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## **CCBE POSITION PAPER ON THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW (COM(2011)0635)**

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers. In relation to European contract law, the CCBE has been actively following political and legislative developments and has contributed to the debate through various position papers which support initiatives to promote a European contract law.<sup>1</sup>

In this paper, the CCBE responds to the proposal for a Regulation on a Common European Sales Law (CESL). The CCBE has issued a preliminary position paper<sup>2</sup> on this matter. In view of doubts regarding the appropriate legal basis of the CESL, the CCBE has called upon the Commission to further investigate whether the enactment of CESL is in line with the legal requirements of Art. 114 of the Treaty on the Functioning of the European Union and whether there are actually no infringements of Art. 6 of the Rome I Regulation<sup>3</sup>.

After a number of meetings of its European Private Law Committee, the CCBE has now had the opportunity to evaluate the proposal further and wishes to express some points of concern to the legal profession.<sup>4</sup>

The CCBE notes that a number of important legal principles are embodied in the proposal for a CESL that correspond with principles proposed in a number of prior position papers issued by the CCBE. Below the main considerations are outlined for a Common European Sales Law that are contained in previous position papers and resolutions of the CCBE:

- Back in November 2006, the CCBE resolved that it is in full support of the initiative to create a Common Frame of Reference in order to improve the quality and coherence of the 'acquis communautaire' and future legal instruments in the area of contract law.<sup>5</sup>
- At the beginning of 2008, the CCBE issued a number of overriding principles that should be taken into account in creating a Common European Sales Law.<sup>6</sup> In this respect the CCBE acknowledged that the principle of freedom of contract should be considered to be the decisive corner stone of such law. However, the CCBE also stressed that avoidance of unfair

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1 These Position Papers are available at the website of the CCBE European Private Law Committee: [http://www.ccbe.eu/index.php?id=94&id\\_comite=59&L=0](http://www.ccbe.eu/index.php?id=94&id_comite=59&L=0).

2 CCBE Preliminary Position Paper regarding the proposal for a Regulation on a Common European Sales Law (COM(2011)0635), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_16022012\\_CCBE\\_Pre1\\_1330672219.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_16022012_CCBE_Pre1_1330672219.pdf).

3 Regulation (Ec) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

4 The UK delegation abstains:

- The Bar Council of England and Wales has engaged fully in discussions but, as it does not agree that the Commission's proposal is likely to achieve the objectives sought, is not able to support the CCBE position: [http://www.barcouncil.org.uk/media/166880/bar\\_council\\_of\\_england\\_and\\_wales\\_summary\\_position\\_on\\_cesl\\_june\\_2012.pdf](http://www.barcouncil.org.uk/media/166880/bar_council_of_england_and_wales_summary_position_on_cesl_june_2012.pdf)

- The Faculty of Advocates agrees with CCBE's concerns regarding legal certainty but takes no position on issues of general policy, including whether the instrument should be available for domestic transactions: <http://www.advocates.org.uk/downloads/news/responses/eurosales.pdf>

- The Law Society of England and Wales has engaged fully in discussions but, as it does not agree that the Commission's proposal is likely to achieve the objectives sought, is not able to support the CCBE position: <http://international.lawsociety.org.uk/node/10660>

- The Law Society of Northern Ireland is in agreement with the Law Society of England and Wales.

- The Law Society of Scotland has consistently supported the CCBE position: [http://www.lawscot.org.uk/media/492984/obl-moj\\_call\\_for\\_evidence-common\\_european\\_sales\\_law-law%20society%20of%20scotland%20response.pdf](http://www.lawscot.org.uk/media/492984/obl-moj_call_for_evidence-common_european_sales_law-law%20society%20of%20scotland%20response.pdf)

5 CCBE Resolution on European Contract Law, November 30, 2006, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/en\\_contract\\_law\\_ccbe1\\_1183717536.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_contract_law_ccbe1_1183717536.pdf).

6 CCBE Position Paper on certain Principles of European Contract Law, January 31, 2008, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_Position\\_Pap1\\_1205761121.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1205761121.pdf)

contract terms in view of the inequality of bargaining power of the parties to a contract should not only be considered to be applicable in b2c-transactions, but also in b2b-transactions. With respect to unfair contract terms in b2c-contract terms, the CCBE stressed that it is desirable to achieve a higher level of uniformity in all European Member States in interpreting Directive 93/13/EEC, dated April 5, 1993, by establishing a “grey list” of such terms that in light of the specific facts of the contract and its circumstances could be judged unfair – contrary to the present rules of the ECJ – not by national courts, but rather by the ECJ itself. Apart from this, the CCBE favoured the establishment of a “black list”, containing clauses that are unfair per se. Furthermore, the CCBE supported the connotation of the term “individually negotiated” to be adequate in order to avoid the applicability of the unfairness test.<sup>7</sup>

- In this respect the CCBE now notes that the Proposal for a CESL is very much in line with these suggestions. Art. 84 CESL contains a “black list” of standard contract terms that are per se unfair, whilst the “grey list” is contained in Art. 85 CESL. The connotation of an “individually negotiated” contract term is now embodied in Art. 7 CESL. Without going into detail, the CCBE also notes that the level of consumer protection has been raised, and a higher degree of uniformity has been obtained with the now completed Directive on Consumer Rights (2011/83). In view of the principle of autonomous interpretation laid down in Art. 4 CESL, the CCBE wants to underline that the ECJ, and not mainly the national courts should finally adjudicate whether a standard contract term contained in the “grey list” of Art. 85 CESL is to be considered unfair. The CCBE recognises that this would involve a departure from the present system of preliminary rulings at the ECJ, whereby interpretation of EU law is made by the ECJ but appraisal of the facts and circumstances particular to one specific case, and the eventual resolution of that case, are left in the hands of the national court.
- Furthermore, the CCBE in its position paper of 2008 also resolved that standard terms of contract in b2b-sales contracts should be considered unfair pursuant to the rules contained in Art. 3(3) of the Late Payment Directive 2000/35/EC, provided that the respective standard contract term grossly “deviates from legal principles and good commercial practise”. In respect of the proposed CESL, the CCBE notes that this suggestion is being reflected in Art. 86, however, without the inclusion of the reference to “legal principles”. The CCBE is of the opinion that a reference to the underlying “legal principles” of which the standard contract term may not grossly deviate, together with the reference to “good commercial practice” carries more legal certainty and, therefore, calls upon the EU institutions to add the term “legal principles” in Art. 86(1b) CESL. In 2009 the CCBE considered carefully the legal principles and various rules embodied in the Draft of a Common Frame of Reference (CFR). In view of the suggestions and proposals contained in the CFR the, CCBE outlined a number of propositions for a European Sales Law in a position paper that was issued at the beginning of 2010.<sup>8</sup> In general, the CCBE held that the provisions contained in the Sales Directive 1999/44/EC and those contained in the Convention on Contracts for the International Sales of Goods (CISG) should be taken as a general basis. Thus, the CCBE proposed that the leading principles of the Sales Directive should also be implemented with regard to sales transactions between traders/professionals<sup>9</sup>. Without repeating what has been resolved, it needs to be stressed that the CCBE furthermore proposed that the damage sections of the CFR – III – 3.701 sequ. should – as a general rule – be considered as an appropriate basis for any damage claims caused by a breach of contract imputable upon the debtor. Therefore, the CCBE also notes that Art. 159 sequ. CESL almost exactly reflects the position previously taken by the CCBE.
- Finally, as already suggested in its response to the Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses<sup>10</sup>, the CCBE proposes that the CESL should not only be applicable to cross-border transactions but also to domestic sales contracts. Such extension of the territorial

7 Position Paper, dated January 31, 2008.

8 CCBE Position Paper on the Draft Common Frame of Reference, January 23, 2010, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_Position\\_Pap1\\_1265878409.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1265878409.pdf)

9 Position Paper, dated January 23, 2010.

10 CCBE Submission: Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, January 21, 2011, p. 3, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_210111\\_CCBE\\_respo1\\_1296568000.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_210111_CCBE_respo1_1296568000.pdf).

scope of the CESL would clearly increase the number of opt-ins, as traders and consumers will become more and more acquainted with the CESL. Furthermore, the application of the CESL for domestic sales contracts would much sooner clear any legal uncertainties as the number of court decisions would necessarily be increased thereby. Some bars, however, have noted that such an extension of scope could lead to greater national divergences as most domestic cases which are taken to court are very likely to be dealt with at lower national court level, rather than the ECJ. References for preliminary rulings which are sent to the ECJ are likely to take some time before they are considered given the current very high caseload and the lack of clarity on how the ECJ would fulfil its role in this field.

As a consequence, the CCBE calls upon the EU institutions to adopt the proposed CESL as a useful legal instrument not only for cross-border, but also – by amending Art. 1(2) CESL (Regulation) – for domestic transactions.

However, the CCBE is concerned that the lack of legal certainty contained in some Articles of the proposal, including in Art. 2 (good faith and fair dealing) and 5 (reasonableness) CESL, and the lack of coherence between different provisions, could be a barrier to the CESL's acceptance. The CCBE therefore calls upon the EU institutions to optimise the practicability of the CESL, e.g. by amending these concepts. In addition the CCBE would like to recommend the EU institutions to carefully review the terminology that has been used throughout the proposal, as well as the different language versions in order to avoid any inconsistencies.

Nevertheless, some CCBE members maintain that the alleged lack of legal certainty will duly be taken care of by enlarging the number of recitals and thus by better explaining the exact content and meaning of many general terms used (good faith, fair dealing, reasonableness, appropriateness etc.), whilst other members believe that the formation of a reliable body of jurisprudence would still take many years, with national divergences being likely, with the risk of increasing uncertainty and thereby cost for contracting parties. In this respect, some CCBE members strongly believe that the provision of "official" comments by the "drafters" of the CESL would decrease the level of legal uncertainty and foster the higher practicability of the CESL and that it might be helpful if the European Commission issues standard terms of contract in b2b and b2c-transactions with comments from the drafters on each article.

Furthermore, the CCBE calls upon the EU institutions not to restrict the applicability to SMEs<sup>11</sup>, but rather to include any and all businesses, regardless of their size. The CCBE also recommends enlarging the applicability of the CESL with regard to digital content over and above its present scope, as the practical importance of CESL will mainly be for distance selling contracts. Therefore, the CCBE calls upon the EU institutions to revise Art. 70(2) CESL, as the incorporation of standard contract terms in a b2c-transaction must reflect the practical requirements (simple click in order to incorporate the standard contract terms by virtue of an agreement). In addition, it is up to the consumer in any distance selling contract, which will be the main field of application of the CESL, to secure that the standard contract terms are incorporated. As a consequence, the CCBE also suggests amending Art. 70(2) CESL by indicating which concrete steps/measures should be observed by both parties.

Some CCBE delegations also maintain that the lack of a hierarchy of remedies in Art. 106 CESL is overprotective to the consumer and that Art. 111(2) CESL does not cure the relatively high risk for the trader of being unable to influence the remedies available to the consumer in case of any non-fulfilment of the sales contract by the seller. This might significantly impair the opt-in-choice of the trader, as the lack of hierarchy of remedies is not known to most of the sales laws of the Member States and goes beyond the Sales Directive.

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11 Art. 7 of the CESL.

## Conclusion

The CCBE therefore urges the EU institutions to take into account the following guidelines when considering the proposal for a CESL:

1. to adopt the proposed CESL as a useful optional instrument not only for cross-border, but also – by amending Art. 1(2) CESL (Regulation) – for domestic transactions;
2. to optimise the practicability of the CESL by trying to clarify general concepts such as ‘good faith and fair dealing’ and ‘reasonableness’ as far as possible, e.g. by issuing official comments and standard contract terms for both b2c and b2b-transactions;
3. to enlarge the applicability of the CESL to any and all businesses, regardless of their size;
4. to enlarge the applicability of the CESL with regard to digital content over and above its present scope, and, in particular, to create more clarity regarding Art. 70(2) CESL;
5. to include a reference to “legal principles” (vide Art. 80 CESL) as an appropriate further benchmark for the unfairness test in Art. 86(1b) CESL;
6. to carefully review the terminology that has been used throughout the proposal, as well as the different language versions in order to avoid any inconsistencies and to optimise the practicability of CESL.