

Position Paper¹

UEAPME² position on the Proposal for a Regulation of the European Parliament and of the Council on a Common Sales Law (COM (2011)635 final) (general remarks)³

General remarks on the proposal as such

UEAPME, the European Association of Craft, Small and Medium-sized Enterprises, welcomes the European Commission's intention to boost cross-border sales within the Single Market.

99.9% of all enterprises in Europe are SMEs. 50% of those are one-person enterprises, and the average European SME has not more than 6 employees. In order to understand the needs and attitudes of SMEs concerning any kind of legislation act at European level, those figures have to be borne in mind.

When talking about SMEs' cross-border business activities, the following issues must be taken into account:

- It is typical that SMEs undertaking cross-border transactions start first with one country (mostly in one of their neighbouring countries), after having done detailed market analyses to find out whether it is useful from a commercial point of view to go cross-border. Only after the experience and monitoring of the relevant market has shown that the business can operate successfully in one foreign market will an SME **probably** consider extending their activities to the territory of other Member States. In most cases, SMEs' cross-border activities **are focusing only on a few countries** of the 27 Member States of the European Union.
- Just very **few** of the SMEs have the intention to pursue **direct** cross-border transactions **in all 27 Member States**. The reason for this is that the business model of an average SME (see figures above) is not meant to be dealt with cross-border activities **in 27 Member States**. If an SME would like to direct its sales to all 27 Member States, it has to change completely its business model.

As it was identified correctly by the European Commission, there are several burdens an SME is facing when it comes to cross-border sales, such as requirements of the different telecommunication laws, data protection, different language regimes, design, recycling methods, tax and intellectual property rights issues and such as delivery and payment modalities. It is without doubt that when an SME directs its activity to another Member State different contract law regimes have to be taken into account as well. However, the relevance of the barriers when it comes to the decision to direct activity in another Member State is very diverse.

¹ This position paper contains our general remarks. For our specific remarks, see http://www.ueapme.com/IMG/pdf/120119_pp_Specific_Remarks_CESL.pdf

² UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](https://ec.europa.eu/transparency/regexp1/index.cfm?do=entity.entityDetail&entityId=55820581197-35).

³ Due to the complexity of this issue and to the ongoing negotiations between EU institutions, the position of UEAPME will be updated as events warrant.

According to the European Commission, the Common European Sales Law (CESL) will ensure that SMEs will undertake more cross-border transactions via using the new instrument. In this respect, the European Commission is mainly making reference to the Eurobarometer 321 survey on contract law. Having looked into the details of the modalities with which the survey was carried out, we came to the conclusion that these figures are not in line with the content of the proposal (see separate detailed remarks on the Eurobarometer 321 and the Impact assessment).

We have the impression that during the whole procedure the economical aspects and the commercial reality of SMEs have not been taken into account sufficiently. From the economical point of view, the analysis of the national law of the addressed country will be undertaken by SMEs anyway. Only in this way it can be made clear for an SME which law is more beneficial and brings more profit: the national law of the country where the business activity is going to take place or the optional instrument. This would mean again that the situation has not changed for SMEs, because the enterprise has to contact a lawyer anyway (having a “model contract” would facilitate the user friendliness for SMEs). Since the proposed **instrument is very complex**, SMEs have to contact a lawyer in order to clarify the open questions and implement these articles eventually in a real contract. Furthermore, it has to borne in mind that the instrument is not dealing with a extensive list of issues⁴, which are definitely affected by a (cross-border) contracts (e.g. transfer of ownership, language issue etc., see detailed remarks in the part on annex I). Those will be regulated also in the future by the national law provisions of the Member States.

This means that traders using the CESL in case of cross-border transactions will have to still study the national law of the Member State to where they direct its activity. We would like to remind lawmakers that **SMEs do not have their own legal department**, contrary to big multinationals, and have to contact in all cases a legal professional if they want to direct their activities cross-border. That will mean that no costs will be saved. For these reasons, it is doubtful whether such an instrument could make the cross-border activities of SMEs easier and more attractive at all.

As it was mentioned already, the proposal is not meeting the requirement of user friendliness for those who are meant to be the beneficiary of this instrument. Here again, we would like to underline that so far not model contracts are going to be provided, but abstract instruments in the field of contract law, small and medium-sized enterprises will need the assistance of legal practitioners any time. This could be avoided if enterprises contact their associations in order to receive advice on the instrument. Unfortunately, **the proposal is mentioning in its “budgetary implication” that trainings organised by the European Commission on the instrument will be provided only for legal practitioners**. The Commission is only taking attention to this point in the Communication, where Member States will be encouraged “*via appropriate channels, to inform traders about the Common European Sales Law*”. We would like to draw attention to the fact that in the current time of crisis Member States will show little willingness to invest into any kind of awareness raising initiatives for SME organisations in this field. The approach of the Commission in this respect gives us the impression that the Commission is ultimately well aware of the fact that the instrument cannot be used without legal advice on it.

Moreover, we are definitely afraid that the issue of the relation between the CESL and “Rome I” needs particular attention. In this respect, two points must be clarified: 1) which role Rome I currently has when it comes to cross-border sales between traders and consumers, and 2) if it is possible at all to overrule the Rome I regulation with the optional instrument of the Common European Sales Law.

Concerning the first issue, it has to be clearly said that article 6 of the **Rome I Regulation** on the applicable law on consumer contracts is only applicable **if the trader directs** its activity to the country where the consumer has his/her habitual residence. This means that the consumer has anytime the possibility to address a trader in

⁴ Recital 27 of the proposal for a Regulation on the Common European Sales Law

another Member State, if he wants to buy from him on- or off-line. If there are no indications (these are defined by the Court of Justice⁵) which would lead to the conclusion that the trader “directs” its activity to the country (habitual residence) of the consumer, the mandatory consumer protection rules of the consumer’s habitual residence do not apply. On the contrary, the applicable law will still remain the law of the trader’s country. It means that traders are not always confronted with the mandatory consumer protection rules of the consumers’ habitual residence just because an order was accepted into another Member State.

Ultimately, this issue will be regulated by the market. If there is a request and interest for the good of the trader, because of the particularities or characteristics of the good, the trader can sell from another Member State without having applied Rome I. If there is no such a request it is questionable how far it makes sense for the trader to direct his activity to another Member State. It can make sense for a big company which can provide lower prices in order to make the good attractive. However, SMEs are not in that situation that they can lower their prices easily and significantly, because of their limited financial and human resources (see figures above).

On the second point, we have some doubts whether it will be possible to overrule **Rome I** if it comes to its application. An **in-depth analysis with the involvement of the Member States** is still pending in this respect. In general it can be said that in order to have a clear overview the issue of the application of Rome I needs to have detailed discussion.

The territorial scope of the CESL should cover cross-border sales and the Member States are free according to article 13 of the proposal to extend the scope to domestic contracts as well. We believe that this approach can lead to several problems. First of all, the Commission’s intention has been from the beginning of the procedure to increase cross-border sales activities within the Single Market. As a **first step** the instrument should be only apply, according to the original idea, to cross-border contracts. Only after the practice has shown that the instrument has established itself in the commercial life, its extension to domestic contracts as well should be considered. Secondly, we fear that a kind of mixed approach concerning the territorial scope, namely that in some Member States it is provided to use for domestic contracts the CESL and in some Member States not, will lead to the distortion of the competition. Thirdly, SMEs that not have the intention at all to extend their activities to other Member States would have to deal with the new instrument, too besides the mandatory national law provisions, if the Member State allows to use it for domestic sales contracts as well.

We think that as a **first step**, if the instrument going to be adopted, it should apply **only for cross-border sales**.⁶ Only after it has been showed that it works and an appropriate legal practise has been developed in the judicial practise a detailed evaluation should take place in order to analyse whether if there is any need and necessity to extend the scope to domestic contracts, as well. For this reason UEAPME is supporting a step-by-step approach regarding the territorial scope of the instrument.

We would like to underline that **in general** we are not in favour of the establishment of different regimes for cross-border and domestic issues with respect to SMEs, since this is putting additional extra burdens on SMEs. Regarding the territorial application of the Common European Sales Law a uniform approach is needed, which is not the case in the current proposal.

Concerning the content of the proposal, we have to recognise that the proposal failed to reach the balance between the protections of both parties in B2C relations (see detailed remarks on the “chapeau” and annex I). In this way the instrument will hardly attract SMEs.

⁵ C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co KG, Hotel Alpenhof GmbH v Oliver Heller

⁶ With the exception of CGPME

In case the optional instrument would be put in force at European level, in order to have an added value we would support that the scope also covers B2B activities.⁷ The instrument would not harm the relation between big and small businesses, since they are free to decide if they going to use it or not. The **freedom of contract is also sufficiently ensured in B2B relations of the proposal**. We believe that in case such an instrument will be adopted B2B application can be only an advantage in SME2SME business activities. It can be a solid ground for a possible contract even without using the whole instrument as such. In this stage we have to emphasis again that model contract are from bigger benefit in any kind of B2C and B2B relations, than abstract law instruments. We would like to encourage the Commission to take action in this issue.

Remarks on the impact assessment and on the Eurobarometer 321

The Impact Assessment as such incorporates more than 200 pages. Our impression is that throughout the whole document several times conclusions were made based on speculations (e.g. concerning the percentage of EU retailers refusing export within the EU, p.11). Furthermore some important facts, e.g. that the European Council has been favouring the “toolbox” and reaffirmed in the Stockholm Programme “*that the common frame of reference for contract law should be a non-binding set of fundamental principles, definitions and model rules to be used by the lawmakers at Community level to ensure greater coherence and quality in the lawmaking process*”, were not mentioned at all in the Impact Assessment, although the position of the European Parliament was listed⁸. We believe that in order to give a correct and complete picture about the opinion of all legislators at European level the Council’s position should have been mentioned as well.

It is not our duty to analyse the whole Impact Assessment in detail in this document. However, we see the need to draw to attention some relevant concerns concerning the Eurobarometer 321 on contract law, which should serve as one of the most relevant basis for the Impact Assessment:

- “*The survey only interviewed enterprises that were involved in cross-border business-to-consumer transactions*”⁹. It is not understandable why this approach was chosen. The European Commission, with the European Parliament, always underlines that its aim with this instrument is to bring SMEs which are currently not active cross-border to do so, because this can be considered as a missed opportunity. This is the reason why we do not understand why only enterprises which are already active cross-border were addressed. It would have been more than important from a Single Market point of view and significant for the proposal to extend the questionnaire to those SMEs which are currently not active in cross-border sales. Since the Eurobarometer fails to address the main part of the problem, i.e. the willingness to have cross-border sales activities, the representativeness of the survey is undermined.
- In our opinion, it should have been mentioned that the recently adopted Consumer Rights Directive is going to fully harmonise (meaning that one set of rules will apply across Europe) the most relevant parts of cross-border business activities, which in fact is the issue of online sales. The survey should have been carried out in the light of this important fact.
- Companies in the financial sector were also among the enterprises interviewed. According to the Commission’s intentions consumers and SMEs should be the beneficiary of the instrument. Companies from the financial sector cannot be considered as typical SMEs.

⁷ With exception of the Czech Chamber of Commerce

⁸ Council of the European Union, 14449/09, JAI 679, The Stockholm Programme – An open and secure Europe serving the Citizen, p. 21

⁹ Flash EB N°321-European contract law, consumer transactions, p.94

- Regarding the wording of the questionnaire, which addressed the enterprises, several problems can be observed:
 - In **Question 2 (what impact do the following potential obstacles have on your decision to sell across border to consumers from other EU countries)** option **B** (the need to adapt and comply with different consumer protection rules in the foreign contract laws), option **C** (difficulty in finding out about the provisions of a foreign contract law) and option **H** (obtain legal advice on foreign contract law) are asking the same issue in a different way.
 - **Question 3 (you said that some issues relating to contract law have an impact on your cross-border B2C transactions. How often did these obstacles deter you from concluding cross-border transactions?)** is generalising and putting together options B, C and H of Q2, since those who answered to these questions at least with large, some or minimal impact, were deviated to Q3.
 - **Questions 5 (if you were able to choose, for ALL your cross-border sales to consumers from other EU countries one single European contract law, how likely would it be that you would use it?), 6 (if you were able to chose one single European contract law in ALL your transactions with consumers from other EU countries, would your cross-border operations...) and 8 (if a European contract law was developed, what would you prefer for your B2C transactions)** are not correct. It is not clear from the way the questions are asked which scope the Common European Sales of Law will have and what will be the content. These questions give the impression that all kind of contract law issues will be regulated by the new instrument and there will be no need any more for looking into the national laws of the Member States, which in fact is not the case with respect to the current proposal. Furthermore, it has to be mentioned at this place again, that when asking these questions the role and effect of the Consumer Rights Directive should have been drawn to the attention of addressed enterprises. For this reason it is questionable whether the answers on these questions can be considered as relevant for the justification.

Because of the controversial approach that has been followed by the Impact Assessment and the Eurobarometer, we believe that it is necessary to carry out a new impact assessment in order to get a whole picture on the attitude of enterprises when it comes to the issue of cross-border transactions.

Conclusion

In conclusion, it can be said that there is no evidence that the instrument will meet its original aim to boost cross-border business activities within the Single Market. The main reason for this is in the fact that if a trader is forming an opinion on cross-border activities contract law as such does not have a decisive role in his final decision. Furthermore, the instrument will never be able to regulate contract law related issues as a self-standing instrument, because of the complexity of this field.

As a last point, we would like to clarify that the controversial issue of whether the proposal is respecting the subsidiarity principles and if the correct legal basis has been chosen for the proposal is not subject to our discussion. Our duty is to analyse the proposal legally and economically from the SME point of view.

Our in depth remarks on the proposal (so called "Chapeau") as such and on the Annex I are available in our detailed position paper on the Common European Sales Law.

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