



EUROPEAN COMMISSION

Brussels, 11.10.2011
SEC(2011) 1166 final

COMMISSION STAFF WORKING PAPER

Executive summary of the Impact Assessment

Accompanying the document

**Proposal for a Regulation of the European Parliament and of the Council on a Common
European Sales Law**

on a Common European Sales Law

{COM(2011) 635 final}
{SEC(2011) 1165 final}

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

The European Commission (Commission) has been working on a European contract law since 2001. In July 2010 the Commission adopted a 'Green Paper on policy options on progress towards a European contract law for consumers and businesses' (Green Paper). The Commission's Work Programme for 2011 provides for a legal instrument on European contract law as a strategic initiative to be proposed in the last quarter of 2011.

In April 2010 the Commission set up an Expert Group (EG) to conduct a feasibility study on a draft instrument. The study was completed in April 2011. An Impact Assessment Steering Group met 5 times to discuss the draft Green Paper, the impact assessment (IA) report and the feasibility study.

The Commission carried out continuous consultations. The Green Paper resulted in 320 responses of a wide range of stakeholders. They allowed the Commission to identify and address concerns relating to the policy options. The Commission also created a key stakeholders expert group representing business, consumers and legal practitioners. It was consulted continuously on the feasibility study to ensure its rules were covering all practical problems and were user-friendly. In addition, the Commission also surveyed business and consumers through Eurobarometers (EB), the SME Panel and the European Business Test Panel surveys. A workshop on contract law with business stakeholders was organised in November 2010. Commission officials also met representatives of BEUC and attended two meetings of the European Consumer Consultative Group (ECCG).

2. PROBLEM DEFINITION

2.1. Introduction

Differences in contract law between Member States (MS) may hinder cross-border trade in the EU, by dissuading business and consumers from cross-border transactions. Businesses involved in the trade in goods that export into other EU markets face unnecessary entry transaction costs close to €1 billion (bn) every year. The value of the trade foregone by those who are dissuaded due to differences in contract law amounts to some tens of billions of euros.

2.2. Current EU legal framework in the area of contract law

The current legal framework in the area of contract law is characterised by differences between the national laws. While a number of EU and international legal instruments have been adopted in the area of contract law, there is no uniform and comprehensive set of rules that businesses and consumers could use in cross-border transactions in the EU.

2.3. Problem 1: Differences in contract law hinder businesses from cross border trade and limit their cross-border operations

Currently on average only 9.3% of all EU businesses involved in trade in goods export within the EU.. The majority of them (62% in B2B and 57% in B2C) export to no more than 3 other MS. One of the reasons for this relatively low level of cross-border trade are the remaining regulatory (e.g. differences in tax regulations, contract law and administrative requirements) and practical barriers (e.g. language, transportation and after-sales maintenance) to cross-border trade.

Negative impact of contract law differences on cross-border trade: Contract law related barriers dissuade some businesses from trading cross-border. 61% of businesses involved in B2B and 55% in B2C transactions were often or at least occasionally deterred by contract law related barriers. Additionally, 3% of respondents in the business-to-business (B2B) and 2% in the business-to-consumer (B2C) EBs always gave up exports for this reason. Secondly, contract law related barriers lead businesses to limit their cross-border operations: Above 80% (both in B2B and B2C transactions) of businesses active in or interested in cross-border trade and affected by contract law barriers suggested that they exported to fewer EU countries for this reason. The value of failed intra-EU trade as a result of businesses giving up cross-border trade due to contract law can be estimated at a range between €26 bn (equivalent to the GDP of Lithuania) to €84 bn (slightly more than the GDP of Portugal).

Research suggests that bilateral trade between countries which have a legal system based on a common origin have a positive effect on trade. If the contribution of removing differences in contract law were to be about 1 percentage point of this positive effect, the increase in intra-EU trade would be of the order of magnitude of €30 bn.

2.3.1. Additional transaction costs stemming from differences in contract law hinder cross-border trade: The need to apply different foreign contract laws generates additional transaction costs compared to domestic trade. These costs usually grow proportionately to the number of EU countries a business trades with. Businesses estimate their transaction costs for entering one MS between less than €1,000 to above €30,000. These costs have the greatest impact on micro and small enterprises, as they constitute a greater share of their turnover.

2.3.2.

The cumulative costs for all currently exporting EU businesses are between €6 and €13 bn. The annual transaction costs amount to approximately €0.9-€1.9 bn. In the absence of action, by the year 2020 they would accumulate to €9-€19 bn if the same level of export entry persists.

2.3.3. Perceived increased legal complexity hinders cross-border trade: The perception of legal complexity is an additional factor affecting the decision to start cross-border trade. Businesses considered for instance the difficulty in finding out the foreign contract law provisions a top barrier. It ranked 1st for B2C and 3rd for B2B transactions.

2.4. Problem 2: Consumers are hindered from cross-border purchases and miss opportunities

The level of cross-border shopping in the EU remains relatively low with 26% of consumers purchasing from another EU country when they travel and 9% from a distance. Barriers on the supply and demand side appear to hinder this growth. While the impact of practical barriers is gradually decreasing, the importance of the regulatory ones remains high.

2.4.1. Contract law differences impact negatively on cross-border shopping:

Contract law includes rules protecting consumers. The certainty about the content of these rules is a major factor determining consumer confidence in cross-border shopping. When consumers are confronted with different foreign laws, they are uncertain about their rights in a cross-border context. Indeed, 44% of European consumers say that uncertainty about their consumer rights discouraged them from purchasing from other EU countries.

2.4.2. Consumers miss out opportunities of the single market:

A substantial number of consumers who prefer to shop domestically due to uncertainty about their cross-border rights, are often disadvantaged by the limited choice and higher prices in their domestic markets. If the 44% of consumers who shop online only domestically and who are uncertain about their cross-border rights, would make at least one online cross-border purchase, they could save €380 million.

On the other hand, consumers who try to access better offers in other MS are often refused a purchase by the trader. Almost a quarter of export-oriented European retailers refused to sell due to contract law. The refusal of sales may dissuade proactive consumers from shopping cross-border and disadvantages them economically. European consumers spend €2.3 bn annually on cross-border purchases. Assuming that within a year the 3 million consumers who experienced a refusal to sell were refused an order of a product of an average value of €2, the value of failed transactions would be €156 million.

2.5. Need for action at EU level and subsidiarity

This initiative complies with the principle of subsidiarity. The objectives of facilitating the expansion of cross-border trade for business and purchases by consumers in the internal market cannot be fully achieved as long as differences in national contract laws persist. As market trends evolve and prompt MS to take action independently (e.g. regulating digital content products) regulatory divergences lead to increased transaction costs and legal complexity for business; gaps in the protection of consumers risk growth. National contract laws can only be approximated by adopting measures at EU level. The Union is best placed to address the problems outlined above as they have a clear cross-border dimension.

3. POLICY OBJECTIVES

The overall objective is to support the economic activity in the internal market by improving the conditions for cross-border trade by reducing the barriers caused by differences in contract law between MS. The general objectives are to facilitate the expansion of cross-border trade for business and cross-border purchases for consumers.

4. POLICY OPTIONS

4.1. Options for type of intervention

Option 1: Baseline scenario (No policy change): The current legal framework would be maintained without further EU action.

Option 2: A toolbox for the EU legislator: This would set out model definitions and rules on contract law topics that are likely to be subject to EU legislation. A Commission document or an inter-institutional agreement could be envisaged.

Option 3: Recommendation on Common European Sales Law: A Common European Sales Law instrument could be attached to a Recommendation addressed to the MS encouraging them to replace (option 3a) or incorporate (option 3b) it into their national laws voluntarily, allowing them discretion on time, method and extent of implementation. This option may induce MS to replace their national contract laws or let them incorporate a Common European Sales Law instrument as an optional regime.

Option 4: Regulation or Directive setting up an optional Common European Sales Law instrument: An optional Common European Sales Law could be set up as a 'second regime' within each Member State's national civil law. It would be a comprehensive, self-standing set of contract law rules with a high level of consumer protection, which could be chosen by the parties as the law applicable to their cross-border contracts.

Option 5a and 5b: Directive on a mandatory Common European Sales Law: A Directive could harmonise the national contract laws of the 27 MS. It would complement the consumer acquis and would be based on a high level of consumer protection. The harmonisation may be full (5a) or minimal (5b).

Option 6: Regulation establishing a mandatory Common European Sales Law: This would create a uniform set of EU contract law rules in all MS.

Option 7: Regulation establishing a European Civil Code: This would create a uniform set of European civil law rules in all MS.

Discarded options:

- Option 3a: Recommendation encouraging MS to replace national laws.
- Option 7: Regulation establishing a European Civil Code.

These options received hardly any support from stakeholders and are likely to go beyond what is necessary and thus be disproportionate. They also raise serious issues of not meeting the principle of subsidiarity.

4.2. Options for scope and content

The scope of a Common European Sales Law instrument could apply only to cross-border transactions or to both domestic and cross-border transactions. The scope could include B2C contracts only or also B2B contracts. A narrow substantive content of the instrument would be limited to core areas of general contract law. A broad scope could go beyond by including specific areas in contract law, such as service contracts and other areas of law, such as non-contractual liability.

This impact assessment analyses a combination of the narrow and broad scope areas. It covers the vast majority of usual practical problems within the lifecycle of a cross-border contract. The analysis focuses on the impacts of substantive provisions which impact upon consumers and businesses.

5. ANALYSIS OF IMPACTS

5.1. Main impacts of policy option 1: Baseline Scenario

The baseline scenario (BS) would not remove the additional transaction costs or reduce the level of legal complexity for businesses who wish to trade cross-border. Competition in the internal market would remain limited, and despite the adoption of the Consumer Rights Directive divergences between the consumer protection rules of different MS would remain.

5.2. Main impacts of policy option 2

5.2.1. 2a: Toolbox as a Commission Document

The toolbox would be used for the amendment of existing or preparation of future sectoral legislation. Therefore, compared to the BS, the positive impacts of this option on business and

consumers would be indirect and also very limited. Moreover, any impacts of this option would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time to achieve. As there is no way of knowing whether and how widely this option would be used and accepted by the Council and Parliament, the impacts of this option would not really differ compared to the BS.

5.2.2. 2b: Toolbox as an inter-institutional agreement

Compared to option 2a, the only difference in this option is that in the negotiations for new legislation or amendments to existing legislation Council and Parliament would make use of the toolbox provided there were no overriding sector-specific reasons. However, as this option would only concern national contract law rules which would be modified following revised or new EU legislation, costs stemming from differences of national contract laws would largely remain. In addition, this option would only have an impact at the earliest in the medium term. The overall positive impact of this option would therefore be, albeit greater than option 2a, still rather limited.

5.3. Main impacts of policy option 3: Recommendation on a Common European Sales Law

This option would only be effective if the Common European Sales Law was incorporated by a number of MS entirely and without amendment to the original version attached to the Recommendation. However, this is highly unlikely. This option would help to a certain extent traders in a B2B contract (as they would have the freedom to decide on the law applicable to their contract). Therefore these traders would have the opportunity to reduce their transaction costs by using the Common European Sales Law of one MS which has best implemented it. The same would not be the case for traders in B2C contracts, as they would have to research whether and where MS have changed the Common European Sales Law with regards to mandatory consumer protection rules. This means that they would not be able to sell across borders to consumers on the basis of one single law and would therefore incur transaction costs of the type indicated in the BS. Consequently this option would only to a limited extent remove the hindrances to cross-border trade identified in the problem definition.

5.4. Main impacts of policy option 4: Regulation/Directive setting up an optional Common European Sales Law

This option would significantly reduce transaction costs because it would allow businesses to use one set of rules for cross border trade irrespective of the number of countries they trade with in the EU. The decrease in costs would provide incentives to increase trade which would result in more competition in the internal market and give consumers more product choice at a lower price.

If a business used the optional Common European Sales Law, administrative costs would amount to €3,000 for B2C contracts and to €1,500 for B2B contracts (on average per enterprise). Assuming that initially 25% of current exporters decide to use the optional Common European Sales Law, one-off implementation costs would amount to €1.89 billion. These costs would be however by far outweighed by the savings which would be made from businesses not paying the additional transaction costs for when they trade with more than one MS. This option would result in costs savings for new exporters and potential savings by current exporters which would expand their cross-border sales to new countries. The annual savings for new exporters can be estimated at €150-€400 million while the potential savings

for current exporters could be estimated at ~~€3.7-€4.3~~ billion. Domestic businesses or those which do not choose the optional Common European Sales Law would not face any costs as this option would not affect them.

This policy option meets the policy objectives as it reduces costs for businesses and offers a less complex legal environment for those who wish to trade cross border to more than one MS. At the same time it provides a high level of consumer protection.

5.5. Main impacts of policy options 5 and 6

5.5.1. Policy option 5a: full harmonisation Directive on a mandatory Common European Sales Law and policy option 6: Regulation establishing a mandatory Common European Sales Law

Compared to the BS, an instrument under these options would have substantial costs attached to it. The instrument would weigh particularly heavily on SMEs. Businesses which only trade domestically would face a very substantial cost to use the new instrument without an added value. These businesses (17,136,213 in B2B and 4,420,563 in B2C) would face a one-off implementation cost of €208.8 billion to use the new legislation.

The instrument would create additional administrative costs for 22 million businesses, i.e. including those who trade only domestically, which would amount on average per enterprise to €2,500 in B2C transactions and to €1,500 in B2B transactions. The businesses trading only domestically would be required to pay these costs with no real financial gain, as this advantage would only be realised for those businesses trading across a border. The one-off transactions costs for 22 million businesses (including for those who trade only domestically) in the EU would amount to €217 billion.

However, the instrument would result in cost savings for new exporters as well as current exporters who would expand their cross-border sales to new countries. The annual savings for new exporters would be ~~€0.63-€1.6~~ billion. Similarly as under option 4, the current exporters that would start trading with additional countries could be estimated to have potential savings of at least ~~€3.7 – €4.3~~ billion.

The instrument would increase competition in the internal market and lead to a decrease in prices. Consumers would benefit from an increased choice of products at a lower price. Although the instrument would provide a high level of consumer protection, the replacing of national legislation could mean that some consumers may lose protection in some specific cases compared to their existing national law.

MS would be likely to find these options politically very difficult to agree and to implement as they would eliminate domestic laws and legal traditions. Although the instrument would harmonise existing contract law legislation and eliminate transaction costs, it would create other substantive disadvantages which would not only be of monetary value. Therefore taking these and the monetary costs into account they outweigh by far the benefits of the instrument.

5.5.2. Policy option 5b: A minimum harmonisation Directive on a Common European Sales Law

MS could implement this Directive going beyond its consumer protection level. As experience with existing minimum harmonisation Directives shows, the level of

implementation could maintain a considerable number of differences in national contract laws. This option would to a certain extent reduce transaction costs and increase the level of consumer protection allowing consumers to have more confidence to purchase across borders.

However, as set out in options 5a and 6, there would be a very substantial one-off cost borne by domestic and cross border traders as they would have to adapt their contracts to use the new law. This cost would affect all businesses involved in the trade in goods, irrespective of their desire to trade cross-border. In addition, due to the nature of minimum harmonisation, there would still be some extra costs for businesses when trading cross border to consumers arising from the necessity to research the levels of consumer protection in other MS. Therefore, whilst there may be a worthwhile investment for B2B cross border transactions, those performing B2C cross-border contracts as well as trading only domestically would have to pay very substantial additional costs without a clear added value.

6. COMPARATIVE ASSESSMENT OF OPTIONS

The comparative assessment shows that that option 4 (an optional Common European Sales Law), 5a (full harmonisation Directive on a mandatory Common European Sales Law) and option 6 (Regulation establishing a mandatory Common European Sales Law) best meet the policy objectives. However, the costs attached to options 5a and 6 are significant when compared to the other options because all businesses involved in the trade in goods in the EU would need to adapt to a new legislative framework. In particular, they would create a financial burden which will not be compensated by any benefits for the businesses who only trade domestically and for whom cross border transactions costs do not create a problem. Therefore this is not a proportionate measure for the reduction of the contract law related obstacles to cross-border trade. Options 5a and 6 also have little support from MS.

The **preferred policy option** is therefore option 4 which would meet the policy objectives in terms of reducing legal complexity and transaction costs. Exporters who decide to use the optional Common European Sales Law would initially face certain transaction costs. However, this option would be chosen voluntarily by businesses. To businesses starting or extending their trade cross-border it would bring significant costs savings. Businesses trading domestically or those who decide not to use the optional Common European Sales Law when exporting would not face any costs as this option would not affect them.

This option would also ensure a high level of consumer protection which would increase consumer certainty and confidence about rights in cross-border shopping. It would contribute to the cross-border trade and competitiveness of the EU economy and would benefit the consumer by greater choice of products and better prices. As this option would be chosen voluntarily by businesses, it would not impose additional burdens but bring significant cost savings for businesses extending their trade cross-border.

7. MONITORING AND EVALUATION ARRANGEMENTS

The Commission will launch a monitoring and evaluation exercise to assess how effectively the Common European Sales Law will achieve its objectives. This exercise will take place 4 years after the date of application of the instrument. The intention is for the exercise to precede and feed into a review process which will examine the effectiveness of the Common European Sales Law instrument.