

CCBE COMMENTS ON THE JURI DRAFT REPORT ON THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW (COM(2011)0635)

18/05/2013

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them more than 1 million European lawyers.

Reference is made to the CCBE's previous responses to the proposal for a Regulation on a Common European Sales Law (CESL).¹

After having evaluated the content of the [JURI Draft Report \(2011/0284 \(COD\) – "Draft report"](#)), the CCBE would like to comment as follows²:

1. In its position paper issued on 7 September 2012, the CCBE strongly supported the Proposal for a Regulation on a Common European Sales Law (COM (2011) 0635 – "CESL") as an adequate instrument, and recommended that it should not only cover cross-border transactions, but also domestic transaction³.
2. Therefore, the CCBE regrets that the Draft Report, for evident political reasons, has proposed to restrict the scope of CESL to e-commerce and cross-border transactions. The CCBE shares the view expressed in the Draft Report that online trade is and will be a growing field of business activities in the future and most certainly will be an important growth factor in the internal market. But considering the benefits of CESL as an appropriate second legal regime in each Member State, the CCBE calls upon the Legal Affairs Committee of the European Parliament to reconsider its proposal.
3. The CCBE welcomes that the Draft Report has clarified the important issue of the legal relation between CESL and Rome I. Nevertheless, practitioners note that, without a change to Rome I itself, legal uncertainty still exists on this issue.
4. Even though the CCBE has expressed some reservations as to the "lack of legal certainty" in Art. 2 – good faith and fair dealing – the CCBE opposes the proposed Amendment No 35 as being inconsistent. The connotation of an "abuse of rights" (Amendment No 35) on the one hand, and the requirement of "openness" and "honesty" (Art. 2) as integral parts of good faith and fair dealing on the other hand, simply makes no sense. Thus, Amendment No 35 should be deleted.

¹ [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 The UK delegation abstains:

- The Bar Council and the Law Society of England and Wales have engaged fully in discussions but, as they do not agree that the initiative is likely to achieve the objectives sought, are not able to support the CCBE position:

http://international.lawsociety.org.uk/files/Law_Society_and_Bar_Council_CESL_briefing_for_MEPs_April_2013.pdf.

- The Law Society of Scotland has consistently supported the CCBE position:

http://www.lawsocot.org.uk/media/492984/obl-moj_call_for_evidence-common_european_sales_law-law%20society%20of%20scotland%20response.pdf.

³ Page 4.

5. The CCBE furthermore notes that Amendment No 35 would be contrary to Art. 3 Sec. 1 of the Directive No. 93/13 on unfair terms in consumer contracts and thus would create a new (and superfluous) conflict with Art. 6 Rome I.
6. In view of the fact that the CCBE had proposed the scheme of Art. 3 Sec. 3 of the Late Payment Directive 2000/35 as an appropriate vehicle for the unfairness test in business-to-business transactions⁴, the suggested Amendment No 131 is inappropriate. The substitution of "customary" instead of "good commercial practice" will not be an improvement, as it inserts an issue of fact that hardly can be determined in view of the principle of autonomous interpretation pursuant to Art. 4. Thus, the old text of Art. 86 should be restored.
7. Concerning the remedies available to the buyer in a business-to-business transaction – vide No 6 of the Explanatory Statement – the CCBE favours the second alternative and believes that a period of one month would be adequate, after the buyer has become aware of any non-conformity of the product purchased.
8. With regard to the problems relating to restitution, the CCBE is of the opinion that the changes proposed in the Draft Report follow the right track and that Amendment No 185 is adequate in regard of Art. 174 Sec. 3 and sets a proper balance of the interests of a seller and a buyer. However, some concerns as to its usefulness might be raised in relation to Amendment No 172.
9. The CCBE is in favour of inserting specific rules governing the sale of digital content (Art. 172 sequ.), including the issues relating the Amendments to Art. 172 and to the new issue of counter performance, as proposed in the Draft Report. However, the CCBE favours a clear-cut definition of what is to be considered as "digital content" (and also "cloud computing" if it remains within scope).⁵ The CCBE also notes that further clarity would be helpful concerning the relationship between CESL and intellectual property law and the ongoing legislative initiative in the field of data protection. Apart from minor issues⁶, the CCBE believes that the solutions presented here in the Draft Report are well balanced.
10. With regard to prescription (vide No 9 of the Explanatory Statement) the CCBE suggests that a warranty period of two years (vide also Art. 52) should be inserted and the longest period of any prescription should not be more than six years.

⁴ Page 3, reference is made to the [CCBE Position Paper on certain Principles of European Contract Law](#) of February 2008.

⁵ In this respect the CCBE refers to the proposed Art. 8 in the [Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law](#), 2012, page 139.

⁶ Concerning the divergent wording in Art. 173 Sec. 6 and Sec. 6 a, and the respective issues in relation to Art. 174 Sec. 3 and Sec. 3 d which both should be harmonised on the basis of the wording of Art. 173 Sec. 6 a. On the other hand, Amendments No 183 and 193 are fully supported.