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**The proposal for a
Common European Sales
Law: an e-business
perspective**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The proposal for a
Common European Sales Law:
an e-business perspective

BRIEFING NOTE

Abstract

The Internet and new technologies transform commerce and allow traders and consumers to transact irrespective of time, place and device. This paper explains the mechanisms behind the new commerce developing and points to the opportunities it presents. The new commerce also presents new challenges. Traders need another set of expertise and tools, and often opt for partner solutions such as online marketplaces. Policymakers need to rapidly and effectively remove barriers to these evolving commerce patterns. Here, we will need smart and flexible policy to support a better functioning internal market, innovation and investment. The proposed Common European Sales Law is a promising example of an attempt to improve the internal market in a novel way. To ensure it is properly designed to support the new commerce, this paper proposes improvements to the areas of language, user experience, dispute resolution, payment, and consumer obligations.

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EXECUTIVE SUMMARY

The eBay¹ marketplace is an example of how the internet and technology lower trade costs for merchants of all sizes, by enabling them to connect, find a match, establish trust, transact and pay. This allows traders of all sizes to expand and grow their operations whilst also creating consumer welfare gains.

Importantly, we see how these lower trade costs also lead to traders expanding their operations to foreign countries. Intra-EU cross-border trade via the eBay marketplace has grown six times faster than offline cross-border trade for the period 2004 to 2010.² Moreover, lower trade costs translate to consumer welfare gains. For example, if, hypothetically, all EU trade were to be conducted at the lower online trade costs, consumers could gain up to 45% of GDP through access to choice and competitive prices.

Not only are trade barriers lower online, they are being diminished much faster compared to offline. For the period 2005 to 2009, the trade-reducing effect of distance has fallen by 41% for cross-border trade on eBay compared to only 14% for offline-cross border trade.

The lower online trade costs stem from, amongst other things, the way in which the Internet and technology can help establish trust between trading partners and between buyers and sellers, by: facilitating communication throughout the transaction process; providing transparent, interactive ways of displaying and sharing information between parties; and allowing for the development of alternative mechanisms for resolving disputes.

While technology-based mechanisms bring down certain trade barriers, there are legal and administrative hurdles that keep the share of cross-border transactions low. We hear from sellers, who use the eBay marketplace as one of their sales channels, that differing consumer protection rules, VAT procedures and rules, and the lack of affordable and reliable delivery services discourage exporting within the EU.

The Internet and technology are transforming commerce, and policymakers need to make sure that legislation and policy do not impede developments. We will need smart and flexible policy to support a better functioning internal market, innovation and investment. The proposed Common European Sales Law is a promising example of an attempt to improve the internal market in a novel way.

To ensure that CESL is properly designed to support innovation in commerce, we would recommend specific attention to these areas:

- **Language** – The CESL should explicitly allow the trader to offer his or her services in any language. Providing this flexibility on language would significantly reduce red tape for traders and would complement trends in consumer behaviour: the 7th Consumer Scoreboard, published by the European Commission, finds that seven out of ten respondents with prior experience of cross-border shopping are willing to use another language.

¹ Founded in 1995 in San Jose, California, USA, eBay Inc. (NASDAQ:EBAY) is about connecting buyers and sellers. Known as the world's largest online marketplace, the company allow users to buy and sell on eBay platforms in nearly every country through PayPal, a system that enables individuals and businesses to securely, easily and quickly send and receive online payments; and through GSI, which facilitates e-commerce, multichannel retailing and digital marketing for global enterprises. eBay reaches millions through specialised marketplaces such as StubHub, the world's largest ticket marketplace, and eBay classifieds sites, which together have a presence in more than 1,000 cities around the world. For more information about the company visit www.ebayinc.com

² The internet and technology are an integrating force for the EU. For instance, exports by EU25 to Romania and Bulgaria have grown by 62% between 2004 and 2010 (accession to EU in 2007), whereas exports via the eBay marketplace have grown almost by a factor of nine – 777% - over the same period.

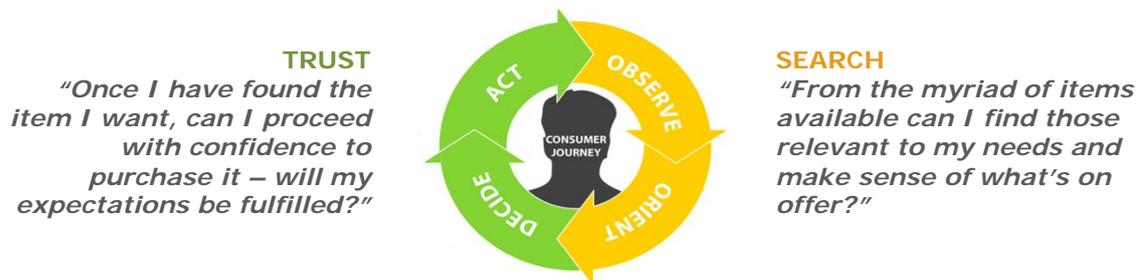
- **User experience** - Recognising that user expectations differ depending on the type of device and even between different models of the same type of device, the CESL should refrain from requiring multiple communications and should allow the trader to choose the format in which information is provided.
- **Payment** - Aligning CESL with common practice by simply requiring the trader to indicate on the website – rather than “*by the contract terms*” – which means of payment are accepted as well as ensuring alignment between CESL, Consumer Rights Directive and the Payment Services Directive (PSD) by deleting the discretion afforded by the PSD to Member States with regard to limiting or forbidding surcharging.
- **Dispute resolution** – Linking the CESL to the proposed Online Dispute Resolution platform to afford consumers and traders certainty up front about the procedures, should something go wrong in the transaction.
- **The consumer** – An increasingly informed and empowered consumer is emerging thanks to the smartphone and this should be reflected in appropriate responsibilities on the part of the consumer pre- and post-transaction (e.g. inform the trader that the product will not be collected, a principle of responsible custody, obligation to examine a product to establish conformity, allow the trader a right to cure, etc.).

We see the development of an increasingly technology-enabled and consumer-driven retail environment. This is the starting point for traders when developing their operations and seeking expertise and new tools from, inter alia, online marketplaces. It must also be the starting point for policymakers when seeking to reduce friction and enable seamless services in the internal market.

1. MECHANISMS OF THE NEW COMMERCE

We see four key technology tools that are fundamentally changing the dynamics of commerce by embedding mobility, inclusiveness, and choice into the process. These are search, trust, technological convergence, and innovation platforms.

Search tools allow consumers to find, compare, and make sense of offerings. They assist consumers to “Observe” and “Orient” during their consumer journey from initial interest to final purchase.



Trust tools allow consumers to make the leap and transact. They play a key role in enabling consumers to transition from the “Observe” and “Orient” phases of the consumer journey to “Decide” and subsequently “Act”.

Search and trust tools not only benefit consumers. They allow merchants of all sizes to:

- i) bring their services and offers to the market more efficiently;
- ii) be found; and,
- iii) build trust with a much larger pool of potential customers, be it in their locality or globally.

The power these tools confer both on consumers and merchants is magnified through **technological convergence** and continuous **innovation** on platforms.

Right now, this is demonstrated by the way mobile technologies and applications put search and trust tools in the pockets of consumers, place merchants’ offline inventory online, and give visibility to local merchants, irrespective of size. This is Commerce 3.0, where mobile phones form the connective tissue between online and offline, local and global opportunities.

This is leading to the emergence of a “self-sufficient consumer”, using his or her mobile phone both inside and outside of the store to research products, as well as to receive advertising and promotion messages. This consumer also carries shopping lists, coupons, and loyalty rewards on his or her mobile phone to secure the best and right deals at all times. The same consumer, still using the mobile phone, self-scans and pays for the purchase online before leaving the store.

We see the development of an increasingly technology-enabled and consumer-driven retail environment, where merchants depend on a whole new set of tools and expertise, some of them quite different from traditional retail capabilities. Many merchants do not have the time or resources to make their own significant investment in developing those solutions and tools. They therefore opt to engage with specialist partners to allow them to take advantage of new technologies, channels and solutions, whilst they continue to focus on their own strengths of sourcing and servicing customers.

2. NEW COMMERCE, NEW OPPORTUNITIES

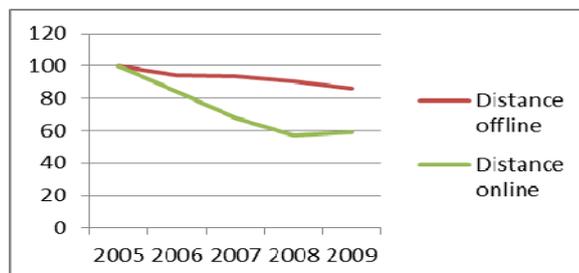
Mobile is fast becoming perhaps the most important channel empowering both merchants and consumers. At eBay, we expect transacted mobile volume to double from 2011 reaching \$10 billion in 2012. A survey among top eBay merchants in Germany and France³ confirmed that mobile broadband coverage and lower consumer costs for mobile Internet access are important elements for the future of their companies.

The opportunities that lie in the intersection of these new mobile technologies and commerce can be deduced by looking at how the Internet has already transformed commerce. To that end, we commissioned an extensive research project by external economists from Sidley Austin LLP and Geneva University.⁴ The study examined how cross-border trade has evolved and what role the internet and technology (brought together on an online platform) have played in its development.⁵

The central finding was that trade costs are significantly lower for eBay trade compared to offline trade. "Distance" – encompassing all sorts of trade costs – matters 60% less for buyers and sellers on the eBay marketplace compared to offline. The explanation is that the technology tools that an online marketplace such as eBay offers enable buyers and sellers to overcome important trade barriers such as searching, informing themselves and establishing trust.

The role of the Internet and technology in enabling new and more efficient trade patterns was recently recognised by the Director General of the World Trade Organisation, Pascal Lamy:⁶

"The world is changing, technology reduces the cost of distance, on eBay there's no distance."



Not only are trade barriers lower online, they are being diminished much faster compared to offline. For the period 2005 to 2009, the trade-reducing effect of distance has fallen by 41% for cross-border trade on eBay compared to only 14% for offline-cross border trade.

³ FreshMinds research conducted an online survey with 869 of the top 10,000 eBay sellers in Germany and with 759 of the top 5,000 eBay sellers in France. The survey ran between December 2011 and January 2012.

⁴ This study was commissioned by eBay and carried out by a team of economists under the supervision of an outside expert, Professor Marcelo Olarreaga of Geneva University, and of Dr. Dr. Simon Schropp of Sidley Austin's Geneva office, with the support of Christine Barthelemy (Sidley Austin Geneva), Andreas Lendle (Graduate Institute, Geneva) and Dr. Pierre-Louis Vézina (Oxford University).

⁵ The work has been presented in a report by eBay and an academic article by the economists.

⁶ WTO 2012 Public Forum, Inaugural Session, see here: <http://www.ebaymainstreet.com/news-events/wto-head-identifies-ebay-driver-world-trade>

Importantly, we see how these lower trade costs also lead to traders expanding their operations to foreign countries. Intra-EU cross-border trade via the eBay marketplace has grown six times faster than offline cross-border trade for the period 2004 to 2010.⁷

The lower trade costs identified for eBay transactions have the effect of encouraging exports and allowing new market entrants to grow faster and gain market shares quicker compared to those using only offline channels. Moreover, lower trade costs translate to consumer welfare gains. For example, if, hypothetically, all EU trade were to be conducted at the lower online trade costs, consumers could gain up to 45% of GDP through access to choice and competitive prices. At the same time, it would boost intra-EU cross-border trade.

The economic study thus confirms that online cross-border trade is already a significant opportunity for small and large merchants. With the advent of mobile technologies and applications, it is certainly also a growing opportunity for consumers.

⁷ The internet and technology are an integrating force for the EU. For instance, exports by EU25 to Romania and Bulgaria have grown by 62% between 2004 and 2010 (accession to EU in 2007), whereas exports via the eBay marketplace have grown almost by a factor of nine – 777% - over the same period.

3. NEW OPPORTUNITIES, NEW CHALLENGES

We have described how the Internet and innovative technologies allow for new and more efficient transaction behaviors. Retailers of all sizes need to embrace this (r)evolution in order to stay relevant in today's commerce landscape. As mentioned, retailers are not necessarily technology experts, but experts at sourcing and servicing their customers. Retailers who want to build enduring 21st Century businesses depend on new partners to compete more easily and affordably. Technology partners (such as eBay marketplace, GSI Commerce, X.Commerce, etc.) offer innovative platforms for flexible, scalable, customizable commerce solutions that help retailers adapt to the changing needs of today's consumers as their businesses grow.

The progressive uptake by retailers and consumers of new technologies, as well as reliance on mobile Internet, create an increasingly seamless and global commerce environment. Here, challenges arise where a borderless digital reality meets a still -fragmented physical reality. Challenges also arise where pioneering and evolving services do not lend themselves to traditional legislation, and where fast-changing consumer behavior itself drives development without waiting for legislators to catch up.

The Swedish Minister for Trade, Dr. Ewa Björling, has said: ⁸

“To make the most of the opportunities, it's not enough to have technology, computer capacity and broadband. It's also about the legal framework which too often is based on the traditional ways of trading.”

“We, decision-makers, must take advantage of the new technology and create frameworks that provide opportunities not obstacles. In this way, we can contribute to growth and job creation.”

Commissioner Neelie Kroes is also recognizing that we need to embrace ***“new technology, new legal frameworks and a new way of thinking”***.⁹

There are promising signs that the European Union is indeed trying to move towards a more flexible approach to policymaking, where the aim is to enable and empower innovation and investment. For example:

- **Effort based rules** - The 2010 Guidelines on the application of EU competition rules to vertical restraints recognise the Internet as a “powerful tool”¹⁰ in the context of achieving the broader EU objective of market integration. It follows that it is the efficient use of this tool that is being safeguarded by competition law. The Guidelines are not form-specific – they do not say that the right to use the Internet is a right to set up a website. Instead, they are effort-based – they say that the right to use the Internet is a right to use it to “reach a greater number and variety of customers”. The fact that the European Commission went with the effort-based approach shows that it understands that merely accessing the Internet is not enough if Europe's businesses and consumers are to benefit from the internal market: you need access to the technology solutions that allow you to make effective use of the Internet. As touched on above, few retailers

⁸ At a seminar (Think 3.0! – see here: <http://www.ebaymainstreet.com/think3>) in Stockholm on 21 September supported by the Swedish Ministry for Foreign Affairs and organised by Stockholm Chamber of Commerce, eBay Inc. and Facebook - short report available here: <http://www.ebaymainstreet.com/news-events/dr-ewa-bjorling-swedish-minister-trade-headlines-ebay-incs-think-3-event> and here: <http://www.regeringen.se/sb/d/15727/a/200015>

⁹ Speech on 8 May 2012: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/334&type=HTML>

¹⁰ See in particular paragraphs 52 and 56 of the Commission Notice, Guidelines on Vertical Restraints, SEC (2010) 411 final, 10.5.2010.

master technology and so they rely on access to innovation and technology platforms¹¹ for traffic generation, back-end solutions, site optimisation, etc. Competition law enforcers must therefore be vigilant in guarding this right to access and effectively make use of technology solutions

- **Bottom-up solutions** - With the proposed Common European Sales Law (CESL)¹², the European Commission takes a novel approach to helping European citizens and businesses overcome differences between national laws. CESL provides an optional legal framework for cross-border transactions, leaving it to retailers to decide whether to make use of it or not. The proposed Regulation on electronic identification (eID) takes a similar approach, providing for a framework for notification of eID schemes to the Commission coupled with the principle of mutual recognition by Member States of these notified schemes. The twist is that there is no obligation place on Member States to notify schemes. The Commission banks on economies of scale, created through the cross-border use of these notified electronic identification means, to “nudge” Member States into notifying schemes. These two proposals are bottom-up legislative solutions that offer users a choice and where success depends on user uptake – similar to commercial propositions.

¹¹ The blog of Neelie Kroes describes one side of the transformative changes we see to economic activity: *“craftsmanship in the 21st century refers to digital crafts such as app developers, web engineers, graphic designers, game developers or interaction designers. These crafts are also known as hypercrafts. Hypercrafts utilize digital communication platforms to empower product development, digital fabrication and distributed production. Hypercrafts lean on new ownership models and alternative forms of value creation”* See here: <http://blogs.ec.europa.eu/neelie-kroes/hypercraft/>

¹² Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, 11.10.2011

4. SOME SUGGESTIONS FOR THE CESL PROPOSAL

The new commerce is developing rapidly and it encourages traders and commerce to transact irrespective of time, place and device. Different national legislation creates an impediment in some circumstances and we need to find practical solutions quickly. We view the CESL as such a pioneering attempt to overcome differences between national consumer and sales laws. In fact, it could become a blueprint for an internal market legislative approach: offering an EU option for citizens and businesses who want to be able to seamlessly take advantage of the internal market.

To ensure that CESL is properly designed to support innovation in commerce, we would recommend specific attention to these areas:

- **Language** - The CESL does not address the language of the contract (recital 27) – that is left to applicable rules under national law. This means that the seller is still obliged to take into account national provisions on language requirements, leaving room for significant uncertainty and potential costs. CESL should explicitly allow the trader to offer his services in any language. Providing this flexibility on language would significantly reduce red tape for traders and would complement trends in consumer behavior: the 7th Consumer Scoreboard, published by the European Commission, finds that seven out of ten respondents with prior experience of cross-border shopping are willing to use another language.
- **Customer experience** – CESL requires multiple communications (notices and confirmations) from the trader to the consumer: on pre-contractual information, on the intended application of CESL, on the consumer's statement to use CESL, on the agreement to conclude the transaction (Articles 8, 9 and 13). This creates too many steps for both the trader and the consumer, making it particularly difficult to create user-friendly mobile experiences. Recognising that user expectations differ, depending on the type of device and even between different models of the same type of device, CESL should refrain from requiring multiple communications and should allow the trader to choose the format in which information is provided. We suggest that the approach proposed in Article 13(3)(a) applies to all information and communication requirements under CESL: "be given or made available to the consumer in a way that is appropriate to the means of distance communication used".
- **Payment** – Article 124 of CESL addresses payment in the context of the buyer's contractual obligations. Here, we offer the following comments:
 - ✓ We recommend aligning CESL with common practice by simply requiring the trader to indicate on the website – rather than "by the contract terms" – which means of payment are accepted. This would also bring CESL in line with the CRD which requires that "trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process [...] which means of payment are accepted" (cf Article 124(1) of CESL, Article 8(3) CRD).
 - ✓ We support the objective behind a prohibition on surcharging as found in Article 124(4) CESL (prohibiting traders) as well as Article 19 CRD (requiring Member States to prohibit). However, we remind that those two articles give rise to discrepancy with the Payment Services Directive 2007/64 (PSD) which simply allows Member States to forbid or limit charges, not requires them (cf Article 52(3): "Member States may forbid or limit"). This leads to fragmentation across the EU with different surcharging practices, it confuses consumers and damages trust. We strongly urge alignment between these

three instruments by deleting the discretion afforded to Member States under the PSD.

- ✓ We stress that the availability of secure and user-friendly payment options for online and offline transactions is central to integrating payment markets – it is a means of empowering consumers to engage in cross-border transactions. Based on EDiMA members' market experience, consumers want to have access to safe and efficient payment methods, and, if possible, use the same, preferred payment method everywhere; or to use different payment methods but also according to their own preference, rather than having a particular method imposed by the trader.
- **Dispute resolution** – We see significant benefit in linking CESL to the proposed Online Dispute Resolution platform (we note that there is an information requirement in Article 13(1)(g) on applicable Alternative Dispute Resolution mechanisms). Ending up before a foreign national court is a concern for traders, holding them back from making their services and goods more widely available. For both consumers and traders, knowing up front that there is a simple and clear procedure should something go wrong with the transaction is key for the transaction to happen.
- **The consumer** – The uptake of mobile technologies is causing a change in the dynamics of commerce: the gravity is shifting away from the traditional retail store and towards an omnipresent consumer. This consumer is empowered by his or her smart phone and informed with the help of mobile internet and apps. We are of the opinion that with empowerment should also come clear responsibilities – for example:
 - ✓ An obligation on the consumer to inform the seller that the product will not be collected on the agreed day, and when it will; if, within a specified time period, the buyer does not collect the product or inform the seller, the seller bears no responsibility and can consider the contract terminated (cf. current Article 97)
 - ✓ Before the buyer exercises any of the remedies, the buyer should be required to notify the seller of the extent and nature of the non-performance of the obligation; the buyer's remedy rights should be subject to the seller's right to cure unless the non-performance was so fundamental that the buyer would have no confidence in the seller's ability to cure effectively (cf. current Article 106(3)(a))
 - ✓ The consumer is subject to a principle of responsible custody in situations of return of a replaced item (Article 112) and early delivery / delivery of wrong quantity (Article 130)
 - ✓ An obligation on the consumer to examine the product for establishing conformity, including an obligation to notify the trader, within an appropriate time period, of non-conformity (cf. current Articles 121 and 122 which are only applicable to B2B)

FINAL WORD

Commerce is rapidly changing. Policymakers need to become innovators themselves and seek out solutions that are as “future-proof” as can be. This, for instance, means refraining from prescriptive legislation and format requirements. As an example, information and format obligations in consumer protection legislation must be such that they can be adhered to on any device without ruining the user experience.¹³ It also means looking for voluntary, cooperative and non-legislative solutions to problems.¹⁴ Commerce 3.0 requires all of us to Think 3.0.

¹³ See for example “Size is challenge to mobile app designers” by Tim Bradshaw, Financial Times, 7 August 2012, discussing how “*designing for mobile requires a completely different approach to creating a website. ... The fixed screen size, less powerful hardware and less generous bandwidth on mobile networks force you to make simpler products*”, [Evan Doll, co-founder of Flipboard] says. ‘It forces you to leave things out.’ See here: <http://www.ft.com/intl/cms/s/0/e2b863f2-e07c-11e1-9335-00144feab49a.html#axzz27evRwht9>

¹⁴ See for example presentation by Mark Fell, Managing Director at Carré & Strauss, available: <http://www.ebaymainstreet.com/think3> as well as eBay’s Roadmap Towards Commerce 3.0, available: <http://www.ebaymainstreet.com/news-events/new-ebay-roadmap-highlights-economic-opportunities-commerce-30-europe>

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POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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