



EUROPEAN COMMISSION

Brussels, 27. 09. 2012
C(2012) 6654 final

Dear Speaker,

The Commission would like to thank the House of Commons for its reasoned Opinion on the compliance with the principle of subsidiarity of the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law {COM(2011) 635 final} and apologizes for the long delay in replying.

As regards the different issues raised in your reasoned opinion, you will find detailed explanations in the annex to this letter, which I hope address the concerns expressed by the House of Commons.

In light of these clarifications, the Commission considers that the proposal complies with the principle of subsidiarity and fulfils the procedural requirements set out in Protocol No. 2 TFEU in that it is duly accompanied by a detailed and comprehensive statement which allows appraisal of the compliance of the proposal with the principles of subsidiarity and proportionality.

I am looking forward to further developing our political dialogue on this important file.

Yours faithfully,

Maroš Šefčovič
Vice-President

The Rt. Hon. John BERCOW
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Annex to the Commission reply to the reasoned opinion of the House of Commons on a Regulation of the European Parliament and of the Council on a Common European Sales Law {COM(2011) 635 final}

1. Compliance with the procedural requirements set up in Article 5 of Protocol No. 2 TFEU

The House of Commons criticises the proposal for an alleged failure to comply with the essential procedural requirement as set out in Article 5 of Protocol No. 2 TFEU. According to the opinion, neither the explanatory memorandum nor the impact assessment give a detailed statement which would allow national Parliaments to appraise compliance with the principle of subsidiarity. In particular, the opinion takes the view that the statement should have referred to the impacts of the proposal on the national laws of contract, on the national regimes for the protection of consumer rights, on legal clarity and certainty in cross-border transactions and on the costs borne by businesses.

Article 5 of Protocol No. 2 TFEU requires that draft legislative acts be justified with regard to the principles of subsidiarity and proportionality and contain a detailed statement making it possible to appraise compliance with these principles. The provision further stipulates that this statement should contain some assessment of the proposal's financial impact. The reasons for concluding that a Union objective can be better achieved at Union level should be substantiated by qualitative and, where possible, quantitative indicators. Draft legislative acts must also take account of the need for financial and administrative burdens on the Union, national governments, regional or local authorities, economic operators and citizens to be minimised and proportionate to the objectives of the act.

The Commission considers that the draft proposal complies with the procedural requirements set out in Protocol No. 2 TFEU. The recitals and the articles of the proposal itself, the explanatory memorandum and the impact assessment report¹ contain a detailed and exhaustive statement which allows the appraisal of compliance with the principles of subsidiarity and proportionality. This approach is supported by the decision of the Court of Justice in the Vodafone case.²

First, the explanatory memorandum³ justifies the need for Union action on the grounds that the objectives of the proposal have a clear cross-border dimension which cannot in practice be achieved by the Member States acting independently in the framework of

¹ Commission Staff Working Paper "Impact Assessment Accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' on a Common European Sales Law" of 11.10.2011, SEC(2011) 1165 final.

² See the similar approach taken by the Court of Justice in the Judgment of 8 June 2010 in case C-58/08 *The Queen v Secretary of State for Business, Enterprise and Regulatory Reform (Vodafone)*, ECR [2010] I-04999.

³ Explanatory Memorandum, pp. 9-10.

their national systems. The Union is best placed to approximate the rules of contract which become relevant in cross-border trade and to ensure an overall high level of consumer protection in those rules. The explanatory memorandum also makes clear that the proposal is proportionate in that it is restricted to areas where problems have been found, i.e. in cross-border transactions and in transactions involving traders and consumers, or traders of which at least one is a small or medium enterprise (SME). Furthermore, the optional nature of the Common European Sales Law ensures that national contract laws remain intact and that only cross-border transactions where parties wish to trade cross-border on the basis of the proposal are affected.

Secondly, recitals (1) to (18) of the proposal contain a detailed statement which allows the appraisal of compliance with the principles of subsidiarity and proportionality. This appraisal must be made in light of the objective of the proposal which, according to Article 1, is to improve the conditions for the establishment and the functioning of the internal market by making available to the parties a uniform set of contract law rules which are set out in Annex I ('the Common European Sales Law'). The Regulation would enable traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty and, in contracts between traders and consumers, a high level of consumer protection.

The recitals to the proposal substantiate the grounds for Union action by highlighting the obstacles that traders and consumers face when trading across borders as a result of differences between the contract laws of the Member States. In particular, they identify the sources of additional transaction costs faced by traders wishing to sell across borders which are particularly burdensome for SMEs and for all traders targeting consumers in other Member States as they have to comply with the level of consumer protection of the consumers' countries⁴. The impact assessment shows that it would cost traders approximately 10,000 euros in additional transaction costs related to contract law to begin export operations in one other Member State⁵. These costs grow proportionately with the number of Member States traders wish to export to. This situation is particularly detrimental to microenterprises which make up more than 90% of all enterprises in the EU. Consumers suffer detriment as a result of differences in contract laws because traders are reluctant to enter more markets, and consumers face therefore a limited choice of products and high prices. Furthermore, consumers themselves are reluctant to engage in cross-border shopping because they are uncertain about their rights.⁶ The reluctance of traders to enter new markets also leads to limited competition in the internal market, in particular in the form of the low choice, high prices and lack of incentives to innovate⁷.

The main aspects of the legal form chosen are also stated in the explanatory memorandum, the recitals to the proposal and the impact assessment. The relative advantages of a regulation setting up an optional set of uniform rules when compared to

⁴ See Recitals (1) to (3) of the proposal, as well as the Impact Assessment Report, pp. 13-16.

⁵ Impact Assessment Report, pp. 13-16

⁶ See Recitals (4) and (5) and the Impact Assessment Report, pp. 18-21.

⁷ See Recital (7).

other policy options reside in that it allows traders interested in cross-border trade to use one single set of rules and affords consumers a high level of consumer protection, without changing national contract laws⁸. The proposal establishes an identical set of rules to be implemented as a 2nd regime in each national law which could be used by the parties and which fits with the private international law of the Union⁹. The proposal is limited to cross-border situations¹⁰, and to contracts for the sale of goods as the most economically important contract type in the internal market, the supply of digital content for which there is a growing cross-border market and increasing legal diversity and uncertainty, and the provision of services related to the previous two types of contracts. The proposal covers both contracts concluded between traders and consumers, as well as contacts between traders one of which at least is an SME, in this latter case action being justified only when SMEs are involved¹¹.

The explanatory memorandum states the reasons for the choice of the legal form of the proposal and the relative advantages, of a regulation setting up an optional set of uniform rules when compared to other policy options¹², It summarises the findings of the impact assessment, which analyses and compares several policy options extensively¹³.

The impact assessment concludes that an optional Common European Sales Law, a full harmonisation directive as well as a regulation setting up a mandatory Common European Sales Law would achieve the objectives of reducing transaction costs for traders and giving consumers a high level of consumer protection, whilst reducing uncertainty about their rights. However, in terms of minimising the financial and administrative burdens on the parties, an optional uniform contract law regime is more appropriate since it would only create one-off costs for those traders wishing to use it for their cross-border trade, the same cannot be said about the other two options which would place unnecessary burdens on those traders and consumers who prefer to sell or buy in their domestic markets¹⁴. The preferred option, upon considering all costs and benefits, is that of a regulation setting up an optional Common European Sales Law¹⁵.

The Opinion of the House of Commons suggests that the proposal should have considered other significant impacts on national contract laws, national levels of consumer protection, legal clarity and certainty in cross-border transactions and the costs borne by businesses. These have been in fact duly analysed in the impact assessment and the main findings have been presented in the Recitals accompanying the proposal and the explanatory memorandum.

With respect to impacts on national contract laws, by requiring the establishment of a 2nd regime of contract law in each Member State which would apply on a voluntary basis, the

⁸ See the Proposal, p. 8 and the Impact Assessment Report, pp. 49-56.

⁹ Recitals (9) and (10).

¹⁰ Recital (13).

¹¹ Recital (21).

¹² Proposal, p. 8.

¹³ Impact Assessment Report, pp. 49-56.

¹⁴ Impact Assessment Report, p. 52.

¹⁵ Impact Assessment, Report, p. 53.

proposal will not require the amendment of pre-existing national contract laws¹⁶. As an expression of the principle of proportionality, the proposal does not interfere with deeply embedded national legal systems and traditions, which will continue to apply unaffected,¹⁷ except in as much as they allow the parties to choose the Common European Sales Law in their cross-border transactions and do not prevent those provisions from taking effect.

As to the impact on consumer protection, the Common European Sales Law would guarantee a high level of consumer protection by setting up its own set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU law¹⁸. Thus, the fully harmonised provisions of the Consumer Rights Directive have been taken on one-for-one, while for the existing minimum harmonisation acquis, for example the Directive on Unfair Terms and the Directive on Consumer Sales and Guarantees, the proposal either maintains or goes above the EU level of protection. Since the Common European Sales Law would be a second national regime, identical in all the Member States, the choice for this instrument would remove the necessity for traders to comply with the level of consumer protection in the consumer's country¹⁹. Furthermore, the impact assessment contains a comparative analysis of some of the most important provisions of Annex I, which shows that the level of consumer protection of the proposal is equal or higher than the current acquis and comparable to that in the Member States.²⁰

In terms of legal clarity and certainty in cross-border transactions, the proposal has simplification potential, in that without replacing national laws it would allow parties to use one single set of terms which is self-standing and offers solutions for the most prevalent problems which arise in cross-border situations. Furthermore, since one of the objectives of the proposal is to increase consumer certainty as to their rights when shopping across borders, the proposal requires traders to provide consumers with a Standardised Information Notice, found in Annex II of the proposal, which contains a description of the core consumer rights under this law. Finally, to improve legal clarity and certainty, the proposal requires the Commission to set up a publicly available database of national judgments and judgments of the Court of Justice applying the Regulation which would facilitate a convergence of the interpretation of the provisions of the Regulation.

Finally, with respect to costs for businesses, the impact assessment demonstrates that, traders, and in particular SMEs, will have significantly reduced transaction costs when exporting to new Member States because they will be able to use one single set of terms across the EU. They will also have reduced administrative costs, as they will only need to

¹⁶ Recital (9).

¹⁷ Explanatory memorandum, p. 10.

¹⁸ Recital (11) and Explanatory memorandum, p. 9.

¹⁹ Recital (12).

²⁰ Impact Assessment, Annex VIII., pp. 144-207.

provide one set of pre-contractual information and a Standardised Information Notice – the latter is provided in an annex to the proposal available in all official languages.²¹

2. Compliance with the principle of subsidiarity as enshrined in Article 5 TEU

The opinion also criticises the proposal for failure to comply with the principle of subsidiarity as enshrined in Article 5 TEU. Although the Opinion considers that it is axiomatic that the objectives of an optional sales law common to all Member States are better achieved at Union level, it doubts that the proposal demonstrates that there is a need for such action, and that Union action will produce clear benefits when compared to national laws.

Article 5 paragraph 3 TEU stipulates that, under the principle of subsidiarity, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

a) The need for Union action

The Commission proposal on a Common European Sales Law respects the principle of subsidiarity as set out in the Treaty. The objective of the proposal is to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules as an alternative to the current diversity of contract law rules applicable in cross-border situations. This objective has a clear cross-border dimension and cannot in practice be achieved by the Member States acting independently in the framework of their national systems. Furthermore, as market trends evolve and prompt Member States to take action independently, for example in regulating the emerging digital content market, regulatory divergences leading to increased transaction costs and gaps in the protection of consumers are likely to grow. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions.

The Commission has carried out a comprehensive impact assessment study which demonstrates the need for Union action. The study covers all Member States and was based on evidence representative for the EU, collected by means of the most appropriate data collection tools available to the Commission. While the impact assessment has always used only the most conservative economic estimates, even those most conservative estimates demonstrate that differences in contract law are a real and objective problem, which hinder cross-border trade in the EU.

Thus, the value of failed EU trade as a result of companies not engaging in cross-border trade because of contract law differences is, according to the most conservative estimate, €26 billion every year. This estimate is calculated on the basis of only 1% of export-oriented companies in the EU which are always deterred from exports due to differences

²¹ Impact Assessment Report, pp. 33-35.

in contract law. According to a more realistic estimate which also takes into account those companies which are deterred often and not very often, the scale of foregone intra-EU trade would be €184 billion each year.²²

The main reasons that dissuade companies from cross-border transactions are the additional complexity and costs for cross-border trade, compared to domestic trade. The impact assessment provides a detailed analysis of the way in which contract law related transaction costs affect cross-border trade. The impact of contract law related transaction costs alone is high enough to dissuade businesses, in particular the micro and small enterprises, from entering cross-border trade or expanding exports to more countries.²³ 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.

Based on conservative assumptions, the impact assessment demonstrates that the benefits of the proposed solution would amount to billions in GDP growth and transaction costs savings. Surveys demonstrated that 7 in 10 export-oriented companies are likely to use a single European contract law for cross-border sales to consumers in other countries.²⁴ It is not surprising that the majority of export-oriented companies see the value in this solution, which will simplify the business environment. While contract law related barriers have the greatest negative impact on companies who are deterred from exports for this reason, they nevertheless also affect those who export as they generate extra costs and complexity in cross-border trade. Thus, current exporters, as well as those who have so far been deterred from exporting will benefit from a simplified business environment and an easier access to new markets.

Moreover, 40% of export-oriented companies said that they would increase their cross-border trade, mostly by entering additional markets if they could choose a single European contract law. Furthermore, as demonstrated in the impact assessment, even a small increase in cross-border trade can bring significant macro-economic benefits for the EU economy as a whole, all the more important in the present economic environment.

The opinion refers to the critical remarks of two UK consumer organisations, Which? and Consumer Focus, on the interpretation that the Commission gave to the results of several surveys. In the Commission's view, these criticisms are unfounded.

The opinion considers that the Commission's interpretation of the results of Eurobarometer 321 on attitudes to contract law in business to consumer (B2C) relations is misleading. However, according to this Eurobarometer survey, 38% of traders with experience or an interest in cross-border trade consider the need to adapt and comply with different consumer protection rules to have an impact on their decision to sell cross-border. While indeed 7% experienced a large impact, there are at least 5 times more companies that experienced some impact or at least a minimal impact. In any case, it is

²² Impact Assessment Report, p. 11, and Annex III to the report.

²³ Impact Assessment Report, pp. 12-17.

²⁴ Eurobarometer 321 on European contract law in consumer transactions, p.31 and Eurobarometer 320 on European contract law in business-to-business transactions, p.29.

important to stress that the impact assessment did not use these categories of impact without distinction. On the contrary, it attributed different weights to companies who said they experienced a large, some or a small impact. In addition, "the need to adapt and comply with consumer protection rules in contract law" is only one of the contract law related obstacles (affecting in total 38% of respondents). If we consider all contract law related obstacles that affect companies, then the percentage of those affected grows to 55% among B2C traders, out of which 18% experienced a large impact. Other obstacles include: finding out about foreign contract law 40%, obtaining legal advice on foreign contract law 35% and solving cross-border contractual disputes 34%.

The findings of the Eurobarometer 300 quoted by the House of Commons²⁵ are relevant for the purposes of this proposal to a lesser extent than the Eurobarometer surveys used by the Commission in its impact assessment accompanying this proposal: the former survey covers B2C transactions only and its target audience is retailers with the exclusion of microenterprises, which excludes 92% of all EU enterprises which are particularly affected by additional transaction costs. Finally, there is another reason why Eurobarometer 300 does not constitute an appropriate basis for this impact assessment; this survey covers both companies that do and those that do not export or have no interest in starting to export either. In this latter case, however, these retailers' attitudes would not change even if obstacles to cross-border trade were removed. Therefore it is not appropriate to include them in the sample for the purpose of this exercise.

The Opinion quotes evidence from several sources which suggests that consumers encounter many practical problems when shopping across-borders, such as fraud, problems of delivery or the fact that it was harder to resolve problems when purchasing from abroad.²⁶ 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. In this context, missed opportunities for cross-border trade lead to a more limited choice of products at higher prices in the consumer's market. A recent study shows that in many Member States certain basic products are available on-line only from abroad, and often at lower prices.²⁷ Nevertheless, there is a huge discrepancy between the number of consumers shopping cross-border (9%) and domestically (33%). Some consumers may prefer to buy domestically. However, 44% of consumers said that they are reluctant to buy across borders because of uncertainty about their rights. With more certainty, these consumers could take better advantage of the internal market.

The opinion also refers to a survey of the Federation of Small Businesses (FSB) in the UK, pointing out that only 14% of FSB members said that legal barriers are a

²⁵ The House of Commons' Opinion, paragraphs 20 and 24.

²⁶ The House of Common's Opinion, paragraphs 20 and 21.

²⁷ YouGov Psychonomics, Mystery Shopping Evaluation of Cross-border E-commerce in the EU, October 2009.

disincentive to trade across borders.²⁸ The Commission believes that this is still a high percentage, especially when compounded for the whole of the Union. The FSB survey, as well as the FSB position on this initiative show that the possibility to sell abroad on the basis of optional contract law rules ranks among the main factors for facilitating cross-border trade for small British companies.

b) Clear benefits of Union action

The opinion argues that a number of concerns undermine the conclusion that Union action would achieve the objectives of the proposal better than the Member States acting independently. However, the concerns expressed in the opinion that the Regulation would create legal complexity, decrease legal certainty, add to the confusion for consumers and encourage application in domestic contracts have been carefully considered by the Commission and properly addressed in the proposal.

Thus, the proposal is a self-standing set of rules and contains legal solutions for the 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.

The uniform interpretation of the Regulation would be ensured. Firstly, as with any Union regulation, the Court of Justice of the European Union will have the competence to give final interpretation of the provisions of the Regulation. Secondly, the database created by the Commission would also help legal practitioners to find the Court of Justice decisions as well as the decisions of national courts applying the provisions of the Regulation. Consequently, this database would facilitate a bottom-up convergence in interpretation.

The opinion presumes that consumers would 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. However, this is already the case today and is one of the problems that this proposal aims to solve. According to the proposal, 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. Furthermore, when using this 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, and that these rights contain a high level of consumer protection comparable or higher than that in the national laws. Currently, under the

²⁸ The House of Commons' Opinion, paragraph 26.

private international law rules, consumers may enjoy different levels of protection in cross-border situations.

The opinion also voices doubts as to the level of consumer protection of the proposal, however without substantiating this claim with any arguments. One of the objectives of the proposal is in fact to ensure a high level of consumer protection in order to enhance consumer confidence in the cross-border trade when they use the Common European Sales Law²⁹. The level of consumer protection of some of the most important provisions in the Common European Sales Law is equal or higher than the *acquis* and comparable to that in the Member States.³⁰ For example, UK consumers will have under the Common European Sales Law the right to terminate the contract for any non-conformity which is not insignificant. This is equivalent with the right to reject in English law and has been welcomed by the Law Commission of England and Wales and the Scottish Law Commission in their Advice to the UK Government.³¹

Concerning the fact that the Common European Sales Law would also, in practice be used in domestic transactions, it must be stressed that Article 4 of the proposal explicitly provides that the Regulation on a Common European Sales Law affects only cross-border situations. The sole purpose of the Common European Sales Law is to improve the conditions for the establishment and functioning of the internal market by facilitating the cross-border trade while ensuring at the same time a high level of consumer protection. It is true that Member States can independently make the rules of the Common European Sales Law available also to domestic contracts. However the regulation would not impose an obligation on them to do so.

²⁹ Recital (11).

³⁰ See the Impact Assessment Report, Annex VIII.

³¹ The Law Commission of England and Wales and the Scottish Law Commission, "An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government", 10 November 2011, p. 60.