Abstract

The field of pre-contractual liability in European law has been subject to relevant transformations, which have modified many national legal systems while implementing European rules via legislation and adjudication. Modifications have occurred both in legislation, with the various directives, including the last on consumer rights, and in the Proposed Regulation on a European Common Law of Sales which follows the Draft Common Frame of Reference (DCFR) and the Feasibility study (Common Frame of Reference; CFR).

The emerging picture in the Common European Sales Law (CESL) is rather complex and enhances the fragmentation of regimes currently in place, thereby multiplying, instead of reducing, search and transaction costs. CESL is a regime of European sales law, which is intended to regulate cross-border transactions. It is currently under examination at the European Parliament. The scope of the regulation is to introduce a regime for cross-border transactions that individual Member States can further extend to domestic transactions. It constitutes an opt-in system that parties can choose to adopt to regulate their transaction. In B-to-B transactions, it may constitute an alternative to the CISG, which applies by default to the signatories. In the B-to-C context, it constitutes an alternative to national regimes that are now designed primarily on the basis of European legislation, which combines minimum and complete harmonization.

In this essay, the analysis of pre-contractual liability will be used to substantiate a broader claim: that is, the weakness of a status-based approach to contract law and the desirability to move to a transaction-based approach, which would include references to supply chains. The intuition is that the manner of what information should be disclosed, how disclosure should occur, and whether misrepresentation might materialize, are considerations which depend on the type of transaction: whether a standardized or a customized one.

European contract law (ECL) was established primarily as consumer law and enacted with the primary objective of achieving a higher level of consumer protection. Only subsequently has the harmonization of contract law been related to the internal market project, which has now become a primary objective. This trend has brought about the shift from minimum to complete harmonization. This can be observed over the last 20 years looking at the changing approach from the Unfair Contract Terms Directive to the Consumer Rights Directive (CRD). While it is generally true that the CRD adopts a full harmonization approach, it should be underlined that MS are nevertheless allowed to maintain or adopt new provisions in the domain of pre-contractual information requirements.

2 See Consumer Rights Directive (hereinafter, CRD) 2011/83 art. 5.4.
The link is today grounded in the reference to art. 114 TFEU, providing the legal basis for the CESL. However, the objections and reservations raised in the debate within political and academic circles suggest that the internal market orientation might not constitute the most solid foundation for harmonizing EU contract law3.

The consumer-protection origins of ECL have created a status-based approach, which differentiates contract rules according to the identity of the party. The initial distinction was based on a tripartite classification: (1) Business-to-business (B-to-B), (2) Business-to-consumer (B-to-C) (3) Consumer to consumer (C-to-C). The rationale for the distinction was, and to a large extent still remains, the notion that consumers need specific rules to be protected given asymmetry of information and bargaining power4. This process had already commenced in some MS, particularly those that had introduced legislation on unfair contract terms in the late seventies5.

From a comparative perspective, the scenario in the US looks rather different. State contract common law is seen as an integrated discipline that includes different types of transactions. So is the UCC which has introduced limited number of provisions specifically applicable to consumers. In general, consumer protection is achieved through administrative regulation rather than through the introduction of a specialized body of rules only applicable to B-to-B contracts. When it comes to considering a scholarly approach, contract law in the US is seen primarily as facilitative in nature and designed to regulate B-to-B contracting6. Only a minority of scholars recognize that consumer contract law departs from general contract law and constitutes a separate discipline.

Referring back to the situation in Europe, a short time after the enactment of legislation, a debate emerged on the scope of consumer protection and the extent to which spillover effects on non-consumer transactions might and should occur. The implementation strategy has differed across MS: while in some countries consumer law has been consolidated into special acts (codes or framework legislation), in others it has become part of the general contract law (for

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example, this has been the case in respect of the modernization process in Germany, with the BGB reform of 2001).

In the last 15 years, a discourse has emerged at both the EU and Member State levels, on whether the scope of consumer protection should be extended to other categories of contract. In fact, the question can probably be conceived as a broader one: Should contract law be consumerized? Should the rules devised in the field of consumer contracts become general rules of contract law?

In particular, the focus has been on the role of SMEs and the desirability of contract rules aimed at providing greater protection, thereby breaking the unitary front of B-to-B contracts into separate status-based transactions, depending on whether one party is an SME. This debate has stimulated proposals concerning unfair contract terms and the application of consumer rules to the relationship between MNCs and SMEs. This path has received some consideration in national legal systems and has been partially endorsed by the European Commission in the CESL7.

CESL endorses this approach since it introduces SMEs as specific contracting parties. According to art. 7, the CESL can only be applied if one party is a trader. If all of the parties are traders, the CESL may only be used if at least one party is an SME.

This choice leaves out (therefore to be regulated by CISG as a default) transactions between large enterprises (MNCs). In comparison to the integrated approach of national legal systems that arose in the codifications of the 19th and 20th centuries in Europe, as a response to fragmentation, the scenario in sales would be divided into at least three macro-regimes: (a) one for sales among large enterprises (CISG), (b) one for sales among consumers (national legal systems), and (c) a third, complex architecture at the EU level8.

The result, if the CESL will be enacted, will be a multilevel regime of sales laws which partitions regulation along the international, European and Member State levels, according to the status of the contracting parties beyond the now-consolidated partition between B-to-B and B-to-C parties. Contracts among large enterprises will, by default, be regulated by the CISG. Contracts between large enterprises and SMEs can be regulated by the CESL or under national systems including CISG. Contracts between SMEs can be regulated by the CESL or the national systems including CISG. Contracts between large enterprises or SMEs and consumers can be regulated by the CESL or under national systems. Contracts among consumers are regulated by national systems. The degree of fragmentation of the sales system would be prima facie enhanced rather than reduced with implementation of the CESL9. Clearly, if the CESL becomes the

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7 See for example the recent art. 62 L. Consider the situation in Italy, where consumer law has been applied to micro-enterprises; see Law Decree 1/2012, approved on January 20, 2012.
8 In relation to CISG it should be clarified that a regime of pre-contractual duties to inform is missing and left to the national systems.
9 CESL approach constitutes a step back in relation to DCFR that had tried to define a general duty applicable to both B-to-B and B-to-C. The structure departs even more deeply from the
dominant regime then fragmentation might, in the long run, be reduced but as it is an opt-in system, the length and the final result of the process will be based on parties’ incentives and power to decide the applicable law.

This outcome is highly questionable from an economic standpoint at least on two grounds:

1) Using the status of the party as a justification for legal intervention constitutes a very poor proxy. Being a consumer, an SME or a MNC in itself does not call for a special regime. Rather, asymmetric information, cognitive abilities and level of bargaining power might constitute the real rationale for devising specific legal rules.

2) Multiplication of statuses renders the very purpose of market integration very costly because it forces the modification not only of contracts but also of communication practices according to the status of the parties, which in the case of SMEs may be hard to know ex ante.

This essay proposes a radical shift in relation to the European approach, moving from a status to a transaction-based approach. What justifies legal differentiation is the nature of the transaction and the bargaining power of the parties determined also by the market structure rather than the status itself. The proposal advanced is therefore to distinguish between two macro categories: standardized and customized transactions. The former are generally either unilaterally regulated by MNCs or defined by standard contract forms drafted by multi-stakeholder organizations like trade associations and consumer organizations while the latter are negotiated by parties in relation to their specific needs. Accordingly the unit of analysis itself should not be determined on the basis of whether a consumer or an SME is part of the contract. Rather whether the prospective transaction will be carried out via a standardized or a customized contract is what can justify legal differentiation.

A second relevant shift reflects the notion that, even within a transaction-based approach, the unit of analysis should often be the supply chain rather than the individual transaction. Transactions, in particular sales, between suppliers along the chain can be fully understood only by looking at the influence that the leading enterprise plays along the chain in the definition of contract terms and contractual practices including payment systems and dispute resolution mechanisms.

The analysis will be circumscribed to the area of information and pre-contractual liability but the conclusions drawn have broader applicability subject to further scrutiny.

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Acquis Principles where there was a general duty applicable to all types of pre-contractual relationships (2:201) with additional obligations for consumers (2:202) and special provisions for disadvantaged consumers (2:203). See Acquis Group (ed), Principles of the Existing EC Contract Law; Contract I: Pre-contractual Obligations, Conclusion of Contracts. Unfair Terms, (Sellier, 2007).
Pre-contractual liability in CESL and in the consumer rights directive: from consent to reliance?

European pre-contractual information has developed along two important trajectories:

(a) An increasing detailed definition of pre-contractual duties to inform becoming an integral part of the contract.

(b) The contractualization of 'spontaneous' public statements made by the seller or other parties along the supply chain before contract conclusion.

Both sources of information have become part of the contractual content in consumer law, shifting dramatically from a will to a reliance-based approach. The binding effects of pre-contractual information are the result of growing relevance to reliance that has replaced the notion of will in consumer transactions. The underlying assumption is that most or all consumer transactions are made via standard contract forms unilaterally drafted by the trader and that the consumers' will in determining the content is absent. However, this assumption is empirically not well-grounded since evidence shows that there is scope for bargaining and negotiation over some of the terms, including price, not only in regulated markets but also in some of the commodities markets.

The European perspective has modified the national approaches. This modification has been more radical for legal systems like the English contract law, which, until the European influence became apparent, had not given reliance a paramount position.\(^{10}\)

The CESL follows the European approach and distinguishes within sales law between B-to-B and B-to-C. The CESL regime of pre-contractual liability is strongly differentiated depending on whether the information is directed to consumers or to traders.

Two main regimes have been designed: one applied to consumers regardless of whether the trader is a MNC or an SME, while the other applied to traders including pre-contractual information transferred both from SMEs (generally suppliers) to MNCs and from MNCs to SMEs. As already mentioned, this regime does not apply to pre-contractual liability between MNCs, to which national laws rather apply.\(^{11}\) In this particular area, the additional fragmentation concerning the distinction between SMEs and MNCs has not taken place.

The regime applied to consumers, specifies the content of the duty to inform which includes the main characteristics of the good, the contract terms, the identity of the trader, the price and the conditions to determine the price (Art.20,


\(^{11}\) Here, national legal systems apply since CISG does not have a pre-contractual liability regime.
CESL; art. 5 CRD). Such a detailed and specific regulation of pre-contractual duties clearly reflects the choice of rules rather than standards. The focus is on what information has to be transferred to the other party; the law determines via mandatory rules the content of these duties. By defining mandatory information, the law defines the minimal content of the contract when it requires that this information becomes an integral part of the contract. The effectiveness of these information duties to enable consumer choice among different standard contract forms is debated. The CESL omits to consider how relevant the role of information intermediaries in processing and comparing information has become for the purposes of reducing the complexity and highlighting the differences among divergent contracts. This omission is part of a broader fallacy of the whole project, which assumes the irrelevance of actors and governance. I have highlighted these major weaknesses in the European project elsewhere\textsuperscript{12}.

The consumer regime is then further differentiated for off-premises and distance contracts\textsuperscript{13}. As such, different types of transactions are taken into account within the macro-category of consumer contracts. Unlike its predecessor, the Cfeasibility study, which clearly stated that this information was to become an integral part of the contract, the CESL omits to state this consequence as a general principle, as does the latest version of the consumer right directive\textsuperscript{14}.

In addition to the duties to inform the law also regulates information freely produced before the contract is concluded. One important dimension is related to the obligation of including the content of pre-contractual information into the contract. This is defined in art. 69, CESL and has become a general principle applicable both in respect of information to be provided to consumers and to traders, with an important difference in respect of consumer transactions, which we will examine below.

The regime applicable to traders follows a very different logic. The rules define the criteria applicable to determine the content of the duties to inform but not the content of the duty itself. It constitutes a standard rather than a set of rules. The general criterion leading to the determination of the supplier’s information duties is the other party’s expectation\textsuperscript{15}. The trader-buyer should receive the information that he could be reasonably expected to receive. A comparative metric is then designed to consider at least:

a) The incentives to acquire information on both sides of the transaction;


\textsuperscript{13} See art. 2, of the Proposal for a Regulation on CESL, on "definitions".

\textsuperscript{14} Contrast art. 13 of the CFR where paragraph (2) states that the information provided form an integral part of the contract as a general principle for consumer contracts, whereas this principle is limited to distance and off-premises contract under article 6 (5) of the consumer rights directive and identically in the CESL, at art. 13 (2).

\textsuperscript{15} According to art. 23.1 " The supplier has the duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods..." (the supplier) has or can be expected to have".
b) The costs of acquiring the information and the ease of the other party to acquire it through other means;

c) The content of the information to be conveyed and its relevance for the transactional choices.

The criteria indicate the level of expertise of the seller (supplier) and the costs to acquire information, which are correlated to the possibility for the buyer to acquire information by other means.

The rule reflects a rudimental economic approach where a comparative analysis, concerning the information acquisition and transfer by the two contracting parties, should be employed in order to determine the existence of the duty and its content\textsuperscript{16}. Thence, the seller (supplier) should define the content of its duty by analyzing where she has a comparative advantage in acquiring and transmitting information over the buyer. Clearly, as the potential buyer is unknown to the seller at the time of information acquisition, the only plausible criterion in which the seller might invest in respect of information provision is that of the "average buyer". Here, the prospective expertise of the buyer plays an important role. Strangely enough, the duty to inform existing between traders assumes that the seller is better informed than the buyer. As we shall see in many supply chains, it is often the case that the retailer or the final producer (buyer) is often the party better informed, especially when the selection of sellers takes place via private procurement. In this framework, it is the buyer rather than the supplier who has information about the goods and its characteristics; when this is the case, the duties to inform should at least be mutual. More importantly this information is often generated along the whole supply chain and distributed among the parties; thence the need for a supply chain approach to sales developed below.

Clearly, even the rudimental cost-benefit analysis should be carried out differently if the assumption is that there is unilateral or bilateral asymmetric information. The provision conflates two different aspects: (1) who should produce the information (considering the comparative costs to produce information) (2) when should information be transferred (considering the comparative costs to transfer/acquire the information). In relation to the first dimension, the issue is not asymmetric information in itself but rather the identification of who is in the best position to produce the information. In relation to the second dimension, the information is available to the seller, or (as we have seen), available to the buyer, and the comparison should allow for determination of whether it is cheaper to transfer the information or alternatively, for the other party to acquire it through other means.

While the approach in consumer sales has strongly shifted to a reliance-based approach, in the business-to-business context, the focus remains on procedure rather than on the content, an understanding that suggests a different balance between will and reliance depending on the status of the parties. The standard defined by the CESL in BtoB does not differentiate between MNCs and SMEs nor

does it make a distinction in relation to the type of contractual instrument, that is, whether it is a standard form contract or a relational contract.

Communication occurs not only on the basis of duties but also on the basis of choices freely made by the seller or by other parties along the supply chain to which she belongs. As mentioned above, despite the different approaches that might be adopted, a common principle coming from consumer contract law concerns the role of pre-contractual ‘public’ statements. Art. 69, CESL states that a statement made to the other party or made publicly is incorporated as a term of the contract unless the other party “… was aware that the statement was incorrect or he could not otherwise be relied on …”. Incorporation therefore does not take place if the other party was aware that the statement was not correct or that the statement could not have influenced the transactional choice. The idea underlying this approach is that when the statement is blatantly incorrect, it will be the law of advertising and direct marketing rather than contract law, which exists as the instrument applicable to deter misleading and deceptive communication. Contract law will only become relevant when there is ambiguity about the correctness of the statement and where incorporation will occur. The rule partly reflects the consumer ‘acquis’ but constitutes a generalization of the principle of incorporation. As such, in a transaction in respect of which an MNC advertises a product to be bought by an SME, the statement will become part of the contract. In a consumer transaction, a statement made by parties and directed upstream in the supply chain is attributed to the trader and therefore becomes part of the contract. Unlike the duties in respect of which the information becomes part of the contract only in off-premises and distance contracts, in this context, the principle is general and encompasses both B-to-C and B-to-C contracts.

The rule was first introduced in consumer contract law on the grounds that consumers were subject to marketing techniques that could induce them to enter into a contract on the basis of misleading pre-contractual information, which might thereafter be contradicted or omitted in the content of the final contract. Clear signs can be found in the Package Travel Directive, in the Consumer Sales Directive and in the Time-Sharing Directive. A somewhat similar provision was introduced in the UNIDROIT Principles but did not refer specifically to the pre-contractual phase.

In the ‘acquis principles’, a distinction was made between pre-contractual statements made by a contracting party and pre-contractual statements made by a third party. As the doctrines of both fraud and mistake seemed to be

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17 See art. 3(2) of the Package Travel Directive 1990/314 and art. 6(1) of the Consumer Sales Directive, 1999/44 and Art. 5(2) of the Timeshare Directive 2008/122.

18 See art. 1.8 UNIDROIT Principles, Inconsistent behavior, which provides: “A party cannot act inconsistently with an understanding it has caused the other party to have and upon which the other party reasonably has acted in reliance to its detriment”.

19 See respectively Art. 4:105 Pre-contractual statement by a contract party and Art. 4:106: Pre-contractual statement by third parties. Art. 4: 105 further provides: Any public statement which a business, prior to the conclusion of the contract, makes about the specific characteristics of the goods or services which it supplies is binding under the contract unless:

(a) When the contract was concluded, the other party was aware, or should have been reasonably aware that the statement was incorrect, or
incapable of affording sufficient protection to the principle of informed choice, the 'sanction' of coerced contractual incorporation of the public statement was introduced. This notion already reflects the European law provision in respect of consumer contracts as provided for in the CRD of 2011. The CESL broadens the scope of application to all types of transactions including those between traders. The rule reflects the emphasis on protection of reliance and that the burden is to fall on those who make statements concerning goods and services to avoid deception and verify the accuracy of the statement.

The rule has represented and, providing that CESL will be enacted, will represent a major transformation of European contract law since it attributes to reliance a paramount role, decreasing the role of will in sales law. Parties are bound by their pre-contractual behavior to a much larger extent than in domestic systems because they generate reasonable reliance in respect of potential buyers with statements about the characteristics of the goods or their prices. The shifting balance between reliance and will forces redefinition of the distinction between pre-contractual and contractual phase. The significance and relevance of the boundaries are dramatically reshaped. Behavior and choices made during the pre-contractual stage become part of the contract. Pre-contractual behavior influences dramatically the contractual design and implementation.

The extent to which the rules defined in the CESL are able to generate incentives to achieve optimal reliance is an open question; in particular, the extent to which precontractual opportunistic behavior on the buyer’s side can be prevented, will depend on judicial interpretation of the rules and on the coordination between private and public regulators and judges. The prediction therefore is that there is scope for both the style and content of advertising and marketing practices to be seriously affected by these rules concerning precontractual statements.

From a status to a transaction-based approach in EU sales law?

The distinction between the consumer and the trader regime adopted by CESL is not well explained by the different status of the contracting parties; rather, it can be more usefully associated with the structure of the transactions. As such, the structure of the transaction, rather than the status of the contracting party should be the metric for determining the application of the regime.

(b) The other party's decision to conclude the contract could not have been influenced by the statement, or
(c) The statement had been corrected by the time of the conclusion of the contract."

Art. 4:106 states "Art. 4:105 also applies to public statements made by the producer, another person within the business chain between the producer and ultimate customer or any person advertising or marketing services or goods for the business, unless the business was not, and could not reasonably been aware of the statement."

20 See CRD 2011/83, and notice that in the previous version art. 5 included a general principle with eve broader scope.
Two different ideal-types of transactions can be identified: one, standardized, where the terms are pre-defined, and the other, customized, where they are defined by the parties in the pre-contractual stage and often, even after the contract is signed, given the incomplete nature of the contract. Clearly there is a continuum between the two ideal types and the daunting challenge of regime design lies in the determination of where and how to draw the line between the two types of transactions.

It is common knowledge that standard contracts forms (SCF) or boilerplates are used both in business and consumer transactions. The use of SCF can be attributed to a number of reasons, suggesting that benefits may accrue for both sellers and buyers. Economic literature has shown that even in competitive markets we observe the use of SCF, challenging the conventional wisdom, on the basis of which the use of SCF is associated with a monopoly of power on the part of the seller. For certain types of goods and services which do not need particular specifications, SCF may thence be beneficial on both sides since they reduce search and transaction costs.

This is not to deny that often the use of SCF may reflect asymmetric market powers. In B-to-B contracts, SFC can be used on either side depending on where the power is allocated. They can be used by final producers with small retailers or by big retailers with smaller producers.

Without engaging into a full examination of individual rules, which is beyond the scope of this paper, this essay suggests that the unit of analysis to be adopted by EU sales law should be changed from status to transaction, and that the sales regime should be organized around different types of transactions. Such a change will eliminate the juxtaposition between consumer and business contracts, focusing on the real economic rationales that justify different regimes. Only when certain types of transactions are used exclusively in the context of B-to-C contracting there will be a rationale for the maintenance of the current distinction.

For the purposes of this essay, I simply propose to take the current, yet debatable, scheme and organize it around transactions rather than status. A deeper analysis would suggest relevant changes concerning the content of the rules but this is beyond the scope of the paper22.

Accordingly, the regime proposed by the CESL for the consumer may be better explained by reference to the more general category of standardized

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22 Clearly the most problematic features are related to the applicability of the regime to precontractual liability given that CESL application requires opt-in when contract is concluded. Linked to this problem is the lack of remedies for precontractual violations when the contract is not concluded. Just to mention a few more relevant missing rules the section on pre-contractual duties does not define the nature of liability and the recoverable losses. It does not distinguish between pre-contractual liability when contracts are not concluded and pre-contractual liability when contracts are concluded. In the latter case does not specify the relationship between validity and liability rules.
transactions, regardless of whether they are B-to-B or B-to-C\textsuperscript{23}. Standardized transactions operate via standard contract forms, which have specific properties in relation to other types of contracts. SCF should be seen as vehicles to convey information. When consumers or customers read a form they also acquire the information concerning the characteristics of the transaction itself but often also of the characteristics of the goods to be purchased. This is one of the features that characterize the ‘commodification’ of contract in standardized transactions\textsuperscript{24}. More specifically, the rules on pre-contractual duties of information are not functional to facilitate negotiations but to enable the choices by the consumer, when the market is competitive and she faces alternative options. Reliance on the information rather than will is the interest that is to be primarily protected by precontractual duties. Thus, the shift from a status to a transaction-based approach would permit the application of that regime to all standardized transactions including those between MNCs and SMEs. It should be clear that this suggestion does not imply my adhesion to the content of the current CESL proposal, which, as mentioned earlier, needs to be significantly modified. However the process of legislative modification would find itself with a much more principled basis, if the type of transaction rather than the status of contracting party were understood to constitute the starting point.

The regime proposed for traders may be better explained by making reference to customized transactions where the aim of pre-contractual information is to enable negotiations rather than choice. There is no reason why such a regime should not also apply to consumer transactions when, rare as it might be, they are not based on standard contract forms but on negotiations with the trader. Unlike standardized transactions where the contract form constitutes a vehicle to convey information, even at the pre-contractual stage, in customized transactions, the contract is formed through a ‘conversation’ between the parties\textsuperscript{25}. These conversations imply mutual learning via an exchange of information, which is based on a combination of duties to inform and spontaneous transfers of information. The legal regime should favor the ability of parties to select contractual partners and to define the contractual content. Unlike in the standardized transaction, where the focus is on choice, as the content is pre-defined here, choice and content are intertwined and determined by the negotiation process.

The distinction between standardized and customized transactions does not necessarily reflect the distinction between standardized and relational contracts. There is a wide range of intermediate types of transactions with different degrees of customization. Within standard forms for example, a sub-distinction should be made between modular and rigid forms. In the former case, SCF are

\textsuperscript{23} The specificity of consumer transactions can be maintained at a second order level in order to analyze the domain of choice, the degree of cognitive abilities that consumers might possess.

\textsuperscript{24} See A. Leff, ‘Contract as a Thing’ (1970) 19 American University Law Review; M. Trebilcock, The Limits of Freedom of Contract (Harvard University Press, 1993); M. J. Radin, ...

conceived as modules that can be used and recombined by the other party, depending on the allocation of power between the buyer and the seller. The modularity generates precontractual conversation different from a contract whose content is entirely defined by the parties.

Increasingly there is evidence of contractual negotiations over standard terms in consumer transactions. In newly liberalized markets, including telecom and electricity, where competition is fierce, negotiations occur over price or duration of the offer. Consumers and customers of utilities are offered different types of product with related financial arrangements. This practice confirms the necessity to adapt the idealt type of standard contract forms to different types of precontractual ‘conversations’. The two macro categories have to be conceived as starting point rather than conclusive variables around which partition the EU sales regulation.

The proposal to move to a transaction-based approach does not disregard the rationale underlying consumer protection but rather considers these rationales within the broader spectrum of market regulation, and in the specific example of information regulation, via pre-contractual liability. Looking at transactions rather than at the status of the parties, consumer protection becomes part of market regulation via contracts.

The adoption of transaction as the basis for defining regimes does not imply the outright rejection of some of the parameters associated with the status-based approach, which can be maintained and usefully deployed. For instance, the level of expertise of the buyer and the degree of professional knowledge should be deployed to evaluate the ability: (1) to acquire information independently; and (2) to test the reliability of the information supplied by the retailer and measure reasonable reliance. This metric can be easily transposed to a transaction-based approach.

The introduction of a transaction-based approach may affect the rule on pre-contractual public statements. In the current wording of art. 69, CESL the statement is either correct or incorrect. The awareness by the recipient is primarily, if not exclusively, dependent upon her cognitive abilities. Clearly, it makes a great difference for the purposes of determining awareness whether, and if so, what kind of pre-contractual negotiations occur. If the transaction is standardized and no negotiations occur there is little room for correction, and therefore primarily reliance should be placed on the recipients’ abilities. If however the transaction is customized and there is room for negotiations, ambiguities and misunderstandings can be corrected before the contract is concluded. The awareness is the outcome of an interactive process between the parties rather than a reflection of the recipient’s cognitive abilities. Accordingly, incorporation of pre-contractual statements into the contract should be

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dependent upon the entire communicative process between the parties. Only if the incorrect statement has not been corrected or clarified during the negotiation process, should incorporation occur. On the contrary, when no negotiations take place and the transaction is regulated by the unilaterally defined terms then incorporation of the statement should take place on the basis of the cognitive abilities of the recipient. Here, differences between consumers and expert businesses should play a role even in respect of standardized transactions.

Including supply chain into the transaction-based approach to pre-contractual information

A transaction-based approach can contribute to the determination of when consumer protection regimes should be extended to other categories. However, the focus on individual transactions might be insufficient and limited. Production and distribution processes occur along (global) supply chains. Information is produced and distributed among the different participants to the supply chains. The information about the product and increasingly, about the process, accumulates along the chain and flows downstream towards consumers. Rather surprisingly, the CESL refers only briefly and sporadically to the chain in relation to pre-contractual statements. As mentioned, public pre-contractual statements, made before the contract is concluded, become part of the contract, subject to the conditions examined above. Art. 69, CESL states that ‘when the other party is a consumer, a statement made on behalf of the producer or other person in earlier links of the chain 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 have expected to have known it’.

This rule broadens the scope of incorporation into the contract by including statements made by parties along the chain. The recognition that information for the consumer can come from various sources, which all influence the transactional choice, suggests the relevance of the chain for defining information flows and transfers.

Two questions arise: is there any reason why only the consumer and not a commercial buyer should be influenced by public statements, including advertisements and commercial communications, in their transactional choices? The rule should be applied, perhaps with some margin for correction, to the supply chain, regardless of whether the sale is to consumer or commercial parties.

A more important dimension can be identified, which is related to the necessity of coordinating information duties along the chain in order that the transmission of information between suppliers and retailers will ensure accuracy in respect of the final recipient of the information. The scope of legal intervention here is not only to define who should inform whom about what. The relevant dimension is how parties should coordinate in order to maximize the flow of information but remain able to correct mistakes and inaccuracies about goods or services to be
sold. Thus, it would be important to recognize an organizational dimension of the duty to inform that would imply a duty on the supplier to organize coordination among the different knots of the chain concerning information production and transfers. This is very important when hazards and defects, dangerous for human health, arise and the product has to be withdrawn and/or recalled. While the reference to the standard of care as a measure to define the content of the duty and the standard of performance can be criticized, it can be helpful to explore how the organizational dimension of the chain can be incorporated in the information duties of the suppliers. The transaction-based approach, integrated by the inclusion of the supply chain, highlights the organizational dimension of pre-contractual duties and liabilities along the chain. It also suggests that the organization of information flow cannot be divided according to the pre-contractual and contractual stages. Often the same organizational model, in place initially to ensure that information is correctly conveyed to the final buyers before the contract is concluded, is also used to ensure compliance with information requirements concerning products hazards, which emerge after the product has been marketed and/or sold.

Such an organizational dimension may require the creation of information networks along the supply chain to optimize information production and dissemination in both directions: upstream and downstream. Often the organizational dimension of information flow operates regardless of whether the final beneficiaries are consumers or business customers who buy the final product. Here again, the distinction between B-to-B and B-to-C is not very helpful in the design of information regimes concerning the pre-contractual and contractual stages whereas modes of contracting could be a more relevant factor.

Concluding remarks

In this essay, a shift in approach to ECL has been advocated, that is, from a status to a transaction-based approach. The proposal articulated in relation to sales law and the CESL has a broader scope and invites rethinking about the architecture of ECL. The traditional partition of European contract law, which regulates separately consumer and business transactions, has become problematic for several reasons. The CESL poses new additional challenges to the extent that it tries to define an integrated regime that should regulate cross-border sales but instead multiplies sales regimes increasing transaction costs. As mentioned, one of the main problems of the CESL is its failure in addressing governance questions concerning the role intermediaries and private actors in promoting devices to reduce information complexities arising from the existence of multiple languages and business cultures. This failure is bound to be relevant given the paramount importance of parties’ incentives in an opt-in system.

The attempt to build an integrated EU sales law requires identification of the determinants concerning regime variation. In particular, this concerns the determination of whether the status-based distinction between B-to-B and B-to-C contracting holds, in light of the necessity to incorporate the specificity of SMEs, both when they interact with MNCs and when they interact with consumers. There is an increasing attention paid to the role of SMEs in Europe,
due to the recognition that they constitute the backbone of European economy. The political pressure to provide them with a special status vis-à-vis MNCs, both European and international in its nature, has brought about a fragmented and difficult to administer web of regimes within the CESL. Since it is an opt-in regime, it is hard to believe that parties will have adequate incentives to opt in. The paper proposes a radical shift in order to move to a comprehensive sale regime: moving from the status of the parties to the structure of the transaction and distinguishing between standardized and customized transactions. The claim is that the level and quality of disclosure might depend on the structure of the transaction, which is reflected in the type of contractual instrument deployed. Within this macro-distinction, sub-distinctions concerning intermediate versus final markets, consumer versus professional traders, and monopoly versus competitive markets, can be factored in as rules or standards. The proposal is applied to pre-contractual information, possibly one of the most problematic areas of the CESL, given that they become enforceable only when contracts are concluded, whereas no enforcement mechanism is provided if contracts are not concluded (in which case, national systems and private international law will apply).

The proposed distinction between the two ideal types is based on the notion that will and reliance might have a different balance according to the type of transaction, distinguishing: (1) when the content of the contract is unilaterally predefined; and (2) when it is the result of negotiations. In the first case, the contract is a vehicle to inform the other parties and enable them to choose among different options. In the second instance, the contract is the result of a ‘conversation’ between the parties taking place before its conclusion. Both duties to inform and ‘spontaneous’ statements perform different functions in relation to the two ideal types: in the standardized transaction, the main goal is to protect reasonable reliance; in the customized transaction, it is to ensure informed determination of content, thus primarily will protection is the main goal of legal regulation. Between the two ideal types, there are several intermediate structures that define customization; differentiation of rules may be appropriate in order to tailor them to specific procedures. Furthermore, often the single transaction does not capture the process through which information is produced and aggregated. In this instance, the supply chain, that is, the web of transactions rather than individual ones, should become the unit of analysis, allowing for coordination of the information duties along the chain.

This complexity suggests that mandatory rules might not be the most suitable instruments for regulation. Default rules may provide better alternatives in distinguishing between different types of customization. Yet even more importantly, standards rather than rules may offer parties guidance to define their information policy. The proposal to move from status to transaction implies a radical transformation of the EU culture of consumer protection and the facilitation of an internal market well beyond sales. It calls for a deeper and wider scrutiny of its theoretical foundations and practical implications. The

agenda for future research leads towards a better and more sophisticated
differentiation between transactions, and the testing of the distinction in other
fields, for example, that of remedies.