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*Committee on Economic and Monetary Affairs*

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**2011/0284(COD)**

11.10.2012

# OPINION

of the Committee on Economic and Monetary Affairs

for the Committee on Legal Affairs

on the proposal for a regulation of the European Parliament and of the Council  
on a Common European Sales Law  
(COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))

Rapporteur: Marianne Thyssen

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## SHORT JUSTIFICATION

### A. Substance of the proposal

By means of this proposal for a Common European Sales Law, the Commission aims to eliminate from the internal market obstacles arising from differences in contract law between Member States. This instrument introduces into national law an alternative set of contract law provisions for which traders can opt (opt-in system), provided that the consumer explicitly consents to this. An opt-in would only be possible in the case of cross-border sales agreements relating to material movable goods, digital content and related service agreements between traders and consumers (B2C) or between traders if at least one of the parties is an SME (B2B). Member States may, however, themselves extend the scope of this system to include purely internal contracts and B2B contracts which do not involve any SME.

According to the Commission, a uniform set of contract law rules may reduce transaction costs for traders, particularly SMEs. The proposed system would give consumers a wider and more competitive range of products to choose from and a high level of consumer protection and legal certainty.

### B. Rapporteur's observations

Differences in contract law constitute an obstacle, albeit by no means the biggest one. Even so, whatever can be done to eliminate it should be done. As the rapporteur for the Committee on Economic and Monetary Affairs, I see it as my task to focus on the concrete economic impact of this proposal and on maximising its added value both to businesses and to consumers.

The crucial question is whether the cost of the existing diversity is greater than the cost of the new regime. In considering this point, it should also be borne in mind that the legal framework for cross-border sales agreements is still very much in flux due to the recently adopted Consumer Rights Directive, the legislative proposals on alternative and online dispute resolution and the evaluation of the Rome I Regulation scheduled for 2013. Nonetheless, and despite the not entirely clear impact assessment, it seems likely that an optional uniform regime could possess added value for the internal market. However, the responses of stakeholder organisations to this proposal show that they anticipate relatively minor 'benefits'. In order to ensure that traders actually opt for the instrument, it must possess substantial added value. The practical details of this uniform regime must therefore be such that it is clear, affords maximum legal certainty and does not entail any additional cost which can act as a disincentive. Moreover, consumers must be able to rely on a high level of consumer protection.

As the difficult negotiations on the Consumer Rights Directive have demonstrated the limits of maximum harmonisation (as the 'first best' option), the rapporteur supports the decision to propose an optional instrument.

Your rapporteur also welcomes the inclusion of B2B contractual relationships in this

proposal. In professional relationships too, SMEs derive benefit from lower legal costs. Moreover, the impact assessment shows that there is major potential for economic gain precisely thanks to the simplification of negotiations between SMEs. Furthermore, this acknowledges the often weaker negotiating position of SMEs in B2B relationships. The rapporteur is accordingly delighted with the binding character of the provisions concerning delays in payment by professional operators. However, this sales law instrument ought to be geared more to SMEs.

The proposal fails to regulate a number of essential elements of the contractual relationship, as a result of which businesses may still need to seek advice on foreign law, and the intended legal certainty is not achieved. Particularly the lack of provisions concerning the transfer of ownership is problematic. When the first review is performed, at the latest, therefore, it should be ascertained whether the matters referred to in Recital 27 – particularly transfer of ownership – ought to be dealt with in this regulation.

Although financial services are in principle excluded from the scope of the regulation, as requested in a previous advisory report from the European Parliament, this point needs to be clarified further in certain respects.

As this instrument is particularly intended to limit the costs of cross-border trade for SMEs, the Commission ought to draw up standard contracts, in consultation with representative organisations, to clarify European sales law. This would improve legal certainty and user-friendliness.

Lastly, the rapporteur trusts that, in view of the concerns expressed by stakeholder organisations, the committee responsible, JURI, and the associated committee, IMCO, will devote themselves to the numerous terminological confusions, the need for it to be made clear that the application of Article 6(2) of the Rome I Regulation does not have the effect that the consumer rights provided for in the sales law instrument are after all superseded by stricter national provisions, the unclear formulation of Articles 8 and 9 of the regulation, and a better balance between the rights and obligations of traders and consumers in order to make the system sufficiently attractive.

## AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a regulation Recital 19 a (new)

*Draft legislative resolution*

*Amendment*

***(19a) In view of their special character,***

*financial services should be excluded from the scope of this regulation. For the purposes of this regulation, 'financial services' means, albeit not exclusively, services and activities of a credit institution, a financial institution or an undertaking which provides ancillary services within the meaning of Article 4(1), (5) and (21) of Directive 2006/48/EC; of an insurance undertaking, a reinsurance undertaking or an insurance holding company within the meaning of Articles 13(1) and (2), 13(4) and (5) and 212(1)(f) of Directive 2009/138/EC; of an investment firm within the meaning of Article 3(1)(b) of Directive 2006/49/EC; of a payment service provider within the meaning of Article 4(9) of Directive 2007/64/EC; of an electronic money issuer within the meaning of Article 2(3) of Directive 2009/110/EC; of a credit intermediary or non-credit institution within the meaning of Article 3(e) or (i) of Directive .../.../EC [proposal for a directive of the European Parliament and of the Council on credit agreements for consumers relating to immovable property]; of a creditor or credit intermediary within the meaning of Article 3(b) or (f) of Directive 2008/48/EC. The provision of currency exchange services should also be regarded as financial services.*

#### *Justification*

*The rapporteur considers it desirable that the exclusion of financial services from the scope of the regulation should already be explicitly stated in the preamble and that a non-exhaustive definition of this category should be inserted.*

## Amendment 2

### Proposal for a regulation Recital 30

#### *Text proposed by the Commission*

(30) Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.

#### *Amendment*

(30) Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection **and the protection of SMEs**. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.

#### *Justification*

*Although freedom of contract is indeed essential, the fact should also be clearly acknowledged that in reality SMEs are in a weaker negotiating position in certain B2B relationships, and it should be remedied where necessary.*

## Amendment 3

### Proposal for a regulation Recital 34 a (new)

#### *Text proposed by the Commission*

#### *Amendment*

***(34a) In order to make the Common European Sales Law as user-friendly as possible for traders, particularly SMEs, and in accordance with the recommendations of the European Parliament, the Commission will draw up European standard contracts in all the official languages of the EU, in consultation with organisations representing consumers and businesses.***

#### *Justification*

*Both the regrettable complexity of this proposal and the lack of in-house legal expertise in SMEs make it highly desirable to draft European standard contracts.*

## Amendment 4

### Proposal for a regulation Recital 34 b (new)

*Text proposed by the Commission*

*Amendment*

***(34b) Furthermore, the Commission will organise training both for legal practitioners and for representative professional and inter-professional business organisations. It should also provide information on how this Regulation interacts with Directive ..../....EU of the European Parliament and the Council of ... on alternative dispute resolution for consumers<sup>1</sup> and Regulation (EU) No xxxx/xxxx of the European Parliament and of the Council of ... on online dispute resolution for consumer disputes<sup>2</sup>.***

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<sup>1</sup> OJ L ...

<sup>2</sup> OJ L ...

### *Justification*

*Professional and inter-professional business organisations often play an important role in informing their members about existing and new regulation and are therefore very much eligible for training concerning the new Common European Sales Law regime.*

## Amendment 5

### Proposal for a regulation Recital 35

*Text proposed by the Commission*

*Amendment*

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to extend further the scope in relation to business-to-business contracts, market and technological developments in respect of

(35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to extend further the scope in relation to business-to-business contracts, ***the need for the Common European Sales Law, in***

digital content and future developments of the Union acquis.

*particular transfer of ownership, rules on claims in tort, market and technological developments in respect of digital content and future developments of the Union acquis. **In order to develop equivalent instruments to be used for more sophisticated contracts, such as contracts linked to insurance or financial services, the review should also consider the possibility of developing such instruments as part of a more comprehensive common European contract law, including rules on insurance and transport law. Likewise the possibility of drawing up a common European insolvency law, including rules on foreclosure, should be looked at.***

#### *Justification*

*Despite the aim of providing a comprehensive set of contract law provisions, the proposal does not regulate a number of essential aspects of the contractual relationship, creating a real risk that businesses will still have to bear the cost of legal advice on a foreign regime. The lack of provisions concerning the transfer of ownership is particularly problematic. When the first review is performed, at the latest, therefore, the Commission should ascertain whether the matters referred to in Recital 27 – particularly transfer of ownership – ought likewise to be dealt with in this regulation.*

#### **Amendment 6**

##### **Proposal for a regulation**

##### **Article 2 – point h – point ii a (new)**

*Text proposed by the Commission*

*Amendment*

***(ii a) the purchase of foreign currency;***

#### *Justification*

*Although in principle financial services are excluded from the scope of the regulation, further clarification is desirable in order to prevent them from being included in the scope unintentionally.*



## Amendment 7

### Proposal for a regulation Article 2 – point j – point i

*Text proposed by the Commission*

(i) financial services, including online banking services;

*Amendment*

(i) financial services, including online banking services, **payment services and the issue of electronic money**;

*Justification*

*Although in principle financial services are excluded from the scope of the regulation, further clarification is desirable in order to prevent them from being included in the scope unintentionally.*

## Amendment 8

### Proposal for a regulation Article 2 – point m – point iv

*Text proposed by the Commission*

(iv) financial services;

*Amendment*

(iv) financial services **including payment services and the issue of electronic money and insurance of any kind whether for goods and digital content or otherwise**;

*Justification*

*Although in principle financial services are excluded from the scope of the regulation, further clarification is desirable in order to prevent them from being included in the scope unintentionally.*

## Amendment 9

### Proposal for a regulation Article 7 – paragraph 1

*Text proposed by the Commission*

1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader.  
**Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those**

*Amendment*

1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader.

*parties is a small or medium-sized enterprise ('SME').*

*Justification*

*The prohibition of the use of CESL for contracts between non-SME traders seems arbitrary. Since it is an opt-in regime, we propose to remove it as cross border trade between larger companies could also benefit from CESL.*

**Amendment 10**

**Proposal for a regulation  
Article 14 a (new)**

*Text proposed by the Commission*

*Amendment*

**Article 14a**

**Toolbox**

***By ... [1 year after the date of application of this Regulation], the Commission shall present a comprehensive 'toolbox' to complement the Common European Sales Law. That toolbox shall at least include a model contract with standard terms and conditions under the Common European Sales Law as well as an explanatory memorandum providing an article by article discussion of the Common European Sales Law;***

**Amendment 11**

**Proposal for a regulation  
Article 15 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. By ... [4 years after the date of application of this Regulation], Member States shall provide the Commission with information relating to the application of this Regulation, in particular ***on*** the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and ***on*** the state of play concerning differences

1. By ... [4 years after the date of application of this Regulation], Member States shall provide the Commission with information relating to the application of this Regulation, ***assessing*** in particular the level of acceptance of the Common European Sales Law ***by SME and non-SME traders, whether it has resulted in reduced transaction costs,*** the extent to

in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.

which its provisions have given rise to litigation and the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.

## Amendment 12

### Proposal for a regulation Article 15 – paragraph 2

#### *Text proposed by the Commission*

2. By ... [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

#### *Amendment*

2. By ... [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, ***the need for the Common European Sales Law to include provisions regulating those aspects of the contractual relationship which are currently not dealt with by the Common European Sales Law, particularly transfer of ownership and rules on claims in torts,*** market and technological developments in respect of digital content and future developments of the Union acquis.

***The review shall, in particular, assess whether the application of the Common European Sales Law has helped to increase consumer confidence in cross-border trade and to reduce transaction costs. It shall also evaluate the impact on vulnerable consumers. Furthermore, in order to maintain the high level of consumer protection under the Common European Sales Law, the report shall take***

*due account of any changes made in the interim to Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights<sup>1</sup>.*

*As regards matters of a contractual and non-contractual nature which fall outside the scope of the Common European Sales Law but nonetheless concern aspects of the contractual relationship, the Commission shall discuss the following subjects: transfer of ownership, 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, and concurrent contractual and non-contractual liability claims outside the scope of the Common European Sales Law.*

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<sup>1</sup> OJ L 304, 22.11.2011, p. 64

#### *Justification*

*Despite the aim of providing a comprehensive set of contract law provisions, the proposal does not regulate a number of essential aspects of the contractual relationship, creating a real risk that businesses will still have to bear the cost of legal advice on a foreign regime. The lack of provisions concerning the transfer of ownership is particularly problematic. When the first review is performed, at the latest, therefore, the Commission should ascertain whether the matters referred to in Recital 27 – particularly transfer of ownership – ought likewise to be dealt with in this regulation.*

### **Amendment 13**

#### **Proposal for a regulation Annex I – Article 4 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

2. Issues within the scope of the Common European Sales Law but not expressly

2. Issues within the scope of the Common European Sales Law but not expressly

settled by it are to be settled in accordance with the *objectives and the principles underlying it and all its provisions, without recourse to the* national law that would be applicable in the absence of an agreement to use the Common European Sales Law *or to any other law*.

settled by it are *as far as possible* to be settled in accordance with the *objectives and principles underling it and all its provisions*.

## **Amendment 14**

### **Proposal for a regulation Annex 1 – Article 20 – paragraph 1 – point b**

#### *Text proposed by the Commission*

(b) the total price and additional charges and costs, in accordance with Article 14(1);

#### *Amendment*

(b) the total price and additional charges and costs, in accordance with Article 14(1) **and (2)**;

#### *Justification*

*If the contract is signed on the trader's premises, it is not clear why the consumer cannot have all the price information under Article 14.*

## PROCEDURE

<b>Title</b>	Common European Sales Law
<b>References</b>	COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)
<b>Committee responsible</b> Date announced in plenary	JURI 25.10.2011
<b>Opinion by</b> Date announced in plenary	ECON 25.10.2011
<b>Rapporteur</b> Date appointed	Marianne Thyssen 14.11.2011
<b>Discussed in committee</b>	25.6.2012            19.9.2012
<b>Date adopted</b>	9.10.2012
<b>Result of final vote</b>	+:                    34 -:                    4 0:                    0
<b>Members present for the final vote</b>	Burkhard Balz, Elena Băsescu, Jean-Paul Basset, Sharon Bowles, Udo Bullmann, Nikolaos Chountis, George Sabin Cutaş, Leonardo Domenici, Diogo Feio, Markus Ferber, Elisa Ferreira, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sven Giegold, Sylvie Goulard, Liem Hoang Ngoc, Gunnar Hökmark, Wolf Klinz, Rodi Kratsa-Tsagaropoulou, Philippe Lambert, Arlene McCarthy, Sławomir Witold Nitras, Ivari Padar, Alfredo Pallone, Anni Podimata, Antolín Sánchez Presedo, Olle Schmidt, Peter Simon, Theodor Dumitru Stolojan, Ivo Strejček, Sampo Terho, Marianne Thyssen, Ramon Tremosa i Balcells, Corien Wortmann-Kool, Pablo Zalba Bidegain
<b>Substitute(s) present for the final vote</b>	Sari Essayah, Ashley Fox, Robert Goebbels, Olle Ludvigsson