EUROPEAN PARLIAMENT

Common European Sales Law

Detailed Appraisal by the EP Impact Assessment Unit of the European Commission's Impact Assessment

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

January 2013

PE 496.736

IMPA Impact Assessment

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Impact Assessment

APDET-2012-2

This appraisal was undertaken at the request of the European Parliament's **Committee on Legal Affairs** and has been produced by the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Internal Policies (DG IPOL) of the General Secretariat of the European Parliament.

AUTHORS
Ms. Alexia Maniaki-Griva
Ms. Elke Ballon

LINGUISTIC VERSIONS
Original: EN
Executive summary: DE, FR

ABOUT THE EDITOR

Manuscript completed in January 2013

ISBN: 978-92-823-4077-6
DOI: 10.2861/28879
CAT: BA-30-13-207-EN-C

This document is available on the Internet at:
http://www.europarl.europa.eu/committees/en/studies.html

To contact the Impact Assessment Unit, please e-mail: impa-secretariat@ep.europa.eu

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Executive Summary

This note analyses the Impact Assessment (IA) accompanying the Commission Proposal for a Regulation on a Common European Sales Law from a methodological point of view, without dealing with the substance of the proposal.

In general, the IA seems to respect the methodological requirements the Commission has imposed upon itself in it Impact Assessment Guidelines. The problems to be addressed by the proposed legislation are clearly explained, related to the underlying problem drivers and logically presented. The set of possible policy options is sufficiently wide and there is sufficient explanation of the baseline scenario.

The Commission seems to have broadly consulted with stakeholders and presents stakeholder positions in the IA.

It analyses a broad range of possible impacts for the policy options, with an emphasis on economic impacts (mainly administrative and transaction costs). The Commission attempts to make a quantitative estimation of the transaction costs, at the same time acknowledging that adequate quantitative data are not available. The transformation of the purely qualitative answers of economic operators in Eurobarometer studies and other surveys into quantitative estimations can be criticised as producing unreliable results.

Introduction

This note seeks to provide a detailed analysis of the strengths and weaknesses of the European Commission's Impact Assessment (IA) accompanying the proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. It does not attempt to deal with the substance of the proposal, is drafted for informational purposes, to assist the JURI Committee in its work, and does not represent an official position of the Parliament.

This note analyses whether the Commission's impact assessment will help the JURI Committee's consideration of the proposal, in full knowledge of the facts, and whether the impact assessment meets, firstly, the standards which the Commission has laid down in its internal Impact Assessment Guidelines, and, secondly, the quality criteria which the Parliament has defined in its resolutions (EP Impact Assessment Handbook, point 13).

* * *

The European Commission has been working on European contract law since 2001, with the publication of its communication on European contract law[1], which launched an extensive public consultation on problems arising from differences between Member

[1] Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398, 11.7.2001.

States' contract laws and on potential actions in this field. As a follow-up to this Communication, the Commission issued an Action Plan[2] in 2003, with a proposal among others to establish a Common Frame of Reference containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. An international academic network financed by the European Commission carried out the relevant legal research which led to the publication of the Draft Common Frame of Reference (DCFR)[3] as an academic text. At the same time, analytical work was also carried out by the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Législation Comparée leading to the drafting of the *Principes Contractuels Communs.*

On 26 April 2010, the Commission decided to establish an expert group (EG) to conduct a feasibility study on a draft European contract law instrument covering the whole life-cycle of a contract. The feasibility study, which was completed in April 2011 and opened to stakeholder consultation, supported the Commission's work in developing its proposal for a legal instrument on European contract law, a proposal which was included in the Commission's Annual Work Programme for 2011.

In parallel to the establishment of the expert group, the European Commission launched in July 2010 an EU-wide public consultation, with the publication of its Green Paper on 'policy options on progress towards a European contract law for consumers and businesses'[4], which sought to obtain stakeholders' views on seven policy options to address the challenges presented by contract law differences to cross-border trade.

From 1989 onwards, the European Parliament has regularly expressed itself in favour of harmonisation in the field of contract law and has supported Commission initiatives in this regard[5]. In a Resolution of 8 June 2011[6], the European Parliament welcomed the Commission's Green Paper, stipulating that "in the wake of the global financial crisis it appears more important than ever to provide a coherent European contract law regime in order to realise the full potential of the internal market and thus help meet our Europe

[2] Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law: an Action Plan, COM(2003)68, 12.2.2003.

[3] Von Bar, C.,Clive, E. and Schulte Nölke, H. (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Munich, 2009.

[4] Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, 1.7.2010.

[5] Resolutions of the European Parliament of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26.6.1989; of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States OJ C 205, 25.7.1994, p. 518; of 15 November 2001 on the approximation of the civil and commercial law of the Member states, OJ C 140 E, 13.6.2002, p. 538; of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council — A more coherent European contract law — An action plan, OJ C 76 E, 25.3.2004, p. 95; of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward OJ C 292 E, 1.12.2006, p. 109; of 7 September 2006 on European contract law(OJ C 305 E, 14.12.2006, p. 247; of 12 December 2007 on European contract law(, OJ C 323 E, 18.12.2008, p. 364; and of 3 September 2008 on the common frame of reference for European contract law OJ C 295 E, 4.12.2009, p. 31.

[6] European Parliament Resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013 (INI)); P7_TA(2011)0262, see in particular recital B, points 1, 5, 14, 19, 20 and 39.

2020 goals'". The Parliament favoured 'the Commission's option 4 of setting up an optional instrument by means of a regulation' which 'would make the internal market more efficient without affecting member states' national systems of contract law'. It also favoured an optional instrument for both 'B2C' and 'B2B' contracts, for cross-border situations in the first instance, and suggested the optional instrument to be complemented by a toolbox that could be endorsed by means of an inter-institutional agreement. The Parliament also recalled the need for 'a comprehensive and broad impact assessment, analysing different policy options, including that of not taking action, and focusing on practical issues, such as the potential consequences for SMEs and consumers, possible effects on unfair competition in the internal market and pinpointing the impact of each of those solutions on both the Community acquis and on national legal systems'.

The European Economic and Social Committee adopted an opinion on the Commission's Green paper on 19 January 2011[7]. It favoured a hybrid option by means of a toolbox and an optional regulatory regime. The Committee indicated that it 'considers it vital that the Commission identify forthwith the obstacles posed by transaction costs and legal uncertainty; these obstacles prevent full advantage being taken of the benefits and opportunities of the single market, particularly by SMEs – i.e. 99 % of EU businesses – and by consumers'. It also called on the Commission 'to carry out an impact assessment of the means available in the single market and an examination of the European value added brought by this new legislative system when it comes to costs and benefits for economic operators and consumers'.

Following the stakeholder consultation on the Green Paper and the feasibility study, DG Justice in the European Commission prepared an Impact Assessment with the input of an Impact Assessment Steering Group and the key stakeholder expert group that was set up to provide a practitioner's perspective on the work of the Expert Group.

The Commission's Impact Assessment Board (IAB) provided an opinion on 22 July 2011, causing DG Justice to revise its draft impact assessment to take into account the recommendations of the IA Board, namely:

- to better explain the existing framework, the baseline scenario and the need for further EU action;
- to provide a more balanced presentation of options;
- to better justify and explain the assumptions underlying the assessment of the impacts, including the key factors influencing take-up of the proposed Optional Instrument and to improve the presentation of the analysis of the economic impacts;
- to reflect the comments of all stakeholders throughout the document and on all major points showing in particular stakeholders' views on the options for full harmonisation and the Optional instrument.

[7] Opinion of the European Economic and Social Committee on the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses of 19 January 2011, OJ C 84/1, 17.3.2011, see in particular points 1.9 and 1.10.

General methodological remarks

This note analyses whether the Commission's IA provides or identifies:

1. a clear definition of the problem or the drivers behind the proposed legislation;
2. objectives directly related to solving the identified problems;
3. an adequate choice of strategic scenarios and policy options ;
4. a proper justification of the preferred options in the light of the principles of subsidiarity and proportionality;
5. a balanced analysis of the economic, social and environmental impacts, and of other impacts where relevant (e.g. SME test, competitiveness, impact outside the EU, impact in terms of administrative burdens);
6. an adequate presentation of stakeholders' views, both in favour and against the preferred policy options.

In general, IA should contain, to the extent possible, quantified or monetised data allowing an assessment of the different policy options. In the IA examined in this paper, the Commission makes a laudable attempt to calculate and monetise the costs of concluding cross-border contracts for business and consumers (transaction costs). The method for making this calculation, and indeed the definition of the concept of 'transaction costs' itself, are not established and are the object of discussion in economic literature. The Commission uses qualitative data from Eurobarometer studies and other surveys to transform these into quantitative estimations of transaction costs. This makes the IA vulnerable to criticism.

1. Policy context and problem definition

A good definition of the problem and a clear understanding of what causes it are preconditions for setting objectives and identifying options to address the problem; it is important to establish the 'drivers' - or causes - behind the problem and to identify clearly any assumptions made, risks and uncertainties involved.
The problem definition must include a clear baseline scenario, i.e. a description of how a problem is likely to develop in the future without new EU action.
(European Commission IA Guidelines, point 5)

The Commission considers that differences in contract law between member states hinder businesses and consumers who want to engage in cross-border trade within the internal market. In the Commission's view, contract law related barriers are a major contributing factor in dissuading a considerable number of traders, small and medium enterprises in particular, from entering cross-border trade or expanding their operations into more member states.[8]. Consumers on their part are hindered from accessing more and better offers at a cheaper price.

[8] IA, p. 7 and annex II.

To help understand where these contract law differences stem from, the Commission provides for a very thorough presentation of the existing EU legal framework in the area of contract law for B2B and B2C contracts (including the Consumer Rights Directive and the Rome I Regulation). To this effect, it provides an analytical table of the applicable EU and international rules and highlights that a comprehensive set of uniform rules is available neither in B2C nor B2B cross-border sales. (Out of the 13 contract law areas identified by the Commission's Expert Group, the existing acquis and international rules only cover 6 areas for B2C and 8 areas for B2B contracts)[9]. According to the Commission, this hinders the smooth functioning of the internal market affecting both consumers and businesses.

The IA says these problems are two-fold:

Problem 1: Differences in contract law hinder businesses from cross-border trade and limit their cross-border operations;

Problem 2: Consumers are hindered from cross-border purchases and miss opportunities.

Problem 1: **Differences in contract law hinder businesses from cross border trade and limit their cross-border operations**

According to the Commission, divergences in contract laws across the member states inhibit businesses from trading in the internal market. To support its claim, the Commission states, citing two Eurobarometer surveys[10], that only 9.3% of the EU companies involved in the sale of goods export within the EU[11] and that the majority of those who do so only export to a small number of member states. The Commission says that contract law related barriers[12] are one of the major factors contributing to this situation, since they dissuade companies from trading cross-border and limit their cross border operations. According to the Commission's data, traders rank contract law related obstacles among the top regulatory barriers to cross-border trade[13].

Although the Commission recognises that some traders may have no interest in exporting, or the market in which they trade could be entirely local, the fact that only one in ten EU companies involved in the sale of goods exports within the EU suggests that there is a lot of room for an increased participation in cross-border trade. Also the fact that the majority of traders who do export only export to a small number of countries

[9] Impact Assessment, p. 8 and annex II.
[10] Eurobarometers 320 on European contract law in business-to-business transactions (EB 320) and Eurobarometer 321 on European contract law in consumer transactions (EB 321) of 2011.
[11] IA, p. 10.
[12] IA. p.11.
[13] IA, p. 11.

could be linked to a multitude of factors, such as the size of the company[14] or its business model[15] .

The Commission says that it is unable to *quantify* the macroeconomic impacts of contract law differences on cross border trade**[16].** Indeed, it indicates that 'determining the impact of differences in contract law on trade flows requires knowledge about the number of companies that are discouraged from trading cross-border due to these differences, the number of countries with which they would trade, and the amount they would trade. This data is not available'. Consequently, to demonstrate the negative impact resulting from contract law differences, the IA relies primarily on the two Eurobarometer surveys mentioned above which asked companies about the impact and potential obstacles incurred when making a decision to sell or purchase across borders, whether to another business or to consumers.

The Commission argues, on the basis of the answers to the aforesaid Eurobarometer surveys and a number of assumptions which are explained in detail in annex III, that the value of lost intra EU trade can be estimated at a range between 26 bn euro and 184 bn euro. The Commission states that part of these opportunity costs will be reduced due to the domestic transactions which may take place instead of the failed cross border ones, but is unable to quantify the value of these compensatory domestic transactions. The Commission indicates that the compensatory domestic trade will most likely take place at a higher price and be detrimental to consumers[17].

The Commission further explains that EU businesses have a reduced opportunity to trade because they are faced with the **additional transaction costs** associated with identifying the applicable foreign contract law, becoming familiar, complying with it and adapting contracts accordingly (**driver 1**)[18], and because they are confronted with **increased legal complexity** (**driver 2**).

Driver 1: Additional transaction costs stemming from differences in contract law hinder cross-border trade

The Commission indicates that the need to apply different foreign contract laws is likely to generate additional transaction costs compared to domestic trade. However, the Commission does not provide a clear definition of 'transaction costs' although the

[14] In fact, EB 320 and EB 321 show that "Trading with at least four (other) Member States was mainly a characteristic of medium and large enterprises".
[15] See in this respect UEAPME's position paper on the Proposal for a Regulation of the European Parliament and of the Council on a Common Sales Law (COM (2011)635 final. Available at http://www.ueapme.com/IMG/pdf/120119_pp_General_Remarks_CESL.pdf. See also on this point W.H.J. Hubbard, "Another Look at the Eurobarometer Surveys", The law school of the University of Chicago, October 2012, p. 5-6.
[16] , IA. p. 11, footnote 39.
[17] IA, p. 11 and annex III, p. 73.
[18] IA, p. 12.

concept is used throughout the IA. This is probably due to the fact that there is currently no generally accepted definition of the transaction cost concept[19].

According to the Commission, in B2C transactions, additional transaction costs arise from the fact that businesses need to bear the costs of compliance with the mandatory consumer protection rules of the country they direct their activities to[20]. The Commission states that 38% of companies with experience in or an interest in cross-border trade considered the need to adapt and comply with different consumer protection rules in foreign contract laws as a barrier to cross-border trade.

The Commission distinguishes two different scenarios of transaction costs on the basis of Article 6 of the Rome I Regulation: the business may either chose to apply the consumer's national law in its entirety or chose to apply its preferred law (most certainly a law it is familiar with), in which case the Commission says the transaction costs will be 'slightly lower' than in the first scenario (no quantification in that respect is provided). If the business chooses to apply its own law, the Commission provides that it will nevertheless have to adapt its contract to the mandatory consumer protection rules of the consumer's country of residence if these are higher.

The Commission states that 'while there is no data on the preference of choice between these two scenarios, it is more likely that in practice businesses would prefer to operate under their own law, as this would in general be less costly'[21]. It then provides that the costs for B2C transactions are estimated as an average for the two above-mentioned scenarios[22].

Furthermore, the Commission states in its IA that traders need to find out and comply in advance with the potentially higher consumer protection provisions[23].

In B2B transactions, the additional transactions costs are linked to the negotiation and eventual application of a foreign law to the contract. According to the IA, this is seen as a barrier by 30% of companies engaged or interested in cross-border trade.

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[19] See the report by professor Mitja Kovač of the University of Ljubljana on the "Economic aspects of the impact assessment accompanying the European Commission's proposal for a Regulation of the European Parliament and of the Council for a Common European Sales Law", p. 11.
[20] IA, p. 13.
[21] IA, p. 13.
[22] IA, p. 13.
[23] This approach is confirmed in the explanatory memorandum of the proposal at paragraph 5 which reads " [...] 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".

For both B2B and B2C transactions, the average transaction costs are calculated based on companies' responses to the SME panel survey in which they were asked to give their own estimates of how much they would save in transaction costs if a single European contract law was available[24].

The Commission's method for calculating the transaction costs appears to be very transparent since a whole annex of the IA is dedicated to this issue and contains very detailed explanations of its reasoning (annex III).

The Commission says that the range of the costs indicated in the SME Panel Survey was verified by the European Business Test Panel survey (EBTP survey). However, the Commission appears to have based its assumptions on a very limited sample size. The SME panel survey attracted 1047 responses from SMEs and 609 companies were interviewed for the calculations of the transaction costs in B2B relations, and 292 in B2C relations[25]. It is interesting to note that more than half of the interviewed traders selling only business to consumer did not know how much they would save[26], fact which seems to put into question the representativeness of the answers.

The possibly low reliability of the estimates appears to be confirmed by the SME panel assessment which concludes that though the responses may be representative across different types of SMEs, 'the methodology for conducting the survey does not ensure representativeness of the results for the whole of the EU'[27].

In the IA, the SME panel evidence is cross-checked against the EBTP panel survey, with a panel sample of 140 firms across the EU.

It is doubtful whether the SME panel-based calculations are sufficiently robust to be used as a basis for calculating transaction costs. In addition, the fact that the Commission has relied on companies' own estimates of their transaction costs, instead of their actual expenses, casts further doubts as to the reliability and accuracy of the figures the Commission comes to[28]. The Commission assumes that for B2B transactions the transaction costs range between 9.000 and 10.658 euro and for B2C transactions between 8.695 and 9.565 euro per company per member state. According to the Eurobarometer studies, 63% of companies involved in B2B trade say the difficulty in agreeing on the foreign applicable law has no impact on their decision to sell or purchase cross-border, 54% of companies involved in B2C trade say the need to adapt and comply with different consumer protection rules in foreign contract laws has no impact on their decision to sell cross-border to final consumers [29].

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[24] IA. p.13 and 75.
[25] See Annex III of the IA, p. 74-75.
[26] See table 3 in Annex III of the IA, p.75.
[27] SME Panel Survey, p.1. Last consulted on 16 November 2012.
[28] See on this point BEUC's comments on the European Commission's impact assessment for the proposal of a common European sales law, November 2011, p.3, the Austrian Federal Chamber of Labour's position paper on the proposal for a Regulation on a Common European Sales Law, February 2012, p. 7,
[29] EB 321, p. 22and EB 320, , p. 27.

Furthermore, the Commission does not explain how transaction costs vary among Member States. Indeed, despite indicating that transaction costs 'are one-off costs that vary according to the company's business activity, its place of business, distribution channels and type of transaction (B2B or B2C)'[30], the Commission only seems to focus its calculations on the types of transaction leaving out the other variables mentioned above.

The Commission indicates that the impact of transaction costs is 'likely to vary depending on the size of the company and would affect mostly micro and small enterprises' and in particular micro enterprises for which transaction costs can represent a significant part of annual turnover[31]. The Commission suggests that the fact that the overwhelming majority of companies interested but not involved in cross-border trade are micro-enterprises could be an indication that the costs may dissuade many micro-companies with no cross-border experience from even starting cross-border activities.

In fact, the Eurobarometer surveys relied on by the Commission show that SMEs are less concerned about contract-law related barriers to trade than large companies. In particular, micro-enterprises are more likely to consider contract law an unimportant barrier than large enterprises[32]

The Commission admits the existence of regulatory (including contract law) and practical barriers to trade[33], and it provides evidence on where contract law differences rank in comparison to other barriers to trade.(Annex IX)[34]. It appears from the EB surveys that contract law-related barriers are about as significant as other potential barriers. In both EB 321 and 320, for example**,** contract law-related issues posed a barrier more or less equivalent to practical difficulties (such as language, cross-border delivery or after sales maintenance)[35].

Besides additional transaction costs, the Commission believes that dealing with foreign laws adds complexity to cross-border transactions, therefore hindering cross-border trade.

Driver 2: Perceived increase in legal complexity hinders cross-border trade

The perception of legal complexity is believed to be among the leading factors affecting the decision to embrace cross-border trade. According to the Commission's data, the difficulty in finding out the provisions of a foreign contract law is considered among the top barriers in business-to-consumer transactions and in business-to-business transactions"[36], these barriers being particularly pronounced for companies with an interest in, but no experience of, cross-border trade.

30 IA, p. 12.
31 IA, p. 16.
32 EB 320, p. 20, EB 321, p. 22 and annex 10 b.
33 IA, p. 11.
34 IA, annex IX, p. 208.
35 EB 321, p. 20 and EB 320 p. 17.
36 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011)635 final, recital 1.

The Commission notes that in B2B transactions, the complexity arises from the frequent need to adapt to the national law of the business partner[37] and in B2C transactions from the need of companies to be aware of applicable mandatory provisions of the national law of the consumers towards whom they direct their activities.

As the Commission recognises, 14,6% of companies said they frequently applied the law of their business partner in their cross-border B2B transactions (60% of managers thought that the transactions they conducted with other businesses located elsewhere in the EU were "most often" governed by their own national contract law[38]).

Moreover, other legal issues, such as tax regulation, licensing, and registration procedures or company law, seem to affect equally a company's decision to enter cross-border trade. EB 320 actually shows[39] that these factors are a greater hindrance for companies interested but not involved in cross-border trade than the problem of finding out about the provisions of a foreign law. Only a good half of companies in B2B (57%) and B2C (54%) transactions consider that this obstacle has no impact on their decision to sell or purchase cross-border[40].

As far as B2C transactions are concerned, it appears from the Commission's own IA that in B2C transactions, out of the 38% of companies who consider the need to adapt and comply with different consumer protection rules in foreign contract laws as a barrier to cross-border trade, only 7% said that this had a large impact on their decision to sell across border to consumers from other EU countries[41], 13% said that this had some impact and 18% a minimal impact.

As far as the negotiation of applicable law is concerned, the Commission indicates that out of the 30% of companies who see this as a barrier to cross-border trade, only 5% said that this had a large impact on their decision to sell or purchase across border, 10% said that it had some impact and 15% a minimal impact[42]. Moreover, only 3% of companies involved in B2B and 2% in B2C always give up exports because of contract law-related obstacles[43].

Problem 2: Consumers are hindered from cross-border purchases and miss opportunities

The Commission indicates that the divergence in contract laws prevents cross-border shopping by consumers (driver 1) and that consumers miss out on opportunities in the internal market since they are hindered from accessing more and better offers at a cheaper price (driver 2)[44].

[37] IA, p. 17.
[38] EB 320, p. 27.
[39] EB 320, p. 21.
[40] EB 320, p. 15, EB 321, p. 19.
[41] IA, p. 13, footnote 55, EB 321, p. 62.
[42] IA, p. 14, footnote 64.
[43] IA, p. 11.
[44] IA. p.17

Driver 1: Contract law differences impact negatively upon cross-border shopping

To support this proposition, the Commission argues that only one in four consumers purchase goods from another country when they travel and only 1 in 10 from a distance[45]. While this statistic reveals that the level of cross-border shopping is indeed low it does not demonstrate that contract law differences per se are the reason behind this.

The Commission argues that the low level of cross border shopping can be attributed to demand and supply barriers: on the supply side, businesses limit their cross-border operations and may refuse to sell to consumers in other member states, and on the demand side, the Commission says most consumers are still reluctant to shop cross-border because of regulatory barriers, mostly related to contract law, and practical barriers. The Commission believes that since practical barriers are gradually decreasing, the regulatory barriers have become key factors for restricting consumer confidence in cross-border shopping.

The IA does not provide any information as to the extent to which consumers rank barriers that hinder them from buying goods from abroad. The Commission appears to argue that the uncertainty over their rights, which results from the complexity of different foreign laws they are confronted with, discourages a significant number of consumers from purchasing from other EU countries[46].

However, the Commission does not provide clear evidence that the uncertainty over consumer rights is due to contract law differences rather than to problems relating to delivery challenges, return of faulty products, or the fear of falling victim to scams or fraud[47].

The Commission's argument that the contract law concerns that consumers might have 'will not entirely be removed even after the adoption of the CRD, which will not regulate some of the key problematic areas, such as remedies for faulty goods'[48] cannot be evidenced, since the CRD has not yet been implemented and consumers' attitudes cannot yet be evaluated.

The Commission explains that, because consumers have to deal with a highly complex legal environment, many are discouraged from taking advantage of the internal market, thus missing out on better and cheaper offers in other EU countries.

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[45] IA, p.17.

[46] IA, p. 18. According to Eurobarometer 299a on attitudes towards cross-border trade and consumer protection "Half of EU consumers *disagreed* that an uncertainty about their rights meant that they were not interested in shopping in another EU country", p. 10.

[47] EB 299 shows that 59% of EU consumers agreed that they were not interested in cross-border shopping because they were worried about falling victim to scams or frauds when purchasing products or services in another country , 57% were not interested in making cross-border purchases because they were worried that difficulties could arise if there would be a need to resolve problems, such as returning a faulty product and about half (47%) of respondents were worried about the delivery of products purchased in another country, p. 30. See also consumer market scoreboard, 5th edition, March 2011, p. 15.

[48] IA, p. 19

Driver 2: Consumers miss out on the opportunities of the single market

The Commission argues that 'a substantial number of consumers prefer to shop domestically, due to uncertainty about their rights in cross-border shopping'[49] and are often disadvantaged by the limited choice and higher prices in their domestic markets.

Furthermore, the Commission states that consumers also miss out opportunities of the single market because they are faced with the business practice of refusal to sell which is often due to differences in contract law[50].

The Commission indicates that 'almost a quarter of export oriented European retailers refused sales due to contact law'. According to the data provided by the Commission, 1% of export-oriented retailers said that they always refused sales due to differences in consumer contract laws, 4% did so often and 18% did not very often[51]. 72% of EU companies have never refused sales due to such differences.

The Commission indicates that it cannot identify how many consumers were affected by the refused sales due to contract law but merely indicates that, according to a recent mystery shopper study, 61% of attempts at online cross border purchases failed and that 50 out of that 61% failed because the seller refused to sell to the consumer's country[52]. The Commission assumes that contract law accounts for a proportion of these cases but is unable to identify the exact proportion.

The statistics cited above, according to which more than half of all online purchase attempts are rejected by the seller seems to be in contradiction with the fact that according to the Eurobarometer survey cited by the Commission , less than a tenth (8%) of EU consumers – who had used the Internet, postal service or phone to buy products or services from sellers or providers in other EU countries in the past 12 months– said that a supplier had refused to sell or deliver a service or product at least once during that time frame[53].

INTERIM CONCLUSION

Generally speaking, the analysis of the different problematic areas in need of EU intervention is quite detailed and presented logically. The underlying problem drivers are sufficiently clearly presented, as well as the causal link with the identified problems**.**

The Commission also attempts to quantify the adverse consequences of differences in the contract laws of the Member States for cross-border trade and in terms of consumer choice, acknowledging at the same time that the quantification is difficult.

[49] IA, p. 20
[50] IA, p. 21 and Explanatory Memorandum of the proposal p. 4.
[51] IA, p. 21.
[52] IA p. 21.
[53] EB 299a, p. 9.

Several academics and stakeholders[54] consider that the Eurobarometer and other surveys[55] on which the Commission relies offer an ambiguous picture of the extent to which contract law is an obstacle to cross-border trade.

The afore-mentioned surveys could be interpreted differently to demonstrate the contrary, namely that there are no large numbers of discouraged traders and contract law differences do not appear in practice to be a major obstacle to cross-border trade.

Nevertheless, even if the Commission might overstate the significance of the results of the surveys as to the magnitude of trade barriers resulting from divergences between national contract laws, the empirical data do not preclude the significance of contract law to cross-border trade. The surveys appear indeed to be consistent with the suggestion that a small, but economically significant, number of traders and consumers are discouraged from cross-border trade by differences in European contract law[56].

In addition, it cannot be disputed that the co-existence of different legal systems of contract law in Europe represents a source of transaction costs and there is no doubt that cross-border trade in Europe would be cheaper if all Member States applied the same set of rules. However, the amount and the effect of those transaction costs remains inconclusive in the IA since the causal link between cost savings (economies of scale) achieved by harmonization of legal rules and increased cross-border trade is not shown in quantitative terms.

While the Commission's sole reliance on the SME and EBTP panel surveys to calculate the transaction costs casts doubts as to the reliability of the calculations since, on the one hand, they are based on companies' estimations of transaction costs instead of their actual expenses and, on the other hand, the surveys suffer from a lack of representativeness, it should be noted that economists commonly admit that the

[54] See W.H.J. Hubbard, "Another Look at the Eurobarometer Surveys", The law school of the University of Chicago, October 2012, T. Ackermann, " Public Supply of optional standardized consumer contracts: a rationale for the Common European Sales Law?", paper presented at the Chicago conference on European contract law: a law and economics perspective, April 2012, p. 4. N. Kornet, "The Common European Sales Law and the CISG, complicating or simplifying the legal environment?", Faculty of Law, Maastricht University, March 2012, p. 4, The Law Society, "Common European Sales Law", Response to the UK Government Call for Evidence, May 2012, p5 and 22; Austrian Federal Chamber of Labour position paper on the proposal for a Regulation on a Common European Sales Law, February 2012, p. 6, Response of Allen and Overy LLP to the UK Government call for evidence in relation to a "common European sales law for the European Union - a proposal for a regulation from the European Commission", May 2012, p. 1 and 10, S. Wrbka, "The proposal for an optional common European sales law: a step in the right direction for consumer protection?", EUIJ-Kyushu Review, Kyushu University, issue 1-2011, p.104-105, BEUC's comments on the European Commission's impact assessment for the proposal of a common European sales law, November 2011, p.6.

[55] Apart from the Eurobarometer surveys (320 and 321), the Commission also relies on the 2010 Small Medium Enterprise panel survey (SME Panel survey) and the European Business Test Panel survey (EBTP survey).

[56] See W.H.J. Hubbard, "Another Look at the Eurobarometer Surveys", Law School of the University of Chicago, October 2012, p. 4.

measurement of transaction costs is highly problematic, in part because of the absence of a commonly accepted definition of transaction costs[57].

In addition, it would appear that, up until now, there has been no attempt to measure the amount of transaction costs resulting solely form differences in contract laws and nor is there an available/reliable formula or analysis which could provide a straightforward answer. As the Commission points out, there is no body of evidence on the actual impact and magnitude of the costs of legal diversity for cross-border activities and trade.

However, the Commission's heavy reliance on Eurobarometer surveys to define the economic problem seems a weak method for data collection, particularly as it relies on data from 'senior executives' through a telephone survey. Thus the respondents did not have enough time to prepare before giving the answers and usually gave a general qualitative reply[58]. Furthermore, the Eurobarometer surveys only interviewed companies already trading cross-border or planning to do so in the future, and not companies which were not active in cross-border sales.

Lastly, contrary to the Commission's impact assessment guidelines, the problem definition does not appear to include a scenario describing how the baseline scenario is likely to develop in the future without any new EU action. The Commission seems to discard the 'do nothing option' from the outset since it indicates in the problem definition section of the IA that 'the European contract law as such addresses all the problems that differences in contract laws pose to cross-border trade in the EU'[59], thus indicating the direction it intends to take.

2. Objectives

All Commission IAs must have clear objectives that are directly related solving the problems which have been identified.
(EC IA Guidelines, point 6)

The IA provides for a set of clear and logically coherent objectives.

The overall objective identified by the Commission is 'to support the economic activity in the internal market by improving the conditions for cross-border trade for the benefit of businesses and consumers. The improvement should be achieved by reducing the barriers caused by differences in contract law between member states'[60].

The Commission then identifies two general objectives, one for businesses and one for consumers, which are respectively:

[57] See Professor Mitja Kovač 's report on the "Economic aspects of the impact assessment accompanying the European Commission's proposal for a Regulation of the European Parliament and of the Council for a Common European Sales Law", op cit. p. 15 and authors cited there.
[58] See IA, p. 73.
[59] IA, p. 10.
[60] IA, p. 22.

- to facilitate the expansion of cross-border trade in the internal market - the specific objectives in that respect being to increase the number of companies starting cross-border activities and to increase the number of companies expanding their activities to more member states;
- to facilitate cross-border purchases by consumers in the internal market - the specific objectives being to increase consumer confidence in shopping cross-border, to decrease the number of consumers who experience refusal to sell, and to improve access to offers from the EU.

Additionally, there are four 'operational' objectives, relating to the two general objectives identified above:

For businesses:
- to reduce additional transactions costs when trading with more than one member state;
- to reduce legal complexity in cross-border trade.

For consumers:
- to ensure a high level of consumer protection;
- to reduce uncertainty about consumer rights in cross-border shopping.

Generally speaking, the objectives seem to correspond to the problems which have been identified. However, contrary to the impact assessment guidelines[61], the Commission has not included any *measurable* objectives so that it is possible to verify whether the objective has been achieved or not, nor has it included any specific time-frame for their realisation.

3. Policy options

> Options must be clearly related to the objectives and must be proportionate.
> The set of options should include: the 'no policy change' baseline scenario; "no EU action" (discontinuing existing EU action), where legislation already exists, improved implementation/enforcement; self- and co-regulation; international standards where they exist.
> *(European Commission IA Guidelines, point 7)*

The Commission puts up a very clear and well-structured presentation of policy options. These are divided into options for type of intervention (7 options are examined in this respect) and options for scope and content.

Annex I includes stakeholders' views on the different options.

It would appear that many respondents to the Green Paper on 'policy options on progress towards a European contract law for consumers and businesses', saw value in the publication of the work of the expert group (option included in the baseline scenario in the IA) and supported option 2, a toolbox for the EU legislator. Some respondents also expressed a preference for option 6 (a regulation establishing a European contract law

[61] Commission's Impact Assessment Guidelines, p. 28.

that would replace member states' national contract laws). There was little support for options 3 (a commission recommendation), 5 (a minimum harmonisation directive) and 7 (a regulation establishing a European civil code).

The Commission actually dismisses option 7, for subsidiary and proportionality reasons, and option 3a, a recommendation encouraging member states to replace national laws, because of the little support it received among member states.

The responses were more varied on option 4 (an optional instrument of European contract law), which is the option preferred by the Commission.

The Commission actually admits, but only further along in Annex IV of the IA, that only a fraction of the respondents to the Eurobarometer surveys who said they were likely or very likely to use a single European contract law in cross-border transactions indicated an optional instrument as the preferred option (respectively 38% in B2B and 37% in B2C)[62]. More than half (53% in B2C and 52% in B2B) of the surveyed enterprises preferred that such a single European contract law would completely replace national contract laws and be applicable to domestic transactions as well.

The Commission appears to have considered mostly options relating to the establishment of a new instrument of European contract law as being an appropriate response to its stated objective of boosting cross-border trade by reducing the barriers caused by differences in contract law between member states. Other alternative options such as the development of awareness-raising campaigns for businesses and specially SMEs as to the applicable law in cross-border situations, the development of model contract terms or the tailoring of the Common European Sales Law instrument to specific areas of trade where problems are more recurring (such as online sales), do not appear to have been examined.

In addition, the 'no EU action' option (discontinuing EU action) does not appear to have been considered, contrary to the Commission's impact assessment guidelines. Admittedly, however, this would have been contrary to all other policy adopted so far, such as the Rome I Regulation, the CRD, EU consumer legislation etc.

4. Subsidiarity principle and choice of legal instrument

The Commission needs to indicate in the IA:

- why the objectives of the proposed action can not be achieved sufficiently by the Member States (necessity test);
- that, as a result of this, objectives can be better achieved by action at the EU level (test of EU Value Added)

(European Commission IA Guidelines, point 5.2)

[62] IA, p. 90.

The Commission justifies acting in this field by arguing that differences in contract law contribute to the internal market not functioning properly and cites three inherent failures[63]:

- high transaction costs as market trends evolve and member states continue to take action independently, increasing regulatory divergences.
- coordination problems: the Commission believes that member states are not able to address the problems in this area because the obstacles relate to the 'functioning of the internal market' and 'have a clear cross-border dimension'.
- lack of uniformity: the Commission considers that 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 cross-border transactions'. According to the Commission, the current legal framework is not sufficient as it lacks a single set of uniform substantive rules which cover comprehensively the lifecycle of a cross-border contract.

The British House of Commons, the Belgian Senate, the Austrian Bundesrat and the German Bundestag have issued reasoned opinions on the subsidiarity implications of the proposal[64] .

Concerning the form of the legal instrument chosen, it should be as simple as possible, and coherent with the satisfactory achievement of the objectives sought. It should also allow for effective enforcement.

In its IA, the Commission explains very clearly its choice of legal instrument, in favour of a Regulation establishing an optional common European Sales Law (CESL), rather than a Directive or Regulation establishing a mandatory CESL, arguing that the latter instruments would not be consistent with the principles of subsidiarity and proportionality, since they would eliminate domestic laws and legal traditions and apply to all companies, including those who are only trading domestically, entailing very high costs which would outweigh by far the benefits.

5. Proportionality

Article 5(4) of the TEU also requires that EU action meets the conditions set by the principle of proportionality. This principle has to be taken into account when assessing and comparing policy options.

In European Union law there are generally acknowledged to be four stages to a proportionality test[65], namely:

- there must be a legitimate aim for a measure;
- the measure must be *suitable* to achieve the aim (potentially with a requirement of evidence to show it will have that effect);

[63] IA, p. 22.
[64] All the reasoned opinions and contributions can be found at the following address: http://www.presnet.ep.parl.union.eu/presnet/cms/site/presnet/lang/fr/2011-COM-635
[65] P Craig and G de Burca, EU Law (5th edn OUP 2011) p. 526.

- the measure must be *necessary* to achieve the aim, and that there cannot be any less onerous way of doing it;
- the measure must be reasonable, not imposing an excessive burden on the individual in relation to the objective (proportionality *stricto sensu*).

The Commission's objectives seem to be based on the (contested) hypothesis that contract law differences constitute a significant obstacle to cross-border trade both for businesses and consumers. Therefore, the proportionality of the proposed measure should be assessed in relation to the two problem areas identified by the Commission, namely: (1) differences in contract law hinder businesses from cross border-trade and limit their cross-border operations, and (2) consumers are hindered from cross-border purchases and miss opportunities.

The IA does not include a section on proportionality, but the issue is raised several times in the analysis and comparison of the different options, both concerning the type of intervention and the scope and content.

The Commission explains that an optional Common European Sales Law applicable to cross-border sales only is in accordance with the principle of proportionality, since it would not replace existing domestic regimes (an issue which many member states said was crucial in their responses to the Green Paper consultation) and need only be chosen by parties voluntarily, when it suits their interests.

INTERIM CONCLUSION

The proposal would appear to respect both the subsidiarity and the proportionality principles since the minimisation of the barriers to the internal market arising from differences in member state contract law requires uniform action across the EU, which can be better achieved by action at the EU level. In addition, 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, thus avoiding further discrepancies, whilst the optional character of the instrument ensures that it does not go beyond what is necessary to solve the problems that have been identified.

6. Analysis of impacts and comparison of options

Identify direct and indirect environmental, economic and social impacts and how they occur. Identify who is affected (also outside the EU).
Identify whether there are specific impacts that should be examined (fundamental rights, SMEs, consumers, competition, international, national, regional).
Assess the impacts in qualitative, quantitative and monetary terms or explain why quantification is not possible or proportionate.
Consider the risks and uncertainties in the policy choices, including expected and unexpected compliance patterns.
(Guidelines, point 8)

All assessments should be based on evidence, including quantitative data. The reasoning that leads from the evidence to the assessments has to be fully transparent. *(Guidelines, point 9.1)*

In this section, we evaluate whether the Commission has assessed all relevant impacts of its proposals in adequate depth on the basis of robust evidence. The analysis should be proportionate and balanced across the three pillars (economic, social and environmental impacts).

- *Analysis of impacts*

The impacts for each of the Commission's individual preferred policy options are reasonably clearly summarised in a comparable manner. All options are assessed for their effectiveness towards meeting the operational objectives and also for their key economic, social and environmental impacts. The options are compared in qualitative terms but the IA also includes a cost-benefit analysis of the options considered as best meeting the policy objectives (optional CESL, full harmonisation directive, and Regulation).

The IA also analyses the impact of each option on SMEs, law firms, public authorities and the judiciary, as well as on competition in the internal market, on consumer protection and on the online environment. The economic impacts of each option are assessed in quantitative terms with very precise estimations.

The Commission has included an annex (Annex V) providing for a detailed analysis of the impacts of each option. The IA also includes an annex (Annex VI) on the impacts of the CESL on fundamental rights as well as an annex (Annex VII) on the administrative costs of each option.

In general, the methodological choices, limitations and uncertainties are acknowledged and made clear. As regards the lack of evidence, it is worth noting that the IA acknowledges the lack of structured evidence on specific points (see examples below - non exhaustive list).

- 'Determining the impact of differences in contract law on trade flows requires knowledge about the number of companies that are discouraged from trading cross-border due to these differences, the number of countries with which they would trade, and the amount they would trade. This data is not available'[66].

- 'It is hardly possible to quantify the value of the domestic transactions which compensate for failed cross-border trade. This data is not available'[67].

[66] IA, p. 11, footnote 39
[67] IA, annex III, p. 73.

- Justification of working assumptions

In its opinion on the draft impact assessment, the Commission's Impact Assessment Board (IAB) stressed that 'the report should better justify and explain the assumptions underlying the assessment of the impacts, including the key factors influencing take-up of the proposed optional instrument, such as size of company and domestic contract law'.

The Commission admits the use of assumptions. However, those assumptions relating to the weighting of the qualitative answers provided in the Eurobarometer surveys, on which the whole IA relies, remain unclear. For example, the Commission does not appear to explain why it bases its savings calculations on the assumption that 25% of the companies would us the CESL. No information is given as to why the 25% figure was chosen and not another[68].

Generally speaking, the process by which qualitative data (the answers to questions in the Eurobarometer surveys) are transformed into numbers seems quite speculative and would require further justification. In this respect, it is interesting to note that the questions asked in the Eurobarometer surveys always referred to a 'single European contract law' and no explanation was given as to the content of the instrument. This could lead to a methodological flaw, since companies might have not responded the same way as to their potential use of the instrument if they had been aware of the contract law areas that are excluded from the scope of the CESL.

The IA could have been more explicit as to the factors influencing take-up of the proposed optional instrument: for example, it does not explain how businesses and in particular small businesses (since they are considered as the main beneficiaries[69]) would find CESL more attractive even if it results in more stringent consumer protection provisions being applicable. The Commission's assertion that a CESL would increase the customer base of small businesses because it would be seen as a 'mark of quality' is credible, but not evidenced[70]. The evidence provided in the IA on the scale of benefits to small firms is mostly qualitative.

Moreover, the IA could have paid more attention to the contractual behaviour of consumers and businesses, in order to be able to assess the impacts of a CESL[71]. In this respect, the IA could have analysed the experiences with the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) and the implications thereof for the necessity and likely success of a European sales instrument. Admittedly, the Vienna Convention is an international instrument with a different scope (eg only B2B) The reasons why the CISG is not frequently used could instead be related to the content of the instrument than to the fact that this is also an optional instrument.

[68] IA, p. 90.
[69] IA, p. 36.
[70] IA, p. 37.
[71] See the Law Society of England and Wales," Response to UK Government call for evidence", May 2012, p. 22.

- *Legal costs*

The Commission's working assumption is that a single body of rules would remove the need to investigate foreign laws,[72] thus reducing transaction costs, this being considered as one of the biggest merits of the proposal. However, several stakeholders believe that, for B2B transactions, companies will need in any case to examine their national law, that of the counterparty and the CESL in order to be able to determine whether the CESL is beneficial for them, and that this could eventually lead to an increase of transaction costs[73].

- *Impact on relations with third countries*

The Commission analyses the impact of all options on third countries. As regards the preferred option, the IA indicates that if third countries could chose the optional CESL they would benefit from easier access at lower transaction costs to the whole EU market and may be able to expand exports to more EU countries. If they could not use the optional CESL, some negative impact could be felt as trade would grow more between EU countries at the expense of potential partners from third countries.

- *Budgetary impact*

The proposal has a budgetary implication both for the Commission and Member States. The Commission would have to set up a database of national judgements and the member states would have to bear the costs which would accompany the implementation of EU legislation.

Companies deciding to use the CESL would also have to face one-off implementation costs[74] which the Commission quantifies precisely[75].

INTERIM CONCLUSION

While the IA is very well structured and contains detailed information on the methodology used by the Commission, several of the assumptions made by the Commission appear to be contestable.

Whereas, admittedly, it has been impossible for the Commission to use quantified data on contract law differences and business and consumer behaviour relating to cross-border trade, its sole reliance on the Eurobarometer and SME Panel surveys, where information on the intended content of the CESL was not provided, could cast doubt as to the accuracy of the scale of benefits calculated by the Commission.

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[72] IA, p. 37.
[73] See Prof. Eric A. Posner, "the Questionable basis of the Common European Sales Law: the role of an optional instrument in jurisdictional competition", the Law School of the University of Chicago, May 2012; Prof. Horst Eindenmüller, "What can be wrong with an option? an optional common European Sales Law as a Regulatory Tool", paper presented at the conference on "European contract law: a law and economics perspective" organised by the University of Chicago, May 2012.
[74] IA, p. 34.
[75] IA, annex III, p. 82.

7. Stakeholder views

The external consultation appears to have been carried out properly by the Commission. Stakeholders were consulted on the Green Paper on policy options on progress towards a European contract law for consumers and businesses, from July 2010 to January 2011. The consultation attracted 320 responses. The Commission indicates that while many respondents wanted to participate in the discussion, some felt unable to provide in depth comments, given the rhythm of the progress of the work and that they did not know the detail of the policy options.

The Commission also established a key stakeholders' expert group, composed of consumer and business representatives, in order to ensure that the different views would be taken in to account in the development of the substantive rules, and that the CESL rules were user-friendly and practical.

The IA is transparent in acknowledging the fact that the preferred option was not supported by the majority of respondents to the Eurobarometer surveys,[76] which sought to elicit business attitudes and experiences with problems related to contract law.

The Impact Assessment Board recommended that the IA should reflect the comments of all stakeholders throughout the document. However, DG Justice has not followed up on this opinion and stakeholder views are mostly mentioned in the annexes.

8. Monitoring, transposition and compliance

The Commission appears to make a proper assessment of transposition and compliance aspects. It proposes plausible and operational monitoring and evaluation arrangements.

The Commission proposes some possible indicators which could be used in the process of evaluation, such as variation in the number of enterprises trading cross-border and variation in the number of EU countries that companies export to, percentage of companies using the CESL, change in transaction costs, and variation of percentage of consumers shopping cross border.

[76] EB 320/2011 and EB 321/2011).

Conclusions

In general, the Impact Assessment methodology, as laid down in the Commission's Impact Assessment Handbook, is respected. The Commission has made considerable efforts to provide a very detailed and transparent impact assessment in which the arguments are clear and logically structured and the limitations and uncertainties of their analysis is acknowledged.

The analysis of the different problematic areas in need of EU intervention is quite detailed and presented logically. The underlying problem drivers are sufficiently clearly presented, as well as the causal link with the identified problems. The Commission analyses a broad range of possible impacts for the policy options, with an emphasis on economic impacts (mainly administrative and transaction costs).

The external consultation appears to have been carried out properly by the Commission.

The Commission makes a laudable attempt to quantify both the problems it seeks to address (adverse effect of contract law differences on cross-border trade, both from the perspective of business and consumer) and the benefits in terms of savings for undertakings wishing to engage in cross-border trade, although the evidence sources it uses to that effect can be challenged.

The main concept used throughout the IA is that of 'transaction costs'. While the way the Commission calculates transaction costs can validly be the object of criticism and is disputed by numerous stakeholders and academics, it must be stressed that there is in fact no generally accepted definition of the concept of 'transaction costs' and that the method for calculating such costs in contract law is not yet scientifically established.

The Commission states that the data needed for estimating the real impact of transaction costs deriving from different contract laws (i.e. the real, not hypothetical, number of companies that are discouraged from trading cross-border, the number of Member States in which they would trade, the volume of trade, the actual legal costs, and so on) are not available and this is not disputed.

The Commission thus takes the 'second best approach' and attempts to transform qualitative data from Eurobarometer studies and two other surveys into figures. While this process may seem somewhat speculative, the Commission is very transparent in its reasoning and understandably takes a cautious approach, using a range of low and high estimates throughout the IA for all its calculations.

Although the Commission is very transparent about the methods used and the assumptions made, Eurobarometer studies are not the best material on which to base IAs, since they usually do not give respondents sufficient time to prepare before providing their answers and usually result in general, qualitative answers. The two other surveys (SME panel survey and EBTP panel survey) openly acknowledge that the results cannot be considered representative for the whole of the EU.

The Commission demonstrates convincingly some effects of the proposed measure, and that, especially in the longer term, the benefits of the proposal will be greater than the (often one-off) costs for business in using this optional instrument. According to the Commission, the CESL would bring benefits to the EU economy if a minimum of 5% of current exporters would use it[77], but even if the take-up rate were lower, given the optional nature of the instrument, the situation would just be equivalent to the no EU action scenario.

[77] IA, p. 56 footnote 213.

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This is a publication of the
Directorate for Impact Assessment and European Added Value
Directorate General for Internal Policies, European Parliament

PE 496.736
ISBN 978-92-823-4077-6
DOI 10.2861/28879
CAT BA-30-13-207-EN-C