

# CCBE position on the revision of the proposed Common European Sales Law

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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 13 further associate and observer countries, and through them more than 1 million European lawyers.

The CCBE has carefully evaluated the decision of the European Commission to modify its Proposal for a Regulation on a Common European Sales Law (CESL) "in order to fully unleash the potential of e-commerce in the Digital Single Market"<sup>1</sup>. The CCBE has always been in support of the original proposal for a CESL<sup>2</sup>, and therefore regrets that it has not been possible so far to obtain endorsement from the Council, despite the support from the European Parliament of the proposed CESL. Even though the Commission has not yet tabled its revised proposal, the CCBE is keen to proactively present its main views as to the elements that need to be taken into account when redrafting the proposed CESL<sup>3</sup>:

1. The CCBE believes that such revised proposal should be restricted to online sales of tangible goods. It should at present not cover any issues of digital content (intangible goods), as this matter seems to be extremely complex and needs much time in order to properly evaluate the technical challenges almost increasing every single day.
2. The revised proposal should represent a high level of consumer protection (Art. 114 Sec. 3 Treaty on the Functioning of the EU).
3. However, the revised proposal should also incorporate business-to-business (b2b) transactions<sup>4</sup>. It seems fair and adequate that not only the last seller should profit from any such new rules under the revised proposal, but also the traders that participate in online trade by supplying their goods to internet platforms. In this respect the CCBE proposes to include all traders in b2b-transactions, not being restricted to SMEs.
4. The high level of consumer protection might call for model rules for general conditions of contract to be "stamped" by the Commission to the effect that the use of such conditions would then be considered to be in all respects lawful, also in view of Art. 6 Rome-I (safe harbour). Such general conditions should take into account that any and all requirements established by the Consumer Rights Directive 2011/83/EC have duly been met.

<sup>1</sup> See Annex to the Commission [Work Programme](#) 2015.

<sup>2</sup> [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.

<sup>3</sup> The UK delegation cannot as a whole support the CCBE position and therefore abstains. The Bar Council of England and Wales adopted a position in March 2015 in which it continues to believe that an EU contract law measure is neither needed, nor likely to solve the problems that the Commission seeks to solve in cross-border sales, online or otherwise: <http://www.barcouncil.org.uk/media-centre/publications/2015/march/2015/april/common-european-sales-law-%E2%80%93-what-next/>

<sup>4</sup> As to point 3 and 6 of this position, the Austrian delegation does not agree that the revised proposal for a CESL should also incorporate b2b-transactions since it considers that this area should generally be governed by the parties themselves. As a member of the UK delegation, the Bar Council of England and Wales agrees with the Austrian delegation without prejudice to its differing position as set out in footnote 3.

5. The CCBE has previously suggested and wishes to repeat for the sake of the revised proposal that the validity test for the use of general conditions of contract in business-to-consumer (b2c) transactions should be split into a "black list" (containing general terms that are considered to be always invalid) and into a "grey list" (containing general terms that are considered to be invalid in view of the specific circumstances of the contract). Art. 84 and 85 CESL are considered to be very reasonable propositions in this respect.
6. The CCBE, furthermore, has suggested that there should be also a validity test for the use of general terms of contract in b2b-transactions based on Art. 3 of the Late Payment Directive 2011/7/EC. Art. 86 CESL might serve as an appropriate guideline in this respect.
7. It seems to be debatable whether any revised proposal for the sale of tangible goods in online-contracts shall be limited to cross-border transactions only. The CCBE favours that such rules, if the parties so choose, shall also be applicable to domestic transactions.
8. The CCBE is still in favour of an optional instrument for such revised proposal, as such Regulation – being the legal basis– would be based on the overriding principle of freedom of contract of the parties, be it for b2c or for b2b-transactions.