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COVER NOTE

from:	the UK House of Commons
Date of receipt:	8 December 2011
to:	Donald Tusk , President of the Council of the European Union
Subject:	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [doc. 15429/11 JUSTCIV 265 CONSOM 158 CODEC 1667 - COM (2011) 635 final] - Reasoned Opinion[1] on the application of the Principles of Subsidiarity and Proportionality

Delegations will find attached a copy of the above mentioned opinion.

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[1] For other available language versions of the opinion, reference is made to the Interparliamentary EU information exchange Internet site (IPEX) at the following address: http://www.ipex.eu/IPEXL-WEB/search.do

HOUSE OF COMMONS

President of the Council of the European Union
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8 December 2011

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Dear Mr President,

EUROPEAN UNION DOCUMENT NO. 15429/11 AND ADDENDA 1 AND 2:
PROPOSAL FOR A COMMON EUROPEAN SALES LAW

On 7 December, the House of Commons of the United Kingdom Parliament resolved as follows:

> That this House considers that the Draft Regulation of the European Parliament and of the Council to introduce a Common European Sales Law (European Union Document No. 15429/11 and Addenda 1 and 2) does not comply with the principle of subsidiarity, for the reasons set out in Chapter 5 of the Forty-Seventh Report of the European Scrutiny Committee (HC 428-xlii); and, in accordance with Article 6 of Protocol (No. 2) of the Treaty on the Functioning of the European Union on the application of principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the extract of the report referred to.

Yours sincerely,
Robert Rogers

Robert Rogers
Clerk of the House

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Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

Concerning a draft Regulation on a Common European Sales Law for the European Union[1]

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(2) TEU:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

2. The EU institutions must ensure "constant respect"[2] for the principle of subsidiarity as laid down in Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.[3]

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a "detailed statement" making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

— some assessment of the proposal's financial impact;

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[1] 15429/11, COM(11)635.
[2] Article 1 of Protocol (No 2).
[3] Article 2 of Protocol (No 2).

— in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and

— qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(2) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity:

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

— in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and

— qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

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>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;

- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;

- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."[4]

Proposed legislation

7. The content of the proposed Regulation is set out in detail in the European Scrutiny Committee's Report, to which this Reasoned Opinion is attached. For these purposes we simply set out the stated objective of the proposal and the reasons given for EU rather than Member State action.

Objective

8. The Commission's explanatory memorandum describes the objective of the proposal as follows:

> "The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and crossborder purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State."[5]

Subsidiarity

9. The Commission's explanatory memorandum addresses subsidiarity in the following terms:

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[4] Article 5.

[5] Page 4 of the Commission's explanatory memorandum.

"The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear crossborder dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems.

"As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

"By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

"The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. 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. 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."[6]

10. The Commission's impact assessment addresses subsidiarity in the following terms:

"This initiative complies with the principle of subsidiarity for a number of reasons. The objectives of facilitating the expansion of cross-border trade for business and purchases by consumers in the internal market cannot be fully achieved as long as businesses and consumers cannot use a uniform set of contract law rules for their

[6] Page9.

cross-border transactions. The current legal framework is not sufficient, as it lacks single set of uniform substantive rules which cover comprehensively the lifecycle of a cross-border contract. Furthermore, as market trends evolve and prompt MS to take action independently (e.g. in regulating digital content products) regulatory divergences grow. They lead to increased transaction costs and legal complexity for business, as well as uncertainty, affecting businesses and consumers involved in cross-border transactions.

"A number of stakeholders acknowledge that the existence of differences in contract laws have led to legal fragmentation which can affect the functioning of the internal market; this may entail additional transaction costs and legal uncertainty for business and a lack of consumer confidence. The Union is best placed to address obstacles to the functioning of the internal market as these obstacles have a clear cross-border dimension. More specifically, it is best placed to address contract law related obstacles by developing a single set of uniform substantive contract law rules. It will add value to the existing legal framework by creating such rules for consumers and businesses that engage in cross-border transactions."[7]

Aspects of the Regulation which do not comply with the principle of subsidiarity

11. The House of Commons considers that the draft Regulation on a Common European Sales Law for the EU does not comply with either the procedural obligations imposed on the Commission by Protocol (No 2) or the principle of subsidiarity in the following respects.

i) Failure to comply with an essential procedural requirement

12. Neither the explanatory memorandum nor the impact assessment contains a "detailed statement to make it possible to appraise compliance with the principle of subsidiarity" (and proportionality), as required by Article 5 of Protocol No 2, TFEU, the contents of which are set out in paragraph 4 of this Reasoned Opinion.

[7] Page 22 .

13. The presumption in Article 5 TEU is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that an EU citizen and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that "a Union objective can be better achieved at union level."[8]

14. The evidence the European Scrutiny Committee received shows that the proposal is likely to have significant consequences for, *inter* alia, national rules on the law of contract, whether directly or indirectly; for national regimes for the protection of consumer rights; for legal clarity and certainty in cross-border contracts for the sale of goods; and for the costs to be borne by businesses. The extracts at paragraphs 9 and 10 of this Reasoned Opinion show that none of these is considered by the Commission in its assessment of whether the proposal complies with the principle of subsidiarity, thereby making it very difficult for national parliaments to appraise compliance with subsidiarity within the eight-week period for the submission of a Reasoned Opinion. (The House of Commons was greatly assisted in this instance by the submissions received from representative organisations in the UK.) The Commission's failure to provide a detailed statement in the view of the House of Commons amounts to an infringement of an essential procedural requirement of Protocol 2.

16. The Commission's approach to the consideration of subsidiarity is a matter of concern not only to the House of Commons, but to all national parliaments of EU Member States. The House of Commons draws its attention to paragraph 2.3 of the Contribution of the XLVI COSAC:

> "In accordance with Article 5 of Protocol 2, COSAC underlines that for national Parliaments to exercise the powers vested in them it is necessary to enable the financial effects of EU draft legislative acts to be evaluated, and, in the case of Directives, the implications for national legal systems also to be evaluated. Moreover, COSAC recalls that EU draft legislative acts should be justified on the basis of

[8] Article 5 of Protocol 2.

qualitative and quantitative indicators. COSAC notes that subsidiarity analyses in the Commission's explanatory memoranda have, to date, not met the requirements of Article 5."

ii) Failure to comply with principle of subsidiarity

17. Compliance of this objective with subsidiarity is appraised in the light of the guidance set out in paragraph 6 above.

18. It is axiomatic that an optional sales law common to all Member States is something that can be better achieved at EU level than at national level. But that is to assume that the proposed Common European Sales Law a) is necessary and b) will produce clear benefits by reason of its scale and effect, compared with action by Member States. Both are requirements to be met for compliance with the principle of subsidiarity; on the evidence it has have reviewed, the House of Commons doubts that either has been met.

Necessity

19. Neither the research carried out by Which? nor by Consumer Focus shows that different contract laws stop consumers or businesses from engaging in cross-border trade to a significant degree. Their conclusions are also based on an analysis of the statistics relied upon by the Commission.[9]

20. Which? reports that in a recent Eurobarometer 80% of companies said they were never or not very often deterred by consumer contract law-related obstacles. 72% of companies said that the need to adapt and comply with different consumer protection rules in foreign contract laws has no impact or only a minimal impact on their decision to sell cross-border to consumers from other EU countries. Furthermore, 79% of companies said that one single European consumer contract law would not change or only increase their cross-border operations a little. Meanwhile other Commission research shows that the biggest concerns among consumers when shopping across borders is fraud (62%) and what to do

[9] The detailed submissions of the representative e organisations, and the Government's evidence to Parliament in the form of an Explanatory Memorandum, are set out in full in the Report of the European Scrutiny Committee of 23 November 2011, to which this Reasoned Opinion is attached.

if something goes wrong (59%). New Which? research confirms this; over half of the consumers surveyed cited concerns over what to do if something goes wrong as the main reason for not buying goods from non-UK retailers.

21. Consumer Focus reports that:

- the Commission's Consumer Market Scoreboard (March 2011) found the major reasons for a lack of cross-border trade to be practical. 62 per cent of consumers cited fears of fraud, 59 per cent were worried about what to do if problems arose and 49 per cent were concerned about delivery;
- in the Commission's qualitative Eurobarometer survey on obstacles for citizens in the Internal Market (September 2011), the most prominent reason why consumers do not buy cross-border was that they prefer to buy locally; and
- a Commission report on cross-border e-commerce found that 71 per cent of consumers thought that it was harder to resolve problems when purchasing from providers located in other EU countries.

22. These findings are borne out by Consumer Focus's own research. Its mystery shopping survey – conducted with consumer organisations from 11 countries – of consumer experiences of buying goods and services with a mobile phone found gaps in information disclosure. These included lines of responsibilities of traders in transaction chains; poor complaint handing and redress; and problems with payments.

23. The impact of diverging consumer contract law on business decisions on cross-border trading also seems to be exaggerated. According to the Commission's Impact Assessment[10] only 7% of companies perceive the 'need to adapt and comply with different consumer protection rules in foreign contract law' as having a large impact on their decision to sell across border to consumers from other EU countries. It is surprising that this important

[10] Page 13, footnote 55.

statistic is not found within the relevant paragraph of the impact assessment, but in a foot note. The sentence in the paragraph reads, misleadingly:

> "38% of companies with experience or an interest in cross-border trade considered the need to adapt and comply with different consumer protection rules in foreign contract law as a barrier."

24. In a recent Flash Eurobarometer (No. 300), nearly 80% of traders said that harmonised consumer law in the EU would make 'little or no difference to their cross-border trade'. And, according to Flash Eurobarometer 321, nearly 90% of traders never or rarely refused to sell to foreign consumers because of differences in consumer protection rules in the contract laws of their EU country.

25. Consumer Focus concludes that the Commission has provided no convincing evidence to support its position that this new EU contract law instrument will meet the Commission's objective of boosting cross-border trade. Their research suggests that other barriers to consumers and businesses trading across borders are much more significant than variations in contract law.

26. The survey conducted by the Federation of Small Businesses (FSB), which is in favour of the proposal, only found that 18% of businesses said the proposal would help them. A quarter of FSB members trade overseas, 87% of them with other EU countries — only 14% of which said legal barriers are a disincentive to trade across borders.

Clear benefits by reason of its scale and effect

27. There are a number of concerns expressed by representative organisations in the UK, and by the Government in its Explanatory Memorandum to Parliament of 31 October, which overlap. These cast considerable doubt on whether the legislative intention of "facilitating the expansion of cross-border trade for business and cross-border purchases for consumers" to facilitate cross-border sales for consumers" can be achieved, and therefore that action by the EU will be more effective than action by Member States.

- *Legal complexity*

28. The first is that the Common European Sales Law could lead to higher levels of legal complexity. The fact that a wide range of matters, as set out in recital 27, affecting the legal relationship between the parties are not addressed within this free standing regime is likely to undermine the intended aim of removing the need for businesses to incur transactions costs in terms of legal advice on another country's law. There is a legitimate concern among legal practitioners in the UK that the proposals as drafted may therefore add to confusion rather than reduce complexity. The exclusions in recital 27 are as follows:

> "All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law."

- *Legal certainty*

29. For a legal code to be applied uniformly across the EU, it must be interpreted uniformly. There is, however, no mechanism for doing so in the proposal. Article 14 requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation; the Commission will set up a database of such judgments. A database of judgments will not, however, set legal precedent for national courts, which are responsible for interpreting and enforcing the Common European Sales Law. Lacking a single source of jurisprudence, legal practitioners in the UK think it is likely that it will be

interpreted and applied differently in Member States. This will add uncertainty rather than clarity to cross-border sales conducted under the new instrument, require legal expertise, and so undermine the essential purpose of the proposal.

- *Consumer rights*

30. The introduction of an 'optional' European Contract Law would increase legal uncertainty and create confusion for consumers. Consumers will be faced with a situation in which different rules apply to the same products depending on whom they are purchasing them from and where the supplier is located.

31. Currently consumers purchasing across EU borders can be confronted with different rules but the Rome 1 Regulation (Article 6) provides protection in that consumers generally benefit from a higher level of protection available under their national law. Although the draft Regulation provides that both parties to the contract need to agree to its use, and that consumers must be asked to give explicit consent, the reality is that consumer choice will be limited to accepting the contract offered by the supplier or not purchasing the product. By introducing a European body of law that businesses, in effect, can choose, national consumer protection law becomes 'optional' too.

32. Under Article 114(3) the Commission is obliged to ensure a high level of consumer protection when making internal market proposals such as this. Again, on the evidence it has reviewed the House of Commons finds that there is considerable doubt as to whether the proposal will achieve this, and therefore whether action at the level of the EU rather than Member States will bring the greater benefits that the Commission claims.

- *Domestic application*

33. Article 13 provides that "a Member State may decide to make the Common European Sales Law available" for use in an entirely domestic setting and for contracts between traders, neither of which is an SME.

34. The House of Commons has grave reservations about the appropriateness of incorporating a permissive provision on domestic contracts in a proposal for EU legislation

whose premise is the better functioning of the internal market. There is no evidence produced to suggest that this Article is necessary to achieve the objectives of the proposal; indeed, nor could there be given that the provision is not obligatory. The concern, therefore, is that it is the indirect effect of it which is the primary legislative goal.

35. The point was well made in the evidence submitted by Which?:

> "There is a real risk that the Common European Sales Law could replace national consumer laws as the Commission's proposal gives Member States the option to make the Common European Sales Law applicable to domestic contracts. Moreover, if traders use it when selling cross-border then it would make sense for them to start applying it to domestic contracts, as allowed under the draft regulation, to avoid operating under two different legal regimes. Additionally, if companies trading cross border have a competitive advantage (because they're using the Common European Sales Law) compared to companies just trading domestically, it might effectively force the domestic companies to migrate to the Common Sales Law as well. Either outcome would de facto lead to back-door harmonisation of contract law."

Conclusion

36. For these reasons given above the House of Commons concludes that this proposal does not respect the principle of subsidiarity.

5 Common European Sales Law

(a) (33227) 15429/11 + ADDs 1–2 COM(11) 635	Draft Regulation on a Common European Sales Law for the European Union
(b) (33228) 15432/11 COM(11) 636	Communication on a Common European Sales Law to facilitate cross-border transactions in the single market

Legal base	(a) Article 114 TFEU; co-decision; QMV (b) —
Document originated	(a) and (b) 11 October 2011
Deposited in Parliament	(a) and (b) 17 October 2011
Department	Justice
Basis of consideration	(a) EM of 31 October 2011 (b) SEM of 23 November 2011
Previous Committee Report	None; but see (31775) 11961/10: HC 428–xxii (2010–11), chapter 4 (30 March 2011) and 31775) 11961/10: HC 428–vi (2010–11), chapter 7 (3 November 2010)
To be discussed in Council	No date set
Committee's assessment	(a) and (b) legally important
Committee's decision	(a) Not cleared; further information requested; recommend debate on a Reasoned Opinion (b) Cleared

Background

5.1 This is a far-reaching proposal with long antecedents. In view of its importance, we set out in full why the Commission says it is necessary:[1]

> "Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.

[1] See pages 2–4 of the Commission's explanatory memorandum.

"Currently, only one in ten of Union traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of Member States. Contract law related barriers are one of the major factors contributing to this situation. Surveys[2] show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.

"The need for traders to adapt to the different national contract laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

"Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

"In cross-border transactions between a business and a consumer, contract law related transaction costs and legal obstacles stemming from differences between different national mandatory consumer protection rules have a significant impact. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),[3] whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State. In cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected. Traders therefore need to find out in advance whether the law of the Member State of the consumer's habitual residence provides a higher level of protection and ensure that their contract is in compliance with its requirements. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas but the differences between Member States' laws remain substantial. In e-commerce transactions, traders incur further contract law related costs which stem from the need to adapt the business's website to the legal requirements of each Member State where they direct their activity.

"In cross-border transactions between traders, parties are not subject to the same restrictions on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

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2 Eurobarometer 320 on European contract law in business-to-business transactions of 2011, p. 15 and Eurobarometer 321 on European contract law in consumer transactions of 2011, p. 19.

3 OJ L 177, 4.7.2008, p. 6.

"These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

"Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.

"Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions.[4] Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.[5]

"Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

"The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to a more limited choice of products at a higher price in the consumer's market.

"While cross-border shopping could bring substantial economic advantages of more and better offers, the majority of European consumers shop only domestically. One of the important reasons for this situation is that, because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market. They miss out on opportunities in the internal market, since better offers in terms of quality and price can often be found in another Member State.

"E-commerce facilitates the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established. However, when consumers try to place orders with a business from another Member State, they are often faced with the business practice of refusal to sell which is often due to differences in contract law.

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4 Eurobarometer 320 on European contract law in business-to-business transactions of 2011, p. 15 and Eurobarometer 321 on European contract law in consumer transactions of 2011, p. 19.

5 A. Turrini and T. Van Ypersele, Traders, courts and the border effect puzzle, Regional Science and Urban Economics, 40, 2010, p. 82: "Analysing international trade across OECD countries we show that controlling for countries specific factors, distance, the presence of common border and common language [...], similar legal systems have a significant impact on trade [...]. If two countries share common origins for their legal system, on average they exhibit trade flows 40% larger."

"The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State."

The documents

5.2 Documents (a) and (b) concern a proposal for a Regulation to establish a Common European Sales Law for the European Union (EU). The proposal follows a consultation exercise on a Green Paper which the Commission published in July 2010 and the Commission's Expert Group's Feasibility Study on the same subject matter, first published in May 2011. We reported on the Green Paper and it was recommended for debate in European Committee, which took place on 24 May 2011.[6]

Overview

5.3 The Commission's proposal contains a set of uniform contract law rules which parties to a contract could choose to cover their contract. This would form part of the national law of each Member State and provide an alternative regime from those currently offered under national laws. This alternative regime would be available for cross-border business-to-consumer contracts or business-to-business contracts where at least one of the businesses is a Small/Medium Enterprise (SME). Key features of the proposal include:

- It would provide a contract law regime that was common to all Member States; in the sense it formed part of each Member State's own law. It would not harmonise national laws nor replace them, but rather be available as an alternative regime to the existing contract law regime in each country. Parties would have the choice as to whether to use the Common European Sales Law regime, or the pre-existing national law regime.

- If selected the optional contract law would govern the parties' relationship to the exclusion of any other law in relation to all matters governed by the optional contract law (it should be noted that a number of matters which might arise in a contractual relationship are not governed by the Common European Sales Law — recital 27 lists particular examples). Parties would need to agree to the use of the optional law — in the sense that one party (the vendor) would choose which law to offer but the other party would need to agree to its use. If no agreement was explicitly established in this way, the parties' contractual relationship would be governed by whichever law was indicated by the provisions of EC Regulation No 593/2008 on the law applicable to contractual obligations (Rome I).

- The measure would cover sales of goods and digital content (for example, music downloads) and related service contracts ("related service" being defined in Article 2(m) to cover service agreements undertaken with the seller of the goods which relate to the goods themselves, for example installation). The regime would be available no matter what the method of sale (for example, direct or on-line).

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[6] *Gen Co Debs*, European Committee B, 24 May 2011, cols 3-14.

- The proposal aims to be a standalone set of rules which does not require recourse to national or any other law (although as noted in (b) above, not all aspects of the legal relationship between the parties are covered by these rules).
- Sales transactions covered would be limited to cross-border contracts (unless individual Member States choose to allow use of the regime in domestic contracts). Cross-border contracts are defined in Article 4.
- Where used, it would provide an identical set of consumer rights across Member States.
- It would have an international dimension, i.e. it would be sufficient for only one party to be established in a Member State of the EU to use the regime (Article 4 and recital 14).
- It would not cover legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.

Detailed provisions

The Regulation

5.4 The draft Regulation is comprised of the following Articles.

- *Article 1* sets out the objective and subject matter of the Regulation.
- *Article 2* contains a list of definitions for terms used in the Regulation. While some definitions already exist in the relevant acquis, others are concepts defined here for the first time.
- *Article 3* explains the optional nature of the contract law rules in cross-border contracts for sale of goods, supply of digital content and provision of related services.
- *Article 4* sets out the territorial scope of the Regulation which is limited to cross-border contracts.
- *Article 5* states the material scope of contracts for sale of goods and supply of digital content and related services, such as installation and repair.
- *Article 6* excludes mixed-purposes contracts and instalment sales from the scope of application.
- *Article 7* describes the personal scope of application which extends to business-to consumer and those business-to-business contracts where at least one party is an SME.
- *Article 8* explains that the choice for the Common European Sales Law requires an agreement of the parties to that effect. In contracts between a business and a consumer, the choice of the Common European Sales Law is valid only if the consumer's consent is given

by an explicit statement separate from the statement indicating the agreement to conclude a contract.

- *Article 9* contains several information requirements about the Common European Sales Law in contracts between a trader and a consumer. In particular the consumer shall receive the information notice in Annex II.
- *Article 10* requires Member States to ensure that there are sanctions in place for breaches by the traders of the duty to comply with the special requirements established by Articles 8 and 9.
- *Article 11* explains that as a consequence of the valid choice of the Common European Sales Law this is the only applicable law for the matters addressed in its rules and that consequently other national rules do not apply for matters falling within its scope. The choice of the Common European Sales Law operates retroactively to cover compliance with and remedies for failure to comply with the pre-contractual information duties.
- *Article 12* clarifies that the Regulation is without prejudice to the information requirements of Directive 2006/123/EC on services in the internal market.
- *Article 13* presents the possibility for Member States to enact legislation which makes the Common European Sales Law available to parties for use in an entirely domestic setting and for contracts between traders, neither of which is an SME.
- *Article 14* requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation. The Commission will set up a database of such judgments.
- *Article 15* contains a review clause.
- *Article 16* provides that the Regulation will enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Annex I

5.5 Annex I contains the text of the Common European Sales Law.

- *Part I "Introductory provisions"* sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.
- *Part II "Making a binding contract"* contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

- *Part III "Assessing what is in the contract"* makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.
- *Part IV "Obligations and remedies of the parties to a sales contract"* looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.
- *Part V "Obligations and remedies of the parties to a related services contract"* concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.
- *Part VI "Damages and interest"* contains supplementary common rules on damages for loss and on interest to be paid for late payment.
- *Part VII "Restitution"* explains the rules which apply on what must be returned when a contract is avoided or terminated.
- *Part VIII "Prescription"* regulates the effects of the lapse of time on the exercise of rights under a contract.
- *Appendix 1* contains the Model instruction on withdrawal that must be provided by the trader to the consumer before a distance or an off-premises contract is concluded, while *Appendix 2* provides for a Model withdrawal form.

Annex II

5.6 Annex II comprises the Standard Information Notice on the Common European Sales Law that must be provided by the trader to the consumer before an agreement to use of the Common European Sales Law is made.

Subsidiarity

5.7 Given the significance of the consequences of the proposal for national rules on cross-border sales of goods contracts, we set out in full the reasons for which the Commission says it complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union:[7]

> "The objective of the proposal — i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules — has a clear cross-border dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems.
>
> "As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal

[7] See p. 9 of the Commission's explanatory memorandum.

market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

"By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

"The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. 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. 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 Government's view

Legal base

5.8 In his Explanatory Memorandum dated 31 October 2011 the Secretary of State for Justice (Mr Kenneth Clarke) said that the Government had doubts about whether Article 114 TFEU was the correct legal base. This was because Article 114 had so far been interpreted by the Court of Justice as not providing the legal basis for optional instruments such as this proposal. Article 352 TFEU, however, could provide an alternative. This is the residual legal base clause (formerly Article 308 EC) which permits the adoption of measures that are necessary to attain an objective set out in the Treaties where the Treaties have not provided specific powers. The Treaties governing the European Union provide no specific competence to create optional contract law legal rules. Article 352 could therefore provide the necessary legislative powers for the Union. Article 352 has been consistently used as the legal base for optional Union legal constructs, the Minister says. He does not add, however, that since the enactment of the European Union Act 2011, primary legislation would have to be passed before the Government could give its consent to the adoption of a proposal based on Article 352, unless it can argue that the adoption is urgent, in which case both Houses would have to give their consent by motion, unamended.[8] Given the long gestation of this proposal it would seem unlikely that its adoption could plausibly be called urgent.

Impact on UK law

5.9 The Government will seek evidence about the expected impact on current UK laws as part of a public consultation exercise which will be initiated as soon as possible. Although the Regulation proposes an optional regime for cross-border sales contracts, impacts may occur upon users and possibly non-users of the regime as well. Because of the optional nature of the Common European Sales Law, it is possible that there will be no direct impact on existing law,

[8] See section 8 of the European Union Act 2011.

other than the impact of the introduction of a parallel, optional, contract code as an alternative to existing law. It may be that the impacts prove to be more indirect (for example, jurisprudence arising from judicial consideration of the Common European Sales Law might have an impact on judicial approach to the common law of contract), but at present this is unknown. The likely impacts are something that the Ministry of Justice and the Department of Business, Innovation and Skills will want to consider in the light of further legal advice and public consultation.

5.10 The Common European Sales Law does not cover all aspects of contract law. Recital 27 gives an indication of which areas are not covered and were not considered to be particularly problematic in these types of cross-border sales contracts. These areas would continue to be governed by the relevant applicable law which would apply but for the choice of the optional contract law.

Fundamental rights analysis

5.11 The Minister concludes that the proposal does not have a significant impact on fundamental rights, but adds that the Government will scrutinise the levels of consumer protection afforded by the optional rules, bearing in mind that under Rome I Article 6, it is possible that some consumers would usually have a higher level of protection under their domestic law than that provided in the draft instrument. The relationship with Rome I is not properly settled by this draft instrument. A consumer may not have any real "choice" regarding the use of the Common European Sales Law (the choice being between the law indicated by the trader, or no sale) and so it will be important to be sure that levels of consumer protection are high enough to meet Article 38 and provide a high level of protection for UK consumers. The Government will reconsider the impact of the Regulation on this area on conclusion of its consultation with interest groups.

Subsidiarity

5.12 The Government will be carefully considering the Commission's evidence for the assertion of a barrier to the internal market arising from differences in Member State contract laws. However, assuming that such a barrier exists, the Government's preliminary assessment is that Member State action would not be able to achieve the minimisation of that barrier sufficiently since uniform action across the EU is required, and this would be better achieved by action at EU level. The Government will be considering the question of whether a Regulation providing for an optional Common European Sales Law is the proportionate response to the perceived barrier as part of the consultation. However, to the extent that the solution really is a pan-European Union law, albeit optional, the use of a Regulation would appear to be proportionate in order to ensure that the law is both identical, and directly applicable, in all Member States.

Policy implications

5.13 The detailed policy implications of the draft Regulation will be consulted on by the Government. Accordingly the views expressed below are preliminary in nature and are subject to the results of that public consultation.

5.14 An initial assessment seems to indicate, that in practical terms, the proposed Regulation would neither be simple or easy to use. Albeit that the Regulation has been designed to be free standing and self contained without recourse to national or other rules, it remains unclear what

relationship it will have with other Union law (such as Rome I). In addition, the fact that quite a range of matters which could affect the legal relationship between the parties are not addressed within this free standing regime may undermine the intended aim of removing the need for businesses to incur transactions costs in terms of legal advice on another country's law, since these matters would not be covered by the Common European Sales Law and so would fall to be determined by the relevant applicable law. It is intended that the consultation will seek evidence about whether those exclusions are insufficiently important to make a difference.

5.15 There also seems to be a heavy reliance on concepts such as "fair dealing" and "good faith", subjective concepts which are not necessarily clear and certain in terms of their meaning or interpretation and which are more familiar in the continental legal traditions than they are in the jurisdictions of the UK. Doubts about this may remain until resolved in jurisprudence, which may take some time to accumulate, and this could limit the practical utility of the new law. The Regulation also appears to focus heavily on regulating the conduct of contracting parties (which already occurs in business-to-consumer contracts) in the UK when, in effect, most business-to-business contracts are essentially about creating an environment and a route to redress than anything else.

5.16 Current arrangements already provide that any law can be chosen as the law of contract so in that sense the trader could of course already opt to use only one law (probably his own) for cross border trade (subject to the consumer protection rule in the Rome I Regulation). So more precisely the anticipated added value here seems to be that the other party will already be cognisant of the EU regime provisions and therefore be willing to trade within those (which they may not be so keen to do under an unfamiliar law such as that of the vendor). This net benefit remains to be tested and quantified and set against any likely costs from introducing a new law. It is noted here that the trader will of course need also to be cognisant of their own domestic law provisions for any internal trade so it will not remove the need for knowledge of more than one law — what it does is potentially limit the need to acquire (costly) knowledge of more than two. However, it is important to note that there is a potential for small businesses to be assisted in accessing EU markets, provided the detail of the substantive laws is sufficiently certain. The Government will be exploring the extent to which this proposal genuinely assists in providing that access and this will form part of the public consultation.

5.17 Earlier consultations revealed that other issues, such as language, scope for fraud, trader reputation, taxation differences, etc, were widely considered far greater obstacles for potential cross-border traders and this would not resolve those matters.

5.18 While there are therefore real concerns, there are also potential significant benefits, not lease in terms of an increase in cross-border trade and economic benefit for UK companies. There is evidence, though much of it is anecdotal, that companies (especially SMEs but also some larger companies) are frustrated by the wide divergence of contract law across the Member States and would be more than willing to offer services to consumers if there was greater legal certainty about what might happen if there were disputes.

5.19 In addition to concerns expressed earlier about the Treaty base, there are concerns that the proposal does not achieve its objectives. Other legislative measures, such as the recently adopted Consumer Rights Directive, which includes some of the aspects addressed through the Common European Sales Law, have yet to be implemented and there is obviously no evidence available on the impact those might have on the need for further action in this sphere. The proposal is limited

in its scope, the law being optional and applying to cross border transactions only. It is restricted to sale of goods and contracts for digital content (and closely related) matters, and the optional law is available only in business to business nsactions if one is a small to medium sized enterprise, and in business to consumer transactions. However, the Government will be closely considering whether the proposal meets its intended objectives — potentially high levels of legal uncertainty, and the lack of a comprehensive code regarding the relationship between the parties, could undermine the achievement of its aims and therefore raise a question of the necessity of the proposal from that perspective. The Government is pleased that the Commission are addressing digital content, but has doubts as to whether the optional Common European Sales Law is the best vehicle in which to do so.

5.20 The scope of the proposal could prove difficult with its wide application to business-to-business and business-to-consumer contracts whether they are concluded by distance (for example, online), away from business premises (for example, doorstep selling) or on premises (in shops). The Government will consult on whether such an all-encompassing Regulation is the correct method to address the different problems that the Commission suggest that traders and consumers experience. A more targeted approach may better achieve the stated objectives. The Government is pleased that the Commission are addressing digital content but do not believe that the optional Common European Sales Law is the best vehicle in which to do so. The Government's public consultation will seek evidence to test the extent to which the current divergence of national law causes difficulties or acts as a hindrance to the internal market and whether the approach taken by the proposed Regulation is the correct way of addressing the issue. The Government believes that the appropriateness of the proposed solution must reflect a proper assessment of the nature and extent of any problems which exist.

Impact assessment

5.21 The European Commission's proposed Regulation is accompanied by an Impact Assessment and summary of the Impact Assessment. The Government is also preparing a partial impact assessment on the proposed Regulation which will form part of its public consultation exercise. This seeks input from those with an interest in this area on whether the proposed Common European Sales Law is likely to produce significant benefits to businesses and consumers and what the likely costs will be of putting such a system in place might be.

Financial implications

5.22 The Government's partial impact assessment seeks input from interest groups in determining the potential costs, benefits and risks of operating an optional regime on contract law for cross-border sales contracts. A final assessment of the likely costs and benefits will be made on conclusion of the negotiations.

Consultation

5.23 Following publication of the Commission Green Paper in July 2010, the Government and devolved administrations consulted widely with those individuals and organisations most likely to be affected. With this new proposal, it is again intended that there will be wide consultation with relevant sectors, in particular business and consumer groups, the legal profession, the judiciary and academics. This consultation will assist in developing the Government's position

on the proposal and its future negotiating strategy. The Government's consultation document will be published on the Ministry of Justice's website.

Views of representative organisations

5.24 The Committee has received submissions on this proposal from Which?, Consumer Focus, The Federation of Small Businesses and the Law Society.

Which?

5.25 Which? gives, in sum, two reasons for opposing the Common European Sales Law:

> "Firstly, there is no evidence to support the European Commission's claim that a common contract law will increase cross-border trade. Secondly, the Sales Law presents a serious risk to UK consumers as it could reduce their rights. We believe that the proposal is a waste of time and money and that it should be scrapped. Instead the Commission should focus on setting up an effective alternative dispute resolution (ADR) system for cross-border cases."[9]

5.26 These concerns are amplified as follows:

- Neither the Commission's research nor Which?'s research shows that different contract laws stop consumers or businesses from engaging in cross-border trade. In a recent Eurobarometer[10] 80% of companies said they were never or not very often deterred by consumer contract law-related obstacles. 72% of companies said that the need to adapt and comply with different consumer protection rules in foreign contract laws has no impact or only a minimal impact on their decision to sell cross-border to consumers from other EU countries. Furthermore, 79% of companies said that one single European consumer contract law would not change or only increase their cross-border operations a little. Meanwhile other Commission research[11] shows that the biggest concerns among consumers when shopping across borders is fraud (62%) and what to do if something goes wrong (59%). New Which? research confirms this; over half of the consumers surveyed cited concerns over what to do if something goes wrong as the main reason for not buying goods from non-UK retailers.

- Which? strongly believes the risks posed to existing consumer rights and the costs associated with negotiating, implementing and operating a new regime outweigh any potential benefits the new regime may be able to offer. In addition, there are still many aspects of the contract that would not be harmonised (for example, validity of contract, transfer of ownership, intellectual property rights) so businesses would still need to understand the laws in the countries they are operating in to some extent anyway.

- The level of consumer protection in the Commission's proposal is pretty good, but there is, however, absolutely no guarantee that this level will be maintained once the proposal has been negotiated through Council and the European Parliament. There was heavy lobbying from business to reduce consumer rights in the Consumer Rights Directive and this was only

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9 Which? Briefing: Common EU Sales Law — Why it's bad for UK consumers and should be scrapped — all your questions answered, November 2011.

10 http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf, p. 27 & 28.

11 http://ec.europa.eu/consumers/strategy/docs/5th_edition_scoreboard_en.pdf, p.15.

resolved by deleting two of the five chapters from the Directive. Which? believes that businesses will try to do the same with the Common European Sales Law as it is extremely unlikely that they will opt to use the law if the high level of consumer protection is maintained.

Furthermore, it is unlikely that the consumers will be given a real choice between two sets of contract law. Instead traders will make the choice, and consumers will "opt to use" the Sales Law as a by-product of choosing the trader.

- There is a real risk that the Common European Sales Law could replace national consumer laws as the Commission's proposal gives Member States the option to make the Common European Sales Law applicable to domestic contracts. Moreover, if traders use it when selling cross-border then it would make sense for them to start applying it to domestic contracts, as allowed under the draft regulation, to avoid operating under two different legal regimes. Additionally, if companies trading cross border have a competitive advantage (because they're using the Common European Sales Law) compared to companies just trading domestically, it might effectively force the domestic companies to migrate to the Common Sales Law as well. Either outcome would de facto lead to back-door harmonisation of contract law.
- The Common European Sales Law does not address consumer concerns over fraud or what to do if something goes wrong; so Which? does not believe that it will suddenly make consumers start shopping cross-border.
- Consumers already have certainty about their rights when shopping cross-border as the Rome I Regulation means that consumers are protected by their mandatory national consumer laws. One could easily argue that a second contract law regime would lead to less certainty and transparency for consumers.

Consumer Focus

5.27 Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal services) Northern Ireland. Its role is to represent the interests of consumers, particularly those who are disadvantaged. It also represents UK consumers' interests in Europe and internationally.

5.28 Consumer Focus does not support the Commission's proposal for three reasons — insufficient evidence of need, legal uncertainty, and cost.

Lack of a clear evidence base

5.29 The emphasis the Commission places on "the role of diverging rules of consumer contract law" as a limiting factor in the development of cross border shopping is misplaced. There are many other factors which explain why consumers do not buy in other Member States. These include: limited access to broadband (only half of European households have access);[12] cultural barriers such as language; preference for known brands and high street shopping; lack of choice

[12] European commission's Digital Competitiveness report, August 2009.

of means of payment and payment security; concerns about post-sale customer service; complaints handling and redress and concerns about privacy and security of personal data.

5.30 The Commission's Consumer Market Scoreboard (March 2011) found the major reasons for a lack of cross-border trade to be practical. 62% of consumers cited fears of fraud, 59% were worried about what to do if problems arose and 49% were concerned about delivery.

5.31 In the Commission's qualitative Eurobarometer survey on obstacles for citizens in the Internal Market (September 2011), the most prominent reason why consumers do not buy cross-border was that they prefer to buy locally.[13]

5.32 A Commission report on cross-border e-commerce found that 71% of consumers thought that it was harder to resolve problems when purchasing from providers located in other EU countries.[14]

5.33 These findings are borne out by Consumer Focus's own research. Its mystery shopping survey — conducted with consumer organisations from 11 countries — of consumer experiences of buying goods and services with a mobile phone found gaps in information disclosure. These included lines of responsibilities of traders in transaction chains; poor complaint handing and redress; and problems with payments.[15] Its survey on digital content shopping[16] found language and fears over payment security to be significant barriers to cross border shopping for UK consumers.

5.34 A survey carried out by Which? (December 2010) found that the top reason why people had not bought from an EU company was concern that if something went wrong they would not get an exchange or refund (62%) followed by preference to support UK companies (57%) and concerns about personal details not being secure (36%).[17]

5.35 The impact of diverging consumer contract law on business decisions on cross-border trading also seems to be exaggerated. According to the Commission's Impact Assessment[18] only 7% of companies perceive the 'need to adapt and comply with different consumer protection rules in foreign contract law' as having a large impact on their decision to sell across border to consumers from other EU countries. In a recent Flash Eurobarometer (No. 300), nearly 80% of traders said that harmonised consumer law in the EU would make 'little or no difference to their cross-border trade'.[19] And, according to Flash Eurobarometer 321, nearly 90% of traders never or rarely refused to sell to foreign consumers because of differences in consumer protection rules in the contract laws of their EU country.[20]

5.36 Consumer Focus concludes that the Commission has provided no convincing evidence to support its position that this new EU contract law instrument will meet the Commission's

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13 Eurobarometer Qualitative Studies *Obstacles citizens face in the Internal Market*, September 2011.

14 Mystery Shopping Evaluation of Cross-border E-commerce, European Commission, October 2009.

15 Pocket Shopping — international consumer experiences of buying goods and services on their mobile phones, Consumer Focus December 2009.

16 Ups and down(load)s — consumer experiences of buying digital goods and services online, Consumer Focus December 2010.

17 European Contract Law, Which? briefing, February 2011.

18 p. 13, footnote 55.

19 Flash Barometer No 300, Retailers attitude towards cross-border trade and consumer protection, March 2011.

20 Flash Barometer No 321, European contract law in consumer transactions, October 2011.

objective of boosting cross-border trade. The research suggests that other barriers to consumers and businesses trading across borders are much more significant than variations in contract law.

Legal uncertainty

5.37 The Commission's proposal for an "optional" European Contract Law introduces a new concept of rule-making and carries risks for UK consumers and the future development of consumer law at national and EU level, Consumer Focus says.

5.38 Consumer law harmonisation has been a pillar of achievement of the EU. A large body or acquis of legal safeguards have been carefully constructed and put in place. As of 2013 many aspects of national laws for online business-to-consumer contracts will be fully harmonised by the recent Consumer Rights Directive, adopted by the EU on 10 October 2011.

5.39 Consumer contract law is mandatory because it is intended to protect the weaker party to the contract. To fulfil its purpose it applies to all business and consumers and both parties are obliged to respect it. The introduction of an "optional" European Contract Law would increase legal uncertainty and create confusion for consumers. Consumers will be faced with a situation in which different rules apply to the same products depending on who they are purchasing them from and where the supplier is located.

5.40 Currently consumers purchasing across EU borders can be confronted with different rules but the Rome I Regulation (Article 6) provides protection in that consumers generally benefit from a higher level of protection available under their national law. Although the draft Regulation provides that both parties to the contract need to agree to its use, and that consumers must be asked to give explicit consent, the reality is that consumer choice will be limited to accepting the contract offered by the supplier or not purchasing the product.

5.41 By introducing a European body of law that businesses, in effect, can choose, national consumer protection law becomes "optional" too. The UK Government has recently announced its intention to bring forward a Consumer Rights Bill to modernise and simplify UK consumer law. The Bill will bring together consumer rights currently found in 12 Acts or Regulations and implement the Consumer Rights Directive. It will cover the law for goods and services and for digital content, consolidate consumer powers for Trading Standards, and provide stronger protection for vulnerable customers targeted by misleading and aggressive sales practices. Consumer Focus welcomes this initiative which will make it easier for consumers, their advisers and businesses to understand their rights and obligations. A parallel optional European Sales Law will push in the opposite direction increasing complexity rather than reducing it.

5.42 A parallel contract law instrument sitting alongside national consumer protection law would not achieve its stated aim of easing cross-border transactions for businesses and consumers, but instead increase their complexity.

Cost

5.43 A new instrument of European contract law for business-to-consumer contracts will incur significant costs in terms of legislative time and implementation costs for businesses, consumers, enforcement authorities and the legal system.

5.44 The Commission argues that the draft regulation will reduce transaction costs for business in terms of legal advice on other Member States laws. However, the fact that the draft Regulation does not cover all aspects of contract law will undermine the Commission's intended aim of reducing legal costs for businesses, as matters not covered by the Common European Sales Law would fail to be determined by the relevant applicable law. The Commission further argues that the draft Regulation will encourage more businesses to trade across border and so result in benefits for businesses and consumers. But this depends on whether the Commission's assumption that divergent contract laws are the significant barrier to cross-border trade that the Commission claims. The Commission's own research and that of others, including Consumer Focus, suggests that this is not the case. So Consumer Focus concludes that it does not believe that the significant costs this measure will impose can be justified.

The Federation of Small Businesses

5.45 In a press release dated 14 October 2011, the Federation of Small Businesses (FSB) welcomed an optional European common sales law as a new survey[21] shows that it would make small firms' lives easier for nearly a fifth of businesses that sell online to other EU countries.

5.46 The FSB has been calling on the Government to support plans for a Europe-wide sales law that small businesses can use when drawing up contracts within the EU.

5.47 Figures from the FSB's "Voice of Small Business" survey panel show 43% of respondent's trade cross-border via the internet, however legal or fiscal obligations and sales disputes are barriers to selling online. So it is welcome news that the EU is proposing an optional EU-wide sales law — as 18% of businesses said it would make their life easier.

5.48 While the FSB supports the Government's development of the Single Market it is also concerned that the barriers and burdens small businesses face when looking to trade across borders are putting them off. A quarter of FSB members trade overseas, 87% of them with other EU countries — 14% of which said legal barriers are a disincentive to trade across borders. The EU sales law will help to fix this and reduce barriers to cross-border trading.

5.49 An EU-wide sales law will also encourage small businesses to use contracts. If a small business has a contract, it stands on firmer ground when asking for timely payment under the late payment directive, helping to improve its cash-flow.

The Law Society

Need not demonstrated

5.50 The Law Society does not agree[22] that a need for the Common European Sales Law has yet been demonstrated or that the mere diversity of national contract laws impedes cross-border trade in the Single Market, nor that the current proposals would necessarily increase trade. The Society notes that there are a range of issues that determine whether or not businesses and consumers wish to engage in cross-border dealings. These include: differences in language and

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21 http://www.fsb.org.uk/fsb-survey-panel.

22 *Common European Sales Law*, Briefing for Parliamentarians — Monday 14 November 2011. Available online at: http://international.lawsociety.org.uk/files/UPDATED_LSEW_Common%20European%20Sales%20Law_Briefing%20note_UK%20Parliament_141111.pdf.

culture; privacy and the risk of fraud; the inherent problems of distance (especially in terms of delivery); VAT rates; and how easy it is to obtain practical redress if something goes wrong.

5.51 The diversity of laws does mean that businesses may wish to take legal advice. However, in-house lawyers that the Society has consulted are not convinced that the Common European Sales Law would be of assistance because:

- it would lack any established jurisprudence; and
- it would not be possible to ensure uniform interpretation of a new contract law across the EU Member States (and so national divergences would continue).

5.52 If the wish of business is to find a mechanism to circumvent the continuing diversity in consumer protection rules, the Society questions whether a contract law instrument is needed when in fact consumer protection issues have previously been dealt with in separate legislation, such as the Consumer Rights Directive.

Potential confusion

5.53 In cross-border dealings, while there will be an agreement between the parties, the laws in relation to a range of issues in additional to contract law may be equally relevant and important. These areas include: tort and property law; non-contractual representations; advertising; packaging requirements; and product liability.

5.54 It is also unlikely from reading the list of exclusions in recital 27 that the instrument itself would be self-standing from a contract law perspective. Businesses would therefore still need to consider national laws when entering into cross-border contracts governed by the Common European Sales Law. Practitioners are concerned that the proposals as drafted may therefore add to confusion rather than reduce complexity.

Statistics

5.55 A large number of statistics have been made available by the Commission which provide a mixed picture on the 'need' for the CESL. Some of the survey results suggest that contract law is not a key obstacle to cross-border trade. As the debate progresses the Society will look to examine these and other studies further.

5.56 As preliminary comments, practitioners have noted that the questions in the various surveys did not set out to respondents the nature of the Common European Sales Law or its contents. Traders were asked whether they would use "one single European contract law".[23] In fact, one of the difficulties with the current proposal is that it is not self-standing i.e. a range of areas of contract law are not included (and other areas of law may apply to a cross-border transaction); an issue acknowledged in the recital 27 of the proposal. In addition:

[23] See Question 4 of Flash Eurobarometer 320 (concerning B2B contracts) and Question 5 of Flash Eurobarometer 321 (concerning B2C contracts).

- Only 7% of respondents on business-to-consumer contracts felt that "the need to adapt and comply with different consumer protection rules in the foreign contract laws" had a "large impact" on companies' decision to sell cross-border.[24]

- On B2B contracts 71% of respondents in the UK thought that the prospect of a single European contract law would have no impact on their cross-border operations.[25]

5.57 These studies require far greater analysis before it can be credibly claimed that they provide evidence of a clear "need" for a Common European Sales Law.

Uncertainty

5.58 The Society believes the Common European Sales Law will increase uncertainty for businesses. There is no jurisprudence available to guide interpretation of the new instrument and there could be a lack of clarity as to its scope of application.

5.59 One clear area of potential confusion and uncertainty is if certain parts of an agreement fall outside the subject matter covered by the new instrument. This is a likely occurrence as many cross-border transactions involve additional areas of law to contract, for example, the law of property and, if something goes wrong, the law of tort. These would still need to be governed by the laws of an EU Member State.

5.60 A second area of uncertainty and confusion could be created through the current ambiguity over how the Court of Justice of the European Union would be able to create jurisprudence of a commercial nature. This raises concerns because any contract law and how it is interpreted is closely bound up with the mechanism for its enforcement through the courts. The suggestion that there could be a database of decisions across the EU is interesting but would prove costly and difficult to administer while not having the legal effect of decisions by senior courts or the Court of Justice. There would be no means of knowing which one of conflicting interpretations was the correct one.

Cost

5.61 The Common European Sales Law has considerable cost implications. The new instrument would give rise to additional training costs for the legal professions and judiciary across all the EU Member States as well as additional resourcing requirements for the Court of Justice. The development of a new body of case-law would also require much litigation on the part of private parties.

"Optionality"

5.62 A key concern is that, whilst the instrument is described as optional in the opening provisions of the draft Regulation, it is not clear how such a mechanism will function.

5.63 The current proposal enables the business to choose to use the Common European Sales Law and for the consumer to decide whether or not to buy the product by accepting the general terms and conditions and then, additionally, giving approval to the use of the Common

[24] See Question 2 of Flash Eurobarometer 321.
[25] See Question 5 of Flash Eurobarometer 320.

European Sales Law to govern the contract. However, practitioners are not convinced that a consumer would be able to make an informed decision on whether the Common European Sales Law would be suitable to govern the contract — practitioners do not think consumers read the terms and conditions. If the requirement for the consumer to consent to the use of the Common European Sales Law is removed, this would be easier for the business. However, it leaves a policy question for legislators as to whether a business should be able to choose whether to offer the consumer the level of consumer protection available under the Common European Sales Law or alternatively under their existing national mandatory rules (which they are currently entitled to under the 'Rome I' Regulation). This policy difficulty would become more pronounced if the level of consumer protection in the current proposal were changed, as many expect.

5.64 For business-to-business contracts, the Society is concerned to ensure that freedom of contract is retained. In a commercial context, it is inappropriate for legislation to interfere with the freedom of the parties to decide the terms on which they are willing to do business.

Conclusion

5.65 **We limit ourselves at this stage to the question of whether the proposal conforms with the principle of subsidiarity — the deadline for a Reasoned Opinion to be sent is 12 December.**

5.66 **It is axiomatic that an optional sales law common to all Member States is something that can be better achieved at EU level than at national level. But that is to assume that the proposed Common European Sales Law a) is necessary and b) will produce clear benefits by reason of its scale and effect, compared with action by Member States. On the evidence we have reviewed, we doubt that either requirement has been met. Our reasons for these conclusions are set out in the attached draft Reasoned Opinion.**

5.67 **In addition, we find again that the Commission has failed to prepare a detailed statement, in accordance with Article 5 of Protocol 2, thereby making it very difficult for national Parliaments to appraise compliance with the principles of subsidiarity within an eight-week period. We were greatly assisted in this instance by the submissions we received from representative organisations in the UK; where their concerns overlapped we found to be particularly instructive. The Commission's failure to provide a detailed statement in our view amounts to an infringement of an essential procedural requirement of Protocol 2.**

5.68 **Accordingly we recommend that the House adopt a Reasoned Opinion to be sent to the President of the Commission, Council and European Parliament before 12 December 2011.**

5.69 **We retain the draft Regulation, document (a), under scrutiny pending a further update on the negotiations; we are particularly interested to hear of the outcome of discussions on the appropriate legal base. Document (b), the Communication, can be cleared from scrutiny.**