

SENATE OF THE ITALIAN REPUBLIC

16th Parliament

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No 64

RESOLUTION OF THE 14TH STANDING COMMITTEE

(European Union Policies)

(Rapporteur: Mauro Maria MARINO)

approved at the session of 21 March 2012

ON THE

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL ON A COMMON EUROPEAN SALES LAW (COM(2011) 635 final)

pursuant to Article 144(1), (5) and (6) of the Rules of Procedure

Notified to the President's Office on 27 March 2012

16TH PARLIAMENT – DRAFT LEGISLATION AND REPORTS – DOCUMENTS

The Committee, having examined the document COM(2011) 635 final,

whereas the proposal for a regulation provides for the establishment of a Common European Sales Law, by creating within each Member State's national law a second system of contract law for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, by express agreement of the parties to a cross-border contract;

whereas, with this proposal, the European Commission aims to help traders and consumers who wish to engage in cross-border trade within the internal market by providing a second optional contract law, thus affording consumers more effective protection of their rights and relieving traders of the burden of having to research as many different national laws as there are export markets for their products, thus reducing transaction costs for businesses;

whereas, under the current system of international private law, a sales contract concluded by a consumer is governed by the law of the country where they have their habitual residence (Article 6(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008), while under the new Regulation consumers will have the right to choose between the law of the country of their habitual residence or the 'new' European contract law, and traders will be able to market their products solely on the basis of a single set of contract law rules, in the form of the Common European Sales Law;

whereas leading Italian academics have followed the preparatory work leading to the adoption of the proposal;

whereas, in the comments approved on 18 December 2009 on the European Commission documents on the five-year programme 2009-2014 in the field of justice and home affairs (the 'Stockholm programme'), the 14th Committee noted that it was 'desirable that, in the next five years of the Stockholm Programme, there should be a step forward with reference to the Community *acquis* in the field of civil law';

whereas the proposal is among those with substantial growth potential listed in the Annex to the European Commission's Annual Growth Survey for 2012 (COM (2011) 815), which launches the European Semester for Economic Governance;

having regard to the reasoned opinions of certain national chambers claiming that the proposal does not comply with the principle of subsidiarity, particularly in view of an alleged incorrect choice of legal basis;

whereas the Justice and Home Affairs Council of 13-14 December 2011 assessed the state of play of negotiations and the discussion confirmed that aspects of the proposal which require thorough discussion include: the personal, material and territorial scope of the proposal; the complexity of linking the proposal with the different national legal systems; the modalities and consequences of choosing the optional instrument, the consequences of an invalid choice; the consumer protection rules relating to the choice and the reporting obligations of Member States, including the envisaged online database of judgments;

whereas, on the methodology to be followed for the negotiations, the Council suggests that the legal basis for the instrument should be dealt with when at least some of the content-specific issues have been settled and the economic impact of the proposal has been sufficiently evaluated;

whereas there is to be a general discussion on the proposal in the Justice and Home Affairs Council on 7-8 June 2012;

hereby, within its remit, comments favourably on the proposal, noting that:

certain national chambers have expressed their opinion that the proposal does not comply with the principle of subsidiarity, particularly in relation to the choice of legal basis, identified by the Commission as Article 114 of the Treaty on the Functioning of the European Union (TFEU) on the 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

These include the reasoned opinions adopted by the Austrian Federal Council on 30 November 2011, the German Bundestag on 1 December 2011, the Belgian Senate on 6 December 2011 and the House of Commons on 7 December 2011. According to these chambers, Article 114 may not be used for the creation of 'parallel regulatory instruments' in areas currently within the sphere of competence of the Member States. Given that a new optional instrument cannot be considered a measure for the approximation of national laws, Article 352 TFEU should have been chosen as the legal basis. However, this article, unlike Article 114, requires the Council to act unanimously and the European Parliament to give consent (i.e. not to act as co-legislator).

The doubts as to the legal basis are based on the judgment of the Court of Justice of 2 May 2006 in Case C-436/03 *Parliament v Council* [2006] ECR I-03733 on Council Regulation (EC) No 1435/2003 of 22 July 2003 on the European Cooperative Society. That Regulation introduced a 'European legal form for cooperatives, based on common principles but taking account of their specific features' which 'should enable them to operate outside their own national borders in all or part of the territory of the Community' (recital (12) of the Regulation). The Regulation was adopted using as its legal basis Article 308 of the Treaty establishing the European Community (EC Treaty) (so-called 'implied powers'), corresponding to the present Article 352 TFEU, although the proposal for a Regulation was presented by the European Commission on the basis of Article 95 of the EC Treaty (on the approximation of laws), which corresponds to the present Article 114 TFEU. These latter Articles require the European Parliament to act as co-legislator and the Council to act by qualified majority.

The European Parliament, supported by the European Commission, therefore brought an action for annulment of the Regulation adopted on the basis of Article 308 EC. The main argument was that it was indeed possible for the Regulation on European Cooperative Society to have as its legal basis Article 95 of the EC Treaty. 'Thus, the approximation of the laws of the Member States may also be carried out by supplementing national law by creating European legal forms.'

Parliament's action was, however, dismissed. According to the Court of Justice, the Regulation aimed to 'introduce a new legal form in addition to the national forms of cooperative societies' and therefore could not be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies. Those laws remained unaffected, while a new legal form of society was introduced in addition to and alongside the national forms. To do this, however, the Court confirmed that Article 95 EC (now

Article 114 TFEU) was not sufficient as the legal basis and that Article 308 EC (now Article 352 TFEU) should be used.

In this regard, it is to be hoped that the issues raised in relation to the choice of legal base do not prevent the progress of the matter at European level.

This is notwithstanding the possibility of re-assessing the position taken on the inadequacy of the legal basis of Article 114 TFEU to create new legal forms, at Union level, within the internal market. Such forms could indeed be used to allow those Member States who so wished – in line with the principle of subsidiarity – to use them as a model to adjust their own internal rules of contract law and so contribute to a significant approximation of national laws. Moreover, the principle of subsidiarity would be served further by the optional nature of the scheme which – being left to the contractual freedom of parties – ensures that the contract cannot be added to on a mandatory basis.

We believe it is therefore vital to continue to move towards the establishment of an optional European sales contract system, recalling that this course of action was duly highlighted in the report of 9 May 2010 by Mario Monti to the President of the European Commission entitled ‘A New Strategy for the Single Market’. That document examines the challenges that will need to be faced by the European Union in order to take any useful initiative to re-launch the single market. For example, Chapter 4 ‘Delivering a Strong Single Market’ states that ‘Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, an EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime. An additional benefit of this model is that it provides a reference point and an incentive for the convergence of national regimes. So far, the 28th regime model received little attention except for the European Company Statute. It should be examined further [...] in the area of commercial contracts where a reference framework for commercial contracts could remove obstacles to cross-border transactions.’

To conclude, the Committee:

- (a) agrees with the European Commission’s choice of Article 114 TFEU as the legal basis of the proposal;
- (b) notes that an optional and alternative scheme for the choice of contract applicable to commercial transactions, as provided for in the Regulation, is in line with the principle of subsidiarity;
- (c) underlines the great potential of the proposal for the growth of small and medium-sized enterprises, which will be able to use a single contract at European level, already drafted and translated into all the official languages of the Union, to sell their goods in all the markets of the Member States;
- (d) stresses, lastly, that the proposal allows consumers to use a second contractual system, if they so choose, thus increasing the instruments for regulation and protection available. In this respect, however, the European sales contract: should not provide less

effective guarantees than those already provided for in EU law on consumer rights; should not lead to fragmentation of the applicable rules; should be adequately publicised in the Member States; and should not prejudice any collective action by consumers seeking compensation.

