

MARTIN ILLMER*

FROM RELATED SERVICES TO SERVICES —
UNCHAINING THE CESL’S SUBSTANTIVE
AND PERSONAL SCOPE WITH REGARD
TO RELATED SERVICES**

A. INTRODUCTION

In the following paper I want to address a specific issue with regard to the Common European Sales Law (CESL) as proposed by the European Commission: its substantive and personal scope with regard to related services which curtails its related services law significantly.

The issue lies at the heart of both the CESL’s role and significance with regard to related services as well as the CESL’s potential impact on or extension to service contracts in general.

My paper is split into two parts. In the first and main part I will clarify the concept of related services as envisaged by the CESL and suggest removing existing restrictions of the substantive and personal scope of the CESL with regard to related services so as to increase its attractiveness to potential users. In the second part I will go one step further: Could and should the CESL’s restriction to *related* services be removed and what would be the consequences of such a move towards a general service contract law. I will address this second issue only briefly and leave details for the discussion.

* *Dr., MJur (Oxford). The author is senior research fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg.*

** The paper was presented as a short lecture at a workshop organised within the Project “Made in Europe — European Legal Standards of Quality of Services Performed under the Competitive Conditions of the Global Market. The Model Solutions for Law of Obligations Oriented on Services”. The Project is funded by the National Science Centre (Narodowe Centrum Nauki) under the decision No. DEC–2012/04/A/HS5/00709. The presentation style is kept and footnotes are kept to a minimum.

B. FRAMEWORK

Before I go *medias in res*, let me first recall briefly the relevant framework of the CESL's substantive and personal scope.

The European Commission's proposal for a Regulation on a Common European Sales Law¹ consists of the proposed Regulation itself (RP) and the substantive law provisions of the CESL forming the Regulation's Annex I². The CESL's scope is not dealt with by the CESL itself but by the RP. As indicated by Art. 3 RP, the territorial scope (Art. 4 RP: only cross-border constellations), some general aspects of the substantive scope (Art. 6: exclusion of mixed purpose contracts beyond a sale/related service mix) and the general personal scope (Art. 7 RP: B2C, SME2C and B2SME contracts) concur with regard to both sale and related services. The key aspects of the CESL's substantive scope, ie. the contract types covered, as well as the specific personal scope differ, however, as between sale and related services by way of the definitions of the respective contract types and contracting parties in Art. 2 RP. In the first part of this paper I will focus on the diverging aspects concerning related services since they constitute the major restrictions of the CESL's applicability to a wide range of related services.

C. RELATED SERVICES UNCHAINED

I. UNCHAINING THE SUBSTANTIVE SCOPE

The substantive scope of the CESL with regard to related services is predominantly determined by the definition of related service in Art. 2(m) RP. It comprises of a positive sector-overlapping definition of the term "related service" on the one hand and a list of sector-specific related services excluded from the substantive scope on the other hand.

1. POSITIVE SECTOR-OVERLAPPING DEFINITION

The sector-overlapping positive definition of related service in Art. 2(m) RP contains two key elements: any service related to goods or digital content and contemporaneous conclusion in case of separate contracts of sale and related service.

¹ COM(2011) 635 final.

² It should be noted that the Committee on Legal Affairs of the European Parliament in its Draft Report on the CESL of 18 February 2013 (COM(2011)0635 — C7 — 0329/2011 — 2011/0284 (COD)) suggests to abandon this approach by making the annexed CESL part of the Regulation.

The first key element “any service related to goods or digital content, such as installation, maintenance, repair or any other processing” concerns the subject matter. It consists of three sub–elements: “service”, “any” and “related” with the examples provided.

A) SERVICE

“Service” as the basic term is defined neither in the RP nor in the CESL. While one can hardly draw inspiration from the term as used in other Community or Union legislative acts due to the context–specific meaning of the term³, it appears safe to assume at least the following boundaries: First, the CESL covers only independently provided services as opposed to dependent work and labour provided by employees towards employers⁴. The CESL’s provisions are not compatible with employment contracts and employment relationships are even excluded from the DCFR by its Art. I.–1:101(2)(e) despite the DCFR’s wider range of services covered by Book IV C. Second, despite emanating from the Roman *locatio conductio*, services in the CESL and the Draft Common Frame of Reference (DCFR) do not encompass the *locatio conductio rei* which is the subject of a distinct contract type: lease.

B) ANY

Apart from these very general boundaries of the concept of service, the adjective “any” indicates that the CESL’s provisions apply to all types and sectors of related services, subject only to the sector–specific exclusions listed in Art. 2(m) RP to which I will come back later.

C) RELATED

The notion of “related” forms the key characteristic of the services covered by the CESL by setting up their key qualification: the CESL does not provide for

³ See *Wendehorst*, Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht, AcP (Archiv für die civilistische Praxis) 206 (2006), 205, 210 et seq.; *Kümmerle*, Güter und Dienstleistungen — Vertragstypenbildung durch den EuGH, in: *Santos/Baldus/Dedek (eds.)*, Vertragstypen in Europa — Historische Entwicklungen und europäische Perspektiven (München, 2011), 295, 304 et seq.; *Unberath*, Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens, ZEuP (Zeitschrift für Europäisches Privatrecht) 8 (2008), 745, 757 seq.

⁴ Concurring *Faber*, Dienstleistungsverträge (Teil V CESL–Entwurf), in: *Wendehorst/Zöchling–Jud (eds.)*, Am Vorabend eines Gemeinsamen Europäischen Kaufrechts. Zum Verordnungsentwurf der Europäischen Kommission vom 11.10.2011 KOM(2011) 635 endg. (Wien, 2012), 147, 156.

a general service contract law but for a related service contract law only. This creates a new, rather narrow type of contract which is alien to the national laws of the member states. Again, Art. 2(m) RP does not provide an abstract definition of “related”. Instead, it operates with typical examples of related services, consisting of the abstract category of “processing” with the illustrations of “installation, maintenance and repair”. The Explanatory Memorandum (“close connection”) and recital 19 RP (“directly and closely related”) further qualify the term “related” in an abstract way. Especially with regard to the recital’s qualifications one is wondering why they are not contained in Art. 2(m) RP itself since this raises the controversial issue of the role and weight attached to recitals⁵. In any event, both qualifications should be considered when determining the quality of the relationship required by Art. 2(m) RP. The qualifications are, however, not self-explaining. This becomes particularly obvious when trying to imagine the opposite, ie. indirectly and loosely related services. While the dichotomy directly versus indirectly may be viable, the dichotomy closely versus loosely is very vague. Still, both qualifications indicate that while any type of service is covered by the CESL, not any relationship meets the CESL’s threshold for related services. But which relationship does?

Considering the concept of “related” in light of the recital’s qualifications and the examples in Art. 2(m) RP, the following observations may serve as a guideline in interpreting the constituent element of the CESL’s new contract type. A related service requires a direct link or other connection between the goods or digital content and the service. This excludes services that are provided independently of a sale or supply or merely in the course of a sale or supply. To determine the required connection, one may ask whether the sale or supply is a *conditio sine qua non* for the service to be offered and performed. The relation may take various forms. The service may be performed on the goods or digital content which would reflect the notion of processing under Art. IV.C.–4:101(1) DCFR. The service may build upon the seller’s or supplier’s obligations under the sale or supply contract (e.g. extended guarantees or special delivery options). The service may improve or extend the use that the buyer can make of the goods or digital content by providing special instructions or by subsequently modifying the goods or digital content so as to make them perform additional or new tasks. As expressed in Art. 2(m) RP, the fact whether the service is provided under the sale contract or under a separate contract is not indicative either way. Beyond the described connection between the service and the goods or digital content the service need not be subordinated to the sale in terms of minor importance or even minor value. Neither recital 19 nor Art. 2(m) RP contain any indication for such an element of subordination and the mere requirement of an existing sales contract says nothing about its importance and weight in relation to

⁵ Equally critical in this respect *Schmidt-Kessel*, Anwendungsbereich, Ausgestaltung der Option und andere Fragen zur Verordnung, in: *idem* (ed.), Ein einheitliches europäisches Kaufrecht?, (München, 2012), 29, 31.

the transaction as a whole. In addition, Art. 46(1) CESL indicates that even a sale may be accessory to a related service.

D) CONCLUSION AT THE SAME TIME IN CASE OF SEPARATE CONTRACTS

In addition to the substantive link between sale and service by way of the structural limitation to related services, Art. 2(m) RP requires a time-based link so as to bring a related service contract into the CESL's substantive scope: the sale and the related service contract have to be concluded at the same time. While this second key element does not materialize if sale and related service form part of a single contract, it applies in case of separate contracts. The ratio behind this requirement is unclear. A potential, if not the only explanation appears to be that the Commission regarded it as necessary to provide for an additional time-based link if the two elements, sale and related service, are not contractually and thereby automatically timely linked by way of a single contract.

To require a time-based link in case of separate contracts is not convincing. Timing is neutral. It bears no relevance to the interrelation of sale and services related to that sale as long as the link required by the term "related" is present. As acknowledged by Art. 2(m) RP itself, a related service may form part of the sales contract or constitute a separate contract. The decision for a single contract is usually not a conscious decision for a contemporaneous conclusion of different parts of a contract which would need to be compensated by a specific time-based link in case of separate contracts. Rather, this decision will either be one of convenience or be a matter of chance which — as an accidental technicality — should not determine the scope of the CESL's provisions on related services.

There may even be cases where the buyer only decides or finds out later, after the sale contract was concluded, that the seller offers services in relation to the sold goods or that he needs such services which he regarded as unnecessary at the time of the sale. This holds even more true in cases where the contracting partner for the related services is not identical with the buyer. I shall return to this three-person scenario later.

As an example, one may think of a buyer who purchases a huge wardrobe at Ikea with the firm intention to assemble it on his own. Once at home and once unpacked, he realizes that he would rather have Ikea assemble it for him. In that situation, the buyer and Ikea cannot opt in to the CESL concerning the assembly service simply because the necessarily separate contracts are not concluded at the same time. If, however, the buyer already opted for the assembly at the time of the purchase of the wardrobe, the parties can easily agree on the CESL for the assembly service. Another example is an extension of the initial guarantee. If such extension is concluded together with the sales contract, it can be made subject to the CESL whereas

this is not the case if the buyer decides only later during the regular guarantee term to contract for the extension. This time-based differentiation produces random and inappropriate results.

Regarding the opt-in perspective of the seller the time-based differentiation will render the CESL unattractive with regard to related services. Depending on the time when the buyer decides to contract for the related services, the seller can or cannot offer such services according to the CESL and a corresponding uniform set of standard contract terms. Consequently, the seller would need to cater for two scenarios: one for single and for separate contemporaneous contracts and another one for separate succeeding contracts. In the first scenario the seller could use a uniform, CESL-compatible set of standard contract terms throughout the EU. In contrast, in the second scenario he would still have to provide 27 different sets of standard contract terms. In effect, he would have to prepare for 28 legal regimes rather than the 27 existing ones. Against this background, he may well decide to leave it at the existing 27 instead of adding the CESL effectively as a 28th regime to his provision of related services throughout the EU.

Finally, the time-based link in Art. 2(m) RP is contradicted by Art. 42(1)(e) CESL which provides for the withdrawal period of “a contract for related services concluded after the goods have been delivered”. For all these reasons, it is strongly recommended to delete the requirement of contemporaneous conclusion of contracts in Art. 2(m) RP.

2. EXCLUSION OF SECTOR-SPECIFIC RELATED SERVICES

The positive sector-overlapping definition of the term “related service” is supplemented by a list of sector-specific related services excluded from the CESL’s substantive scope: transport services, training services, telecommunications support services and financial services. Given the time restraints of my presentation I will not address these exclusions in greater detail⁶. Apart from financial services as such the exclusions are not convincing. While the exclusion of transport services is in practice less problematic since transport is in the majority of cases covered by the sale provisions on carriage of the goods, the exclusion of training and telecommunications support services removes two types of services from the CESL’s substantive scope which are functionally and also from a regulatory perspective comparable to the more “physical” processing services as envisaged by the examples given in Art. 2(m) RP⁷.

⁶ For a detailed analysis see *Illmer*, Related Services in the Commission Proposal for a Common European Sales Law COM(2011) 635 final — Much ado about nothing? —, ERPL (European Review of Private Law) 21 (2013) 131, 147 et seq.

⁷ Equally critical *Schulze-Wendehorst*, Common European Sales Law (Baden-Baden, 2012), Art. 5 para 27 et seq. and 40.

I mention in passing that — although the exclusion of financial services as such appears justified — the exclusion of mixed sale contracts with a financing element — which is a related service — from the CESL's substantive scope by virtue of Art. 6(2) RP, is not justified. The reason for the exclusion appears to be that the 2008 Consumer Credit Directive⁸ brought about a maximum harmonisation of consumer credit agreements within the EU dispensing of any need for further unification⁹. While this holds true, it does not justify the exclusion of (mixed) sales contracts with a financing element. To the contrary, the maximum harmonisation of consumer credit agreements rather militates in favour of including sales contracts with a financing element into the CESL's substantive scope. In B2C transactions, the financing element would be additionally subject to the Consumer Credit Directive, i.e. the national implementation of the law chosen in the first place before opting in to the CESL. Since sale-related financing appears to be an integral part of many sales contracts, the benefits of a uniform sales regime would otherwise be seriously undermined. Traders offering financing of the sale would have to provide for different sets of standard contract terms: one tailored to the CESL for non-financed sales and as many others as the number of member states where they offer their products for financed sales. The irony of this dichotomy is the fact that in case of sales contracts with a financing element the standard contract terms will have to be diversified with regard to the sale element while they can be practically uniform with regard to the financing element due to the maximum harmonization of the Consumer Credit Directive. Accordingly, sales contracts with a financing element should be covered by the CESL's substantive scope.

II. UNCHAINING THE PERSONAL SCOPE

I shall now turn to the key limitation of the CESL's personal scope: the seller as the only viable service provider.

1. CURRENT LEGAL FRAMEWORK

The CESL's personal scope with regard to related service contracts is determined by the general provision on the CESL's personal scope in Art. 7 RP, the restrictions

⁸ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66.

⁹ Pointing to that reasoning *Staudenmeyer*, *Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht*, NJW (Neue Juristische Wochenschrift) 2011, 3491, 3494 (who presided the Commission's expert group); it is also reflected in Art. 6(2) RP taking over the definition of credit agreements in the 2008 Consumer Credit Directive.

regarding the parties to the contract in the definition of “related service” in Art. 2(m) RP, the definition of “service provider” in Art. 2(n) RP and the definition of “customer” in Art. 2(o) RP. According to Art. 2 RP’s definitions a related service is only such a service that is provided by the seller of the goods or supplier of digital content to a customer which may be the buyer or a third person. Hence, while the service provider must be identical with the seller, the recipient of the services need not be the buyer as the party to the sales contract to which the services relate. If the customer is different from the buyer, there will regularly be separate contracts, one for sale between seller and buyer and another one for related services between seller/service provider and customer. This three-person scenario envisaged by Art. 2(o) RP underlines the critique of the requirement of contemporaneous conclusion of the sale and related service contracts in Art. 2(m) RP expressed above. A third person may not only discover the need for related services subsequently to the sale — it will often only learn of the sales contract long after it has been concluded.

2. THE THIRD PARTY SCENARIO

The requirement of provision of the services by the seller does not mean that related services are only those performed by the seller/supplier in person. Rather, the seller/supplier may, according to Art. 150 CESL, subcontract the services to another person (rule) unless personal service is required (exception) and in the majority of cases he will do so.

However, as a consequence of the restriction to the seller/supplier, persons that are not a party to the sale/supply contract cannot offer related services under the CESL. This is the case even if they are providing what is in essence a related service such as installation, maintenance or repair of a sold computer or database and even if the service is provided on a regular, institutionalized basis, e.g. by a specialized company recommended by the seller. The restriction affects not only offers by third persons directly to buyers but also offers by third persons as subcontractors to sellers/suppliers. In the latter scenario this may result in the situation that seller/supplier and service-subcontractor cannot opt in to the CESL with regard to services which the seller/supplier offers to the buyer under the CESL. If the seller/supplier is rendering the services “himself”, the possibility to opt in to the CESL with regard to the related services will depend on the corporate structure of the entities involved: If the related service is not provided by a separate legal entity but by the selling entity (even if by another internal department than the concluding one), there is no third person involved. There are only two contracting parties which conclude the sale and related service contracts with regard to which they can opt in to the CESL. If, in contrast, the related service is provided by a separate legal entity (usually on the basis of a separate contract), a third legal person enters the stage. Being different

from the seller, it cannot opt in to the CESL— neither with regard to service contracts directly with the buyer nor with regard to subcontracts with the selling legal entity — even if it is part of the corporate group to which the selling entity belongs or otherwise affiliated with it. Corporate links, even in their strongest form of ownership, do not render such linked legal entities parties to the contract of sale. Any broader interpretation would go beyond the wording of the term seller/supplier and the strictly contract-related concept of the seller/supplier as expressed by Art. 2(k), (m) and (n) RP in conjunction with Art. 150 CESL. Whether the CESL-option is available with regard to related services may therefore depend on the corporate structure of the respective seller although this structure will usually have been chosen prior to, and for completely different reasons than, the CESL-option, e.g. tax advantages or aspects of employment law.

3. CRITICAL ASSESSMENT OF THE RESTRICTED PERSONAL SCOPE

The limited personal scope calls for a critical assessment. From the seller's perspective, the CESL's limited personal scope renders it unattractive to opt in to it with regard to related services. If the seller wants to offer related services, e.g. extended guarantees, installation, repair or maintenance services, he has two options: Either he provides such services himself. This will regularly imply setting up service units within his business — in case of cross-border sales even service units in several countries. Or he concludes subcontracts with independent service providers (including such service providers that belong to the same corporate group) who are either located in the country of distribution of the goods or digital content or are operating cross-border. Regardless of a domestic or cross-border context and irrespective of the size and resources of the seller, subcontracting is the model that is regularly chosen by sellers. In case of SME's it is often the only realistic one. Well known examples are the Amazon and Ikea installation and assembly services: In Germany, Amazon offers an installation service for large home appliances such as washing machines and refrigerators. Amazon is, however, not performing the services itself but through subcontractors. These are special divisions of large logistics and transport companies, in Germany DHL and Hermes. Likewise, Ikea is offering assembly services for their furniture in Germany which are subcontracted to three large logistics and transport companies. In this case, the seller remains responsible towards the buyer for any non-performance of the related service and the obligations and remedies forming the basis of his responsibility are governed by the CESL if the parties opted in to it not only with regard to the sale but also with regard to the related service. The obligations and remedies of the seller vis-à-vis the subcontractor as the basis of the seller's recourse against the subcontractor, however, will be governed by a national law since the seller and the subcontractor cannot opt in to

the CESL regarding their contractual relationship. Furthermore, the CESL does not contain any redress safeguards as provided by the Consumer Sales Directive and its national implementations. Consequently, the seller may incur liability as to the related services offered by him that he cannot pass on to the subcontractor. If he wants to avoid that divergence, the seller will have to check the national laws governing the contracts with the subcontractors in order to assess in how far they allow for aligning particularly the obligations and remedies to those of the CESL or in how far they provide for effective redress mechanisms. In effect, aligning the obligations and remedies in every respect, let alone to use uniform standard contract terms replicating Part V of the CESL in relation to all subcontractors throughout the EU will be impossible and the redress safeguards differ substantially throughout the Member States. Even if the seller responded to that by choosing one national law to govern all subcontracts, mandatory provisions of the national laws applicable according to the objective connections would still prevent uniform standard contract terms. The resulting incongruence of the applicable laws or, in any case, the remaining degree of uncertainty about the congruence as such may suffice to deter traders from opting in to the CESL with regard to related services.

Overall, the potential advantages of a uniform related service regime in relation to buyers are outweighed by the regularly lacking possibility of the selling service provider to align the law applicable to a recourse claim against his subcontractor(s). Since congruence of the laws applicable to the seller's liability towards the buyer and the seller's recourse claim against the subcontractor may be decisive for the seller's choice of law regarding the related service contract with the buyer, a uniform law in relation to buyers is worthless when the uniformity is not replicated in the relationship between seller and subcontractor.

As a result, sellers who offer related services will either not opt in to the CESL with regard to the related service but only with regard to the sale or they will not even opt in to the CESL at all. Instead they may agree on a single national law regarding the sale and the related service contract with the buyer as well as the related service–subcontract. Congruent laws in relation to buyer and subcontractor and in relation to sale and related service outplay a uniform regime towards buyers. By the same token, the CESL will not encourage sellers who are currently not offering related services to do so.

4. CONSEQUENCES OF EXTENDING THE PERSONAL SCOPE

An extension of the CESL's personal scope to third person–service providers would change the picture.

Sellers who already offer cross–border related services could align their contracts with buyers and subcontractors uniformly throughout the EU by opting in to

the CESL with regard to both contracts. This would amount to a substantial advantage over the current status quo and the status quo under the Commission proposal, both potentially resulting in the application of multiple laws. Sellers who currently do not offer cross-border related services, particularly SME, may be encouraged to do so by the prospect of a bidirectional uniform regime. Their reluctance to offer related services will often rest on limited financial means to inquire into different laws depending on the setting of the case and on the risk of liability towards buyers which they cannot pass on to subcontractors. Only a CESL covering related services provided by third persons would address both concerns.

Third person-service providers would equally benefit from an extension of the CESL's personal scope. As additional players on the internal market they have a real and self-standing interest to opt in to the CESL since it would put them into the position to offer their sale-related services in cross-border cases EU-wide under a uniform regime — either to buyers directly (which appears to be the exception) or as service-subcontractors to sellers (which appears to be more common enabling sellers to offer the whole “package” of sale plus related service to potential buyers). In both scenarios, replacement of 27 regimes for offering such services by a single regime would considerably reduce transaction costs and lower the barriers to enter other national markets (as part of the internal market).

An increased use of the CESL with regard to related services by sellers and third person-service providers would result in an increased offer of related services hand in hand with an increased competition for customers. Eventually, this would result in lower prices and greater availability not only of related services but also of goods and digital content throughout the internal market. In particular, service-dependent goods or digital content, i.e. such goods or digital content worthless for the buyer without the related service, e.g. maintenance of a specific machinery or software by the selling producer, would be more readily available cross-border. Furthermore, sellers would more often offer sale plus related service-packages which would serve the general interest of buyers in a one-stop shop, i.e. goods and related services by way of a single transaction with one contractual partner (even if formally split into separate contracts). This interest is particularly strong if the buyer is interested in several related services which are different in kind and would otherwise require several contracts with different service specialists.

Against this background, an extension of the CESL's personal scope to third person-service providers would be a win-win situation for sellers, third person-service providers and customers. But even further, only by way of extending the CESL in this regard, related services would operate effectively as cross-border sales-maximiser in the internal market and contribute to achieving the goals pursued by the Commission with the CESL, i.e. increase cross-border trade and availability of goods, digital content and related services fostering competition resulting in lower prices for consumers.

V. CONCLUSION

The CESL's related services regime requires an overhaul in relation to its substantive and personal scope. With its current scope it is at risk to gain no significant relevance or act even to the detriment of the adjoining sales law. The focus of the overhaul regarding scope should be the numerous restrictions of scope in addition to the general structural limitation to related services: contemporaneous conclusion, excluded sectors and excluded third-party service providers. If they were removed, the CESL's related services regime could fulfil the function attributed to it by the Commission — the function as a sales maximiser. But beyond this sale-serving function, it could also boost the market for related services as such, even in relation to contracts concluded between non-selling service providers and customers. It had the potential to establish an internal market for related services even independent of sellers aiming to offer such related services.

D. FROM RELATED SERVICES TO SERVICES IN GENERAL

I will now turn to the second part of my paper which I primarily intend to be a stimulus for the discussion so that I will only draw of rough sketch of the move towards a general service contract law. When nearly all restrictions of the substantive and personal scope are removed as I suggested it in the first part of my paper, the characteristic structural limitation of the CESL services regime still remains: it is a regime for related services and as such dependent on a sales contract. Services rendered independently of a sale are not covered by it. Inevitably, the question arises whether one could and should remove even this structural restriction to *related* services.

Removing the requirement of “related” would alter the types of service contracts significantly. From mere annex services the CESL's scope would shift to services as such. This would be a substantial move towards a uniform general service contract law on EU level.

The crucial question as regards such a move is whether the CESL's content and structure are ready for such a major extension from sale plus services to sale and services? In its current version the CESL is tailored to sales contracts. Still, Arts. 1 to 86 and 159 to 186 apply to both sale and related service contracts. Although not separated and named as such and even though drafted with a view to sales, they constitute the nucleus of a general contract law. As such, they could apply or at least be adapted to apply equally to services in general as they apply to related services. The “related”-requirement does not refer to a specific content of service contracts resulting in specific provisions for *related* services only (apart from very few, rather minor exceptions). Instead, the link to and dependency on a sale expressed

by the “related”-requirement are rather politically motivated so as to extend the sales law slightly to frequent annex services but not to services in general. Activities constituting a related service may likewise form the subject-matter of an independent, general service contract. A customer may ask a service provider to mount his storage rack in connection with the rack's sale as well as unrelated to the sale after having moved into a new apartment. Hence, nearly all provisions contained in chapter 15 on related services are structurally not limited to related services but could equally apply to unrelated services. This holds particularly true for the remedies apart from the right of termination. The parties' obligations are contained in separate provisions along the generally applicable dichotomy between obligations to achieve a result and obligations of care and skill which is common in most Member States' general service contract laws and which is also the approach of DCFR apart from the additional special regimes for the six basic activities. Hence, despite being limited to related services, the CESL's regime in chapter 15 is not as such incapable of addressing service contracts of all sorts of types. This is mainly due to the rather general character of the CESL's provisions on related services. Hence, turning the CESL's related services law into a general services law appears viable without any insurmountable obstacles on the way. Changes and adaptations are, however, required of which the following five are suggested as being of primary importance.

First, one should move Art. 87–90 CESL on non-performance and change of circumstances from the sales chapter into the general provisions and delete the reference in Art. 147(1) CESL.

Second, one has to move the termination provision in Art. 147(2) CESL to Art. 9 CESL on the effect of termination of one part of a mixed contract of sale and related service on the contract as a whole which, however, itself requires a substantial overhaul¹⁰.

Third, the service provider's right to cure should be extended to sales contracts, the deviation regarding remedies in Arts. 155(2) and (3) CESL becomes obsolete.

Fourth, several further aspects of the contractual relationship should be added to the obligations existing under chapter 15 CESL. These include additional pre-contractual and contractual information duties and duties to warn, the service recipient's right of direction and its consequences on future performance of the contract, duties to co-operate, details of subcontracting as well as tools and materials used by the service provider. It is to be stressed, though that they may be added without touching the general structure of chapter 15.

Fifth, one should consider afresh whether to deal with the problem of incorrect installation primarily under the sales contract or under the service contract. Despite the opt-in nature of the CESL and the possibility of *dépeçage* as between sale/sup-

¹⁰ For details see Illmer, Related Services in the Commission Proposal for a Common European Sales Law COM(2011) 635 final — Much ado about nothing? —, ERPL (European Review of Private Law) 21 (2013) 131, 185 et seq.

ply and related services, one can hardly justify the double effect system under Arts. 101 and Art. 148(4) CESL (incorrect installation as a non-performance of the sales as well as of the related service contract triggering dual remedies). Especially if a general service contract law were to be made the subject-matter or a separate instrument, the relationship with the CESL's sales provisions on incorrect installation would have to be re-considered, particularly in light of potentially differing remedies.

The European Law Institute's statement on the CESL¹¹ is already a move into the right direction with regard to structure and partly also content which could, however, be taken further as indicated here.

The result would be a general service contract law of a rather general nature which could potentially later be supplemented either by special parts on special types of services within the CESL or by separate legal instruments addressing special types of services for which the CESL provisions could still serve as a general service contract law. Despite turning the related service contract law into a general service contract law one could keep the category of related services and the few provisions which are truly distinct from the general service contract law (such as Art. 152(1)(b) CESL) in order to apply them only to related services. In effect, related services would be a special type of service already addressed in the CESL and potentially succeeded by other special types.

A final point to be mentioned in this context is the rather political and tactical question whether the CESL — given the status of the legislative and political process as it currently stands — is the right place for a general service contract law. If one takes the view that a general service contract law without the “related”-requirement is desirable, one may well take the position that it is preferable to have a fresh start as to such a European service contract law, ie. make it the subject-matter of a new, independent legal instrument. If so, the additional question would arise whether to approach related services in the course of such a separate instrument on service contract law or whether to approach them still in the course of the CESL due to their interplay with the sales contract. If they are still addressed within the CESL, one may even consider integrating them with a reduced scope and content (covering mainly installation, maintenance and repair) into the sales provisions while at the same time abandoning chapter 15.

¹¹ The “Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final” is accessible at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf (last visited 28 May 2013).

E. CONCLUSION

In the first part of the paper I demonstrated in how far the CESL's substantive and personal scope need to be unchained with regard to related services to make at least the concept and idea of a uniform opt-in regime for related services throughout the EU work. In effect, this amounts to removing nearly all restrictions of the substantive and personal scope to make the CESL sufficiently attractive for potential users to opt in to it.

In the second part of the paper I considered the question whether to remove even the "related"-requirement so as to turn the CESL's related services regime into a general European service contract law. While this appears viable and desirable, it requires some careful rethinking of the CESL's, but even a future European contract law's structure and content.

MARTIN ILLMER

FROM RELATED SERVICES TO SERVICES — UNCHAINING THE CESL'S SUBSTANTIVE AND PERSONAL SCOPE WITH REGARD TO RELATED SERVICES

S u m m a r y

The article addresses the Common European Sales Law's (CESL) substantive and personal scope with regard to related services which curtails its related services law significantly. In the first and main part the author clarifies the concept of related services as envisaged by the CESL and suggests removing existing restrictions of the substantive and personal scope of the CESL with regard to related services so as to increase its attractiveness to potential users. In the second part the author considers briefly whether the CESL's restriction to related services could and should be removed and the consequences of such a move towards a general service contract law.