

Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

Concerning a draft Regulation on a Common European Sales Law for the European Union¹

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(2) TEU:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

2. The EU institutions must ensure “constant respect”² for the principle of subsidiarity as laid down in Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.³

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a “detailed statement” making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

— some assessment of the proposal’s financial impact;

¹ 15429/11, COM(11)635.

² Article 1 of Protocol (No 2).

³ Article 2 of Protocol (No 2).

- in the case of a Directive, some assessment of the proposal’s implications for national and, where necessary, regional legislation; and
- qualitative and, wherever possible, quantitative substantiation of the reasons “for concluding that a Union objective can be better achieved at Union level”.

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(2) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity:

“For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

“The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”⁴

Proposed legislation

7. The content of the proposed Regulation is set out in detail in the European Scrutiny Committee's Report, to which this Reasoned Opinion is attached. For these purposes we simply set out the stated objective of the proposal and the reasons given for EU rather than Member State action.

Objective

8. The Commission's explanatory memorandum describes the objective of the proposal as follows:

“The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and crossborder purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.”⁵

Subsidiarity

9. The Commission's explanatory memorandum addresses subsidiarity in the following terms:

⁴ Article 5.

⁵ Page 4 of the Commission's explanatory memorandum.

“The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear crossborder dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems.

“As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

“By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

“The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions. Furthermore, as market trends evolve and prompt Member States to take action independently, for example in regulating the emerging digital content market, regulatory divergences leading to increased transaction costs and gaps in the protection of consumers are likely to grow.”⁶

10. The Commission’s impact assessment addresses subsidiarity in the following terms:

“This initiative complies with the principle of subsidiarity for a number of reasons. 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 businesses and consumers cannot use a uniform set of contract law rules for their

⁶ Page9.

cross-border transactions. The current legal framework is not sufficient, as it lacks single set of uniform substantive rules which cover comprehensively the lifecycle of a cross-border contract. Furthermore, as market trends evolve and prompt MS to take action independently (e.g. in regulating digital content products) regulatory divergences grow. They lead to increased transaction costs and legal complexity for business, as well as uncertainty, affecting businesses and consumers involved in cross-border transactions.

“A number of stakeholders acknowledge that the existence of differences in contract laws have led to legal fragmentation which can affect the functioning of the internal market; this may entail additional transaction costs and legal uncertainty for business and a lack of consumer confidence. The Union is best placed to address obstacles to the functioning of the internal market as these obstacles have a clear cross-border dimension. More specifically, it is best placed to address contract law related obstacles by developing a single set of uniform substantive contract law rules. It will add value to the existing legal framework by creating such rules for consumers and businesses that engage in cross-border transactions.”⁷

Aspects of the Regulation which do not comply with the principle of subsidiarity

11. The House of Commons considers that the draft Regulation on a Common European Sales Law for the EU does not comply with either the procedural obligations imposed on the Commission by Protocol (No 2) or the principle of subsidiarity in the following respects.

i) Failure to comply with an essential procedural requirement

12. Neither the explanatory memorandum nor the impact assessment contains a “detailed statement to make it possible to appraise compliance with the principle of subsidiarity” (and proportionality), as required by Article 5 of Protocol No 2, TFEU, the contents of which are set out in paragraph 4 of this Reasoned Opinion.

⁷ Page 22 .

13. The presumption in Article 5 TEU is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that an EU citizen and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that “a Union objective can be better achieved at union level.”⁸

14. The evidence the European Scrutiny Committee received shows that the proposal is likely to have significant consequences for, *inter alia*, national rules on the law of contract, whether directly or indirectly; for national regimes for the protection of consumer rights; for legal clarity and certainty in cross-border contracts for the sale of goods; and for the costs to be borne by businesses. The extracts at paragraphs 9 and 10 of this Reasoned Opinion show that none of these is considered by the Commission in its assessment of whether the proposal complies with the principle of subsidiarity, thereby making it very difficult for national parliaments to appraise compliance with subsidiarity within the eight-week period for the submission of a Reasoned Opinion. (The House of Commons was greatly assisted in this instance by the submissions received from representative organisations in the UK.) The Commission’s failure to provide a detailed statement in the view of the House of Commons amounts to an infringement of an essential procedural requirement of Protocol 2.

16. The Commission’s approach to the consideration of subsidiarity is a matter of concern not only to the House of Commons, but to all national parliaments of EU Member States. The House of Commons draws its attention to paragraph 2.3 of the Contribution of the XLVI COSAC:

“In accordance with Article 5 of Protocol 2, COSAC underlines that for national Parliaments to exercise the powers vested in them it is necessary to enable the financial effects of EU draft legislative acts to be evaluated, and, in the case of Directives, the implications for national legal systems also to be evaluated. Moreover, COSAC recalls that EU draft legislative acts should be justified on the basis of

⁸ Article 5 of Protocol 2.

qualitative and quantitative indicators. COSAC notes that subsidiarity analyses in the Commission's explanatory memoranda have, to date, not met the requirements of Article 5.”

ii) Failure to comply with principle of subsidiarity

17. Compliance of this objective with subsidiarity is appraised in the light of the guidance set out in paragraph 6 above.

18. It is axiomatic that an optional sales law common to all Member States is something that can be better achieved at EU level than at national level. But that is to assume that the proposed Common European Sales Law a) is necessary and b) will produce clear benefits by reason of its scale and effect, compared with action by Member States. Both are requirements to be met for compliance with the principle of subsidiarity; on the evidence it has have reviewed, the House of Commons doubts that either has been met.

Necessity

19. Neither the research carried out by Which? nor by Consumer Focus shows that different contract laws stop consumers or businesses from engaging in cross-border trade to a significant degree. Their conclusions are also based on an analysis of the statistics relied upon by the Commission.⁹

20. Which? reports that in a recent Eurobarometer 80% of companies said they were never or not very often deterred by consumer contract law-related obstacles. 72% of companies said that the need to adapt and comply with different consumer protection rules in foreign contract laws has no impact or only a minimal impact on their decision to sell cross-border to consumers from other EU countries. Furthermore, 79% of companies said that one single European consumer contract law would not change or only increase their cross-border operations a little. Meanwhile other Commission research shows that the biggest concerns among consumers when shopping across borders is fraud (62%) and what to do

⁹ The detailed submissions of the representative e organisations, and the Government's evidence to Parliament in the form of an Explanatory Memorandum, are set out in full in the Report of the European Scrutiny Committee of 23 November 2011, to which this Reasoned Opinion is attached.

if something goes wrong (59%). New Which? research confirms this; over half of the consumers surveyed cited concerns over what to do if something goes wrong as the main reason for not buying goods from non-UK retailers.

21. Consumer Focus reports that:

- the Commission's Consumer Market Scoreboard (March 2011) found the major reasons for a lack of cross-border trade to be practical. 62 per cent of consumers cited fears of fraud, 59 per cent were worried about what to do if problems arose and 49 per cent were concerned about delivery;
- in the Commission's qualitative Eurobarometer survey on obstacles for citizens in the Internal Market (September 2011), the most prominent reason why consumers do not buy cross-border was that they prefer to buy locally; and
- a Commission report on cross-border e-commerce found that 71 per cent of consumers thought that it was harder to resolve problems when purchasing from providers located in other EU countries.

22. These findings are borne out by Consumer Focus's own research. Its mystery shopping survey – conducted with consumer organisations from 11 countries – of consumer experiences of buying goods and services with a mobile phone found gaps in information disclosure. These included lines of responsibilities of traders in transaction chains; poor complaint handling and redress; and problems with payments.

23. The impact of diverging consumer contract law on business decisions on cross-border trading also seems to be exaggerated. According to the Commission's Impact Assessment¹⁰ only 7% of companies perceive the 'need to adapt and comply with different consumer protection rules in foreign contract law' as having a large impact on their decision to sell across border to consumers from other EU countries. It is surprising that this important

¹⁰ Page 13, footnote 55.

statistic is not found within the relevant paragraph of the impact assessment, but in a foot note. The sentence in the paragraph reads, misleadingly:

“38% of companies with experience or an interest in cross-border trade considered the need to adapt and comply with different consumer protection rules in foreign contract law as a barrier.”

24. In a recent Flash Eurobarometer (No. 300), nearly 80% of traders said that harmonised consumer law in the EU would make ‘little or no difference to their cross-border trade’. And, according to Flash Eurobarometer 321, nearly 90% of traders never or rarely refused to sell to foreign consumers because of differences in consumer protection rules in the contract laws of their EU country.

25. Consumer Focus concludes that the Commission has provided no convincing evidence to support its position that this new EU contract law instrument will meet the Commission’s objective of boosting cross-border trade. Their research suggests that other barriers to consumers and businesses trading across borders are much more significant than variations in contract law.

26. The survey conducted by the Federation of Small Businesses (FSB), which is in favour of the proposal, only found that 18% of businesses said the proposal would help them. A quarter of FSB members trade overseas, 87% of them with other EU countries — only 14% of which said legal barriers are a disincentive to trade across borders.

Clear benefits by reason of its scale and effect

27. There are a number of concerns expressed by representative organisations in the UK, and by the Government in its Explanatory Memorandum to Parliament of 31 October, which overlap. These cast considerable doubt on whether the legislative intention of “facilitating the expansion of cross-border trade for business and cross-border purchases for consumers” to facilitate cross-border sales for consumers” can be achieved, and therefore that action by the EU will be more effective than action by Member States.

- *Legal complexity*

28. The first is that the Common European Sales Law could lead to higher levels of legal complexity. The fact that a wide range of matters, as set out in recital 27, affecting the legal relationship between the parties are not addressed within this free standing regime is likely to undermine the intended aim of removing the need for businesses to incur transactions costs in terms of legal advice on another country's law. There is a legitimate concern among legal practitioners in the UK that the proposals as drafted may therefore add to confusion rather than reduce complexity. The exclusions in recital 27 are as follows:

“All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.”

- *Legal certainty*

29. For a legal code to be applied uniformly across the EU, it must be interpreted uniformly. There is, however, no mechanism for doing so in the proposal. Article 14 requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation; the Commission will set up a database of such judgments. A database of judgments will not, however, set legal precedent for national courts, which are responsible for interpreting and enforcing the Common European Sales Law. Lacking a single source of jurisprudence, legal practitioners in the UK think it is likely that it will be

interpreted and applied differently in Member States. This will add uncertainty rather than clarity to cross-border sales conducted under the new instrument, require legal expertise, and so undermine the essential purpose of the proposal.

- *Consumer rights*

30. The introduction of an ‘optional’ European Contract Law would increase legal uncertainty and create confusion for consumers. Consumers will be faced with a situation in which different rules apply to the same products depending on whom they are purchasing them from and where the supplier is located.

31. Currently consumers purchasing across EU borders can be confronted with different rules but the Rome 1 Regulation (Article 6) provides protection in that consumers generally benefit from a higher level of protection available under their national law. Although the draft Regulation provides that both parties to the contract need to agree to its use, and that consumers must be asked to give explicit consent, the reality is that consumer choice will be limited to accepting the contract offered by the supplier or not purchasing the product. By introducing a European body of law that businesses, in effect, can choose, national consumer protection law becomes ‘optional’ too.

32. Under Article 114(3) the Commission is obliged to ensure a high level of consumer protection when making internal market proposals such as this. Again, on the evidence it has reviewed the House of Commons finds that there is considerable doubt as to whether the proposal will achieve this, and therefore whether action at the level of the EU rather than Member States will bring the greater benefits that the Commission claims.

- *Domestic application*

33. Article 13 provides that “a Member State may decide to make the Common European Sales Law available” for use in an entirely domestic setting and for contracts between traders, neither of which is an SME.

34. The House of Commons has grave reservations about the appropriateness of incorporating a permissive provision on domestic contracts in a proposal for EU legislation

whose premise is the better functioning of the internal market. There is no evidence produced to suggest that this Article is necessary to achieve the objectives of the proposal; indeed, nor could there be given that the provision is not obligatory. The concern, therefore, is that it is the indirect effect of it which is the primary legislative goal.

35. The point was well made in the evidence submitted by Which?:

“There is a real risk that the Common European Sales Law could replace national consumer laws as the Commission’s proposal gives Member States the option to make the Common European Sales Law applicable to domestic contracts. Moreover, if traders use it when selling cross-border then it would make sense for them to start applying it to domestic contracts, as allowed under the draft regulation, to avoid operating under two different legal regimes. Additionally, if companies trading cross border have a competitive advantage (because they’re using the Common European Sales Law) compared to companies just trading domestically, it might effectively force the domestic companies to migrate to the Common Sales Law as well. Either outcome would de facto lead to back-door harmonisation of contract law.”

Conclusion

36. For these reasons given above the House of Commons concludes that this proposal does not respect the principle of subsidiarity.