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CCBE Comments on the tabled amendments to the JURI Draft Report 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) represents the bars and law societies of 32 member countries and 11 further associate and observer countries, and through them more than 1 million European lawyers.

In the past the CCBE, guided by the respective proposals of its European Private Law Committee, has passed a number of position papers[1] in support of the Common European Sales Law (CESL), as proposed by the European Commission[2].

In consideration of the position taken by the CCBE so far, account has been taken of the Amendments No 206 – 531 to the Draft Report of the Legal Affairs Committee of the European Parliament. In this respect the CCBE[3] wishes to present the following comments:

1 The substitution of a Regulation for an Optional Instrument on CESL by a Minimum Directive is inappropriate. The CCBE is convinced that the fundamental principle of freedom of choice of the parties in a sales transaction within the European internal market, as provided for in Art. 8 CESL, is much better protected by an Optional Instrument. A Minimum Directive would again cut deeply into the flesh of the national laws, necessarily causing a number of incoherencies and possibly also contradictions between European law and the Law of the Member States.

2 The Amendments, as a whole, seem to be designed to render the entire CESL unworkable. In order to be genuinely operative, a European Sales Law does need, for instance, sections relating to "general provisions" (Chapter 9), "seller's obligations –delivery and time" (Chapter 10), "buyer's obligations" (Chapter 12), and "seller's remedies" (Chapter 13). Without such Chapters and their provisions, traders and consumers will consider the European Sales Law as a too incomplete legal system and as a source of legal uncertainty because it will leave a large number of important practical legal problem areas to the national laws of the Member States. Therefore the Amendments which seek to delete those sections (i.e. Amendments No 380, 382 sequ., 470 and 471) should be rejected. In addition, if those Amendments would be passed, the final text will become entirely

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1 CCBE comments on the JURI Draft Report on the proposal for a regulation on a Common European Sales Law (COM(2011)0635), May 2013; CCBE Position Paper on the proposal for a Regulation on a Common European Sales Law (COM(2011)0635), September 2012; CCBE Preliminary Position Paper regarding the proposal for a Regulation on a Common European Sales Law, February 2012.

2 COM (2011) 635 final.

3 The UK Delegation abstains.
- The Bar Council and the Law Society of England and Wales remain fully engaged in the wider discussions relating to the proposed CESL but, as they do not agree that the CESL is likely to meet the claimed objectives, are not able to support either the detail or the line of the CCBE position: http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf
- 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

The UK Delegation considers more time is needed to consider the pros and cons of the alternative approach suggested by Evelyne Gebhardt MEP and a number of others in the European Parliament and whether it is more or less likely to meet the objective of increased cross-border trade.

unsatisfactory for any business-to-business (b2b) transactions and thus it could never compete as a pan-European Instrument with the UN-Convention on Contracts for the International Sale of Goods (Vienna Convention). The Vienna Convention was a great legal success. But at the present as the commercial experience shows traders, in their relationships, would prefer a more complete legal regulation. Basic rules of contract law should and must be the same for business-to-consumer (b2c) and b2b transactions (although in b2b-transactions the scope of the freedom must be much wider than in b2c-transactions; in fact it must be the rule, not the exception). There is a basic need for a European-wide harmonisation of those basic rules in order to stimulate the internal market (in this regard, Amendment No 301 is welcomed, as the restriction of the scope of CESL – Art. 7 – to SMEs, for practical reasons, is not a satisfactory approach).

3 The level of consumer protection offered by the Amendments No 206 – 531 is by and large too high; it would cause considerable costs for businesses in Europe. Therefore, it is recommended to reject these amendments. This conclusion is based on the following grounds:

3.1. It has to be pointed out that the deletion of the overall principles of good faith and fair dealing (Amendment No 260) is inappropriate, as it is already part of European Law pursuant to Art. 3 Sec. 1 of Directive 93/13/EC.

3.2. However, Amendment No 336 (and also No 338) might be considered to a sound device to improve the acceptable standard of consumer protection of CESL; as such Amendments insert an appropriate test for a surprise clause that will be to the detriment of the consumer and thus shall not become part of the contract in a b2c-transaction. Actually the content of those Amendments would reflect the case-law in, at least, several EU member States. According to it, surprise clauses are not consistent with the legal principle of transparency.

3.3. Amendment No 337 is entirely unacceptable, as it calls for applying the unfairness test of standard terms in order to also control "core terms" (i.e. mainly prices) by the same legal mechanism. This is overprotecting the consumer and is contrary to the overall principle of freedom of contract.

3.4. The same reservation must be made in view of Amendment No 339, calling for the application of the principle of transparency also to those terms that have been individually negotiated.

3.5. Consequently, Amendment No 341 is also not acceptable, as it proposes that the unfairness test of Art. 83 CESL should also be applied to standard terms that have been individually negotiated. There is simply no need to disregard the principle of freedom of contract of the consumer, as it has come to the light namely in those contract terms that have been individually negotiated. In this respect Art. 7 CESL correctly requires that the consumer/customer has been able to actively influence the content of the respective contract term.

3.6. The CCBE in the past proposed to create a "black" and a "grey list" of standard contract terms in order to balance the level of consumer protection in b2c-transactions. The CCBE, therefore, recommends to reject Amendments No 343 sequ. since these are inconsistent with that proposal.

3.7. It is not appropriate to increase the level of consumer protection above the limits set by the standard of CESL. There is no need to uphold a separate protection device of Art. 6 ROME I.

3.8. Besides the hierarchy of remedies, as suggested in Amendment No 453, seems to be appropriate, as it asks the consumer to only seek an alternative remedy if the remedy to cure the non-conformity has failed for the second time. And Amendment No 465 relating to the right to terminate the contract (Art. 119 CESL) is also welcomed, as it is in line with the prior CCBE proposal in this respect.

3.9. Amendment No 474 asking for a prescription period of six years instead of two years (Art. 179 CESL) is unacceptable.

3.10. In a nutshell, all in all, the Amendments No 206 – 531 mostly are too far reaching for the aim of improving the level of consumer protection beyond the high standard offered by CESL and therefore will strongly impair the acceptance of this instrument in the legal profession and thus also in the business community. Harmonising only the level of consumer protection on the basis of a Minimum Directive does not seem to be the correct answer to the legal challenges of the internal market.