characteristics as other sample goods (a), be fit for the purpose which the consumer requires them and which was made known to the seller at the time of purchase (b); be fit for the purpose for which goods of the same type are used (c), and show the same quality and performance, which are normal in goods of the same type which consumers can reasonably expect. This will also take into account the nature of the goods and any public statements made about the specific characteristics of the goods by the producer, seller or in their advertising (d). Other than the Sales Directive, Article 102 CESL also defines third-party rights or claims regarding the goods as a source of non-conformity. Articles 41-42 CISG are obviously the main source of inspiration. These provisions find application to B2B as well as B2C contracts.

Differences regarding the concept of lack of conformity can only be seen in the following areas:

- **Public statements/advertisement:** For B2C contracts, the Consumer Sales Directive stipulates that all public statements, including advertisements, made by the seller or the producer regarding the goods will be considered when defining what the ‘normal’ quality of the goods is (Article 2(2)d). Article 69 CESL broadens this approach to B2B contracts to an extent that all public statements and advertising originating from the *seller* are deemed to be part of the contractual consensus, unless proven otherwise (Article 69/I). That means public statements or advertisement of the producer is not binding for the B2B seller; however, advertisement or statements generating from himself are binding even if they were not directed to the specific buyer. Just like in the Sales Directive, the CESL accepts for B2C sales that also statements by the producer or other links of the chain are binding on the seller, unless he proves that he did not know and could not be expected to have known of it (Article 69/III).<sup>29</sup> When looking into CISG literature, one can see that public statements or advertisement of the seller

28 Cf., e.g. A. von Vogel, *Verbrauchervertragsrecht und allgemeines Vertragsrecht*, De Gruyter, Berlin, 2006, pp. 211 *et seq.*

29 Where the other party is a consumer, then for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.

are deemed to be relevant in defining the contractual quality of the goods.<sup>30</sup> However, statements of the producer are mostly not discussed.

But is this really the correct way of approaching the issue, given that the buyer in a B2B contract just like in a B2C contract almost never will be in a situation to know by whom the advertisement or public statement was made – by the seller or the producer? The negotiation phase of the parties has to be interpreted in light of Article 8 CISG anyhow. That means, if the buyer as a reasonable person was entitled to understand, for example, that an advertisement made in a professional journal was generated by the seller, or at least known to the seller, the legally relevant description of the goods in this ad should be assumed to be part of the contract also in a B2B sales. Obviously, the seller will have the chance to prove that he neither knew nor was in a position to know about the advertisement being made in the buyer's country. In international sales contracts, a proof like this can be brought easier given that advertisements may vary from country to country. But a general exclusion of liability for statements made by a person in earlier links of the business chain should not be the case for B2B contracts. In fact, this is also the approach of Article IV.A.-2:303 DCFR, where such statements are binding for the seller irrespective of who the buyer is. This is certainly the better approach.<sup>31</sup>

- **Incorrect installation of the goods due to seller, or shortcomings of the installation instruction:** The so-called IKEA clause was already introduced into the 1999 Consumer Sales Directive (Article 2(5)).<sup>32</sup> According to this rule even if a non-conformity arises after delivery of the goods, the seller is liable if this non-conformity can be traced back to an incorrect installation of the goods by the seller or his auxiliaries or to a mistake in the installation instruction. Article 101 CESL takes over the same idea, however, again only limited to consumer. But one can see no reason why in a B2B sales contract, the value judgement should be different. In fact, looking at the CISG commentaries, one can see that the seller is held liable for all types of shortcomings of the installation manual and that the goods are considered as being not fit for the ordinary purpose in such case.<sup>33</sup> The installation of the sold goods by the seller does also not hinder the application of the CISG provisions (Article 3 CISG) and can cause a non-conformity

30 Cf., e.g. Schwenger & Hachem, in Schwenger, 2010, *supra* note 8, Art. 35 CISG, Para. 7; S. Kröll, in S. Kröll, L. A. Mistelis & M. P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, C.H. Beck, Munich, 2011, Art. 35 CISG, Para. 39.

31 For comparative information on the issue, see Notes to Art. IV.A.-2:303 DCFR in C. von Bar & E. Clive (Eds.), *Principles, Definitions and Model Rules of European Private Law – DCFR*, Full Edition, Vol. 2, Sellier European Law Publishers, Munich, 2009, p. 1297. In favour of a broader application also I. Schwenger, P. Hachem & C. Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, Paras. 31.48 *et seq.*

32 Reich *et al.*, 2014, *supra* note 24, p. 176.

33 Schwenger & Hachem, in Schwenger, 2010, *supra* note 8, Art. 35 CISG, Para. 14; Kröll, in Kröll *et al.*, 2011, *supra* note 30, Art. 35, Para. 102.



according to Article 35 CISG if it is not carried out correctly, just like in a B2C contract.<sup>34</sup> Therefore, the distinction made in the CESL between B2B and B2C sales in the matter does not seem to be justified.

- **Knowledge of buyer of non-conformity:** According to Article 35(3) of the CISG and Article 2(3) of the Consumer Sales Directive, the seller is not liable for any non-conformity if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity (or ‘the consumer was aware, or could not reasonably be unaware of the lack of conformity’). That means for B2B as well as B2C contracts, the burden of proof is on the seller. If she proves that the reasonable buyer could have been aware of the lack of conformity, she will not be held liable for this non-conformity. Articles 99(3) and 102(4) of the CESL, however, diverge from this approach and seek in case of B2C sales proof of actual knowledge about the lack of conformity. For B2B contracts, the old rule still applies (Article 104) and the ‘could not have been unaware’ formula is used.

However, one cannot see the reason for this differentiation given that proof of actual knowledge is very difficult, and in most of the rules of evidence of national laws, the proof of constructive knowledge is accepted.<sup>35</sup> In fact, it sets also correct incentives for the buyer given that he is in a relatively good position to ascertain blatant defects of the goods when concluding the sales agreement.<sup>36</sup> Even though the same can sometimes be said for the seller, the general principle which can be deduced from Article 122/VI CESL (same: Article 40 CISG) that the seller ‘is not entitled to rely on this article if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer’ can be generalized and be applied also here.<sup>37</sup> If the lack of conformity is manifestly evident at contract conclusion and should have been so also for the seller, the protection of the buyer will be preferred and he will be granted his rights for non-conformity under the sales contract.

#### 12.4.2 Examination and Notification Duty

One of the major differences between B2B and B2C sales is probably the requirement of the commercial buyer to examine the goods (Article 38 CISG), whereas a similar duty is not existent for the consumer in the EU legislation.<sup>38</sup> Even though there are still some

34 Schwenger & Hachem, *in* Schwenger, 2010, *supra* note 8, Art. 3 CISG, Para. 13.

35 Schwenger, Hachem & Kee, 2012, *supra* note 31, Para. 31.158.

36 S. Grundmann, ‘Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?’, *Archiv für die civilistische Praxis*, Vol. 202, 2002, pp. 40-71 at p. 48.

37 Schwenger, *in* Schwenger, 2010, *supra* note 8, Art. 35 CISG, Para. 38.

38 For comparative information on the issue, see Notes to Art. IV.A.-4:301 DCFR, pp. 1350-1351; Schwenger, Hachem & Kee, 2012, *supra* note 31, Chapter 34.

jurisdictions in Europe, like the Swiss Code of Obligations which does not differ between B2C and B2B contracts in regard to the examination duty (Article 201), the EU Member States have given up such duty for B2C contracts with the 1999 Consumer Sales Directive.

The only duty which partially remains is the notification duty. Article 5 of the Sales Directive allows that “[the] Member States may provide that [...] the consumer must inform the seller of the lack of conformity within a period of two months from the date on which [s]he detected such lack of conformity”. This provision has led to a fragmented picture in Europe.<sup>39</sup> For example, Estonia, Hungary, Italy, the Netherlands,<sup>40</sup> Poland, Portugal, Romania, Spain and Sweden have introduced such notification period, whereas in Germany, France and the UK, no such duty is existent in B2C sales. According to Article 106/III (b) CESL, ‘the requirements of examination and notification set out in Section 7 of this Chapter do not apply’ if the buyer is a consumer. That means CESL goes further than the Directive and forgoes also the notification duty for B2C contracts.

It is obvious that here we have an important dissimilarity between B2B and B2C contracts. In the trade business, the seller has to know as quickly as possible whether the delivered goods are non-conforming so that he can offer cure, or at least budget for the financial risks involved. Given that both parties are professionals, an examination and notice duty does not burden the buyer too much, but rather gives him also the chance to mitigate any losses that might be encountered due to this non-conformity. The consequences of a failure to give timely notice are harsh: the buyer loses all of his remedies under Article 45 CISG.<sup>41</sup>

However, Article 40 CISG brings the two systems at least a bit closer. For a commercial seller, who either as the producer or as the seller has the capacity and knowledge to examine the goods herself, it would be contradictory to allow for an exemption given that she could have found out about the non-conformity herself. In fact, Article 40 states expressly that if the seller knew or could not have been unaware of the lack of conformity, she cannot rely on Articles 38-39. Under such circumstances, the buyer will retain all his remedies. But still, the examination and notification duty of the commercial buyer remains certainly as one of the major differences between the two contracts.

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39 Cf. Commission Non-paper on a comparison between 27 mandatory consumer protection provisions in the Common European Sales Law proposal and national laws: <[http://ec.europa.eu/justice/contract/files/common\\_sales\\_law/comparative\\_table\\_en.pdf](http://ec.europa.eu/justice/contract/files/common_sales_law/comparative_table_en.pdf)>.

40 Cf. Opinion of Advocate General Sharpston delivered on 27 November 2014 in *Case 497/13, Froukje Faber v Autobedrijf Hazet Ochten BV* discussing among others the conformity of the notification period provided for in the Dutch Civil Code.

41 One CISG-specific exception is Art. 44: “Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.”

### 12.4.3 *Burden of Proof Regarding the Non-Conformity*

In B2B as well as B2C sales contracts, the time for assessing a non-conformity is generally the time when the risk passes to the buyer.<sup>42</sup> In principle, if the buyer has accepted the goods, he will have to prove that any non-conformity arising later than this moment already existed at the time of passage of risk. However, Article 5(3) Sales Directive has introduced a rebuttable presumption in favour of consumers.<sup>43</sup> Any non-conformity in B2C contracts which becomes apparent in the first 6 months is presumed to have existed already at the moment when risk has passed to the consumer. The same approach was taken over by Article 105/II CESL. This presumption does not apply if it is incompatible with the nature of the goods or the nature of the lack of conformity.

Obviously, in B2B contracts, such presumption is not valid, and the buyer has to prove that the goods were really defective at the time of delivery, and these defects were not ascertainable despite the examination.

### 12.4.4 *Remedies of the Buyer*

The types of remedies granted in the different sets of rules on sales are to a great extent identical. According to Article 3 Sales Directive, the buyer/consumer may ask for performance which includes specific performance, repair or replacement of the goods. Or he can choose to terminate the contract or to reduce the price. Article 45 CISG and Article 106 CESL give the buyer exactly the same rights. However, both give the buyer in addition the right to ask for damages beside these remedies. The Sales Directive had left the issue of damages to national laws. Finally, a right to withhold is granted expressly in Article 106/I (b) CESL referring to Article 113 CESL. Even though the CISG does not grant such right particularly, this is deduced as a general principle from the Convention.<sup>44</sup> All in all, the four elective rights of the buyer plus damages and the right to withhold are remedies which are suitable for the needs of B2B as well as B2C contracts. No difference is existent.

### 12.4.5 *Hierarchy between the Remedies*

One of the major questions of sales law is whether the four remedies of the buyer should be granted in a hierarchy or as equal options. We see that different sets of rules favour different solutions. In regard to B2B contracts, the approach in the CESL and CISG is

<sup>42</sup> Cf. for different systems Schwenzler, Hachem & Kee, 2012, *supra* note 31, Paras. 31-165 *et seq.*

<sup>43</sup> Reich *et al.*, 2014, *supra* note 24, p. 177.

<sup>44</sup> Schwenzler & Hachem, *in* Schwenzler, 2010, *supra* note 8, Art. 7 CISG, Para. 40; Viscasillas, *in* Kröll *et al.*, 2011, *supra* note 30, Art. 7 CISG, Para. 58.

parallel: those remedies keeping the contract alive are favoured. In principle, the seller has a ‘right to cure’, which means that she can block the remedies of the buyer in case she can cure the non-performance without unreasonable delay, and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of expenses advanced by him (Article 48 CISG; Article 109 CESL).<sup>45</sup> The Consumer Sales Directive does not grant the seller such right; however, there is a two-tier system where the consumer has to first ask for performance (repair or replacement), and only if this claim is not appropriate, or cannot be completed within a reasonable time and without any significant inconvenience to the consumer, he may make use of his rights to rescind or to reduce the price.<sup>46</sup> Exceptionally, if replacement or repair is impossible or disproportionately expensive, the seller might reject the claim, and the consumer would have to use one of his second tier rights immediately.

In fact, the right to cure of the seller and a two-tier system of remedies are pretty much mirror imaging the same idea. In case there is a right to cure, and the seller makes use of it, the contract will be kept alive. It is the buyer who has to prove that using this right would burden him with unreasonable inconveniences, and therefore, he should have the right to rescind or to reduce. In case of a two-tier system, the seller has no right to cure, but she can prove that the claim of the consumer cannot be performed or is disproportionately expensive. If such prove is brought, again the buyer has to make use of his right to rescind or to reduce the contract price. That means the debate is more about the burden of proof. Either way the major aim is to keep the contract alive if possible.

Now, looking at the CESL text, one can see that this approach was not followed at all for B2C contracts. According to Article 106 CESL, the consumer is free to decide which remedy to make use of. He may, for example, directly resort to his right to rescind any time within the limitation period.<sup>47</sup> Neither the two-tire system is applicable nor the seller has a right to cure in B2C contracts (Article 106/III, a). Whether this is the correct way to protect consumers is very doubtful given that the cost of an immediate termination will be reflected on all consumers via pricing.<sup>48</sup> As put forward by *Lehmann*, the seller will have to assume the full risk of goods, which could have been repaired or replaced, now being

45 In detail A. Leukart, *The Seller’s Right to Cure, with Special Reference to Standard Terms and the CISG*, Helbing Lichtenhahn, Basel, 2013, pp. 67 *et seq.*

46 Cf. Reich *et al.*, 2014, *supra* note 24, p. 180.

47 According to Art. 179 CESL, the general period of prescription is two years after the buyer became or could be expected to have become aware of the non-conformity and a maximum of ten years after delivery.

48 Critical M. Lehmann, ‘Vom geduldigen Lamm zum Pascha: Die Rechte des Verbraucher-Käufers nach dem Entwurf eines Gemeinsamen Europäischen Kaufrechts’, in M. Schmidt-Kessel, S. Leible & L. Tichy, *Perspectiven des Verbrauchsgüterkaufs*, Mohr Siebeck, Tübingen, 2015, pp. 105-124 at p. 117 *et seq.*; H. Eidenmüller *et al.*, ‘The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law’, *The Edinburgh Law Review*, Vol. 16.3, 2012, pp. 301-357 at p. 334 *et seq.*; O. Bar-Gill & O. Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law’, *Common Market Law Review*, Vol. 50, 2013, pp. 109-126 at p. 112.

piled up in her store, given that there will be only a limited market for these ‘used’ goods. And in her B2B contract with the producer, she will often not be able to make use of a right to rescind and to pass the risk on to the producer.<sup>49</sup> The adverse effects for the seller are even more visible in case the goods were prepared according to the qualifications of the buyer/consumer.<sup>50</sup> Also under such circumstances, the value judgement of the CESL does not change: The consumer can rescind despite the possibility to cure the non-conformity. In fact, as is stressed by Eidenmüller *et al.*, it is a contradiction in itself to give the seller the right to reject a claim for repair because ‘the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain’ (Article 110/III (b)), however, not to grant a parallel defence in case the consumer makes use of its right to rescind.<sup>51</sup>

To treat B2C contracts, different than B2B contracts in this matter does not convince. The only reasonable differentiation could be in regard of the burden of proof. Giving the seller a *right* to cure would put the burden of proving that performance in the specific case is not reasonable on the buyer.<sup>52</sup> However, in consumer contracts, it seems to be much easier for the seller to prove that a claim for specific performance cannot be fulfilled, or is disproportionate. A two-tier system where the consumer has to first make use of its rights to repair or replacement, and the corresponding possibility of the seller to sometimes block this claim would therefore balance the interests of the parties best. This is exactly the system of the 1999 Consumer Sales Directive and should be maintained.

#### 12.4.6 *Pre-Requisites of a Right to Terminate?*

Parallel to the discussion above, all three sets of rules try to limit the right of termination to unimportant non-conformities. Whereas in the Sales Directive, the threshold is the ‘minor lack of conformity’ (Article 3(6) Sales Directive), the CESL asks for the lack of conformity not to be ‘insignificant’ (Article 114/II CESL). At first sight, the CISG has a much higher threshold given that it requires the breach to be ‘fundamental’ (Article 49 CISG).

However, looking into the CISG doctrine on fundamental breach, one can discern several criteria which can also be relevant for B2C sales contracts.<sup>53</sup> Often the decision on

49 Lehmann, 2015, *supra* note 48, p. 122; G. Wagner, ‘Termination and Cure under the Common European Sales Law: Consumer Protection Misunderstood’, *Common Market Law Review*, Vol. 50, 2013, pp. 147-168 (157).

50 Wagner, 2013, *supra* note 49, p. 166.

51 Eidenmüller *et al.*, 2012, *supra* note 48, pp. 336-337.

52 Müller-Chen, in Schwenzler, 2010, *supra* note 8, Art. 48 CISG, Para. 13.

53 *Cf.* on these criteria Huber, in Kröll *et al.*, 2011, *supra* note 30, Art. 49 CISG, Paras. 12 *et seq.*; Schroeter & Hachem, in Schwenzler, 2010, *supra* note 8, Art. 25 CISG, Para. 44 *et seq.*

fundamentality will go hand in hand with the question whether the non-conformity can be cured. As put forward above, the right to cure of the seller on one side, and the buyer's first tier remedies aiming at performance on the other side signal already that a discussion on the significance of the non-conformity has to take into account whether a cure is possible. In principle, if repair or replacement is possible without any inconveniences for the consumer and within a reasonable time, the non-conformity has to be defined as an insignificant one. However, even if cure cannot be effected in such way, or is anyway impossible right from the beginning, still the non-conformity will not automatically be qualified as a significant one allowing for rescission.

Although this issue was not expressly discussed by the European Court of Justice (ECJ), a case decided in October 2013 supports the foregoing argument. According to the facts, Ms Duarte Hueros had purchased a car with a sliding roof for an amount of EUR 14.320 from Autociba. Ms Duarte Hueros returned the vehicle to Autociba because, when it rained, water leaked in through the roof into the car interior. After a number of unsuccessful attempts to repair it, Ms Duarte Hueros requested that the vehicle be replaced. Following Autociba's refusal to replace it, Ms Duarte Hueros brought an action before the Court of First Instance seeking rescission of the contract of sale.<sup>54</sup> However, the Spanish Court decided that the non-conformity was insignificant, and the consumer therefore could not terminate the contract. The debate was focusing on the issue whether the Court of First Instance could grant an appropriate price reduction of its own motion even if the consumer brought proceedings which were limited to seeking rescission of that contract. This was accepted by the ECJ since otherwise the consumer would have no remedy left against the seller, and this would undermine the protection granted by the Directive. But the ECJ did not question at all the conclusion of the Court of First Instance that non-conformity remains insignificant even though it cannot be remedied.<sup>55</sup>

As already put forward above, economical arguments indicate that easy termination comes at a price which has to be paid by consumers. It seems therefore appropriate to grant also consumers this right with caution. All the circumstances of the case should be evaluated, especially the loss the seller would encounter if the non-conforming goods would be returned and the benefits of the consumer of having 100% conforming goods

54 ECJ, *Soledad Duarte Hueros v Autociba SA, Automóviles Citroën España SA*, 3 October 2013 (C-32/12).

55 Cf. also a Swiss High Court decision of 2013, where a whirlpool which was on display and was bought from a showroom for private use but caused several different electrical problems. The buyer wanted to terminate the contract; however, the High Court stated that a fundamental breach, and therefore rescission would only be accepted if there were a risk of an electric shock. As long as this risk is not existent, and given that a removal would be too costly, the court found that a reduction in price is absolutely sufficient to protect the consumer. BGE, 4A\_252/2013, 2 October 2013: "La résolution doit en principe être admise lorsque la chose manque d'une qualité essentielle ou se révèle inutilisable; en présence de plusieurs défauts, il faut tenir compte de leur cumul. Il faut aussi prendre en considération les intérêts en présence et le comportement des cocontractants. Les inconvénients que la résolution entraîne pour le vendeur doivent être proportionnés aux avantages que l'acheteur peut en attendre".

should be weighed against each other.<sup>56</sup> Otherwise, there would be no check against any opportunistic behaviour of the consumer.<sup>57</sup> One should not forget that the consumer is still protected with the reduction of the sales price and an additional damages claim. These remedies will mostly make up for any non-conformity which is not fundamental. It is not argued here that the value judgement in B2B and B2C contracts should be absolutely overlapping. For example, the criteria whether the non-conforming goods can still be used commercially ('reasonable use test')<sup>58</sup> can obviously not be relevant in case of consumer contracts. That means that the threshold for a termination in B2B sales will remain higher than in B2C contracts. However, a very lenient approach for B2C sales like in the CESL should be rejected.<sup>59</sup>

#### 12.4.7 Cost of Repair and Replacement

According to Article 3(2) of the Sales Directive 'in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement'. A parallel provision can be found in Article 110(2) CESL. Even though Article 46 CISG does not state this requirement expressly it is undebated in CISG literature and case law that the costs of repair and replacement have to be carried by the seller.<sup>60</sup>

What exactly is meant by 'free of charge' is explained in Article 3(4) of the Sales Directive: "The terms 'free of charge' in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials". In the joined cases, *Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH*, the question was whether this term also includes costs of removing the goods not in conformity and installing replacement goods.<sup>61</sup> The ECJ held that even though this was not expressly stated in Article 3(4), the enumeration in the provision was not exclusive since the term 'particularly' was used. The Court rejected especially the argument that this interpretation would be inequitable in regard to non-conformity of goods that do not result from the fault of the seller.

56 Grundmann, 2002, *supra* note 36, p. 51; Wagner, 2013, *supra* note 49, p. 158.

57 Cf. on the issue Wagner, 2013, *supra* note 49, p. 164.

58 Müller-Chen, in Schwenzler, 2010, *supra* note 8, Art. 25 CISG, Paras. 52-53.

59 Parallel Wagner, 2013, *supra* note 49, p. 167. In favour also of a strict interpretation of § 323 (5) BGB for B2C contracts, see W. Ernst, in J. Säcker & R. Rixecker (Eds.), *Münchener Kommentar zum BGB*, 6th edn, C.H. Beck, München, 2012, BGB § 323, Para. 243e.

60 Huber, in Kröll *et al.*, 2011, *supra* note 30, Art. 46 CISG, Paras. 40 and 52; U. Magnus, in J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Sellier – de Gruyter, Berlin, 2013, Art. 46 CISG, Para. 29; Oberlandesgericht Hamm (Germany) 9 June 1995 (window elements), CISG-Online 146.

61 Judgement of 16 June 2011 in *Joined Cases 65/09 Gebr. Weber GmbH v Jürgen Wittmer and Case 87/09 Ingrid Putz v Medianess Electronics GmbH*, [2011] ECR I, p. 5257.

Accordingly, in a situation where neither party to the contract is at fault, it is justified to make the seller bear the cost of removing the goods not in conformity and installing the replacement goods, since those additional costs, first, would have been avoided if the seller had at the outset correctly performed his contractual obligations and, second, are now necessary to bring the goods into conformity (Para. 57).

In the author's view, this argument is perfectly well also valid for B2B sales contract.

One major discrepancy of the CESL is in regard to the performance claim and its relation to exemption. According to Article 106(4) CESL, “[i]f the seller’s non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 *except requiring performance* and damages”. This provision reflects Article 8:101(2) of the Principles of European Contract Law (PECL) and Article III. – 3:101(2) of the Draft Common Frame of Reference (DCFR). However, as already discussed by this author elsewhere,<sup>62</sup> this approach seems to disregard that the question whether a specific performance claim is given or not has nothing in common with the question if the seller is excused or not. The existence of a performance claim is independent from the fact of whether non-performance can be imputed to the seller or not. Even if an unforeseeable and insurmountable impediment has caused the non-conformity of the goods, the buyer can still make use of his supplementary performance claims like repair or replacement. Both claims are in principle only excluded if it would be unlawful or impossible to perform, or performance would impose costs on the seller that would be disproportionate (Article 111 CESL). As clearly stated in the ECJ decision above, the liability of the seller is not fault based. Even an impediment beyond control cannot rescue him from repairing or replacing the goods. If for example, the goods sent to the consumer were detained at customs clearance because of a state intervention triggered by an outbreak of an epidemic, and the goods would become non-conforming during that period, the consumer would still have a right to ask for performance. The approach of Article 79(5) CISG is absolutely preferable: ‘Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention’, which means that performance claims live on even if the seller is excused. B2B as well as B2C contracts show no difference in this regard.

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62 Cf. on this in detail Y. M. Atamer, ‘Grenzen des Erfüllungsanspruchs im System des Leistungsstörungsrechts der PICC, PECL und des DCFR im Vergleich zum CISG – Probleme und Änderungsvorschläge’, in S. Grundmann *et al.* (Eds.), *Festschrift Hopt, Unternehmen, Markt und Verantwortung*, de Gruyter, Berlin, 2010, p. 3 *et seq.*



#### 12.4.8 *Passing of Risk*

The 1999 Consumer Sales Directive included no special provision on passing of risk on the buyer/consumer. The time for ascertaining non-conformity was the time the goods were delivered. And in the Recitals, it was stated expressly that “[...] the references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk”. The issue was left to the Member States. However, the 2011 Directive on Consumer Rights has introduced in Article 20 a very clear-cut provision:

In contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods.

Article 142 CESL has adopted the same approach.<sup>63</sup> The major difference to B2B sales contracts is obvious, it is the physical possession of the goods which counts. Handing them over to the first independent carrier for transmission to the buyer in accordance with the contract of sale is not sufficient as it would be under Article 67(1) of the CISG. That means for consumer sales, it is stipulated by law that the contract is always a destination contract. The risk, the goods would be subject to during transportation, is burdened on the seller in order to protect the consumer.

However, even without a special provision, the same risk distribution could have been easily also inferred from Article 145/II CESL given that it includes an exception regarding sales where the seller is bound to hand the goods over at a ‘particular place’ (parallel also Article 67(1) CISG). Under such circumstances, risk passes only if the goods are delivered at that very place. That means, that the matter is more one of interpretation. For consumer contracts, the inclusion of a particular place of delivery has to be always interpreted as the stipulation of a destination contract.

The reason for protecting consumers here is that a trader selling goods on distance is in a much better position than the consumer to control as well as to insure the risk involved with the journey.<sup>64</sup> First of all, she can assess correctly the risk of transporting, *e.g.* a laptop, given that she probably has a longstanding experience, and presumably can also assess the risk involved with the different transport companies on the market. This risk premium can be calculated easily and a suitable insurance contract can be concluded to a much better price (cheapest insurer) than a consumer could ever get for a single transport contract.

<sup>63</sup> Cf. Zoll & Watson, *in* Schulze Commentary CESL, Art. 142, Para. 3.

<sup>64</sup> Cf., *e.g.* the explanations of the German law reform regarding passing of risk in B2C contracts: Begründung Regierungsentwurf, Bundestag Drucksache 14/6040, p. 244, available from <<http://dipbt.bundestag.de/doc/btd/14/060/1406040.pdf>>.

The bargaining position of the trader with thousands of transport contracts is certainly better than any consumer shopping in the Internet and concluding a transport contract every now and then.

#### 12.4.9 *Is There a Need to Draft B2C Sales Law Provisions as Mandatory?*

The last difference between B2B and B2C sales contracts to be addressed here is the tendency in EU law to draft all consumer-related provisions as mandatory. The consumer cannot forgo any of his rights granted in the Sales Directive (Article 7), or in the relevant provisions of the CESL. Bar-Gill and Ben-Shahar count eighty-one articles in the CESL which are bestowed a mandatory status.<sup>65</sup>

However, is there really a need for mandatory rules as long as a judicial control of standard contract terms is guaranteed?<sup>66</sup> The safety-net provided by this control seems to be sufficient to protect the consumer in case he could not bargain freely and had to accept unfair terms. The crucial factor is the bargaining factor. According to Article 3(1) of the Unfair Contract Terms Directive of 1993, a contractual term is unfair if it ‘has not been individually negotiated’ and in addition ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. That means, if the parties have individually negotiated the whole or at least some parts of the contract, this part is not going to be subject to judicial assessment on fairness. Such negotiation has to be proven by the seller (Article 3(2)). Now, if a consumer had for once the chance to bargain and get a better price in exchange for giving up, for example a right to avoid the contract why should the law intervene? Why should the remedial scheme be imposed on a consumer who would knowingly like to dispense with it. Whether or not there was really a bargaining situation, the courts will control anyhow.

In fact, a contradiction in the CESL shows also that this relation has been disregarded completely. The ‘black list’ of standard terms in Article 84 CESL defines as its first two unfair terms, standard contract terms (a) limiting or excluding liability for death or personal injury and (b) limiting or excluding liability for any harm caused deliberately or as a result of gross negligence. That means, that in principle, a limitation of liability for property damage and pure economic loss caused as a result of ordinary negligence is possible even in standard contract terms. Obviously, the judge will have discretion to decide if under the special circumstances of the case, such clause is still unfair and has to be invalidated. However, the freedom given to the parties is taken away again in Article 108 CESL, which

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65 Bar-Gill & Ben-Shahar, 2013, *supra* note 48, pp. 109-126 at p. 112.

66 Parallel Wagner, 2011, *supra* note 17, pp. 9-42 at p. 34, *cf.* p. 35 for an example from the German market for used cars where an exclusion of liability for hidden defects was common.

states that in B2C contracts, the parties may not derogate from the chapter on buyer's remedies, which also includes the damages claim. That means even an exclusion of liability for pure economic loss in case of minor negligence is forbidden under Article 108. It remains open which of these provisions would prevail.<sup>67</sup>

## 12.5 CONCLUSION

The heading of an article of Stefan Grundmann from 2002 is in fact very telling: 'Consumer Law, Business Law, Private Law – Why are the UN-Sales Law and the EU-Sales Directive So Similar?' Already then, the author had underlined that there are not many consumer-specific rules in the Consumer Sales Directive of 1999 and that this Directive has to be seen as part of a broader European Private Law applicable to B2B as well as B2C transactions.<sup>68</sup>

In fact, the short overview above shows that the rules designed specifically for B2C sales contracts are really very rare. It is true that an examination and notification duty is not suitable for B2C contracts. A differentiation in this regard is correct. It makes also sense to accept for B2C sales contracts that the risk during transport is always on the seller given that the seller is the cheapest insurer. The change in burden of proof for the 6 months after delivery of the goods to the consumer is a good way to set an incentive for consumers to apply to courts. However, courts were already very lenient before the introduction of this rule and did not set the standard of proof very high.<sup>69</sup>

But in all other areas, one can see that either the protection granted should not be specific to B2C contracts (like for advertisement or installation manuals), or that the protection given to the consumer is too excessive (like the right to rescind without first seeking performance, or the stipulation of mandatory rules). One should not forget that in the EU, the dichotomy of B2B and B2C sales is due to competence problems, and the EU has only competence to regulate the latter. But that does not necessarily mean that these two types of sales contracts really need to be also handled differently. Even though this article does not aim at discussing how far the 'cost' of consumer protection has to be taken into consideration when drafting codes, this discussion can certainly not be neglected.<sup>70</sup> If it is true

<sup>67</sup> See also the critique in Eidenmüller *et al.*, 2012, *supra* note 48, pp. 341-342.

<sup>68</sup> Grundmann, 2002, *supra* note 36, pp. 40-71 at p. 56 *et seq.* Parallel also von Vogel, 2006, *supra* note 28, p. 223.

<sup>69</sup> Cf. A. Schwartze, 'Die zukünftige Sachmängelgewährleistung in Europa – Die Verbrauchsgüterkauf-Richtlinie vor ihrer Umsetzung', *Zeitschrift für Europäisches Privatrecht*, 2000, pp. 544-574 at p. 560.

<sup>70</sup> Cf. on the issue: Bar-Gill & Ben-Shahar, 2013, *supra* note 48, pp. 109-126 at pp. 113 *et seq.*; H. Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool', *Common Market Law Review*, Vol. 50, 2013, pp. 69-84 at p. 72; Wagner, 2011, *supra* note 17, pp. 9-42 at p. 31; but also R. Craswell, 'Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships', *Stanford Law Review*, Vol. 43, 1991, p. 361.

that the cost of a protective norm is reflected via pricing on the consumer and the net benefit of the rule for the consumer is less than what he has to pay now more for the goods than the means of protection get even more questionable. Sales law is certainly an area of law unification where it would be worth to follow up this question.