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*Committee on the Internal Market and Consumer Protection*

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**2011/0284(COD)**

22.2.2013

## **DRAFT OPINION**

of the Committee on the Internal Market and Consumer Protection

for the Committee on Legal Affairs

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))

Rapporteur (\*): Evelyne Gebhardt, Hans-Peter Mayer

(\*) Associated committee – Rule 50 of the Rules of Procedure

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## **SHORT JUSTIFICATION**

### **1. Introduction**

On 11 October 2011 the Commission submitted a proposal for a regulation on a Common European Sales Law (CESL). The objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating cross-border trade for businesses and consumers. It seeks to achieve this objective by means of a Common European Sales Law, a self-standing uniform set of contract law rules including provisions to protect consumers in connection with the sale of goods and digital contents, which is to be considered as a second, optional contract law regime within the national law of each Member State.

In view of the proposal's significance for consumer protection, the Committee on the Internal Market and Consumer Protection (IMCO) has a particularly important role to play. Accordingly the committee is not simply issuing an opinion for the Committee on Legal Affairs (JURI) as the committee responsible under the Rule 50 'associated committees' procedure, but is itself solely responsible in many areas.

As in the committee responsible, so in the IMCO committee two co-rapporteurs were appointed, who have worked closely together in preparing the opinion (including by holding a public hearing and by ordering a quality check on the Commission's impact assessment). Owing to the two co-rapporteurs' differing approaches, this draft opinion contains two documents: (1) the joint amendments and (2) the separate amendments from each of the co-rapporteurs. A brief explanation of the joint amendments is set out below. Each of the two rapporteurs will then set out the reasons for the approach they have chosen.

### **2. Justification for the joint amendments**

A legal text regulating the rights and duties of two contracting parties should be as clear and precise as possible. This is particularly important when it relates to consumers; scope for differing interpretations should be avoided as far as possible. Consistency with existing rules, particularly the Consumer Rights Directive, also needs to be ensured. Accordingly the co-rapporteurs propose a number of amendments to clarify the terminology used and align it with existing definitions. Joint amendments are also tabled concerning the contractual conformity of digital contents, the term 'free of charge', and the offer of cure on the termination of the contract.

### **3. Justification for the separately tabled amendments**

#### **a. Evelyne Gebhardt**

##### **Unsuitability of optional instruments in consumer law**

The co-rapporteur Evelyne Gebhardt has fundamental doubts concerning the suitability of the Commission proposal. In consumer contract law, given the asymmetry of information between the parties, the consumer has a particular need for protection and must be able to rely on a high level of protection in the conclusion of sales contracts. Particularly in the field of

cross-border online trade, the European legislator therefore has a duty to create reliable rules by the approximation of national law. In the past the bulk of this work was done by Directive 2011/83/EU and similar legislation. Creating an additional, optional instrument, and effectively placing the decision on the choice of instrument in the hands of the trader, would complicate the legal situation and would disadvantage the consumer in particular. The legal uncertainty which could be created by the introduction of an optional sales law represents an avoidable risk for the operation of the single market. The co-rapporteur shares the concerns of a number of experts that, in the absence of case law, it would take many years before the European Court of Justice had given final rulings on the interpretative issues raised by the Common European Sales Law. Furthermore, an optional instrument would be a departure from the existing successful formula of harmonisation.

### **Criticism of the Commission's Impact Assessment**

The co-rapporteur Evelyne Gebhardt is not convinced by the calculation of the transaction costs and assumptions concerning consumer confidence in the Commission's impact assessment. For example, neither the harmonisation effects of the recently adopted Directive 2011/83/EU nor the legislation on alternative dispute resolution mechanisms (ADR and ODR) are taken into account. Accordingly, at the suggestion of the co-rapporteur, a questionnaire was submitted to the European Parliament's IA Unit by the two committees responsible, JURI and IMCO, with a view to carrying out a quality check on the Commission's impact assessment. The results were presented on 22 January 2012 in the JURI committee and largely confirm the co-rapporteur's misgivings. The analysis highlights methodological failings which seriously detract from the meaningfulness of the impact assessment and call into question its value, even taking into account that there is as yet no generally accepted model for calculating transaction costs.

### **Minimum harmonisation of aspects of performance, related services and digital contents**

The co-rapporteur Evelyne Gebhardt is therefore unable to support the Commission proposal for an optional CESL. Nevertheless she is convinced of the need for common European rules in the field of consumer contract law. As an alternative to the optional sales law she therefore recommends that the existing, successful process of harmonising EU consumer contract law should be continued and completed. The adoption of Directive 2011/83/EU has left few areas of consumer contract law to be modernised by this proposal for a directive. Account also needs to be taken of developments in online trade by including contracts on digital contents. The co-rapporteur also takes the view that related services should also be included because of their close links to the sales contract.

### **b. Hans-Peter Mayer**

#### **Choice of instrument and need for this instrument**

On 8 June 2011 the European Parliament, in paragraph 5 of its own-initiative report on progress towards a European contract law for consumers and businesses (P7\_TA(2011)0262), clearly favoured the option of setting up an optional instrument (OI) by means of a regulation. It stressed that only a Regulation setting up an OI, thanks to its direct effect, could bring about benefits for businesses (reduction in costs as a result of obviating the need for conflict-of-law

rules) and consumers (legal certainty, confidence, high level of consumer protection). The Commission's impact assessment of 11 November 2011, the quality and credibility of which – like that of the European Parliament – is not in doubt, came to the same conclusion.

In co-rapporteur's view, the point is that the consumer in online trade cannot shop in all Member States, because traders do not offer their services abroad, or only to particular Member States.

Only after an online purchase has taken place do downstream dispute resolution mechanisms such as ODR and ADR come into play. The co-rapporteur is mainly concerned that an opening should occur in the market. The facts and figures show that this is a major problem in the single market.

The co-rapporteur therefore considers that the approach must be to further open up the single market by using a new instrument, and to offer both consumers and traders the opportunity to make cross-border transactions simply, rapidly and cheaply.

### **Substance of the instrument:**

In his amendments, the co-rapporteur Hans-Peter Mayer is concerned to produce a text that is simple and easy to understand. The most important consideration for him is that the legislative text should guarantee a balanced relationship between the rights of the consumer and those of the trader.

The proposal offers a very high level of consumer protection which in many cases exceeds that in individual Member States. It therefore has benefits not only for traders, who will find it easier to operate on various European markets, but also for consumers, who will obtain a higher level of protection. The co-rapporteur is convinced that the optional instrument will prevail in the long term and result in a revival of the internal market, to the benefit of both consumers and traders.

The co-rapporteur also takes the view that the information requirements should not be overdone. References to other existing rules lead to confusion and should be better worded. In the interest of simplifying the proposal, the rapporteur proposes eliminating the terms 'supplier' 'user', 'service provider' and 'customer'. In his view it is sufficient to describe the parties as 'purchaser' and 'seller', both as regards the sale of goods and as regards the supply of digital contents of whatever nature, and also for the provision of related services. This amendment would permit the simplification of some 40 provisions.

The rapporteur seeks to make the Commission proposal more precise. He is concerned in particular to tighten up provisions and to avoid vague legal terms and the accompanying legal uncertainty. No doubt some cases will end up before the European Court of Justice; that is not uncommon. However, the rapporteur hopes that his suggested corrections will reduce the potential for this to happen.

The co-rapporteur Hans-Peter Mayer considers the JURI Committee's proposal, that the scope be restricted to online and distance selling contracts, to be a good compromise which should be explored further in the IMCO procedure.

## **AMENDMENTS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

**Amendment 1**  
**Proposal for a regulation**  
**Recital 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***(3a) A person should also be considered as a consumer in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract.***

Or. de

*Justification*

*Wording taken over from Recital 17 of the Consumer Rights Directive.*

**Amendment 2**  
**Proposal for a regulation**  
**Article 2 – point e**

*Text proposed by the Commission*

*Amendment*

(e) “trader” means any natural or legal person who is acting for purposes relating to ***that person's*** trade, business, craft, or profession;

(e) "trader" means any natural person or any legal person, ***irrespective of whether privately or publicly owned***, who is acting, ***including through any other person acting in his name or on his behalf***, for purposes relating to ***his*** trade, business, craft or profession ***in relation to contracts***;

Or. de

**Amendment 3**  
**Proposal for a regulation**  
**Article 2 – point f**

*Text proposed by the Commission*

(f) ‘consumer’ means any natural person who is acting for purposes which are outside **that person’s** trade, business, craft, or profession;

*Amendment*

(f) "consumer" means any natural person who is acting for purposes which are outside **his** trade, business, craft or profession;

Or. de

*Justification*

*Definition should be brought into line with the Consumer Rights Directive.*

**Amendment 4**  
**Proposal for a regulation**  
**Article 2 – point h – introductory part**

*Text proposed by the Commission*

(h) “goods” means any tangible movable items; **it excludes:**

*Amendment*

(h) "goods" means any tangible movable items, **with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods where they are put up for sale in a limited volume or a set quantity;**

Or. de

*Justification*

*Wording of definition should be brought into line with the Consumer Rights Directive, particularly as regards the order in which the goods are mentioned.*

**Amendment 5**  
**Proposal for a regulation**  
**Article 2 – point h – point i**

*Text proposed by the Commission*

*Amendment*

*i) electricity and natural gas; and*

*deleted*

Or. de

#### **Amendment 6**

#### **Proposal for a regulation**

#### **Article 2 – point h – point ii**

*Text proposed by the Commission*

*Amendment*

*ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity;*

*deleted*

Or. de

#### **Amendment 7**

#### **Proposal for a regulation**

#### **Article 2 – point m – introductory part**

*Text proposed by the Commission*

*Amendment*

(m) ‘related service’ means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:

(m) ‘related service’ means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as ***or in connection with*** the sales contract or the contract for the supply of digital content; it excludes:

Or. de

**Amendment 8**  
**Proposal for a regulation**  
**Article 2 – point n**

*Text proposed by the Commission*

(n) ‘service provider’ means a ***seller of goods or supplier of digital content*** who undertakes to provide ***a customer with*** a service ***related to those goods or that digital content***;

*Amendment*

(n) ‘service provider’ means a ***trader*** who undertakes to provide a ***related service***;

Or. de

**Amendment 9**  
**Proposal for a regulation**  
**Article 2 – point s**

*Text proposed by the Commission*

(s) ‘commercial guarantee’ means any undertaking by the trader or a producer to the consumer, in addition to ***legal obligations under Article 106 in case of lack of conformity*** to reimburse the price paid or to replace or repair, or service goods or digital content in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

*Amendment*

(s) "commercial guarantee" means any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to ***his legal obligation relating to the guarantee of conformity***, to reimburse the price paid or to replace, repair or service goods ***or digital contents*** in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

Or. de

*Justification*

*Wording of definition should be brought into line with that in the Consumer Rights Directive.*

**Amendment 10**  
**Proposal for a regulation**  
**Article 2 – point s a (new)**

*Text proposed by the Commission*

*Amendment*

*(sa) ‘repair’ means remedying a lack of conformity of goods or digital contents;*

Or. de

**Amendment 11**  
**Proposal for a regulation**  
**Article 2 – point s b (new)**

*Text proposed by the Commission*

*Amendment*

*(sb) ‘producer’ means any natural or legal person who manufactures or orders the manufacture of goods or digital contents, any importer of goods or digital contents into the territory of the European Union, or any other person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods or digital contents;*

Or. de

*Justification*

*Definition from Consumer Goods Directive 1999/44 EC.*

**Amendment 12**  
**Proposal for a regulation**  
**Article 2 – point t**

*Text proposed by the Commission*

*Amendment*

(t) “durable medium” means any medium which enables **a party** to store information addressed **personally** to **that party** in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(t) "durable medium" means any instrument which enables **the consumer or the trader** to store information addressed to **him** in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

*Justification*

*Wording of definition should be brought into line with the Consumer Rights Directive. However, the word 'personally' should be deleted, since this could imply that the information in question must always be addressed to one of the parties.*

**Amendment 13**  
**Proposal for a regulation**  
**Article 2 – point y a (new)**

*Text proposed by the Commission*

*Amendment*

*(ya) 'free of charge' means free of the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.*

Or. de

**Amendment 14**  
**Proposal for a regulation**  
**Annex 1 – Article 105 – paragraph 4**

*Text proposed by the Commission*

*Amendment*

4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.

4. Where the digital content must be subsequently updated by the trader, ***or where he supplies its components separately***, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.

Or. de

**Amendment 15**  
**Proposal for a regulation**  
**Annex 1 – Article 109 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

***3. An offer to cure is not precluded by notice of termination.***

***deleted***

Or. de