ABSTRACT

Pre-contractual Information under Art. 69 CESL – Remake or Revolution?

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"The principle of conformity with the contract can be regarded as common to the different national legal traditions." (Recital 7 of the Consumer Sales Directive [1999/44/EC]). One can hardly argue with it: Pacta sunt servanda. However, the more interesting question is: What is *'the contract'*? What are its contents? And how are contract terms generated?

In general, these terms are brought to life by an agreement of the parties involved – a bilateral, usually mutual declaration of intent (cf. Art. 30 [1] CESL). On the other hand, unilateral pre-contractual statements issued by the seller or in advertising can strongly influence the buyer's decision to conclude a contract in the first place. This is where Art. 69 CESL comes in. This provision – obviously a direct descendant of Art. II.-9:102 of the Draft Common Frame of Reference (DCFR) which in turn was inspired by Art. 6:101 of the Principles of European Contract Law (PECL) – stipulates that any reasonable statement made by the producer, the seller, or any other person in the supply chain may bring about liability of the final seller vis-a-vis his buyer.

While this general concept is already installed by the Consumer Sales Directive (CSD) with regard to public statements made by the producer and his representatives, the proposed Art. 69 CESL follows a different concept in detail and thus imposes additional risks of liability on the seller. Furthermore, the proposal lacks clearness on a number of issues.

1. The CSD sets out that descriptions and statements on the characteristics of the goods do not automatically end up as formal terms of the contract. They merely are to be “taken into account” when determining the conformity of the goods delivered by the seller. This approach allows for a flexible and appropriate interpretation of the statement in question and its practical consequences. In contrast to this, Art. 69 (1) CESL turns all of these statements into contract terms. From a methodical point of view, this is indeed something new in European contract law. Whether it is necessary or appropriate, that is another question.

2. According to Art. 78 (1) CESL, the contracting parties may confer a right on a third party by the contract. Since Art. 69 CESL classifies pre-contractual statements – including those made by persons other than the seller and the buyer – as contract terms, such statements may generate rights in favour of third parties and even entitle them to damages in case of non-performance. The problem is that this liability arises not only without explicit consent of both parties but in certain cases even without a statement made by the seller himself. To create a contract term, Art. 69 CESL only requires a statement issued by anyone in the supply chain (cf. Art. 69 [3] CESL). In order to protect the seller from this inadequate liability it should be clarified in the text of Art. 78 CESL that a certain right can only be conferred to a third party by an explicit agreement between the parties of the contract.

3. It is unclear what a 'statement' by virtue of Art. 69 CESL is, i. e. in which form it has to be made. Does it have to be an explicit or even written one? Is a tacit statement sufficient? Does it comprise 'conduct' as mentioned in Art. 12 (5), 30 (5), 59 (b) CESL? Does it not have to be made by a particular form at all (cf. Art. 6 CESL)? The proposal does not really answer these questions but leaves the solution to the judge.

4. According to Art. 69 (1) (a) and (b) CESL, a statement does not become part of the contract if the buyer could at least be expected to have been aware, at the time of the conclusion of the contract, that the statement was incorrect. Does this also apply to the mandatory information given by the seller on the grounds of Art. 13-27 CESL? This information forms an integral part of the contract (cf. Art. 13 [2] CESL) and thus it cannot simply be challenged by the potential knowledge of the buyer. Art. 28 (2) CESL does not change this finding because it only relates to the remedies of Art. 29 CESL but not to Art. 106-122 CESL.

5. While there is no doubt that statements made by third parties can strongly influence the buyer's decision to conclude a contract, Art. 69 (3) CESL clearly misses the mark when it states that in a B2C contract the seller is responsible for every statement made by '*other persons in earlier links of the chain of transactions*.' The problem with this wording is that literally everybody who is part of the supply chain could make a relevant statement. In consequence, the provision would impose on the seller a duty to gain extensive knowledge about the product's complete transaction history, including all the persons involved in the chain and their potentially relevant statements regarding the goods. Otherwise the seller cannot prove or even argue that he could not have been expected to know about the statement in question. This goes way too far. Art. 69 (3) CESL should – in

line with Art. 2 (2) (d) CSD – limit the circle of relevant people to the producer and his representatives.

6. According to Art. 69 (4) CESL the parties of a B2C contract may not, to the detriment of the consumer, exclude the application of this article or derogate from its effects. On the other hand, Art. 99 (3) CESL stipulates that in a consumer contract agreements to the detriment of the consumer could very well be valid if the consumer knew of the specific condition of the goods and accepted them as being in conformity with the contract. This is inconsistent with Art. 69 (4) CESL.

7. Art. 4 CSD states that the final seller is entitled to pursue remedies against the person that made a statement if this statement proves to be incorrect and leads to a liability of the final seller. This so-called right of redress is an important means of allocating the ultimate liability with the person who actually is responsible for the false statement. Unfortunately, CESL does not explicitly contain such a right. In the end, there is a risk that the final seller may be left alone with a loss caused by somebody else.

In conclusion, Art. 69 CESL is part remake, part revolution. The general approach of the proposal with regard to the seller's responsibility for pre-contractual statements is quite a suitable one. However, some important modifications – especially with regard to third party statements and to the right of redress – have to be made in order to guarantee that this article provides for a well-balanced set of rules regarding the subject matter. In its present form, the provision may prove to be a major obstacle for every trader who is considering to choose CESL.