



EUROPEAN COMMISSION

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C(2012) 9641 final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law {COM(2011) 635 final}, and apologises for the long delay in replying.

The Bundesrat asserts in its Opinion that the principles of subsidiarity and proportionality have been breached and that the legal basis for the proposal is incorrect. However, the Commission believes that, on the contrary, the proposal complies with the principles of subsidiarity and proportionality for the following reasons:

The Common European Sales Law would constitute a second national contract law in Member States' civil law systems, but would not replace the existing national contract law. Thus, contrary to the fears of the Bundesrat, the optional sales law would not override the General Civil Code or the Consumer Protection Act. It is therefore the solution that would eliminate obstacles to the internal market while least impinging on national sovereignty. The Commission has repeatedly heard complaints that EU legislative acts relating to consumer and marketing law have been altering specific points of national civil law, such as the General Civil Code and the Consumer Protection Act, and this harmonisation of certain points has disrupted the coherence of national systems. The Commission wished to avoid such criticisms in the field of sales law. It therefore decided to propose an important change in method and an innovative solution in the form of an optional instrument which businesses and consumers can use for cross-border transactions but which they are not obliged to do so. The Commission has also taken account of the negotiations on the Consumer Rights Directive, which showed the limits to the harmonisation approach. It is true that, as the Bundesrat critically points out, the proposal for a Regulation includes areas that were included in the proposal for a Consumer Rights Directive but were dropped because of Member State resistance. However, the Consumer Rights Directive, unlike the Common European Sales Law, requires the Member States to take over in full the areas that have been fully harmonised, and hence to amend their national legislation accordingly, whereas the Common European Sales Law does not compel Member States to make any amendments to their existing sales law. The Commission therefore considers that the proposal fully respects the principle of subsidiarity.

The Regulation on a Common European Sales Law is also compatible with the proportionality principle, as its scope is confined to what is necessary. Thus it only applies to areas in which it is particularly clear that there are problems, i.e. cross-border sales transactions and, aside from consumer sales contracts, only those business-to-business

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contracts to which SMEs are party. Moreover, contracting parties can opt for the Common Sales Law voluntarily. It does not affect any other matters. This applies in particular to purely domestic transactions. The General Civil Code and, where applicable, the Consumer Protection Act will not have to be amended and will continue to be the only applicable law for domestic transactions and transactions between large undertakings, as well as for contracts within the scope of the optional Common European Sales Law if the parties to the contract do not wish to opt for that law.

The Common European Sales Law removes obstacles to trade which have arisen from 27 different contract law systems existing in parallel. In its impact assessment for the proposed law the Commission found that problems relating to contract law had a substantially more damaging impact on the internal market than geographical distance or cultural and language differences. The Commission asked businesses supplying consumers and those trading with other businesses what they considered the ten most important obstacles to intra-Community trade. Assessing all the answers given by the businesses, problems associated with different contract laws ranked on first, third, sixth and seventh positions in the case of consumer contracts and on third, fifth, sixth and seventh positions in the case of contracts with other businesses. The obstacles referred to by the Bundesrat, such as practical problems and language, on the other hand, carried less weight. The associated problems of cross-border delivery and cross-border customer services are ranked ninth and tenth for contracts with consumers, while language problems and cultural differences are ranked fourth and ninth respectively. Businesses trading with other businesses expressed similar views.

Contrary to the opinion of the Bundesrat, adopting an optional European Sales Law will not put an end to harmonisation in the field of consumer protection. The Commission was clear about this in its Communication accompanying the proposal COM(2011)136 final: 'The proposal represents a complementary approach to that found in the existing acquis in the field of consumer protection. ... given its limitation to cross-border contracts, it is not a replacement for the generally applicable acquis'. There will therefore be a continuing need to develop consumer protection standards using the traditional harmonisation approach used in this area. In this respect, it can be expected that over time the two approaches will develop in tandem, and inspire one another.

The Commission cannot agree with the Bundesrat's criticism of the choice of legal basis. It is convinced that internal market Article 114 TFEU is the correct legal basis for the proposal for an optional Common Sales Law, since the purpose of the proposal is to remove obstacles to cross-border transactions in the internal market. This objective can be achieved even with an optional instrument. The Bundesrat also bases its doubts on the ECJ judgment on the European Cooperative Society. However, the Commission believes that the Common European Sales Law differs greatly from the case that was the subject of that judgment. The European Cooperative Society is a new legal form in addition to the national forms of cooperative societies, so that a European Cooperative Society can transfer to another Member State without having to be wound up or created afresh. By contrast, the Common European Sales Law does not create a new legal form that is also subject to the requirement to conform to a legally defined legal form under national law and can only be introduced by the legislator. On the other hand, Article 352 TFEU is not the right legal basis as, according to consistent ECJ case law, this Article is subsidiary and therefore only applicable if no other legal basis, in particular Article 114 TFEU, is applicable. However, the conditions of Article 114 TFEU are in fact fulfilled.

Moreover, in a legal opinion delivered at the report of the Council Working Party on Civil Law, the Council's legal service has endorsed the legal basis chosen by the Commission.

For the above reasons the Commission believes that the proposal for a Common European Sales Law complies with the principles of subsidiarity and proportionality and relies on the correct legal basis.

The Commission hopes that these clarifications address the Bundesrat's concerns and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*