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Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law

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REGULATORY TECHNIQUES IN CONSUMER PROTECTION: A CRITIQUE OF EUROPEAN CONSUMER CONTRACT LAW

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1. Introduction

The Draft Common European Sales Law (CESL)[1] incorporates four of the most important consumer protection techniques that have been widely used in European Contract Law. Unfortunately, these techniques' superficial appeal does not withstand economic logic. This article argues that European Contract Law in general, and the CESL in particular, are far less likely to succeed in protecting consumers than lawmakers and commentators believe, and that the techniques they commonly employ may bring about unintended consequences and hurt consumers.

The four consumer protection techniques commonly employed in European contract law 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, but all originate from prior enactments.

The first technique – mandatory pro-consumer arrangements – is perhaps the most phenomenal device. This technique has been proliferating over the past decades in European consumer law, but has reached its acme in the CESL. 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 concern remedies, withdrawal rights, risk of loss, warranties, notices and communications, disclosure rules, and more. Sellers, for example, do not have the right to cure non-conforming

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1. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011)635 final, Annex I: Common European Sales Law (hereinafter we refer to Annex I as "CESL" and to the entire proposal for a regulation as "Regulation").

performance, and buyers have a non-disclaimable right to reject non-conforming goods for two years.

We argue that many of these 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, when the price effect is regressive, a 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.[2] More fundamentally, we argue that many of the mandatory arrangements lack an *a priori* welfare-enhancing justification, because they are not responding to a systematic market failure or to a systematic redistributive problem.

The second common 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 consumers are accorded, nicely illustrated by the CESL's novel mandates, are likely futile. These disclosures are neither read nor used, and they are beyond most people's interest or understanding. While novel approaches to "targeted" disclosure are being experimented with elsewhere (including in the U.K., for instance), the conventional European disclosure paradigm reproduces archaic templates that have consistently and irreparably failed.

The third technique is the regulation of entry to, and withdrawal from, consumer contracts. Entry regulations help consumers make deliberate, conscious choices, tailored for their needs. Withdrawal regulations help them correct poor choices without bearing any pecuniary fine. Here, too, various European laws take a sensible starting point but leverage 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, and the regulation of withdrawal takes a practice that is already prevailing in markets and imposes it in contexts where it might be too costly to consumers.

The fourth and final regulatory technique is the supplementation of incomplete contracts with pro-consumer default arrangements. We find less use of this device in Europe compared to the U.S. for the simple reason that many arrangements that operate as gap-fillers in the U.S. are accorded mandatory status in Europe. But, interestingly, in the CESL for example, the few pro-consumer default rules are bolstered by "stickiness". Parties can opt

2. Micklitz (Ed.), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, 2011), p. 37.

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 opt-out regulation in the form adopted in the CESL is unlikely to generate any benefit, and may impose unnecessary cost. A related technique, directing courts to interpret ambiguous contract terms in pro-consumer fashion, is also likely to increase transactions costs without providing substantial benefits.

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 particular rules and rethinking their 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 Conclusion points to some implications of our critique for the prospect of harmonization.

2. Mandatory arrangements

2.1. *The law*

Much European legislation in the past several decades has created a web of mandatory arrangements that limit freedom of contract in consumer transactions. Since Member States vary in the scope of such legislation and in their choices to go beyond the benchmarks imposed by European Union directives, we will focus on the set of mandatory rules proposed by the CESL, which reflect the direction that many local jurisdictions have already taken.[3] The analysis we offer is general, however, and is not restricted to the CESL. In fact, we will pay little attention to the substance of the proposed mandates and comment instead on the generic merits and limits of the technique.

This legislation 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.[4] But anticipating that such default-rules would likely result in standard form

3. We recognize that the CESL cannot reduce the level of consumer protection embodied in the *acquis communautaire*, which contains almost all of the rules below (in the existing EU regulations and directives). Accordingly, the critique we propose is not aimed specifically at the CESL and applies to existing law as well.

4. See e.g. UCC, paras. 1–302; U.K., The Sales of Goods Act of 1979, para 55(1).

opt-outs and disclaimers, the protections are accorded mandatory, non-disclaimable status.

In keeping with existing trends, the CESL includes a dizzying array of mandatory arrangements – provisions that cannot be excluded and can only be modified to favour consumers. In thirty-one 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".[5]

In all, we counted eighty-one 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 disclosure rules, the interpretation rules, the restitution rules, the risk of loss provisions, some of the implied and express warranties, limitations on sellers' right to cure, rules relating to notices and communications, interest for late payments, grace periods, all the prescription rules, and much more.[6] For example, consumers have a non-disclaimable right to choose between repair and replacement. A seller must give the consumer a thirty-day mandatory grace period if the consumer is delayed in performance. Take-or-pay clauses are forbidden altogether in consumer contracts, and, strikingly, the seller does not have a right to cure defective performance, while the buyer has up to two years from the time she learned of the defect to reject delivery and terminate the contract.[7]

In addition, many terms are blacklisted – conclusively presumed to be unfair. These include some of the most common choice-of-forum terms, such as mandatory arbitration or seller's home court.[8] 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 (not conclusively) to be unfair. These are some of the most common provisions one would otherwise find: limits to buyers' remedies, one-sided termination rights, sweeping modification clauses, assignment terms, large advance payments, restrictions on seeking supplies or repairs

5. 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 and 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.

6. Ibid., Arts. 2, 10(3)(4); Ch. 2.1; 2.3; Arts. 28, 29; Ch. 4; Arts. 64, 69–72, 74, 75(2), 77; Ch. 8; Arts. 92(2), 99(3), 101, 102, 105; Ch. 11; Arts. 135, 142, 148(2), 150(2), 158, 167; Ch. 16.3; Ch. 17; Art. 186.

7. Ibid., Art. 106(3)(b); Art. 111(1); Art. 135(1)(2); Art. 155(3); Art. 106(3); Art. 84(j); Art. 179.

8. Ibid., Art. 84(d).

from third parties, bundling separate goods and services, or setting a contract's duration to exceed 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.[9] Surely, subjecting quality and price to mandatory restrictions would deal a fatal blow to any notion of freedom of contract, and even the most ambitious statutes honour the parties' freedom to agree on any quality and price, even if such agreements reflect harsh bargaining realities.

2.2. *Discussion*

It is tempting to think that a pro-consumer mandatory regime would benefit consumers. All else equal, consumers are better off with more favourable provisions. But all else is not equal. Consumer protection comes at a price. Pro-consumer terms that actually constrain and change sellers' behaviour raise sellers' costs, and sellers will pass on (at least some of) these increased costs to consumers in the form of higher prices.[10] Recall, the CESL preserves freedom of contract with respect to price.

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 programmes, buy non-refundable items, choose slower delivery options, or decline to insure, because it makes the product cheaper. A thirty-day grace period, or a generous remedy, or an 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 the fact that the law needs to mandate them – suggests that most consumers prefer the discount (assuming that consumers are sufficiently sophisticated).

The preceding discussion lumps all consumers together, asking whether consumers as a group would benefit from strong protections once these protections are priced. But consumers are a heterogeneous group, with different preferences and different budgets. Indeed, heterogeneity of

9. Ibid., Art. 80(2).

10. See, e.g., Posner, *Economic Analysis of Law* (1998); Shavell, *Foundations of Economic Analysis of Law* (2004); Craswell, "Passing on the costs of legal rules: Efficiency and distribution in buyer-seller relationships", 43 *Stanford Law Review* (1991), 361.

consumers is one of the important premises of the harmonization project, aiming "to grant access justice to those who are excluded from the market or to those 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".[11] The protections secured by the CESL or by even more ambitious Member States' laws 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 consumers may prefer to pay high prices for strong protections, others may prefer the low-price-low-protection combination. 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 travellers 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 programmes offered by retailers. They don't want to buy better terms.[12]

The focus, thus far, has been on heterogeneity with respect to the price-protection trade-off. Consumers are also heterogeneous with respect to their propensity to benefit from protections. Some consumers are more likely to inspect goods and return them, to invoke warranties, to demand replacements, or to sue and seek damages. For them, the right to sue the seller in court rather than arbitration, or the right to obtain strong remedies for breach, is more valuable. To others – often the "silent majority" who are not aware of their legal rights and protections – the enhanced access to court and remedies is less beneficial. They do not complain, do not sue, or reach an "off-contract" understanding with the seller – and *de facto* waive the protections. For example, the Eurobarometer survey, cited and relied on by the Commission in proposing the CESL, shows that consumers report a preference for arbitration over litigation.[13] Since sellers are generally unable to segregate, in advance, the more vs. less litigious consumers, all consumers will pay the price of the

11. Micklitz, op. cit. *supra* note 2, 5. See also Mak, "Unweaving the CESL: Legal-economic reason and institutional imagination in European contract law" (in this volume).

12. Only 1/3 of consumers purchase extended warranties; see Chen, Kalra and Sun, "Why do consumers buy extended service contracts?", 36 *Journal of Consumer Research* (2009), 611, 615; Ross and Ahmed, "Extended warranties: A behavioral perspective", 19 *Advances in Consumer Research* (1992), 879, 879 (30–50% estimates).

13. See Hubbard, "Another look at the Eurobarometer surveys" (this volume).

protections that only the few enjoy.[14] This is a cross-subsidy from the majority to the few (and not from sellers to buyers).

This cross-subsidy is often inefficient: the cost to the many is greater than the benefit to the few. It is also regressive and unfair. To benefit from the legal protections, consumers need to be informed about these rights, to have the sophistication to insist on compliance, and to afford legal advice.[15] The wealthier and healthier consumers are systematically more likely to invoke the protections. The poor, the elderly, the less educated – those for whom the protections are enacted in the first place – lack the information, the sophistication, and the 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.

Mandatory rules are not bad *by definition*. They could be utilized efficiently when voluntary contracts cannot be relied upon to maximize social welfare – for example, when contracts impose externalities, or when one of the parties is unable to make good decisions.[16] 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 fare 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.[17] This concern may justify an occasional protection, but it hardly justifies the CESL's wholesale inventory of mandates, which are often based on exaggerated *ex post* concerns rather than any systematic notion of market failure, and are not justified by any empirical evidence that suggests any systematic market failure.[18]

14. Gillette, "Rolling contracts as an agency problem", (2004) *Wisconsin Law Review*, 679; Quillen, "Contract damages and cross-subsidization", 61 *Southern California Law Review* (1988), 1125.

15. Hubbard, op. cit. *supra* note 13. Studies show a disproportionate advantage to the wealthy in learning about pecuniary benefits through mandated disclosure. See e.g. O'Neill et al., "Money 2000 participants: Who are they?", 37 *Journal of Extension* (1999), 6; Gartner and Todd, *Effectiveness of Online "Early Intervention" Financial Education for Credit Cardholders* (2005).

16. See, generally, Bebchuk, "The debate over contractual freedom in corporate law", 89 *Columbia Law Review* (1989), 1395.

17. See Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (OUP, 2012).

18. There is a different, potential justification for a uniform sales law that is basically mandatory. In a large market like the EU, consumers need to consider and compare different products, offered by different sellers, from different countries, at different prices, and with

3. Information and disclosure

3.1. *The Law*

The regulation of information is arguably the most common 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 affirmative disclosures, requiring informed parties to convey certain information, often in mandated formats, to all consumers. Second, they supervise voluntary disclosures to assure their integrity, with causes of action against deception and fraud.

The CESL, for example, applies both techniques. Like any sales statute, it forbids deception. Since merchants lure consumers by representations that are at times rosier than the subsequent performance, consumers are entitled to rely on the information given, and the representations are enforceable notwithstanding attempts to disclaim then in the standard form.[19] This is the "basis of the bargain" principle of warranty law.[20]

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).[21] Second, the CESL mandates a "duty of transparency," which is achieved in several ways. Boilerplate terms have to be communicated "in plain intelligible language".[22] Many of them have to be in writing.[23] 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.[24] A separate and specific acknowledgement of assent is required, to ensure that the information reaches its destination. Thus, the consumer must receive not only the standard form contract in a durable

different governing legal-contractual regimes. It may be beneficial to simplify this multidimensional decision problem by fixing one aspect – the legal-contractual regime. Still, this potential justification needs to be weighed against the substantial costs of the mandatory rules. And, moreover, the optional nature of the CESL undermines this potential justification.

19. CESL, Arts. 28 and 69.

20. UCC, paras. 2–313. See Baird, "Precontractual disclosure duties under the Common European Sales Law" (this volume).

21. CESL, Arts. 13–18, 20, 22, 27.

22. Ibid., Art. 82, Arts. 13(3)(b) and 13(4)(b).

23. Ibid., Art. 18 (for off-premise contracts).

24. Ibid., Art. 70.

medium, but also a separate disclosure regarding the right to withdraw and its limitations (as well as a standardized withdrawal form).[25]

Third, and most innovative, the very fact that the CESL is chosen as the governing law has to be disclosed and explained. Since consumers are oblivious to lawyerly matters like choice of law, the CESL pursues a formidable mission: "The use of the Common European Sales Law should be an informed choice" and so 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".[26] The CESL 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, highlighting the law's "salient features".[27]

3.2. *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, and to enable credible sorting along quality and price dimensions. We are more critical of the CESL's other information device: its approach to mandatory disclosure. The disclosure paradigm adopted by the CESL is archaic and likely futile. It mandates formats of disclosure that have failed in the past, are highly unlikely to deliver any benefit, and are more likely to impose unnecessary costs, and even have unintended harms.

The 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 has been documented thoroughly, in area after area of consumer transactions, medical "informed consent," privacy, financial literacy, and much more.[28]

Many factors account for this "non-readership" phenomenon. First, the CESL alone requires a hefty amount of disclosures, far too time-consuming for shoppers to investigate in the course of routine sale transactions. The

25. Ibid., Arts. 17(4), 19(5), 41(3). The form that the disclosure must take is mandated in Appendixes 1 and 2.

26. Regulation, Preamble, s.22–23.

27. Ibid., Arts. 8–9 and Annex II.

28. See, generally, Ben-Shahar and Schneider, "The failure of mandated disclosure", 159 *University of Pennsylvania Law Review* (2011), 647.

typical consumer would take home a "packet": the standard terms of the contract, the right-to-withdraw disclosure, the actual withdrawal form and the Standard Information Notice. The packet may actually be 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. And in Europe there are country-specific disclosure mandates. If these sale transactions involve credit, or service elements, or insurance, or implicate privacy issues, or environmental issues, or conflicts of interests, additional disclosures may be mandated. In this clutter, how likely are consumers to read any of the CESL's pre-printed boilerplate? And the fact that people might get the CESL's packet monotonically, 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 analyse their roots. Disclosure mandates are often written 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 analyse. People do not read the disclosures because good things will rarely emerge from this exercise. It is time-consuming, dull, largely irrelevant, and full of bad news. Any dash of vitality that brought them to the transaction in the first place would be quashed. Besides, if they read something they dislike, would they switch to another merchant with its own set of disclosures?

This kind of mandated disclosure could be costly and harmful. It is costly because it compounds the transactions costs with extra forms, signatures, clicks, and much ceremony. It is harmful because it creates a presumption of "informed consent" that weakens the effect of other protections. When a term is disclosed, it is no longer "hidden". If courts are willing to strike hidden one-sided terms, they might hold back if consumers are presumed to be fully aware. For example, "written disclosure requirements, without other protections, can have the unintended effect of insulating predatory lenders where fraud or deception may have occurred".[29]

29. U.S. Dep't of Hous. and Urb. Dev. & U.S. Dep't of Treasure, Recommendation to curb predatory home mortgage lending (2000), 67; See also Hilllman, "Online boilerplate: Would mandatory web site disclosure of e-standard terms backfire?", in Omri Ben-Shahar (Ed.), *Boilerplate* (2007).

This does not imply that disclosure, as a regulatory tool, can never work. If mandated disclosure is to help consumers, at the very least a new approach must be adopted – one very different from the more-information-is-better paradigm that the CESL implements. Effective information tools come in two general forms:

– Very simple, aggregate metrics that consumers can easily understand and compare, like total cost of ownership or satisfaction ratings.
– Information that is designed and aimed to facilitate the work of sophisticated intermediaries.

If anything, the CESL's Standard Information Notice – the two-page sales law tutorial – represents the opposite of such "new paradigm". If there is a place for more targeted and simplified disclosures, it is not in a general sales law like the CESL, but rather in market specific laws and regulations.

4. Regulating entry and withdrawal: Freedom *from* contract

4.1. *The law*

The regulation of entry and withdrawal from contract intends to help consumers choose the deals they want and allows 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.

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, the CESL envisions entry into a contract that is more active and deliberate on the consumer side. First, sellers must obtain explicit consent to various aspects, including the use of the CESL, "separate from the statement indicating the agreement to conclude a contract".[30] Second, the seller must provide the consumer with a "confirmation of that agreement on a durable medium".[31] In practice, consumers will likely have to sign two forms – the contract and the consent to use the CESL. In addition, specific confirmatory memoranda and acknowledgments are required for distant and electronic contracts.[32]

Under the CESL consumers enjoy a right to withdraw from distance and off-premises contracts, within a fourteen-day period, at no cost to the

30. Regulation, Art. 8.
31. Ibid.
32. CESL, Arts. 19, 24–25.

consumer.[33] 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. This right is augmented by the consumer's power to reject non-conforming goods for two years past delivery.

4.2. *Discussion*

Ensuring informed consent or conscious choice is clearly valuable. But it is unlikely that the techniques used by the CESL, and by many other consumer protection laws, would have the desirable effect, and they might impose undesirable costs. Under these rules, consumers will sign more forms, but will they read them? Understand them? 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.[34] 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, sometimes 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.

Indeed, the main problem with the CESL's right to withdraw rule is its mandatory nature. In the absence of a mandatory duty, prime retailers engaged in on-site or distance sales 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

33. Ibid., Arts. 40, 42.

34. See Ben-Shahar and Posner, "The right to withdraw in contract law", 40 *Journal of Legal Studies* (2011), 115; Eidenmüller, "Why withdrawal rights?", 7 *European Review of Contract Law* (2011), 1.

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 non-refundable airfares instead of the costlier, 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. It is possible, for example, that consumers in doorstep sales make biased decisions to purchase, decisions that they later regret and wish to reverse.[35] These imperfectly rational consumers would not demand a right to withdraw and sellers would not offer it. Under these circumstances, the price differentiation and signalling benefits of a voluntary right to withdraw would also go away. But is this really the situation outside the doorstep sale context? Are consumers unmindful of 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. And even in the doorstep context, where a mandatory right may be theoretically justified, it is questionable whether a mandatory disclosure

35. See Eidenmüller, ibid., 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 pre-existing or heightened by sellers.

would successfully inform weak consumers of their right to withdraw, and enable them to exercise a robust re-examination of their purchase.

5. Supplementation and interpretation

5.1. *The law*

Contracts, including lengthy fine print consumer contracts, are necessarily incomplete. Accordingly, supplementation (or gap-filling) and interpretation are necessary. To advance consumer protection, contract law may adopt pro-consumer default rules and a pro-consumer interpretation approach. This, for example, is the strategy one finds in the Uniform Commercial Code, with its buyer-friendly default rules relating to remedies, warranties, perfect tender, and even the parol evidence rule.[36]

Because many pro-consumer provisions in the CESL are mandatory, there is a lesser role for default rules. Still, the CESL includes several pro-consumer gap-fillers. Recognizing, however, that standard default rules are easily disclaimed by sellers, the CESL makes 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 list of fees will not suffice.[37] Likewise, the rules on product conformity, which set high warranty standards, can be circumvented, but their derogation "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 …." Again, opt-out is allowed only after the consumer expresses conscious, informed consent.[38]

Contract terms are often ambiguous and require interpretation. When faced with B2C contracts in various areas, most notably insurance, courts interpret ambiguous terms *contra proferentem.* And the CESL follows suit: "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".[39]

36. UCC, Arts. 2–715, 2–314, 2–601, 2–202.
37. CESL, Art. 71.
38. Ibid., Arts. 99, 100. Contrast these opt-out rules with the more lenient opt-out rules for business-to-business contracts in CESL, Art. 104.
39. CESL, Art. 64, 65.

5.2. *Discussion*

In consumer contracts, pro-consumer defaults have only limited effect because sellers can easily replace them with standard form terms, at no cost and without raising suspicion. Mindful of this problem, the law may impose special consent requirements, but often such additional requirements only increase transaction costs, without substantially alerting consumers or subduing greedy sellers.

Consider the "no additional payments" default in the CESL, which stipulates that sellers cannot charge an additional payment beyond the price remunerated as the main contractual obligation.[40] Opt-out requires explicit consent to the additional payment term, and cannot be accomplished by mere reference to the additional payments in the standard contract document. But how difficult would it be to obtain such explicit, separate consent? The consumer would simply need to sign her name on yet another dotted line or a separate form (one more sheet added to the paperwork packet). This type of "sticky" default is, in the end, just another disclosure. Even if some basic disclosures are thought to be effective, they lose their value as they pile up.

In choosing to enact sticky defaults, rather than mandatory rules, the law intends to preserve some room for freedom of contract, while safeguarding against mindless opt-outs. It wants consumers to "know", pay special attention to, a reversal of the defaults. But in mass-market transactions, there is a harsh trade-off. Mandating disclosures to inform consumers about opt-outs is cheap but likely ineffective. Sellers would figure out the disclosure templates that are legally sufficient and easily direct their clients away from the pro-consumer default rules. Techniques that meaningfully raise consumers' awareness, assuming such techniques exists (can we force consumers to pay attention?), would dramatically increase transactions costs.

Currently, most consumer sales law systems opt for the low-transaction cost version of the sticky default. This scenario, in which opt-outs become just another meaningless disclosure, is illustrated by the Uniform Commercial Code, which provides a pro-buyer warranty of merchantability along with generous remedies. Like the more ambitious CESL, the UCC requires that opt-outs be conspicuous.[41] 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 artefact of this regime. Just in case, though, merchants sometimes require a separate signature or "click" to signify

40. Ibid., Art. 71.

41. See UCC paras. 2–314 and 2–702 for the default rules on warranty and remedies; see UCC para 2–316 for the conspicuous disclaimer rule.

the buyer's "meaningful" assent to a pro-seller term.[42] A pro-consumer default scheme is subsumed by the disclosure escape valve.

A mandate to interpret ambiguous terms in favour of consumers would force sellers to write clearer, more explicit, longer form contracts. The cost to sellers of such lengthy drafting is probably negligible. 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 legal terms, and thus policyholders have affirmative expectations over these terms. The pro-consumer construction protects these expectations.[43] In most other consumer contracts, 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 might not generate any meaningful benefit.

6. Conclusion

Our analysis of the four regulatory techniques used by European consumer contract law suggests that they may be ineffective, and perhaps worse – inefficient and harmful to consumers. But European optional law may have another objective – of saving legal costs by inducing parties to utilize a uniform law across various transactions. Even law that is suboptimally designed can become uniform and accomplish this additional goal, as long as parties would indeed opt in to it.

One possibility is that sellers and buyers will choose the optional law if it increases the contractual surplus, as compared to the alternative national law. Another possibility is that sellers will unilaterally choose the optional law, even if it is welfare-reducing, as long as it increases their payoff. Either way, there would likely be a sorting effect, whereby some parties – predominantly those whose national law is even more restrictive than the optional law – would opt in. Others would not. If most national laws are more restrictive, there will be substantial opt-in, likely increasing the efficiency of the transactions and

42. Cf. Baird, "The boilerplate puzzle", 104 *University of Michigan Law Review* (2006), 933 (discussing opt-outs of property rights); Eisenberg and Miller, "The role of opt outs and objectors in class action litigation: Theoretical and empirical issues", 57 *Vanderbilt Law Review* (2004) 1529 (discussing opt-outs of class action rights).

43. See *C&J Fertilizer, Inc.* v. *Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975).

achieving substantial uniformity. Otherwise, if most national law are less restrictive, there would be less opt-in and less uniformity.[44]

It is beyond the scope of this article to explore whether an enactment like the CESL can achieve substantial uniformity in governing law, and reduce legal costs. In an important way, however, the goal of reduced legal cost and of making available "a self-standing uniform set of contract law rules" is inconsistent with the other primary goal – "to protect consumers".[45] The more the optional law pulls the second lever of consumer protection, and sets it beyond the levels existing in most Member States, the less often the proposed law would be chosen and less uniformity would ensue. And *vice versa*. Thus, as long as the consumer protection prong is either inefficient or profit-reducing to sellers, the trade-off is inevitable.

This trade-off seems inevitable, but it may also suggest an alternative strategy for contract law "harmonization" (we use the term "harmonization" loosely, to imply *de facto* uniformity in the law governing different transactions). Imagine a statute that is minimally protective and thus highly desirable to sellers. By enacting such an optional permissive instrument, the EU could establish the infrastructure of harmonization, assuring that parties choose and use the optional law, and priming sellers to grow accustomed to the benefits of uniformity. Once this baseline is set – once sellers were lured into this network of contracting under the optional law – consumer protection amendments could be gradually added. It would be harder for reluctant sellers to leave the established legal network than to refuse to join a budding network in the first place.

44. This "sorting" argument has to be qualified in two ways. First, as Eric Posner argues in this Volume, it is costly to learn a new legal system. To reduce transactions costs of learning, parties might simply stick with old habits. See Posner, "The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition". Second, as Ganuza and Gomez argue in the Volume, it is costly for a seller to comply with differential state laws, and some sellers might choose a uniform statute that is less efficient only to enjoy the benefits of a uniform compliance standard. See Ganuza and Gomez, "Optional law for firms and consumers: An economic analysis of opting into the Common European Sales Law".

45. Regulation, p. 4.