

Meeting of the European Affairs Committee of the Federal Council on 30 November 2011

Reasoned Opinion pursuant to Article 23g (1) of the Austrian Constitution

regarding

COM (11) 635 final

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

The Federal Council has adopted the following resolution:

“A. Reasoned Opinion

The project under consideration is incompatible with the principle of subsidiarity.

B. Grounds for Reasoned Opinion

On 11 October 2011, the European Commission presented its proposal for a regulation on a Common European Sales Law. This new set of rules is to apply to cross-border sales contracts. It represents a new contract law regime to be applied by the contracting parties on a voluntary basis and existing alongside the 27 national contract law regimes of the Member States as a 28th regime. Through this optional regime, the European Commission intends to promote cross-border transactions, especially those using modern distribution channels, i.e. above all online transactions. Although we commend the Commission for this intention, we doubt whether the means chosen for implementation are adequate.

As already indicated in the negative opinion submitted with regard to the Single Market Act, the co-existence of different legal regimes does not provide the degree of legal certainty which has been guaranteed by the Austrian legislator under Austrian private law since the creation of the General Code of Civil Law exactly 200 years ago. On the one hand, the risk of legal uncertainty inherent in a Common European Sales Law is due to the limited scope of the regime proposed, which leaves certain aspects of the contractual relationship unregulated. Regardless of the applicability of the Common European Sales Law, issues such as legal capacity or agency would still be subject to the relevant national law regime. Hence, those applying the law would in future have to deal not only with two different legal regimes, i.e. the counterparty's and their own, but with a third one as well. Given this triple approach, substantial conflicts and contradictions are expected to arise at the interface between national law and European sales law.

We do not agree with the European Commission's argument that the optional instrument would be part of the national legal regime of the Member States and, as such, embedded in the legal framework of the Member State concerned. A regulation of the European Union does not become national law, but remains EU law. As a matter of fact, the optional instrument – as an alternative contract law regime – would be intended to replace parts of the national law.

On the other hand, the set of rules proposed contains a number of undefined notions that would call for autonomous interpretation, i.e. ultimately by the European Court of Justice. This process of creating legal certainty would take years and involve a risk of increased costs of litigation, which

ultimately impedes access to the law. Thus, the added value to be derived from the proposal for an optional sales law for those applying the law is expected to be minimal. The contrary may turn out to be the case, with greater legal uncertainty leading to an increase in transaction costs.

Moreover, the scope of the proposed regulation covers areas that had already been contained in the original version of the Consumer Rights Directive and had to be excluded in the face of massive opposition on the part of Member States before the Directive was adopted. Among others, the Directive originally contained a chapter on unfair contract terms. Given the original differences between Member States and the resulting differences in the need for regulation, there are great variations in transposition into national law, regardless of the existence of a Directive which, admittedly, only aims at a minimum level of harmonisation. In this area, harmonisation will not meet with consensus. The provisions eliminated from the Consumer Rights Directive for this very reason are now being reintroduced, without modification, into the proposal for a regulation on a Common European Sales Law.

Although the proposal for a Common European Sales Law does not aim at creating a set of rules to be applied on a mandatory basis, as it allows the contracting parties the freedom to choose this optional sales law regime, structurally weaker consumers or SMEs engaging in transactions with powerful traders may not be in a position to influence the choice of law.

Measures taken at the European level to increase the frequency of cross-border transactions should focus on the real problems encountered in this field. The Eurobarometer results of March 2011 speak a clear language. Consumers are reluctant to engage in cross-border transactions not because of differences in legal regimes, but due to factual and practical problems, such as language barriers, fear of fraud, delays in delivery or problems encountered in the event of deficient products received. Traders themselves indicate that they do not consider differences in legal regimes a substantial obstacle to cross-border activities. General considerations of economic efficiency play a greater role for them.

In conclusion, we wish to point out that – in light of the ECJ decision on the European Cooperative Society (see ECJ C-436/03) – it appears more than doubtful if Article 114 TFEU can serve as the legal basis for an optional sales law. Art. 114 TFEU should not be used to provide the legal basis for the creation of “parallel regulatory instruments” in areas currently within the sphere of competence of the Member States. Given that an optional instrument is not to be considered a measure of legal approximation, Art. 352 TFEU would have to be referred to, which, unlike Art. 114 TFEU, requires a unanimous decision by the Council.

A European regulation, although directly applicable in the Member States, does not constitute national law, but competes with national law. All things considered, the optional instrument is not aimed at modifying the existing national legal standards, but rather at providing a fully harmonised parallel legal regime. Ultimately, however, there is a risk of harmonisation coming to a standstill in areas in which the creation of uniform and binding provisions in the form of directives or regulations for the purpose of consumer protection would be urgently required. In this context, we wish to refer to the fact that the proposal for a Common European Sales Law only contains very basic provisions on the supply of digital content.

The Austrian private law regime and, in particular, the Code of Civil Law and its interpretations as an inherent part of the citizens’ conception of the law, does not in any way run counter to the achievement of the goals pursued by the proposal. Therefore, instead of creating an optional instrument, effort should be made to promote confidence-building measures at the European level in order to help eliminate the real obstacles impeding cross-border transactions. The proposal submitted by the Commission does not meet the requirements of the principle of subsidiarity, as it is

not necessary to achieve the goal pursued and there is no evidence of the added value to be obtained through the creation of a 28th contract law regime.

As regards the Commission's comments on the compatibility of the proposal with the subsidiarity principle, we wish to point out that these comments ought to include a balanced presentation of the consequences of the proposed changes based on concrete quantitative and qualitative criteria. However, the Commission only refers to a wide range of transaction costs allegedly arising for traders, without considering any of the additional costs that may arise for consumers.

The potential macro-economic loss that might be caused by the increased legal complexity inherent in the proposal would also have to be quantified by the Commission in order to arrive at a credible impact assessment. Only then would the impact assessment provide an appropriate basis for assessing the compatibility of the proposal with the subsidiarity principle."