



MARCELLO MAGGIOLO

Professore ordinario di diritto privato e critica del diritto - Università di Padova

PRE – CONTRACTUAL INFORMATION IN THE CESL

SUMMARY: 1. Introduction: The three pre – contractual information flows in the CESL. – 2. The first flow : The information to be given by the trader before the agreement on the use of the CESL. – 3. The second flow : the pre – contractual information to be given by a trader dealing with a consumer, by a trader dealing with another trader, or by the trader whose contract is to be concluded by electronic means. – 4. The remedies. – 5. The third flow: the information requirements resulting from the Services Directive. 6. Conclusion.

1. – This paper will outline the pre – contractual information duties laid down in the CESL: a topic that is basically making reference to transparency.

In this setting, apart from further information duties imposed by National laws, the CESL system shows three flows of information, all of them to be provided by the trader. The first flow contains the information to be given by the trader before the agreement on the use of the CESL. The second flow contains all the relevant pre – contractual information to be given by the trader dealing with a consumer, by the trader dealing with another trader, or by the trader whose contract is to be concluded by electronic means. The third flow contains the information requirements resulting from the Services Directive.

2. – As I previously mentioned, the first flow contains the information to be given by the trader before the agreement on the use of the CESL. This agreement is necessary, both when the trader deals with a customer and when the trader deals with another trader, but specific rules are only provided for negotiations between the trader and the customer.

The system is described in Recitals 22 and 23 of the Commission Proposal for a Regulation on CESL, and is then summarized in Articles 8 and 9 of the same Commission Proposal.

We must be reminded that, according to Article 8(2) of the Commission Proposal, the agreement on the use of the CESL requires the consumer’s consent to be given by an explicit statement, which is separate from the statement indicating the agreement to conclude a contract, and that the trader shall provide the consumer with a confirmation of the agreement on the use of the CESL on a durable medium.

In a pre – contractual information analysis, the most relevant point can be found in Recital 23, where the following phrase can be found: *“In addition to being a conscious choice, the consent of a consumer to the use of the Common European Sales Law should be an informed choice”*.

According to the same Recital, the trader should draw the consumer’s attention to the intended use of the CESL, and should inform him on its nature and its pertinent features. However, all of this should be performed *“avoiding unnecessary administrative burdens”* for the trader.



The balance between the information to be given by a trader dealing with a customer and the need to avoid unnecessary costs for the trader is obtained by means of a standard information notice to be supplied by the traders to the consumers (Recital 23 and Article 9 of the Commission Proposal) ⁽⁸¹²⁾.

Therefore, the standard information notice is the vehicle of information owed to the consumer on the intended use of the CESL, on its nature and on its pertinent features. Therefore, according to the Commission Proposal and thanks to the standard information notice, the consent of the customer to the use of the CESL should not only be conscious ⁽⁸¹³⁾, but it should also be an informed choice.

The standard information notice is provided as Annex II of the Commission Proposal: it briefly explains what CESL is and what are the conditions for it to be applied to the contract; it contains an outline of the consumer's pre – and post – contractual information rights; it mentions the withdrawal of rights (with a link to the relevant form); it lists the consumer's choices when products are faulty or not delivered as agreed, or the trader has not performed a related service as promised in the contractual agreement; it stresses the statute of limitations; it states the trader's standard contract terms which are unfair are not legally binding.

After a reading of the standard information notice in Annex II, it is possible to express three linked arguments.

The first argument is technical, and it concerns the drafting of the standard information notice. It stems from the observation that the standard information notice in Annex II does not provide any information on the law that otherwise applies to the contract, i.e., the law that applies to the contract when the consumer does not agree to the application of the CESL. I must state that when I first read the standard information notice, I myself had to call to mind the relevant law in my country and to reflect on whether the consent to the use of the CESL bears advantages or not. If this occurs to a person who – like myself – has or at least should have some knowledge of the relevant law of contracts, then I must wonder how a normal consumer may react. It can't be expected that a consumer is fully aware, or worse, that he should enquire about the law that alternatively applies to the contract. Therefore, since the standard information notice does not offer the means for a simple

⁽⁸¹²⁾ Besides, “Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8(2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law” (Article 9[1] of the proposal; see also recital 23).

⁽⁸¹³⁾ In particular, knowledge is obtained by the provision of an explicit statement apart from the statement indicating the agreement for the conclusion of the contract (Article 8 of the Proposal and Recital 22).



and clear comparison between CESL and a National law ⁽⁸¹⁴⁾, the possible consent of a consumer to the use of the CESL can't be deemed to be a truly informed choice.

The second argument has a sort of psychological tone. Let's imagine a consumer's examination of the standard information notice, with all the included perplexities caused by the fact that he isn't aware of the consumer's rights according to the law that applies to the contract rather than the CESL. At the end of the standard information notice, the consumer finds the following sentences: First sentence: *"This list of rights is only a summary and therefore not exhaustive, nor does it contain all details. You can consult the full text of the Common European Sales Law [here](#)".* The consumer clicks on the link and is overwhelmed by 114 pages and 186 Articles of the Regulation: the overabundance of information is quite obvious. Second sentence: *"Please read your contract carefully"*. Now the consumer is aware that all he has read up to that point isn't enough. Third sentence: *"In case of dispute you may wish to ask for legal advice"*. The consumer is now aware that there might be unpleasant and unexpected surprises.

Even though one might believe in the prospect theory which states, on the grounds of experimental tests, that since losses are more painful than the feeling of pleasure when one gains, the risk seeking behavior increases when a person faces an unfavorable choice ⁽⁸¹⁵⁾, I cannot be convinced that those final sentences do not have a discouraging effect ⁽⁸¹⁶⁾.

The third argument regards the economic perspective of the trader. The trader is the subject who should promote the use of the CESL, asking the other party – consumer or trader – for his consent to the agreement on its application.

But during the relationship between a trader and a consumer, the trader who proposes the agreement on the use of the CESL faces the option of either giving consent to a contract regulated by the National law of a consumer who will not give consent to the agreement on the use of the CESL, thus increasing the administrative costs due to the fact that the contracts must be drafted according to at least two laws, or refusing to stipulate contracts with consumers who will not give consent to the agreement on the use of the CESL ⁽⁸¹⁷⁾. I must ask whether the CESL, from the trader's point of view, can compete with the distribution channels of the countries where traders wish to export goods.

⁽⁸¹⁴⁾ See J.M. SMITS, *Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market*, <http://ssrn.com>, 9-11.

⁽⁸¹⁵⁾ See D. KAHNEMANN and A. TVERSKY, *Prospect Theory: an Analysis of Decision under Risk*, in *Econometrica* 47 (1979), 263 – 291.

⁽⁸¹⁶⁾ See also M. PIERS and C. VANLEENHOVE, *The Common European Sales Law: A critical Assessment of a Valuable Initiative*, in *Contratto e Impresa/Europa*, 2012, 437-438.

⁽⁸¹⁷⁾ According to J. BASEDOW, *An optional Instrument and the Disincentives to Opt in*, in *Contratto e Impresa/Europa*, 2012, 37, this is the only likely scenario.



3. – The second flow of information contains all the relevant pre – contractual information to be provided by the trader dealing with a consumer, by the trader dealing with another trader, or by the trader whose contract is to be concluded by electronic means. This flow of information specifically concerns the content of the contract in a broad sense. Its discipline is described in Article 13 ff. of the CESL (i.e. Annex I at the Commission Proposal).

This regulation of pre – contractual information can be divided into three groups of rules.

The first and most significant group again concerns with contracts between a trader and a consumer. The rules mostly apply to distance and off – premises contracts, because the intended contract in the CESL perspective has the features of distance or off – premises contracts. In the fewer contracts that are not distance or off – premises contracts, the duties for pre – contractual information are simplified (Article 20 of the CESL).

First of all, in the area of distance and off – premises contracts, the CESL establishes several broad rules. With some of the redundancies that are anything but unusual regarding European Private Law, (i) it states that, when concluding a distance or off - premises contract, pre – contractual information must be provided in a clear and comprehensible manner (Article 13 [1] of the CESL); (ii) it reiterates that, when concluding a distance or off - premises contract, pre – contractual information must be in plain and – insofar as it is provided on paper or another durable medium – also legible (Articles 13 [3 *b* and *c* and 4 *b*] of the CESL); (iii) the burden of the proof that the information required has been provided is imposed on the trader (Article 21 of the CESL); (iv) it is established that the rules of Articles 13 – 22 of the CESL are of mandatory nature (Article 22 of the CESL).

The information to be provided by the trader to the consumer must be relevant to the aim of the contract (goods, digital content or related services; total price and additional charges and costs (Articles 13[1 *a* and *b*] and 14 of the CESL); the individual qualities of the trader (Articles 13 [1 *c*] and 15 of the CESL); the contract terms (Articles 13 [1 *d*] and 16 of the CESL); the rights of withdrawal (Articles 13 [1 *e*] and 17 of the CESL); and finally, after – sale services and assistance, guarantees, policy for handling complaints, possible ADR, digital content and its features (Article 13 [1*f* – *i*] of the CESL).

These rules are rather commonplace. They impose pre – contractual information duties similar to those which can be found in many other areas of the law of contract of European origin. Therefore, I will not analyze every single one of its provisions.

Another – the second – group of rules that apply to this second flow of information is included in the provisions of Articles 24 – 26 of the CESL, dedicated to pre – contractual



information duties for the trader who provides the electronic means for concluding a contract – a distance contract – not only with costumers, but with other traders as well.

The rules apply where a contract is concluded via Internet, but without the exclusive exchange of e – mails or other individual means of communication (Article 24[1] of the CESL): Therefore, as a whole, where a contract is concluded via so – called point and click systems.

For contracts concluded by electronic means, there are three categories of pre – contractual information duties. The first one always applies whomever the trader is dealing with; the second and third apply only when the trader deals with a consumer.

Firstly, whoever the trader's other party might be, in relation to the trader's duty to make available to the other party adequate technical means for identifying and correcting any input errors before his offer or acceptance of an offer (Article 24[2] of the CESL), the trader must provide information concerning (i) the technical steps to be taken in order to conclude the contract; (ii) whether or not a contract document will be filed and be easily accessible, (iii) the technical means for identifying and correcting any input errors before the other party makes or accepts an offer; (iv) the languages available for the contract and the contract terms (Article 24[3 a – e] of the CESL).

Secondly, where a distance contract for a valuable consideration is concluded with a consumer by electronic means, before the placing of an order the trader must inform the consumer on (i) the main characteristics and features of the goods, digital content or related services to be supplied, (ii) total price or the manner in which the price is to be calculated and any possible additional charges and costs; (iii) duration and conditions for the termination of the contract (Article 25[1] of the CESL).

Thirdly, where a distance contract for a valuable consideration is concluded with a consumer by electronic means, the trader must guarantee that the consumer, when placing the order, acknowledges that the order implies an obligation to make payment: if the trader does not comply, the consumer will not be bound by the contract or order (Article 25[2] of the CESL).

Again, in the relationship between a trader and a consumer, the trader bears the burden of the proof that the information required has been provided (Article 26 of the CESL).

The last group of rules that apply to the second flow concerns the pre – contractual information to be given by a trader dealing with another trader according to Article 23 of the CESL. I am making reference to it now mainly because the issue is linked with the last flow of information, which will be discussed in a short while, and which contains the information requirements indicated in the Services Directive and the relevant National laws which transpose it.

Before the conclusion of a contract for the sale of goods, supply of digital content or the provision of related services from a trader to another trader, the supplier has the responsibility of



disclosing the information concerning these items which the supplier “*has or can be expected to have*”, and “*which it would be contrary to good faith and fair dealing not to disclose to the other party*” (Article 23[1] of the CESL).

In order to single out the information owed to the other trader, some indications are provided: regard must be given to the circumstances, and amongst them (i) supplier’s special expertise; (ii) cost to the supplier of acquiring the relevant information; (iii) ease for the other trader to acquire the information by other means; (iv) nature of the information and its likely importance for the other trader; (v) good commercial practice (Article 23[2 *a – f*] of the CESL) ⁽⁸¹⁸⁾.

Following its by now customary method, European legislation operates by successive approximation.

Article 2(1) of the CESL provides a good faith and a general fair dealing clause. Article 23(1) of the CESL reiterates the good faith and general fair dealing clause for pre – contractual information to be given by a trader to another trader. Further general clauses provide some standards for a judge to specify the broader ones (Article 23[2] of the CESL).

4. – Before discussing the third flow of information, let’s briefly consider the remedies. On this point, the rules concerning relations between a trader and a customer are explicitly stated to be mandatory (Articles 28 [3] and 29 [4] of the CESL).

The first rule states that a party who supplies information in order to comply with the aforementioned duties, or otherwise has the responsibility of providing a reasonable guarantee that the information supplied is correct and not misleading (Article 28[1] of the CESL). The oddity is quite evident: even without this rule, providing incorrect and misleading information would surely not be considered lawful.

If (i) incorrect or misleading information has been supplied, or if (ii) any pre - contractual information duty hasn’t been complied with, the defaulting party is liable for any loss caused to the other party (Article 29[1] of the CESL).

Furthermore, the consumer is not liable to pay any additional charges and other costs where the trader has not complied with the relevant information requirements (Article 29[2] of the CESL).

These remedies are without prejudice for the extension of the withdrawal period where the trader has not provided the consumer with the information required in Article 17 (1) of the CESL, as stated in Article 17[2] of the CESL, or for the avoidability of the contract due to mistake of fact

⁽⁸¹⁸⁾ Critical O. LANDO, *Comments and Questions Relating to the European Commission Proposal for a Regulation on a Common European Sales Law*, ERPL, 2011, 724. But see also A. DE BOECK, *B2B Information Duties in the Feasibility Study: Analysis of Article 23*, ERPL, 2011, 787 ff.



or law, or due to fraudulent misrepresentation or fraudulent non disclosure of information as stated in Articles 48 and 49 of the CESL (Article 29[3] of the CESL).

It must be stressed that according to Article 29(3) of the CESL, the party may avoid the contract for mistake or fraud if the relevant requirements actually exist. The plain and simple non-compliance of the information duties is not enough. So, the principle of non interference between behavior rules and good faith rules shouldn't be affected ⁽⁸¹⁹⁾.

Quite strangely, there is no specific remedy for the violation of pre – contractual information duties where the contract is not concluded ⁽⁸²⁰⁾.

5. – I will now discuss the third and last flow of information. Art. 12 of the Commission Proposal explicitly states that the CESL is without prejudice for the information requirements laid down by National laws that transpose the provisions of Directive 2006/123/EC (so – called Services Directive or Bolkestein Directive) ⁽⁸²¹⁾.

The Directive applies to services supplied by service providers established in a Member State (Article 1 of the Directive 2006/123/EC). “Service” is defined as any self employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty (Article 4 n. 1 of the Directive 2006/123/EC). According to Article 50(2) of the Treaty “Services”, also include activities of industrial or commercial character, activities of craftsmen and artisans, and activities of professions. Therefore, it results in a full overlap with the Common European Sales Law, and this is made particularly clear by the Italian transposition law which states that the law applies to any entrepreneurial or professional economic activity intended in dealing with goods or providing other – also intellectual – services (Article 1 of the d.lgs. 59/2010).

The relevant rule here is Article 22 of the Directive 2006/123/EC ⁽⁸²²⁾, regarding information on service providers and their services. This information must be provided in a clear and unambiguous manner, and within reasonable time before the conclusion of a contract or, where there is no written contract, before a service is provided (Article 22[1] of the Directive 2006/123/EC). ⁽⁸²³⁾. There is no need to examine every piece of information the service provider has to provide according to Article 22 of the Directive 2006/123/EC. It should be sufficient to point

⁽⁸¹⁹⁾ See Cass. S.U. 2007, December 19th, n. 26724, *Corr. giur.* 2008, 227 ff. and Cass. S.U. 2007, December 19th, n. 26725, *Giur. it.*, 2008, I, 350 ff.; V. PIETROBON, *Errore, volontà e affidamento nel negozio giuridico*, Padova, 1990, p. 104 ss.

⁽⁸²⁰⁾ This lack of enforcement policy is stressed by C. CRAVETTO & B. PASA, *The “Non – sense” of Pre - contractual Information Duties in Case of Nonconcluded Contracts*, ERPL, 2011, 759 ff.

⁽⁸²¹⁾ In Italy, see d.lgs. 2010, March 26th, n. 59.

⁽⁸²²⁾ In Italy, see Article 31 of the d.lgs. 59/2010.

⁽⁸²³⁾ In Italy, see Article 31(1) of the d.lgs. 59/2010. Article 32(3) of the d.lgs. 59/2010 states that the provider bears the responsibility of the proof that it has provided the information required and that the information is correct and not misleading: another that may overlap with the CESL.



out that the information expected by the provider is basically the same information to be given by a trader dealing with a consumer, according to Article 13 ff. of the CESL. There obviously are several small differences that should be carefully considered, with the implications that would eventually be taken into consideration.

For the time being, there is no need to go beyond the observation of how the knowledge and the level of protection guaranteed to the customer are just about equal in the Services Directive (and the National laws that transpose it) and in CESL.

Article 22 of the Services Directive and Italy's Article 31 of the d.lgs. 59/2010 become truly significant, and the clause of Article 12 of the Commission Proposal becomes truly effective in the area of contracts between a trader and another trader.

It should be stressed that the Services Directive refers to contracts between a trader and a customer, and between a trader and another trader: Article 4 n. 3 indeed defines the recipient of a service as a natural or legal person who, for professional or non – professional purposes, uses or desires to use a service ⁽⁸²⁴⁾. It should also be noted that in contracts between a trader and another trader, the information duties are established in a rule – Article 23 of the CESL – which has the characteristics of a general clause, even with the implementation of standards which, in any case, have the characteristics of open – ended standards (special expertise of the trader, ease with which the other trader could have acquired the information via other means, nature of the information, likely importance of the information, good commercial practice: Article 23[2] of the CESL).

Therefore, regarding contracts between a trader and another trader, the Services Directive and the National laws which transpose it hinder the flexibility of the general clause of Article 23 of the CESL. Such being the case, there is reason to foster doubts on the adequacy of the CESL system for the needs of swiftness and simplicity of transactions between SME ⁽⁸²⁵⁾.

6. – In conclusion, it's possible to offer an overall and concise assessment of the pre – contractual information duties laid down by the CESL.

Considering the pre – contractual information flows in contracts between a trader and a customer; considering the aforementioned misalignments between the CESL and the National laws which transpose the Services Directive in the discipline of the pre – contractual information to be given by a trader negotiating with a customer; considering which spin – off the Services Directive and its transposing laws has for contracts between a trader and another trader; considering all of

⁽⁸²⁴⁾ In Italy, see Article 8 c of the d.lgs. 59/2010.

⁽⁸²⁵⁾ See also N. KORNET, *The Common European Sales Law and the CISG. Complicating or simplifying the Legal Environment?*, <http://ssrn.com>, 15.



these circumstances, a strong push towards the need to adopt corporate compliance function takes place, along with unavoidable administrative costs. This push clashes with the proclaimed need to avoid unnecessary administrative burdens for the trader (Recital 23 of the Commission Proposal). I am not fully aware whether the push has been a conscious act or not. If it were conscious, then the decisions of the European legislator has been somehow contradictory, because the use of the CESL is promoted by the trader who wishes to sell his products, and the trader's decision to stipulate an agreement on the use of the CESL to the other party clearly depends on a cost – benefit analysis⁽⁸²⁶⁾.

⁽⁸²⁶⁾ See also R. ZIMMERMANN, *Diritto privato europeo: "smarrimenti, disordini"*, in *Contratto e Impresa/Europa*, 2012, 30-31; G. LOW, *Unitas via Diversitas. Can the Common European Sales Law Harmonize Through Diversity?*, in 19 *MJ* 1 (2012), 142; J.M. SMITS, *cit.*, 15-16.