



EUROPEAN COMMISSION

Brussels, 19.10.2012  
C(2012) 7023 final

Dear President,

Thank you very much for transmitting the Resolution of the Chamber of Deputies of the Czech Republic on the proposal of a Regulation on a Common European Sales Law {COM(2011) 635 final}.

In its resolution the Czech Chamber of Deputies appreciates the efforts of the European Commission to create better conditions for the functioning of the internal market and to improve European standard-setting in the area of sales. It believes, however, that the European Commission did not consider the opinions of Member States regarding the various options of the Green Paper, that article 114 is not the appropriate legal for the proposal and that the chosen instrument does not comply with the principle of subsidiarity. Moreover, the Chamber is concerned that the proposal will lead to further complexity.

The Commission welcomes that the Czech Chamber of Deputies appreciates the Commission's efforts to improve the conditions for the smooth functioning of the internal market and is convinced that the proposal of a Regulation on a Common European Sales Law could contribute to it.

#### 1. Consideration of the Opinions of Member States

The Czech Chamber of Deputies believes that the contributions of Member States to the Green Paper consultation on policy options for progress towards a European Contract Law consumers and businesses {COM (2010) 348 final} have not been sufficiently respected.

The Commission does not share this view. It analysed thoroughly all the contributions which were submitted and in particular the contributions from Member States and national parliaments that sent in 29 contributions in total. The Opinions about the need for action and about possible options were rather divided. Some governments (e.g. Czech Republic, United Kingdom, France, Cyprus) and parliaments (e. g. the Czech Chamber of Deputies and the Czech Senate, the Danish Parliament, the British House of commons) clearly rejected the idea of an optional contract law. Some were reluctant to take a position as they did not know what an optional European contract law would look like. However, quite a number of governments (e. g. Germany, the Netherlands, Poland, Luxembourg, Bulgaria, Greece, and Lithuania) and national parliaments (e. g. the German Bundesrat, the Portuguese Parliament) expressed their support for an optional contract law, in some cases as a second step after the adoption of a toolbox. Some Member States as Estonia and Romania would even prefer a European Contract Code, but could also support an optional Common European Sales Law.

Miroslava NĚMCOVÁ  
Předsedkyně Poslanecké sněmovny  
Sněmovní 4  
CZ – 118 26 PRAGUE 1

Moreover, the impact assessment showed that the co-existence of 27 different national contract laws affected cross-border trade and that the non-binding measures such as a toolbox or a mere recommendation would not cure the problem. In principle, there were two non-binding measures at stake, a toolbox and a Commission Recommendation. The toolbox either in the form of a Commission document or in the form of an inter-institutional agreement would be used for the amendment of existing or preparation of future sectoral legislation. Therefore, the positive impacts of this option on business and consumers would be indirect and would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time. Costs stemming from the existing of 27 different national contract law regimes would remain. A Commission Recommendation would only be effective if the Common European Sales Law was incorporated by a number of Member States entirely and without amendment to the original version attached to the Recommendation. However, this is highly unlikely. Moreover, this option would not help traders in business-to-consumer (B2C) contracts, as they would have to research whether and where Member States 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. Consequently this option would remove only to a limited extent the hindrances to cross-border trade. That is why the Commission decided to submit the proposal of an optional (it is the proposed regime which would be optional not the regulation) Regulation on a Common European Sales Law. Furthermore, the Common European Sales Law would open up new opportunities for growth and help to harness the untapped potential for trade by overcoming contract law related barriers. This could be interesting especially for the Czech Republic which is facing a period of economic stagnation.

## 2. Legal base and subsidiarity principle

In contrast to the Czech Chamber of Deputies' view, the Commission is convinced that Article 114 of the Treaty on the Functioning of the European Union (TFEU) is the correct legal basis for the proposal in its present form. According to Article 114 (1) TFEU, the European Parliament and Council are entitled to adopt measures for the approximation of the provisions in Member States which have as their object the establishment and functioning of the internal market. The Union legislators may have recourse to Article 114 TFEU where differences between national rules might obstruct the fundamental freedoms and thus affect directly the smooth functioning of the internal market or distort significantly competition.<sup>1</sup> Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.<sup>2</sup>

Two strands of reasoning are apparent in the preamble to the Commission's proposal and explanatory memorandum. In the first place, in consumer contracts, differences in national mandatory rules represent legal and practical impediments to the free movement of goods. In the second place, in both business-to-business (B2B) and business-to-consumer (B2C) contracts, differences in substantive law (even in respect of rules from which the parties may derogate) represent economic obstacles in the form of transaction costs that have a

---

<sup>1</sup> C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, paragraph 37; C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paragraphs 84 and 106.

<sup>2</sup> C-376/98 *Germany v Parliament and Council*, [2000] ECR I-8419, paragraph 38.

*disproportionately negative effect on small and medium sized enterprises (SMEs). The proposal will significantly reduce these obstacles by allowing the parties to apply a single legal instrument irrespective of the Member States to which they are exporting.*

*As to the possibility to adopt measures for the "approximation" of national laws, Article 114 TFEU does not mean that a measure based on that article must formally change the wording of national law since, as the Court has held, the expression "measures for the approximation" confer on the Union legislature a discretion as to the harmonisation technique most appropriate for achieving the desired result<sup>3</sup>. The Regulation on a Common European Sales Law brings about harmonisation through the introduction of a "second sales law regime" because the reach of national law would be changed by the introduction of the Common European Sales Law. The parties must be able to validly agree on its choice. National legal orders are forbidden from preventing or impeding that choice from taking effect within the applicable legal system.*

*Last but not least the following argument should also be considered: would the proposal aim at replacing national contract law by a Common European Sales Law applicable irrespective of the wishes of the parties, rather than simply establishing it as an option for the parties, it would definitely change existing national law and therefore be considered as an approximation measure. It would be paradoxical and inconsistent with the ratio of the Treaties if only the more incisive measures regarding Member States competences adopted by the EU could be considered "approximation" and thus be based on a legal basis (Art. 114 TFEU) requiring only a qualified majority.*

*Moreover, the Commission takes the view that Article 352 TFEU is not the correct legal basis for the proposal. First of all, Article 352 TFEU is a residual legal basis which may be used for a measure only where no other provision of the Treaty gives the Union legislature the power to adopt that measure. As explained above the conditions of Article 114 TFEU are met.*

*Furthermore, the concept of the present proposal differs from the situation which gave rise to the European Cooperative Society judgment.<sup>4</sup> In that case, the Court of Justice of the European Union confirmed that Article 352 TFEU (ex 308 EC) was the correct legal basis for the Regulation on the Statute for a European Cooperative Society because that measure introduced a new transnational legal form in addition to the national forms of cooperative societies. The effect of this was among others that the registered office of such a society could be transferred from one Member State to another without this leading to the winding-up of the society or the creation of a new legal person. In contrast to the European Cooperative Society judgment the Common European Sales Law does not involve a new legal form, since the parties do not choose or create a new "European sales contract" that differs conceptually from a national sales contract. The pre-existing national sales contract law rules are only complemented by the Common European Sales Law.*

*In that context, it is worth reminding the Council's argument in the European Cooperative Society case: The Council argued before the Court that a measure adopted under Article 114 TFEU (ex 95 EC) must lead to a result that could have been achieved by the simultaneous adoption of identical legislation in each Member State. In the present case, the Member States could – at least in theory – create a Common European Sales Law as the second regime in*

---

<sup>3</sup> Case C-66/04 United Kingdom v EP and Council, paragraph 45.

<sup>4</sup> C-436/03 Parliament v Council [2006] ECR I-3733.

*each Member State by acting simultaneously and concertedly, which was not the case regarding the creation of a new legal form in the company law or intellectual property field.*

*Furthermore, the Regulation complies with the principle of subsidiarity. The aim of creating an identical corpus of sales law that can actually be used by undertakings and consumers for cross-border contracts irrespective of the country of destination could theoretically be attained by simultaneous and concerted legislative action at Member States level. But in practical terms, this aim could not be achieved at national level and can thus be attained better and more effectively by legislative action at Union level. The Regulation thus complies with the principle of subsidiarity. Indeed, it can be seen as particularly compatible with this principle in that it does not affect national civil law and the way in which it is applied.*

*In contrast to concerns of the Czech Chamber of Deputies the Commission does not adopt a path of broad harmonisation. On the contrary, the Regulation takes particular account of the principle of proportionality. First, its scope is limited to the areas in which problems are most acute, namely cross-border sales contracts and contracts involving SMEs. Secondly, it does not in any way pre-empt the field within which the national legislatures may act since, outside the second sales law regime that the Regulation introduces, they may continue to legislate in the field of sales law and may even enact mandatory rules. Furthermore, the Regulation does not propose any full harmonisation that would replace national law and impose new law on the parties irrespective of whether they want to export. Rather, an optional instrument that the parties can choose when they want is being tabled. Overall this means that interference with national law is kept to a minimum.*

### *3. Need for the proposal of a Regulation on a Common European Sales Law*

*The Czech Chamber of Deputies is of the opinion that consumers and businesses do not refrain from doing cross-border transactions because of different national sales law, but because of practical problems, such as different languages, general lack of trust in distance transactions or a preference for physical sales outlets or domestic goods.*

*The Commission has never denied that there are such practical obstacles to cross-border trade and the Commission is dealing with other such obstacles. For example, the Commission has recently submitted a proposal for a directive on alternative dispute resolution which will make it easier and cheaper for consumers to obtain redress. However, the existence of other obstacles does not mean that the Commission should not deal with contract-law related obstacles. Indeed, the impact assessment showed that problems stemming from the co-existence of 27 different national contract law systems deter business from doing cross border transactions and are more important than other factors such as different languages or distance. The Commission has conducted two Eurobarometer surveys of which one addressed businesses trading with consumers and the other businesses trading with other businesses. The questions focused on the ten most important obstacles to intra-Community trade. Six questions considered practical problems such as different languages or cultures or problems with tax rules. Four questions related to problems that may arise because of the existence of 27 different contract laws, such as difficulties to adapt and comply with different consumer protection rules in the foreign contract law, to find out about the provisions of a foreign contract law, to resolve cross border conflicts and to obtain legal advice on a foreign contract law. Problems associated with different contract laws ranked in B2C contracts on positions 1, 3, 6 and 7 in B2C contracts and on position 3, 5, 6 and 7 in B2B contracts.*

*These hurdles have the greatest impact on SMEs, in particular on micro and small enterprises, because the cost to enter multiple foreign markets is particularly high when compared to their turnover. The transaction costs to export to one other Member State could amount up to 7% of a micro retailer's annual turnover. To export to four Member States this cost could rise to 26% of its annual turnover. Considering that in the EU micro enterprises make up 92% and SMEs account for 99% of all companies, the contract law related transaction costs hinder a large number of traders. As the Czech economy is largely constituted by small and medium-sized enterprises (99.8 % of all undertakings) the Czech Republic could really benefit from the Common European Sales Law.*

*The number of Czech enterprises that have indicated that they would choose a European contract law because of problems with the diverging contract law regimes was higher than the EU average: Indeed, 73 % of the Czech retailers (EU average: 71 %) answered that they would choose a common European contract law for their cross border contracts with consumers. 77 % of the companies (EU average: 70%) selling to other traders replied the same. 42 % of Czech retailers would expand their exports to 1 to 2 more EU Member States, 30 % to 3 to 5 and 12 % to 6 and more. 39 % of Czech businesses contracting with other businesses would increase their exports to 1 to 2 more Member States, 30 % to 3 to 5 and 12 % to 6 and more Member States. This shows again the interest of and potential for Czech businesses. A reason for this result could be that the Czech economy is characterized by SME which in principle face more difficulties when doing cross-border trade.*

*Also consumers could benefit from the introduction of the Common European Sales Law: At present, 50% of Czech consumers say that uncertainty about their rights discourages them from buying from other EU countries. This figure is above the EU average of 44% consumers. While a third of consumers would consider buying online from another EU country if uniform European rules would apply, only 7% currently do so. Their uncertainty is often linked to concerns about what they can do if something goes wrong and uncertainty about the nature of their rights if they buy from another country. On the other hand, consumers who are confident and proactively search for products across the EU, in particular online, are often refused sales or delivery by the trader. At least 3 million consumers had this experience over a one year period. In practice, attempts to purchase products online more often fail than succeed in a cross-border context and often end-up with a disappointing message such as "this product is not available for your country of residence." A study where mystery shoppers tried to perform almost 11,000 test transactions showed that 61 % of the attempts to purchase cross-border products would have failed. The situation is even worse for Czech consumers who would have failed in 63 % of the cases.*

*Furthermore consumers could benefit from a broader range of products at cheaper prices. According to a mystery shopping study of 100 products popular on the internet 41 % of products surveyed were not available locally on line in the Czech Republic. The survey also showed that in 44 % of product searches the Czech consumers could save at least 10% if they were able to shop cross-border.*

#### *4. Lack of transparency*

*In its resolution the Czech Chamber of Deputies argues that the regulation could lead to a greater lack of transparency in a system of already very complicated rules for consumers. However, these concerns were carefully considered by the Commission and properly addressed in the proposal. In order to ensure that consumers are able to make an informed*

*choice, the proposal stipulates that consumers would have to agree to the use of the Common European Sales Law by giving a separate and explicit consent and only after they have received the Standard Information Notice containing a description of their core rights under this law. Currently a choice of law clause is usually inserted in the trader's standard terms and conditions.*

*As regards the increasing complexity the concerns are also unfounded. Already today consumers could be confused because different rules would apply depending on whom they are purchasing from and where the supplier is located and that they will not have a real choice of applicable law. This is one of the problems that this proposal aims to solve. When using the Common European Sales Law consumers would be confident that they would have the same rights irrespective of whether they were targeted by the trader or not and of where the trader is located. In addition they can be sure that these rights contain a high level of consumer protection which is comparable or even higher than the protection level offered by their national laws. Furthermore consumers would also benefit from an economic point of view: As the Common European Sales Law would facilitate cross-border trade businesses would also sell their products in Member States in which they were not present before. Consumers could then benefit from a larger choice at lower prices.*

*The Czech Chamber of Deputies adds that the recently adopted Consumer rights Directive has also the objective of ensuring the same level of consumer protection in all Member States. This is certainly true as far as the scope of the Consumer Rights Directive is concerned. This Directive deals however only with pre-contractual information duties and right of withdrawal. However, a lot of issues which are relevant in cross-border trade such as sales remedies or unfair terms control are not covered as well as other items which are not part of the "acquis communautaire" such as formation of a valid contract or prescription. Thus the Consumer Rights Directive does not harmonise a broad range of important issues and does not set aside contract law related obstacles.*

*As to the concern that one has to have recourse to applicable substantive law for some issues not covered by the Common European Sales Law the Commission believes that the proposal is a self-standing set of rules and contains legal solutions for the very large majority of problems which are likely to be relevant in cross-border transactions. The fact that some subjects remain outside the scope of the proposal can be explained either by the fact that those rules are unlikely to be often encountered in cross-border sales contracts (e.g. rules on set-off) or by the fact that they are so sensitive to the Member States that approximating them at EU level may not correspond to the principle of proportionality (e.g. rules on immoral and illegal contracts and on the capacity of minors). In any case, the optional nature of the Common European Sales Law means that only parties who see an economic benefit in the proposed law will use it.*

*I hope that my reply addresses exhaustively concerns expressed by the Czech Chamber of Deputies.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*