REGULATORY TECHNIQUES IN CONSUMER PROTECTION:
A CRITIQUE OF THE COMMON EUROPEAN SALES LAW

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Abstract

This Article classifies the consumer protection techniques that the CESL employs into four categories: Mandatory arrangements; disclosure; regulation of entry to and exit from contracts; and pro-buyer default rules. It argues that these techniques are far less likely to succeed than the drafters believe, and that they may bring about unintended consequences and hurt consumers. Moreover, the problems we identify with the design of the CESL will likely prevent the CESL from attaining its purpose of harmonizing European sales law and enhancing access to markets.

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Introduction

The Draft Common European Sales Law (CESL)\(^1\) uses four major techniques to protect consumers. Unfortunately, these techniques’ superficial appeal does not withstand economic logic. This article argues that the CESL provisions designed to protect consumers are far less likely to succeed than lawmakers and commentators believe, and that they may bring about unintended consequences and hurt consumers. Moreover, the problems we identify with the design of the CESL will likely prevent the CESL from attaining its purpose of harmonizing European sales law.

The four consumer protection techniques employed by the CESL are (1) mandatory pro-consumer arrangements, which must be part of every consumer contract; (2) mandated disclosure; (3) regulation of entry to and withdrawal from contracts; and (4) pro-consumer default rules and contract interpretation. Each of these techniques is utilized extensively and repeatedly in the CESL. None of these approaches is new, but the fervor with which they are implemented is almost unprecedented.

The first technique—mandatory pro-consumer arrangements—is perhaps the most phenomenal device. Eighty-one (!) provisions in the CESL are mandatory: sellers cannot write contracts that derogate from these arrangements to the detriment of consumers. The mandatory provisions involve remedies, withdrawal rights, risk of loss, warranties, notices and communications, disclosure rules, and

\(^1\) REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Common European Sales Law, Annex I: Common European Sales Law (hereinafter we refer to Annex I as “CESL” and to the entire Regulation as “Regulation”).
more. It is hardly an exaggeration to conclude that “freedom of contract” applies only to the quality of the product and its price. There is no freedom of contract with respect to the “quality” of the standard form terms.

We argue that many of these superficially protective rules are unlikely to help consumers as a group. The ex post pro-consumer arrangements will be priced ex-ante. Consumers will thus pay for protections that many of them would rather waive for a discount. This price effect is particularly disturbing when it is regressive—namely, when all consumers pay for what only the more sophisticated ones enjoy. Ironically, the wholesale inclusion of mandatory terms undermines, rather than promotes, “social justice” concerns, which intend to protect weaker consumers and secure their access to the markets. More fundamentally, we argue that many of the mandatory arrangement lack an a-priori welfare-enhancing justification, because they are not responding to some systematic market failure or to a systematic redistributive problem.

The second technique is, unsurprisingly, mandated disclosure. This is a standard staple of consumer protection: give people information to help them make better autonomous choices. “Sunlight is the best of disinfectants,” as the truism goes. Unfortunately, the types of disclosures that the CESL mandates are likely futile. Extensive past experience in consumer protection suggests that standard consumer “informed consent” techniques fail. They are not read nor used, and they are beyond most people’s care or understanding. Mandated disclosures are used so extensively, in so many areas of the law, that people view them with apathy and resentment, if

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they consider them at all. While novel approaches to smart disclosure are being experimented with elsewhere, the CESL’s disclosure paradigm adopts archaic templates that have consistently failed.

The third technique is the regulation of entry to, and withdrawal from, consumer contracts. These rules are intended to promote freedom from contract: help consumers avoid transactions that are otherwise the result of “passive” contracting. Entry regulations help consumers make deliberate, conscious choices, suited for their needs. Withdrawal regulations help them correct poor choices without bearing any pecuniary fine. Here, too, the CESL takes a sensible technique but leverages it to an extent that is unjustified and is likely to be either ineffective or harmful. The regulation of conscious entry is merely another form of disclosure, likely to be as ineffective as other mandated disclosures. And the regulation of withdrawal applies a practice that is already prevailing in markets and imposes it in contexts where it might hurt, rather than help, consumers.

The fourth and final regulatory technique is the supplementation of incomplete contracts with pro-consumer default arrangements. We find relatively less use of this device for the simple reason that many arrangements that operate as gap-fillers in other sales statutes are accorded mandatory status in the CESL. But, interestingly, the few pro-consumer default rules are bolstered by “stickiness.” Parties can opt out, but the procedure for these opt-outs is more rigorous and costly. While sticky default options are a growing trend in consumer protection law—a strategy designed to slow down wholesale boilerplate opt-outs—we argue that the
opt-out regulation adopted in the CESL is unlikely to generate any benefit, and is more likely to impose unnecessary cost.

In sum, we argue that the major regulatory techniques, as implemented by the CESL, are unlikely to achieve their consumer protection goal. The next four sections examine each of the four methods in more detail. We do not take issue with the substantive content of any of the rules. Looking at each particular rule and rethinking its justification is beyond the scope of this article. Rather, we focus on the methods by which protective interests are promoted—mandatory rules, disclosure, exit and entry, default plans—and evaluate the likely effects of these methods vis-à-vis their objectives.

The fifth and final section explores the implications of our critique to the likely success of the CESL’s harmonization goal. Here, for the first time, we consider the optional nature of the CESL. The inefficiencies we identify make the CESL a less attractive option as governing law. The question – a question that needs to be asked and answered separately for each member state – is whether the CESL is better or worse than the national law and, specifically, whether the CESL is better or worse for the sellers who, by and large, determine whether the CESL will be chosen. We predict that the CESL will be chosen only in member states that have more restrictive national laws. There, the CESL will have a beneficial effect. But it will not achieve harmonization. A full analysis of these issues would require detailed pairwise comparisons between the CESL and the national laws of each member state. Such comparisons are beyond the scope of this article.
I. Mandatory Arrangements

A. The Law

The CESL was designed to provide consumers a high level of protection, and it features many pro-consumer arrangements concerning substantive contractual rights, remedies, formalities, formation procedures, disclosures, warranties, and interpretation. It could have done what many other sales statutes do, and establish these arrangements as default rules, allowing willing parties to opt out of them by express agreement. But anticipating that such default-rules would likely result in standard form opt-outs and disclaimers, the CESL safeguards its consumer protections by according them mandatory, non-disclaimable, status.

The statute includes a dizzying array of mandatory arrangements—provisions that cannot be excluded and can only be modified to favor consumers. While Article 1 declares the basic norm of “freedom of contract” and the right of parties to exclude or alter any of the provisions of the law unless otherwise stated, the remaining Articles state otherwise, unequivocally. In 31 different places, the following sentence appears:

““The parties may not, to the detriment of the consumer, exclude the application of this Article [or Section, or Chapter] or derogate from or vary its effects.”

In all, we counted 81 of the statute’s articles which are bestowed a mandatory status. All of the buyer’s remedies are mandatory, as are the withdrawal rights, the

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4 CESL Arts. 2, 10, 22, 27, 28, 29, 47, 64, 69, 70, 71, 72, 74, 75, 77, 81, 92, 99, 101, 102, 105, 108, 135, 142, 148, 150, 158, 167, 171, 177, 186. In some of the Articles, the sentence quoted in the text appears with slight variations. In a handful of Articles, the phrase “to the detriment of the consumer” does not appear.
disclosure rules, the interpretation rules (more on disclosure and interpretation in parts II and III below), the restitution rules, the risk of loss provisions, some of the implied and express warranties, rules relating to notices and communications, interest for late payments, grace periods, all the prescription rules, and much more.\(^5\)

For example, consumers do not have to notify sellers of non-conformity in order to invoke remedies, and cannot agree otherwise. Consumers have a non-disclaimable right to choose between repair and replacement. A seller must give the consumer a 30-day mandatory grace period if the consumer is delayed in performance. A seller does not have the right to cure incorrect installation of goods. And take-or-pay clauses are forbidden altogether in consumer contracts.\(^6\)

In addition, the CESL bans a long list of terms by establishing that they are always unfair. These include some of the most common choice of forum terms, such as mandatory arbitration or seller’s home court.\(^7\) They also include “asymmetric” arrangements, for example when the consumer is bound but the seller is not, or notice periods that are more lenient to the seller, or remedies that are more forgiving to the seller.

Some terms are banned more “softly” by presuming them to be unfair (although, we take it, the presumption is not conclusive). These banned terms are some of the most common provisions one finds in sellers’ standard forms: limits to buyers’ remedies, one-sided termination rights, sweeping modification clauses,

\(^5\) CESL Arts. 2, 10 [¶¶ 3–4]; Ch. 2, Sec. 1 (10 articles); Ch. 2, Sec. 3 (4 articles); Arts. 28, 29; Ch. 4 (8 articles); Arts. 64, 69, 70, 71, 72, 74, 75 [¶ 2], 77; Ch. 8 (8 articles); Arts. 92 [¶ 2], 99 [¶ 3], 101, 102, 105; Ch. 11 (17 articles); Arts. 135, 142, 148 [¶ 2], 150 [¶ 2], 158, 167; Ch. 16, Sec. 3 (4 articles); Ch. 17 (6 articles); Art. 186.

\(^6\) See CESL Art. 106, ¶ 3(b); Art. 111, ¶ 1; Art. 135, ¶¶ 1-2; Art. 155, ¶ 3; Art. 84(j).

\(^7\) See CESL, Article 84(d).
terms allowing the seller to assign the contract to others, terms requiring
“excessive” advance payments, restrictions on seeking supplies or repairs from third
parties, bundling separate goods and services, or setting contract duration
exceeding one year.

In this cornucopia of mandatory protections, it is important to remember
which elements of the contract are not mandatory. The “main subject matter of the
contract” and the price are excluded from the unfairness tests, and are binding even
if set unilaterally by the seller.8 Surely, subjecting quality and price to mandatory
restrictions would deal a fatal blow to any notion of freedom of contract, and the
CESL honors the parties’ freedom to agree on any quality and price, even if such
agreements reflect harsh bargaining realities. It is precisely this dual structure—
restrictions on the legal provisions, coupled with freedom to set price and quality—
that undercuts the protective ambitions of the statute. We now turn to explain why.

B. Discussion

It is tempting to think that a pro-consumer mandatory regime would benefit
consumers. All else equal, consumers are better off with more favorable provisions.
But all else is not equal. Consumer protection comes at a price. The pro-consumer
terms in the CESL raise sellers’ costs and sellers will pass-on (at least some of) these
increased costs to consumers in the form of higher prices.9 Recall, the CESL
preserves freedom of contract with respect to price.

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8 See CESL, Article 80(2).
9 See, e.g., Richard A. Posner, ECONOMIC ANALYSIS OF LAW (1998); Steven Shavell,
FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004); Richard Craswell, Passing on the Costs of
Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 STAN. L. REV. 361
Of course, higher prices are not inherently bad. Consumers may prefer high-quality products with a high level of consumer protection, even if these high-quality, protection-intensive products cost more. But consumers might also prefer to pay a lower price and get lower quality products with a lower level of consumer protection. People often waive warranty programs, or buy non-refundable items, or choose the slowest delivery option, or decline to insure, because they are cheaper. A 30-day grace period, or a generous remedy, or easy no-questions-asked termination option, are surely beneficial to consumers, but they are also costly to sellers, resulting in higher prices. If most consumers prefer these perks, sellers would offer them and lure consumers with them. The fact that they do not—and that the law needs to mandate them—suggests that most consumers prefer the discount.

The preceding discussion lumps all consumers together, asking whether consumers as a group would benefit from strong protections once these protections are priced. But the consumers are a heterogeneous group, with different preferences and different budgets. Indeed, one of the fundamental objectives of the CESL, and the entire harmonization project, is “to grant access justice to those who are excluded from the market or to who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market.”¹⁰ The protections secured by the CESL are intended to benefit consumers who are otherwise mistreated, denied service, or left without access. Unfortunately, the perspective we offer suggests that the proposed protections would undermine, rather than secure, access justice. While some

¹⁰ Micklitz, supra note 2, at 5. See also Chantal Mak, *In Defense of CESL* (this volume).
consumers may prefer to pay high prices for strong protections, others may prefer the low-price, low-protections combo. Among this latter group are some consumers who would be priced out of the high-protection market. When consumers are heterogeneous, a one-size-fits-all mandatory approach necessarily hurts certain subgroups of consumers. Metaphorically, some air travelers prefer to fly first class, even at the higher airfare. But most consumers would protest if airlines were required, by notion of equal access, to fly all passengers in first class. This is precisely why many people reject extended warranty programs offered by retailers. They don’t want to buy better terms.11

The focus, thus far, has been on heterogeneity with respect to the protection-price tradeoff. Consumers are also heterogeneous with respect to their propensity to benefit from protection itself. Some consumers enjoy a given protection more than others. For example, the right to sue the seller in court rather than arbitration, or the right to obtain strong remedies for breach, is more valuable to consumers who are systematically more likely to enforce these rights. To others—often the “silent majority”—the enhanced access to court and remedies is less beneficial. Many consumers are not aware of their legal rights and protections. Others “waive” their legal rights de facto. They do not complain, do not sue, or reach an “off-contract” understanding with the seller. Indeed, the Eurobarometer survey, cited and relied on by the Commission in proposing the CESL, shows that consumers

report a preference for arbitration over litigation. Since sellers are generally unable to separate, in advance, the more vs. less litigious consumers, all consumers will pay the price of the protections that only the few enjoys. The resulting cross-subsidization clearly hurts the majority of consumers, and it may also reduce total welfare.

This cross-subsidy is often regressive and unfair. The wealthier and healthier consumers are systematically more likely to invoke the protections. People need to be informed about these rights, to have the sophistication to insist on compliance, and to afford legal advice. The poor, the elderly, the less educated—those for whom the protections are enacted in the first place—lack the information, sophistication, and resources. And yet, they bear an equal share of the cost. Thus, mandating such a long list of protections is likely to diminish the access to markets for those who already face the greatest barriers.

While we are skeptical whether the many mandatory arrangements in the CESL benefit consumers, we do not argue that mandatory contract rules are always bad. Economic analysis has sought to delineate the proper domain of this regulatory tool. Mandatory rules limit freedom of contract. They should be used when voluntary contracts cannot be relied upon to maximize social welfare. In general, contracts fail to improve welfare when they impose externalities, or when one of the

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12 Consumer Attitudes Towards Cross-Border Trade and Consumer Protection, Flash Eurobarometer Series #299 (March 2011), at p. 23 (48% of respondents agree that it is easier to resolve disputes with sellers through arbitration; only 33% said the same about courts).
parties is unable to make good decisions. Consumers may fail to make good
decisions either because of asymmetric information or because of imperfect
rationality (and often the combination of the two). A rational, informed consumer
would selectively bargain for the protections that are worth the added price. Less
sophisticated consumers might not fair so well in a laissez-faire environment. They
might fail to appreciate certain risks or powers, and so they might underestimate
the importance of certain protections. When sophisticated sellers face such naive
consumers, the market equilibrium may include an inefficiently low level of
consumer protection. This concern may justify an occasional protection, but it
hardly justifies the CESL’s wholesale inventory of mandates.

II. Information and Disclosure

A. The Law

The regulation of information is arguably the most common and universal
technique in consumer protection law. Based on the irrefutable logic that informed
decision makers reach better, safer, and more efficient decisions—consumer
protection statutes rely plentifully on two devices that deliver information to
consumers. First, they mandate various disclosures, requiring informed parties to
convey specifically prescribed information, in specifically mandated formats, to
specifically designated recipients. Second, they supervise voluntary disclosures to
assure their integrity, with causes of action against deception and fraud.

15 See, generally, Lucian A. Bebchuk, The Debate over Contractual Freedom in Corporate Law,
16 See Oren Bar-Gill, SEDUCTION BY CONTRACT: LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER
MARKETS (Oxford University Press, 2012).
The CESL applies both techniques. As to the anti-deception rules, it places a duty to ensure that precontractual representations are correct, incorporating them into the contract even if they are disclaimed in the standard form.\(^\text{17}\) Since merchants lure consumers by statements that are at times rosier than the subsequent performance, and are often more alluring than the formal boilerplate terms, consumers are entitled to rely on the information given. This is the “basis of the bargain” principle of warranty law.\(^\text{18}\)

More ambitious is the CESL’s approach to mandated disclosure. First, consumer contracts have to explicitly disclose a variety of terms, ranging from the most basic (e.g., price, fees, payment and delivery, duration) to the more specialized (e.g., conditions for termination, post-sale services, digital rights limitations, right to withdraw).\(^\text{19}\) Second, the CESL mandates a “duty of transparency,” which is achieved in several ways. Boilerplate terms have to be communicated “in plain intelligible language.”\(^\text{20}\) Many of them have to be in writing.\(^\text{21}\) And drafters have “the duty to raise awareness” to terms that are particularly important—“a mere reference to them in the contract document” is not sufficient.\(^\text{22}\) A separate and specific acknowledgement of assent is required, to ensure that information passed through. Thus, the consumer must receive not only the standard form contract in a durable
medium, but also a separate disclosure regarding the right to withdraw and its limitations.\textsuperscript{23}

Third, and most innovative, the very fact that CESL is chosen as the governing law has to be disclosed. Recognizing that many consumers are oblivious to lawyerly matters like choice of law, the Regulation strives to raise awareness. It requires merchants to use a uniform Standard Information Notice—a two-page pre-drafted form—that consumers must receive in writing, separate from the merchant’s standard form contract. This disclosure explains and highlights the “core rights” guaranteed by CESL, and provides a quick, two-paragraph tutorial of Sales Law.\textsuperscript{24} Its purpose is formidable:

“Consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. […] The use of the Common European Sales Law should be an informed choice. The trader should […] provide information on its nature and its salient features.”\textsuperscript{25}

B. Discussion

The CESL’s anti-deception rules are quite standard, adopting familiar safeguards for the integrity of voluntary disclosures. Markets that rely on voluntary communications, advertisements, and promises must penalize fraud—for the benefit of both consumers and honest merchants. We are more critical of the CESL’s other information device: its approach to mandatory disclosure.

The disclosure paradigm adopted by CESL represents an archaic and futile regulation of information. These formats of disclosure have not helped people in the

\textsuperscript{23} CESL, Articles 17(4), 19(5), 41(3). The form that the disclosure must take is mandated in Appendixes 1 and 2.
\textsuperscript{24} Regulation, Articles 8-9 and ANNEX II.
\textsuperscript{25} Regulation, Preamble, Sections 22-23.
past, are highly unlikely to deliver any benefit, impose unnecessary costs, and might even have unintended harms.

CESL’s contract disclosures are likely to fail because consumers will not pay attention to them. People do not pay attention to standard forms, neither long nor short, in plain language or in legalese, written or oral, separately signed or unified into one document, handed out in advance or ex post. The failure of consumers to attend to mandated disclosures packaged in pre-drafted language, like ones CESL utilizes, has been documented thoroughly, in area after area of consumer transactions, medical “informed consent,” privacy, financial literacy, and much more.26

Many factors account for this “non-readership” phenomenon. First, CESL alone requires a hefty amount of disclosures, far too time consuming for shoppers to investigate in the course of routine sale transactions. The typical CESL consumer would take home a “packet”: the standard terms of the contract (embellished by specific terms that must be included); the right-to-withdraw disclosure; the actual withdrawal form; and the Standard Information Notice. The packet may actually much heftier, because lawmakers regulate sector-specific disclosures to alert consumers to particular features, risks, costs, and options, unique to some products. In the U.S. for example, there are sector-specific disclosure mandates for sales of cars, appliances, food, drugs, timeshares, prepaid charge cards, burial products, art, pets—and many, many, more. If these sale transactions involve credit, or service elements, or insurance, or implicate privacy issues, or environmental issues, or

conflicts of interests, additional layers of separate disclosures are mandated. In this clutter, how likely are consumers, even the most educated ones, to read the Appendix, the ANNEX, or any of the CESL’s pre-printed boilerplate? And the fact that people might get the CESL’s packet in repeated opportunities might only render it invisible, regarded as another robotic routine—not as a vital information source.

The problems with disclosure as a consumer protection device run deeper, and this is not the place to analyze their roots. Disclosure mandates are written so often without regard for people’s cognitive abilities and literacy levels. They disregard people’s reluctance to read texts that are unfamiliar and imposing. They misconstrue people’s objectives, thinking of consumers as guzzlers of technical information, not as users of products. They tell people stuff about matters that most people have no experience with, which require a theoretical framework to analyze. People do not read the disclosures because good things will rarely emerge from this exercise. It is time-consuming, dull, largely irrelevant, and with the load of disclaimers and warnings it rarely conveys any good news, thus draining their enthusiasm from the transaction. Besides, if they read something they dislike, would they switch to another merchant with its own set of disclosures?

The mandated disclosure paradigm employed by CESL is not only futile, it is costly and harmful. It is costly because it compounds the transactions costs, with extra forms, signatures, clicks, and ceremony, thus extending the time and the waste involved in standard form exchange. It is harmful because the presumption of “informed consent” weakens the effect of other protections. When a term is disclosed, it is no longer “hidden.” Courts that are willing to strike hidden terms
when they are also found to be one-sided, would hold back if consumers are presumed to be “fully aware.”

The disclosure paradigm adopted by the CESL is likely to fail. This does not imply that disclosure, as a regulatory tool, can never work. If mandated disclosure is to help consumers, a new approach must be adopted – one very different from the traditional paradigm that the CESL implements, and with far less ambitious goals.

Effective information tools come in two general forms:

(1) Very simple, aggregate metrics that consumers can easily understand and compare, like total cost of ownership or satisfaction ratings.

(2) Information that is designed and aimed to facilitate the work of sophisticated intermediaries.

Of course, the proper place for such “new paradigm” disclosures is not in a general sales law like the CESL, but rather in market specific laws and regulations.

III. Regulating Entry and Withdrawal: Freedom from Contract

A. The Law

The regulation of entry into contract and withdrawal from it are key consumer protection techniques. They help consumers choose the deals they want without artificial time pressure and bias, and they allow consumers to correct poor choices hastily made. With greater freedom from contract, merchants are less able to afflict consumers with unwanted products and hidden burdens.

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The CESL rules require an active, conscious choice by consumers in order to enter into the contract. In an era of standard form contracting characterized by consumer passivity, in which sellers stuff their pre-drafted boilerplate into the packages and consumers are rarely, if ever, aware of the terms of the agreement, the CESL envisions a different reality. Entry into a contract would become a more active, deliberate decision by consumers.

First, we saw, sellers must obtain the consumer’s consent to use the CESL, “by an explicit statement which is separate from the statement indicating the agreement to conclude a contract.” 28 Second, the seller must provide the consumer with a “confirmation of that agreement on a durable medium.” 29 In practice, consumers will likely have to sign two forms – the contract and the consent to use the CESL. In addition, the CESL imposes requirements for distance contracts or electronic contracts. These requirements involve specific confirmatory memoranda and specific acknowledgment of disclosures. 30 For example, the consumer must explicitly acknowledge that he is required to make payment (e.g., by clicking a button that says “Order with obligation to pay”).

The CESL does not feature a specific rule regarding the formation practice known in the U.S. as “shrinkwrap”—sellers binding consumers to terms that are packaged in the box and which can only be viewed after the purchase. While most U.S. courts enforce such “terms in the box,” European jurisdictions are more hostile

28 Regulation, Article 8.
29 Id.
30 CESL, Article 19, 24-25
to them.\textsuperscript{31} Our guess is that the CESL drafters were less worried about this practice, despite it being the most perilous form of consumer passivity, because the safety net of mandatory arrangements that effectively bans most of the onerous terms that sellers can sneak in.

Under the CESL consumers enjoy a right to withdraw from distance and off-premises contracts, within a 14-day period, at no cost to the consumer.\textsuperscript{32} The rationale for the right to withdraw is that consumers need to inspect and try out the product before deciding. Assent is not complete until the consumer had the opportunity to inspect the product and decide not to withdraw.

B. Discussion

Ensuring informed consent to the offered contract is clearly valuable. It makes consumers better off and the market more efficient. But it is unlikely that the technique used by the CESL to accomplish this goal would have the desirable effect, and it might impose undesirable costs. The entry rules will merely increase transaction costs, without actually improving the quality of the expressed consent. And the withdrawal rules could impose an unfair cross subsidy, hurting the weakest echelons of consumers.

The conscious choice rules amount to consumers signing more forms. For example, consumers will affirm that they agree to use the CESL. But will they read the form? And, if they read it, will they understand how it differs from national law to be affirmatively choosing it as a feature of their transaction? How many

\textsuperscript{31} For the U.S. – see Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); For Europe – see [CITE]
\textsuperscript{32} CESL, Articles 40, 42.
consumers will actually read the tedious terms in the written affirmation or remote contracts and reevaluate their choice? It is true that one additional form, one additional signature, one additional click—all these are not too costly and will not slow down the wheels of commerce. But such costless mechanical gestures are not very beneficial either. If the CESL were true to its “conscious choice” rationale, it would require more thorough and meaningful procedures that would guarantee more than an appearance of choice. Those, however, would impose a significant transaction cost.

What about the right to withdraw? This right, like other consumer protections, provides a real benefit. The ability to inspect the product and try it out for a period of time, before making a final commitment to purchase, is valuable, especially if products are easily returnable. A right to withdraw may also be valuable to the seller, if it increases demand for the seller’s products. Consumers would be more likely to make remote purchases if they can return a product that turns out to be less attractive than it initially appeared.33

But, alongside these benefits, a right to withdraw entails potentially large costs, especially when it is abused by a subgroup of opportunistic consumers. Returned items depreciate in value, sometime substantially. This cost will be born, at least in part, by consumers, as sellers anticipate the likelihood of returns and increase prices accordingly. The effect is similar to that of any other mandatory quality feature.

The main problem with the CESL’s right to withdraw rule is its mandatory nature. In the absence of a mandatory duty, prime retailers routinely offer a right to withdraw, while low-end retailers do not. Even Walmart offers a 90-day free returns policy. A voluntarily designed right to withdraw thus enables sellers to signal superior quality and reliability. A mandatory right to withdraw destroys this selection effect.

In addition, a mandatory right to withdraw reduces sellers’ ability to offer differentiated prices. Some consumers purchase extended return periods, while other consumers waive the right to return the product altogether in exchange for a lower price. (Think of the latter groups as passengers buying cheap nonrefundable airfares instead of the costlier but refundable fares.) For this group, the right to purchase cheap products is valued more than the right to withdraw. The CESL’s mandatory right to withdraw will force these consumers to pay for a feature that they do not want.

We can think of at least two categories of consumers that might be hurt by this mandate. First, the poorest consumers, who prefer to shop for low-end products at low-end prices, will be deprived of some of their desired savings. It is a dubious protection—in the name of “access justice”—to force the poor to spend money on quality features that a paternalistic lawmaker selected for them, only to price some of them out of the market. Second, consumers who are systematically less likely to invoke the right to withdraw (perhaps because they are familiar with the product, or are averse to reversals, or annoyed by the return effort), will have to pay for a
feature they are unlikely to enjoy, thereby cross-subsidizing the heavier users of this feature.

As with other mandatory provisions, a right to withdraw makes sense only if it corrects a costly market failure. Such a market failure would occur, for example, if consumers fail to appreciate the importance of a right to withdraw.34 These imperfectly rational consumers would not demand a right to withdraw and sellers would not offer it. Under these circumstances, the price differentiation and signaling benefits of a voluntary right to withdraw would also go away. But is this really the situation? Are consumers unmindful to sellers’ return policies? Are they stuck with products that they cannot return? The prevalence of voluntary return policies, offered by many stores, chains, and e-retailers, suggests that withdrawal rights are a salient quality feature. There does not seem to be a market failure. And, accordingly, regulatory intervention seems unnecessary and potentially disruptive.

IV. Supplementation and Interpretation

A. The Law

Contracts, including lengthy fine print consumer contracts, are necessarily incomplete. Accordingly, supplementation (or gap-filling) and interpretation are necessary. To further advance its consumer protection strategy, the CESL adopts a pro-consumer set of default rules and interpretation approach.

Because many of the pro-consumer arrangements in the CESL are mandatory, there is a lesser role for default rules. Still, the CESL includes several

34 See Eidenmueller, supra note 33, who identifies the theoretical justifications for withdrawal rights and concludes that they ought to be optional in the distance selling context but mandatory in cases like doorstep sales that involve decision biases that are either preexisting or heightened by sellers.
pro-consumer gap-fillers. Recognizing, however, that standard default rules are easily disclaimed by sellers, the CESL bolsters its default provisions by making them “sticky,”—more difficult for drafters to unilaterally alter. For example, the default rule of “no additional payments”—that is, no hidden remuneration beyond the main contractual price—can be altered, but any agreement to additional payments requires a separate express consent by the consumer. A passive, unnoticed checklist of hidden fees will not suffice.35

The CESL’s rules on conformity provide more examples of pro-consumer, sticky defaults. They stipulate conformity requirements, including fitness for ordinary and particular purposes, but maintain that derogation from these standards “to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it.” Again, opt-out is allowed only after the consumer expresses conscious, informed consent.36

Contract terms are often ambiguous and require interpretation. The CESL establishes that ambiguous terms in consumer contracts will be interpreted in a pro-consumer way. “Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.”37 This is reinforced by the familiar contra proferentem principle—ambiguous terms that

35 CESL, Article 71.
36 CESL, Articles 99, 100. Contrast these opt-out rule with the more lenient opt-out rules for business-to-business contracts in CESL, Article 104.
37 CESL, Article 64.
were not individually negotiated should be interpreted against the party who supplied these terms.38

B. Discussion

In consumer contracts, pro-consumer defaults have only limited effect because sellers can easily replace them with standard form terms, without incurring any added transaction costs, and often without even alerting people and raising suspicion. Mindful of this problem, the CESL imposes special consent requirements. We are concerned, however, that these additional requirements will only increase transaction costs, without substantially increasing informed consent and without reducing the likelihood of self-serving opt-out.

Consider the “no additional payments” default. Opt-out requires explicit consent to the additional payment term. But how difficult would it be for the seller to obtain such explicit consent? The consumer would simply need to sign her name on yet another dotted line or, perhaps, even on a separate form. Similarly, opting-out of the conformity defaults is permitted only if the consumer knew of the non-conformity at the time of contracting. In essence, the CESL imposes another disclosure requirement as a condition for effective opt-out. As we have argued, these multi-layer disclosures are not effective, and are all the more futile as they pile up.

In choosing to enact these provisions as default, rather than mandatory rules, the CESL surely intended to preserve some room for freedom of contract, but to safeguard against mindless opt outs. It thus requires that consumers “know” and pay special attention to a reversal of the defaults. But the law’s sole device for

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38 CESL, Article 65.
alerting people and informing them is mandated disclosure, and so the regulation of 
opt outs is merely another disclosure requirement. This is not a pre-drafted 
mandated disclosure; here, courts would determine ex post facto whether the 
disclosures were effective in informing the opt-outers, and if not they could rescind 
or modify the consents or reinstitute the default term. To those who believe that 
lengthy precontractual disclosures are effective in protecting consumers, this “sticky 
default” technique has obvious appeal.

But as we argued in Section II above, such beliefs bump against the sobering 
reality of ineffective disclosures. Sellers would figure out the disclosure templates 
that are regarded by courts as reasonable and use them to direct their clients away 
from the pro-consumer default rules. As long as it only takes another stack of pre- 
printed forms—however reasonable or comprehensible—to validate the opt-out, 
sellers’ preferred terms would prevail.

This scenario, in which opt-outs become just another meaningless disclosure, 
is unfortunately exceedingly common. For example, U.S. sales law – the Uniform 
Commercial Code (UCC) – provides a pro-buyer warranty of merchantability along 
with generous remedies. And, like the CESL, the UCC requires that opt outs be 
conspicuous.39 The result: practically every consumer contract comes with 
boilerplate language disclaiming the default warranty. The ALLCAPS font of these 
terms, which American law deems sufficient to render the disclosure conspicuous, is 
an artifact of this regime. Just in case, though, merchants sometimes require a 
separate signature or “click” to signify the buyer’s “meaningful” assent to a pro-

39 See UCC §§ 2-314 & 2-702 for the default rules on warranty and remedies; see UCC § 2- 
316 for the conspicuous disclaimer rule.
seller term.\textsuperscript{40} A well-intended, pro-consumer, default scheme is trumped by the disclosure escape valve.

The CESL mandate to interpret ambiguous terms in favor of consumers would force sellers to write clearer, more explicit, longer form contracts. The cost to sellers of such lengthy drafting is probably small. But since consumers do not read these contracts anyway, the benefits will also be insignificant. This is not to argue that contra proferentem is always undesirable. In insurance contracts, for example, the ambiguous language can sometimes apply to the very essence of the policy. In such contracts, there is no “product” other than the insurance policy—that is, the legal terms—and thus policyholders have affirmative expectations over these terms. The pro-consumer construction restores the integrity of the bargain.\textsuperscript{41} In consumer contracts, by contrast, the pro-consumer construction applies to the fine print, which is otherwise beyond the affirmative expectation of most consumers. There, a legal policy that induces sellers to draft these terms with hyper meticulous care will not generate any meaningful benefit.

\textbf{V. Consumer Protection versus Harmonization}

Our review and analysis of the four regulatory techniques used by the CESL suggests that many CESL provisions are both inefficient and likely to harm consumers, despite their consumer protection purpose. We now explore the


implications of this assessment for the ability of the CESL to achieve another one of its declared goals – the harmonization of European sales law.

Law that is suboptimally designed can nonetheless become uniform. If the EU imposed the CESL on all sales transactions, then harmonization would be achieved, regardless of whether the CESL promotes efficiency or protects consumers. But the CESL is an optional law. To assess the CESL’s harmonization potential, we must therefore examine the incentives of sellers and buyers to choose the CESL.

Assume initially that sellers and buyers will choose the CESL only if it increases the contractual surplus, as compared to the alternative – the relevant national law. In the previous sections, we have identified substantial inefficiencies in the CESL. But we have said nothing about the relative efficiency of the CESL as compared to the national laws of different European states. In principle, the CESL divides Europe into (1) states with sales laws that are more efficient than the CESL, and (2) states with sales laws that are less efficient than the CESL. Sellers and buyers will only opt into the CESL if, absent such opt-in, they expect to be subject to the laws of a Group 2 state.\textsuperscript{42} If most states are in Group 2, then the CESL should be able to achieve substantial harmonization and, at the same time, increase the efficiency of many sales transactions. On the other hand, if most states are in Group 1, then the effect of the CESL – both its harmonization effect and its efficiency effect – will be limited.

\textsuperscript{42} The division into Group 1 and Group 2 states is overly simplistic. It could well be that the sales laws of State A are superior to the CESL with respect to one category of transactions but inferior to the CESL with respect to another category of transactions.
It is also possible that due to consumers’ ignorance and passivity, the choice to opt into the CESL would reflect, not an increased total surplus from the transaction, but rather increase profits to sellers. If sellers have unfettered control of choice of law, and if consumers remain ignorant about this aspect, sellers will choose the CESL only if it benefits them, even when this choice is overall welfare-reducing.

Many of the CESL provisions that we surveyed in the previous sections are expected to reduce sellers’ profits. Consider, for example, some of the mandatory terms discussed in Section I: Consumers do not have to notify sellers of non-conformity in order to invoke remedies; Consumers are free to choose between repair and replacement; A seller must give the consumer a 30-day mandatory grace period if the consumer is delayed in performance. Again, the CESL divides Europe into two groups: (1) states with sales laws that are more pro-seller than the CESL, and (2) states with sales laws that are less pro-seller than the CESL. Sellers will only opt into the CESL if, absent such opt-in, they expect to be subject to the laws of a Group 2 state. If most states are in Group 2, then the CESL should be able to achieve substantial harmonization. If most states are in Group 1, then the CESL will have a limited harmonization effect.

This discussion suggest that CESL can achieve harmonization only if the laws of many member states are inferior from either the perspective of overall efficiency or from the perspective of sellers, and even then harmonization will be only partially accomplished. In an important way, the CESL’s two goals are at war with each other. The CESL seeks to harmonize—namely, to make available “a self
standing uniform set of contract law rules”, but it is also ambitious with respect to the content of such uniform rules—“to protect consumers.” The problem is that the two goals are inconsistent. The more the CESL pulls the second lever of consumer protection, and sets it beyond the levels existing in most member states, the less often it would be chosen and less uniformity would ensue. And vice versa. Thus, long as the consumer protection prong is either inefficient or profit reducing to sellers, the tradeoff is inevitable. Harmonization can be achieved—and may even justify mandatory metrics that simplify product comparison—but it cannot at the same time institute redistributive policies through an opt-in scheme.

**Conclusion**

Many of the protections the CESL purports to confer upon consumers are of little or no value. The disclosure requirements, the meaningful assent, and the pro-consumer defaults rules—all create the appearance of consumer protection without much substance. If anything, they increase transactions costs. Other protections in the CESL are inefficient or regressive. Some of the mandatory arrangements and the right to withdraw are examples for protections that have actual effect on transactions, but a potentially undesirable effect.

The CESL is an optional instrument. Sellers would resist choosing governing law that reduces the value of the transaction, or which prices out some customers. Accordingly, sellers will opt into the CESL only to avoid national law that is even more restrictive and inefficient. This limited opt-in translates into limited

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43 Regulation, p. 4.
harmonization. Two main goals of the CESL – consumer protection and harmonization – are unlikely to be achieved.