



## Common European Sales Law

Position Paper on a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law ([COM/2011/0635 final - 2011/0284 \(COD\)](#))

### Summary of ESBA's recommendations to the institutions:

- ✓ An optional set of contract rules which could help SMEs to export;
- ✓ More legal certainty, particularly with Business to Consumer contracts;
- ✓ An equal level of consumer protection which could be profitable for both consumers and businesses (higher consumer protection is important for SMEs);
- ✓ Supporting contracts for the supply of digital content;

### General remarks:

There are compelling economic arguments for a pan-European contract law system, which consumers and business can opt in to. Compared to other global economic markets, the European Single Market is hindered by regulatory fragmentation. The Commission has addressed this major trade barrier with CESL. We welcome this initiative as it will harmonise consumer rights, without reducing them, and offer businesses the option to use one contract to trade throughout the EU. This will make it easier for local businesses to target and access the single market.

Despite an understanding of the growing importance of internet sales, full harmonisation of consumer law has failed under the Consumer Rights Directive (CRD) as it only harmonises three areas of sales law: pre-contractual information, the right of withdrawal and risk management. The CRD contains minimum harmonisation clauses, which allow Member States to create or maintain national rules. The net result is a quasi-harmonisation of consumer law across the EU, meaning there will be no unified law under which (for example, internet) sales can be made in Europe. Therefore, there is an economic argument to have an instrument such as CESL.

In addition to the three areas of sales law in the CRD, the CESL harmonises 10 areas of sales law. CESL is a comprehensive set of rules, covering almost all aspects of a cross-border (online) sales transaction. A 2009 Commission report suggested that up to 60 per cent of EU cross-border e-commerce contracts failed. This is unacceptable for the EU's online business struggling to grow us out of recession.

We are aware of other solutions and softer measures that have been put forward, for example model contracts. We would accept that model contracts can be useful, but these would need to have a common legal base, which CESL would establish. Without the legal base, model contracts will fall back on the existing *acquis* and this will not solve the regulatory fragmentation.

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**Micro and small businesses specific comments in support of an optional Common European Sales Law:**

**With regards to Business to Business (B2B) contracts:**

- An optional Common European Sales Law could provide a more neutral option towards big businesses imposing the laws of their own country. With a widely used and accepted CESL, the bargaining position for SMEs would be stronger. We however recognise that the CESL has to be accepted by both parties and therefore weak parties (SMEs) in particular will not be always able to influence the choice of law.

**With regards to Business to Consumer (B2C) contracts:**

- The application of an optional Common European Sales Law would lead to a high level of consumer protection, in particular in Member States where the protection of consumers is weak. A higher level of consumer trust would strengthen relations between consumers and SMEs, thereby increasing the amount of goods sold by micro- and small businesses.
- The introduction of a secondary contract would offer a chance to solve several classical disputes between consumers and businesses involved in cross-border trades. Both consumers and businesses are reluctant to go to court due to the low value of the products and high costs of going to court. An optional CESL could solve these disputes by preventing such a situation.
- ESBA recognises that there are still questions regarding certain elements that fall outside the scope of the CESL. It is important to identify the items which are not incorporated in the CESL and how they interact with national law. *More legal certainty is needed* regarding the applicable law.