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Committee on Legal Affairs

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WORKING DOCUMENT

on the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

(COM(2011)0635 – C7-0329/2011– 2011/0284(COD))

Committee on Legal Affairs

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A. Introduction

The Commission's proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) (COM(2011)0635) is a ground-breaking initiative of key importance for consumers and businesses in the internal market. It is the fruit of the European contract law initiative – targeted at addressing internal market problems created by diverging national contract laws – which has been under discussion for many years, with Parliament repeatedly giving guidance and support[1], most recently in its 2011 resolution on the Commission's Green Paper[2]. That resolution favoured, *inter alia*, the option of "setting up an optional instrument" and stressed that the legislative procedure should be as "inclusive and transparent as possible".

Against that background, the Legal Affairs Committee adopted – at the proposal of your co-rapporteurs – an ambitious programme of events in order to hear a broad range of experts and interest groups. One hearing[3] and three workshops[4] have been held so far. A conference with national parliaments is to be held 27 November 2012, with a further interparliamentary event already scheduled for 2013 in order to conduct an enhanced dialogue.

After a first analysis of the proposal, on the basis of the expertise gathered so far, this working document – by no means an exhaustive paper, but work in progress – seeks to explore the main issues which your rapporteurs consider to be crucial for the debate.

B. Issues

In general, your rapporteurs wish to reiterate Parliament's call, in its 2011 resolution, for an instrument "drawn up in a simple, clear and balanced manner which makes it simple and attractive to use for all parties"[5]. They believe that the text could be improved, so as to be more user-friendly, clearer and more coherent with the *acquis* as regards terms and definitions, and less vague in its terminology.

I. Regulation

Issues under discussion regarding the regulation relate mainly to the functioning of the CESL.

1. Legal basis

Your rapporteurs are aware that questions have been raised as to whether the proposal can indeed be based on Article 114 TFEU. However, they believe that, by creating a harmonised second regime within Member States' law (see Recital 9), the proposal clearly qualifies as a

[1] European Parliament resolutions of 26 May 1989 (OJ C 158, 26.6.1989, p. 400), of 6 May 1994 (OJ C 205, 25.7.1994, p. 518), of 15 November 2001 (OJ 140 E, 13.6.2002, p. 538), of 2 September 2003 (OJ C 76 E, 25.3.2004, p. 95), of 23 March (OJ C 292 E, 1.12.2006, p. 109), of 7 September 2006 (OJ C 305 E, 14.12.2006, p. 247), of 12 December 2007 (OJ C 323 E, 18.12.2008, p. 364), of 3 September 2008 (OJ C 295 E, 4.12.2009, p. 31).

[2] European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (P7_TA-PROV(2011)0262).

[3] http://www.europarl.europa.eu/committees/en/juri/events.html#menuzone

[4] http://www.europarl.europa.eu/committees/en/juri/events.html?id=workshops#menuzone

[5] Paragraph 29.

"measure for [...] approximation" and therefore should be based on Article 114 TFEU, as has been confirmed by the Legal Services of the three institutions.

2. Optional nature of the instrument

Your rapporteurs are aware that the optional nature of the instrument has come up against some resistance from some groups of stakeholders. However, it has been shown that working with optional instruments is a widely used approach[1]. In line with the 2011 resolution[2], and strengthened by the conviction of your rapporteurs, this working document departs from the point of view that an optional instrument in the area of contract law is useful for consumers and businesses, and thus focuses on how to increase its attractiveness to potential users and its practicability.

3. Relationship with the Rome I Regulation

This is a crucial issue for the functioning of the CESL. As a starting point, your rapporteurs wish to highlight that the agreement to use the CESL is "not to be confused with a choice of the applicable law", but is a "choice exercised within the scope of the respective national law" (see Recital 10).

At present, Article 6(2) of the Rome I Regulation allows there to be a choice of law in consumer contracts where businesses direct their activity towards consumers subject to the mandatory rules of the consumer's place of habitual residence. The CESL states in Recital 12 that "Article 6(2) of Regulation (EC) No 593/2008 […] has no practical importance for the issues covered by the Common European Sales Law".

The proposal can achieve its effect only if this is truly the case, since otherwise the benefit for businesses of choosing a uniform instrument so as to overcome differences between Member States' laws and thereby avoid having to research, to apply and to litigate under foreign law will not be attained. However, avoiding the application of Article 6(2) of the Rome I Regulation is desirable only if its objective – to guarantee that the consumer is as protected as he would be under his own law – is ensured in a different way. In its 2011 resolution, Parliament, emphasised "that the optional instrument must offer a very high level of consumer protection"[3], and went on to say that a high level of consumer protection is also "in the interest of business as they will only be able to reap the benefits of the optional instrument if consumers of all Member States are confident that choosing the optional instrument will not deprive them of protection"[4].

Your rapporteurs believe that the relationship to the Rome I Regulation, in particular Article 6, must be made as clear as is possible and necessary in the text of the CESL, in the interest of legal certainty. Further work will be needed on how this can be achieved. As regards the level of consumer protection provided by the CESL, first evidence appears to indicate that it is indeed very high; this will have to be explored further.

3. References to national law

[1] Study "Implementation of optional instruments within European Civil Law" http://www.europarl.europa.eu/committees/en/juri/studiesdownload.html?languageDocument=EN&file=72928
[2] Paragraph 5.
[3] Resolution, paragraph 14.
[4] Resolution, ibd.

Whereas the principle of self-standing interpretation applies to matters within the scope of the CESL (Article 4(2) of the Annex), matters "not addressed" in it fall under the national law identified according to relevant private international law rules, in first instance the Rome I Regulation (see Recital 27). Such recourse to national law adds complexity, but is necessary where issues cannot or should not be included in the CESL. Your rapporteurs see it as a valid approach to have the CESL "cover the matters of contract law that are of practical relevance during the life cycle of the contracts falling within the scope, particularly those entered into online" (Recital 26). However, they reserve the right to consider possible extensions, e.g. as regards lack of capacity or representation, which are of relevance in online trade.

4. Scope

As regards the scope of the proposal, your rapporteurs are aware that some advocate excluding B2B contracts. However, since the CESL is merely offered to the parties, there is no reason why it should not be offered as well for B2B cases. The CESL could provide interesting benefits in particular for SMEs (to which it offers a ready-made set of rules, with some protective elements), and it is clear that it will probably not be chosen by multinationals, which the CESL does not target in any case. However, in your rapporteurs' view, acknowledging that the CESL might be interesting to SMEs does not necessarily mean that the scope should be limited, as is proposed, to B2B contracts where one of the parties is an SME. This creates confusion and uncertainty – even to the awkward and frequently mooted situation of a party having to ask a potential contracting party about its balance sheet.

Secondly, the limitation to cross-border contracts will have to be examined. Technical issues have been raised concerning the definition of the cross-border element, and as a matter of fact the difference between cross-border and domestic contracts is starting to fade anyway, with increased mobility, the internet, mobile devices and sales platforms starting to operate across Europe. A limitation to cross-border cases might jeopardise the advantages the CESL can offer, as it will still be necessary to differentiate between domestic and cross-border transactions. Obviously, it will have to be made sure that any misuse of the CESL for situations it was not designed for is avoided.

Whether the CESL should be limited to online or distance transactions is a difficult question. It is widely argued that the CESL could be advantageous in online trade, particularly for low-value transactions. But would this have to mean that it should be limited to such transactions? Given that the CESL is merely offered to the parties, it might be regrettable to limit the circle to which this offer is made. On the other hand, it is obvious that the CESL, as one set of EU-wide rules, is the ideal tool for online trade. There might thus be some appeal in choosing this important and rapidly growing area as a pilot. Further reflection will have to be given to this issue. In any event, should there be a limitation of scope, this will have to be carefully formulated, also in the light of the recent *Alpenhof*[1] and *Mühlleitner*[2] judgments.

Further analysis as regards the substantive scope might be also needed with a view to mixed-purpose contracts and contracts with a credit element.

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[1] Joined Cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* and *Hotel Alpenhof GesmbH v Oliver Heller* [2010] E.C.R. I-12527.

[2] Case C-190/11, *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi,* nyr.

5. Flanking measures

Your rapporteurs welcome the proposed establishment of a database of judgments. It must be comprehensive, well-maintained and regularly updated as well as easily understandable and accessible, in particular for consumers.

The link with ADR and ODR is important. The legislative package on ADR and ODR is currently under negotiation with the aim of achieving a first-reading agreement. However, it might be worth reflecting on whether it might be desirable to have a stronger connection between ADR and the CESL (e.g. combining the CESL with a recommendation to parties to use ADR, or providing for some link between the agreement to use the CESL and the consent to use ADR).

The need to produce EU-wide standard model contracts in parallel to the CESL, as emphasised already in the 2011 resolution[1], must be reiterated. It is important to recall that standard model contracts – in particular owing to Article 6(2) of the Rome I Regulation – would not work in the current legal setting. Your rapporteurs are convinced that such model contracts, available off-the-shelf, will be crucial for the success of the CESL, and urge the Commission to start working on them as soon as possible and in parallel to the ongoing legislative process. They welcome the Commission's commitment in the communication accompanying the CESL[2], but believe that an express reference thereto is needed in the operative text.

Furthermore, suggestions have been made that CESL should be accompanied by a commentary or that an advisory body should be established. Your rapporteurs wish to further look into these proposals, while underlining that such initiatives would have to be closely linked to the database of judgments and be of the highest standard of quality and independence, so that parties, in particular consumers, can have confidence in the assistance provided.

The point has also been made that it might be useful to explore the possibilities of the Treaties in order to ensure that the ECJ will be prepared for any additional workload that might be expected.

II. Annex

As regards the Annex containing the CESL rules, the co-rapporteurs will only raise a limited number of issues, as any more detailed discussion would go beyond the scope of this working document.

1) Unfair contract terms

As regards B2C cases, analyses have been made listing various terms from national laws which are not present in the same way in the CESL. Your rapporteurs will closely consider any evidence provided. However, it does not seem a sound approach – neither on this nor on other aspects – to view the CESL as a sum of national laws, adding up different elements of consumer protection (e.g. of terms on black or grey lists). The overall result achieved by the

[1] Paragraph 30.
[2] COM(2011)0636, p. 11.

restrictions on unfair contract terms under the CESL should be assessed and compared to the overall result under national law. Your rapporteurs will work carefully and thoroughly on the provisions on unfair contract terms. The scope of the restrictions on unfair terms, and the relevant test, will need to be clear and sufficiently close to the Unfair Contract Terms Directive in order to ensure the desired result of enabling reference to be made to the case-law of the ECJ .

For B2B transactions, it has been argued that the proposed regime – as opposed to its competitor, the CISG – does not give enough emphasis to promoting certainty in commercial transactions, on the grounds that the scope is too broadly defined and the test for unfair contract terms does not give sufficient guidance or is open to erosion from B2C cases. Your rapporteurs will analyse this and propose appropriate modifications.

2) Remedies of the buyer

Whether the system of consumer remedies put forward by the CESL – characterised by free choice of remedies, absence of cure by the seller, no requirement to give notice of termination with a certain time – is viable and can ensure the attractiveness required for the success of an optional instrument is one of the "hot topics" under discussion. Consumer representatives request clarification and more protection; business and their legal counsel predict that businesses would not use such an overly protective instrument. After a first analysis, the system proposed indeed seems to offer a very high level of consumer protection, which goes beyond the acquis, in particular the Consumer Sales Directive, and which matches almost entirely, or even goes beyond, national laws. Obviously, further research will have to be carried out into this aspect.

Your rapporteurs are aware that a link has been made between the extent of rights granted to the consumer, in which some see a risk for abuse, and the principle of good faith and fair dealing, which might work as a corrective in abuse cases. The latter principle is not known to all Member States' legal orders, and it might bear risks of diverging interpretation. On the other hand, there might be some need for case-by-case solutions under general clauses, and a database of judgments and auxiliary documentation might be of tremendous help in this connection.

Your rapporteurs believe that it will be necessary to assess the system of remedies in its overall architecture in order that concerns raised can be dealt with through technical corrections (clearer wording coupled, if necessary, with restructuring of provisions) where substantive changes are necessary. This exercise will have to be undertaken in an open-minded way, while not pre-empting any solution from the outset and closely listening to all future CESL users.

3) Restitution

Your rapporteurs will have a close look at the suggestions made for reformulation and restructuring of the restitution rules. To them it is most important that the solution proposed should strike a viable balance between both sides, and that it should be clear and foreseeable for consumers what they have to pay or return so that they may be confident when exercising their rights.

4) Digital content

Your rapporteurs, at first sight, see some merit in including digital content, given that a common regulatory framework is particularly needed in this area. However, it appears that a number of issues have to be reassessed, i.e. how to deal with cases where digital content is not paid for with money, but e.g. with personal data, or whether further adaptations of the provisions on non-conformity or restitution are necessary, taking into account the specific nature of digital content.

5) Prescription

After a first analysis, your rapporteurs acknowledge that the subjective start of the short prescription period corresponds to the choice of modern national and international legislation.

The 10-year prescription period has triggered critical reactions, whereas others, including the Commission, explain that its aim is to create legal certainty, but its practical relevance is limited. Only in very rare cases would a buyer not be aware of a non-conformity for nine-and-a-half years, then become aware of it, and still be able to prove that it existed at the time of delivery.

Your rapporteurs aim at providing clear rules on prescription which correspond closely to practical needs, without losing sight of the fact that the prescription periods will have to be assessed as one element of the system of remedies, and not isolated.

C. Conclusion

It is the view of your rapporteurs that the CESL has huge potential advantages for consumers and businesses in the internal market, in particular in the digital era, and offers an opportunity that should not be missed. Your rapporteurs invite further consideration of the elements that could ensure the success of this instrument and look forward debating these matters further.