COMMENTS

10 February 2012

COMMON SALES LAW FOR THE EU

KEY MESSAGES

1 BUSINESSEUROPE supports the objective of increasing the overall coherence of European contract law as a contribution to a fully operational internal market and in the spirit of the better regulation agenda.

2 BUSINESSEUROPE remains open to analyse the possible advantages of applying the optional instrument business-to-consumers (B2C), however it still has a number of concerns on the proposal.

3 Contractual freedom, a fundamental value of business-to-business contracts must be preserved.

WHAT DOES BUSINESSEUROPE AIM FOR?

- Preserve legal clarity and legal certainty, two key elements in the functioning of the Internal Market. Any optional contract instrument must be guided by these principles.
- Avoid burdening European companies with extra compliance costs which makes the decision to contract across borders less attractive.
- Ensure that proper impact assessment and analysis are carried out before regulating digital content at European level, especially through an optional instrument. This is a complex issue that should not be rushed.
- Ensure that companies remain free to choose the law governing their contract in a business-to-business environment.

KEY FACTS AND FIGURES

As of 2013 a considerable number of national rules for online business-to-consumer contracts will be fully harmonised by the recent Consumer Rights Directive adopted on 10 October 2011.

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COMMENTS ON COMMON EUROPEAN SALES LAW

A more harmonised European regulatory framework governing business-to-consumer contractual relations can contribute to a better functioning Single Market and implementation of the better regulation agenda.

This is why BUSINESSEUROPE supported a well targeted and well balanced harmonisation of consumer rights. The recent adoption of the consumer rights directive is an important step in further harmonising rules in business-to-consumer contracts at European level, especially in the online environment.

The European Commission has now adopted a proposal for a Common European Sales Law. It attempts to promote a single set of rules for business-to-consumer and business-to-business contracts without requiring amendments to the existing national contract law. Instead it creates within each Member State's national law a second contract law regime identical throughout the European Union. This instrument will exist alongside the pre-existing rules of national contract law.

This is a new approach that deserves deep and careful analysis. BUSINESSEUROPE would like to constructively express some concerns on this project.

I. Business-to-business contracts

The vast majority of BUSINESSEUROPE members fail to see a practical or legal need for including business-to-business contracts in the proposal for a Common European Sales Law.

Indeed, there is no evidence that legal fragmentation is causing significant obstacles to business-to-business cross-border trade. Businesses have freedom of contract and freedom to choose the law governing their contract.

The European Commission seems to assume that anyone entering into a cross-border business-to-business contract must know the material rules of the applicable law. The truth is, however, that parties will generally rely on their individual contract and the general conditions that they choose to apply. Furthermore, there are already a number of international instruments available in the business-to-business area such as the Vienna Convention on the International Sales of Goods and the UNIDROIT principles.

The same imbalance in bargaining power in business-to-consumer contracts is not in general found in the business-to-business environment. The principle of contractual freedom in business-to-business relations should not be undermined. There should not be a spill-over from the business-to-consumer area to the business-to-business area.

Businesses are capable of protecting their own interests and must not be treated as consumers.

II. Business-to-consumer contracts

BUSINESSEUROPE remains open to analyse the possible advantages of applying the Common European Sales Law to contracts involving consumers. However, it would like to highlight a number of questions/concerns on the proposal.

1. Another layer of legislation

Instead of harmonising national contract laws of Member States by requiring amendments to those laws, the Common European Sales Law adds another layer of legislation to an already extensive legal framework.

For businesses engaged in both domestic and cross-border trade as well as in distance sales and on-premises sales, the Common European Sales Law risks adding to their compliance costs rather than leading to a decrease in these costs.

2. Legal (un)certainty

BUSINESSEUROPE has particular concerns about uncertainty in the interpretation of the instrument, whose complexity is likely to make it unattractive for companies (in particular SMEs) as well as for consumers.

Ultimately, where differences of interpretation by national courts arise it might be necessary to refer to the Court of Justice of the European Union, which generally takes time. Because the proposal requires that the Common European Sales Law is interpreted autonomously and in accordance with its objectives, it will take years for national courts to be able to provide legal certainty through their case law. Lack of certainty is damaging for businesses which are unlikely to opt for a regime which lacks legal certainty in the way in which it will be operated and applied.

In addition, as the European Commission points out, this instrument does not cover every aspect of the contract. Parties still need to rely on national laws on aspects like representation, illegality of contracts and capacity.

3. International private law implications

According to the European Commission, two of the greatest advantages of the Common Sales Law are its optional nature and the fact that it remains a self-standing and independent instrument.

Therefore, the link with article 6 of the Rome I regulation imposing restrictions on the choice of applicable law for business-to-consumer transactions is key. Despite the arguments of the European Commission, BUSINESSEUROPE still has doubts whether the Common Sales Law as proposed by the Commission can indeed remove the need of traders, under the Rome I regulation, to ensure that the consumer is not deprived of the level of protection to which he is entitled under the consumer law of his country of residence.

Even if consumers chose to be covered by this instrument (the same in all Member States) they could always argue before the court that their consumer law provides wider and higher protection than the Common Sales Law. Consequently, it is hard to predict what Member States' courts will do when assessing cases involving the Common European Sales Law. Correspondingly, it is difficult to envisage how legal certainty could be guaranteed without amending Article 6 of the Rome I regulation.

4. Level of consumer protection

If the proposal is to attract both parties to opt in, it must offer them an incentive. Even though businesses are willing to offer a high level of protection, consumer demands would inevitably raise a complex discussion over the level of protection. The solution for this disparity of interests is not easy to find.

BUSINESSEUROPE expects the political negotiations on the Common European Sales Law to face the same difficulties that occurred during negotiations on the consumer rights directive. In those discussions Member States showed unwillingness to give up certain features of their national consumer laws. It is probable that the same difficulties will have a detrimental effect in the quality of the Common European Sales Law Proposal by means of derogations and exemptions.

The Common Sales Law will have to provide the highest level of consumer protection if consumers are to opt out of their national consumer protection rules. This could cause an imbalance with respect to business interests, increase compliance costs and thus not provide business with a useful legal instrument. For example, by setting a free choice of remedies for consumers or a too long prescription period in case of non-compliance and unduly extensive lists of unfair clauses, the Common European Sales Law risks increasing the bar of protection to a level not manageable by traders, especially SMEs.

5. Digital content

BUSINESSEUROPE acknowledges that this rapidly growing area presents a number of challenges that need to be looked at. However, we believe this is a complex issue that should not be rushed.

Regulating digital content through an optional instrument, without the necessary impact assessment and analysis, might have a counterproductive effect in a future more holistic European approach to this area.

6. Separate mechanism of acceptance

A special agreement on the use of the Common Sales Law is foreseen in Articles 8-10 of the proposal whereby the consumer is expected to give his informed consent in order to be bound by the optional instrument. It is unrealistic to think that consumers will devote time to understand the legal content and implications of choosing from two competing legal systems. Also, the fact that two distinctive acceptances by the consumer are required (on the choice of law and on the product) seems too complex which might discourage the trader from using the optional instrument.

III. Examples of specific articles of concern in the Annex of the Common European Sales Law regulation. They address exclusively the rules on business-to-consumer contracts.

- Chapter II, section 1, Articles 13-20 **information requirements in distance and off-premises contracts**: the consumer rights directive fully harmonised these provisions hence it would be advisable to follow the same content.
- Article 52, **notice of avoidance**: avoidance must not be carried out through a simple notice rather through a court decision.
- Article 72(3), **prohibition of merger clauses** (clause stating that the contract embodies all the terms of the contract): this prohibition is inappropriate. Such clauses should be allowed if they are clearly understood and accepted by the consumer.
- Article 84 and 85, **unfair contract terms**: the lists of contract terms always unfair or presumed unfair are too extensive and risk placing too large a burden on traders who wish to offer the optional instrument.
- Chapter IV, **right of withdrawal**: the consumer rights directive fully harmonised these provisions hence it would be advisable to follow the same content.
- Article 106, **no hierarchy of remedies in case of non compliance**: we support having a hierarchy of remedies for lack of conformity because it is more adapted to the reality of the markets. Granting the trader the choice between repair and replacement in the first instance when a product is defective is reasonable and in line with current practice. This would avoid situations where in cases of an easily repairable defect, the consumer would be able to opt for direct replacement or reimbursement. This is particularly important for products of high-value, personalised products or those that would lose substantial value if returned or resold.
- Article 106 (3) (b), **non obligation of the consumer to notify non-performance**: it seems unbalanced not to require the consumer to notify the seller in case of lack of conformity. This means that no matter what the burden of proof always lays on the trader throughout the prescription period which seems unreasonable.
- Article 118, **notice of contract termination in case of non-performance**: termination of a contract by a note to the seller is highly problematic and a court decision would be preferable.
- Article 120, **unilateral reduction of price by a party**: gives buyers a prerogative normally reserved for judges to reduce the price unilaterally. Such a price reduction, even if legitimate, should be the result of an agreement between the parties or of a decision of a court or of an ADR procedure.
- Chapter 18, **prescription (guarantee) periods**: the prescription periods range from 2 years to 30 years, which is too long. They place too high a burden on companies and do not favour legal certainty.

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