



EUROPEAN COMMISSION

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Dear President,

On behalf of the Commission, I would like to thank you for forwarding the German Bundestag's reasoned position on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final). My apologies for the late reply.

The Commission has noted that in its position paper, the Bundestag argues that the proposal for a Common European Sales Law is inconsistent with the principles of subsidiarity and proportionality for reasons which include the fact that Article 114 TFEU is not the correct legal basis for this proposal.

For various reasons, the Commission is unable to share the opinion of the Bundestag:

The Commission is convinced that 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 Bundestag 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 subject-matter of that judgment. The European Cooperative Society saw the creation of a new legal form in addition to national forms of cooperative societies, meaning that a European Cooperative Society can transfer to another Member State without having to be wound up or created afresh. By contrast, the proposal for a Regulation on a Common European Sales Law does not create a new legal form that is also subject to the requirement to comply with a legal form defined under national law and may only be created by the legislator. Parties do not opt for a 'European sales contract' that is conceptually different from a national contract, but agree on an independent and private basis to use a second set of rules for their sales contract, namely the Common European Sales Law.

While the judgment of the ECJ on the European Cooperative Society might be understood as saying that recourse to Article 114 TFEU means that existing national laws do not remain unchanged, this does not mean, in the Commission's view, that a measure based on Article 114 TFEU must necessarily lead to changes in national laws. According to the case law of the ECJ, the term 'approximation of measures' leaves the Community legislator a degree of discretion as to how to achieve a desired outcome with the most appropriate method of approximation. The Regulation on a Common European Sales Law also conforms to national law, establishing a single minimum standard within EU legislation. As such,

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parties to the contract in particular must be able to agree on the Common European Sales Law. National legislation must therefore not obstruct or make it more difficult to choose the Common European Sales Law within the applicable national legal system.

On the other hand, the Commission takes the view that Article 352 TFEU is not the right legal basis for the Regulation on a Common European Sales Law, 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. The Council's Legal Service has also confirmed the legal basis chosen by the Commission.

The proposal for a Common Sales Law takes account of the subsidiarity principle in a particular way, as it constitutes a second contract law within national civil law systems, without replacing the existing contract law. In this way, the Common Sales Law provides the optimal solution, eliminating obstacles to the internal market whilst impinging least upon 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 Civil Code, for decades and this harmonisation of certain points has disrupted the coherence of the Civil Code. The Commission wished to avoid such criticisms in the field of sales law. It is also for this reason that the Commission decided upon an important change in method. Instead of harmonising sales law rules, the proposal for a Common European Sales Law leaves the Civil Code largely untouched. The Commission has proposed an innovative solution in the form of an optional instrument which businesses and consumers can opt to use for cross-border transactions, in line with the principle of contractual freedom, without being obliged to do so. The Commission also learnt its lesson from the negotiations on the Consumer Rights Directive, which revealed the limits of taking a harmonised approach.

It is important to the Commission for the principle of subsidiarity to be respected, particularly given fears that the Commission may be intending to harmonise all civil law. The Member States' civil law has been built up over centuries in some cases and has developed its own system and traditions in case law and in practice. In its proposal for the optional Common Sales Law the Commission has therefore embarked on a new, subsidiarity-friendly legislative approach, with which it aims to approximate the national sales law systems in the least intrusive way possible.

The Regulation on a Common European Sales Law is also particularly compatible with the proportionality principle, as it is restricted to what is necessary. On the one hand, the Regulation only applies to areas in which it is particularly clear that there are problems, i.e. cross-border sales contracts and, aside from consumer sales contracts, only those business-to-business contracts to which SMEs are party. On the other hand, 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 Civil Code will therefore not have to be amended and will continue to be the only applicable law for domestic transactions and transactions between large undertakings. At the same time, businesses which do not opt for the Common European Sales Law will also be able to use it for contracts within the scope of the Common European Sales Law.

The Common European Sales Law removes obstacles to trade which have resulted from 27 different contract law systems existing in parallel. During the impact assessment for the proposed law, we discovered that problems relating to contract law had a substantially more damaging impact on the internal market than language and cultural differences or

geographical distance. The Commission consulted both businesses which supply consumers and businesses trading with other businesses. Businesses were asked about the ten greatest obstacles to intra-Community trade, with four questions focusing on problems relating to contract law. Other questions concerned the difficulties posed by different languages, cultures, distance, varying tax laws or administrative requirements. The problems associated with different contract law systems came first, third, sixth and seventh in the case of consumer contracts and third, fifth, sixth and seventh in the case of contracts with other businesses. The obstacles referred to by the Bundesrat, such as distance and language, on the other hand, carried less weight. The associated problems of cross-border delivery and cross-border customer services were ranked eighth and ninth for contracts with consumers, whilst language problems and cultural differences were ranked fourth and tenth respectively. Businesses trading with other businesses expressed similar views. Moreover, the very fact that there are other problems for cross-border trade does not mean that any significant problems which currently exist and which could be solved, should not be.

In total, 59 % of the German businesses that answered (EU average: 55 %) stated that the problem of differing national contract laws was the main reason why they would not supply consumers in other EU countries. In business-to-business trade, the percentage of businesses having similar problems was also high, albeit slightly lower, at 51 %. It is therefore only to be expected that 75 % of German retailers (EU:71 %) answered that they would choose a Common EU Contract Law for cross-border contracts. Interestingly, the number of German business with this view exceeded the already high EU average. An obvious reason for this is that Germany is an exporter, so German businesses are particularly interested in solutions to the problems this entails, thus also in a Common European Contract Law.

I hope that this information will help to appease the concerns of the German Bundesrat and I look forward to continuing our political dialogue.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

