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from: Presidency

to: Council

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Subject: Proposal for a Regulation of the European Parliament and of the Council on a
Common European Sales Law - First reading
- Orientation debate / Certain issues

I. Introduction and state of play of negotiations

1. By letter of 12 October 2011 the Commission submitted to the Council a proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. The Commission proposal is based on Article 114 TFEU and is thus dealt with by the ordinary legislative procedure. The objective of the Commission's proposal is to improve the functioning of the internal market by making available a uniform set of contract law rules which remedies obstacles stemming from different national contract laws.
2. Following the presentation of the proposal in the JHA Council in October 2011 the Working Party on Civil Law Matters (Common European Sales Law) had a series of meetings and held a preliminary exchange of views on various aspects of the proposal, including questions related to the nature of the instrument and how it relates to national law and other existing international instruments, such as the Rome I Regulation and the United Nations Convention on Contracts for the International Sales of Goods.

3. Furthermore, the Impact Assessment was addressed and the issue of the legal basis of the proposal was also discussed. The Council Legal Service delivered an opinion¹, in which, on the basis of the Impact Assessment, it stated that Article 114 TFEU was a correct legal basis for the proposal.
4. At the JHA Council meeting on 13-14 December 2011 a progress report was given. On this occasion, several Member States requested that a policy debate be held at Council level before entering into a detailed, technical debate on the proposal.
5. In the light of this request the Presidency submitted to the Working Party a discussion paper² focusing on a number of general issues regarding a Common European Sales Law. The purpose of the paper was to prepare a basis for a policy debate to be held at the JHA Council in June 2012. The issues identified in this paper related mainly to the type of instrument (binding, non-binding or combination of both), its nature (optional or otherwise), and its scope (material, personal and territorial). On 23 March and 18 April 2012, the Working Party examined these questions.
6. In addition to the issues identified in the Presidency paper, several delegations requested that discussions be opened on the legal basis of the instrument, as well as on the actual need for such an instrument. Some Member States considered that further clarification as to the actual need for the instrument was necessary before they could engage in a substantial discussion on the proposal as well as on some of the issues identified in the Presidency paper. However, some Member States expressed a preference to start examining the Annex of the proposal first.
7. In the light of the comments made by delegations in the discussions held so far, the Presidency invites the Council to hold a general policy debate on a Common European Sales Law, with particular focus on how to take this issue further.

¹ 7139/12 JUR 116 JUSTCIV 77 CONSOM 27 CODEC 534

² 7102/12 JUSTCIV 76 CONSOM 26 CODEC 525

II. Considerations on the need for a European instrument on sales law and on the legal basis in the light of discussions held so far

8. In the area of contract law in general and of sales law more specifically, party autonomy is a central principle. Any work in this area at the level of the European Union should naturally respond to the real needs of the parties and provide them with those tools, which they need to allow them to participate more efficiently in cross-border trade and to benefit from the internal market.
9. The Commission proposal aims at improving the internal market by making available a comprehensive and uniform set of contract law rules. The proposal is intended to overcome obstacles stemming from the differences in national contract laws, which are considered to currently hinder the proper functioning of the internal market.
10. The Commission has on several occasions emphasised the important role that a Common European Sales Law would play in creating growth in Europe. In this connection the Commission has pointed to the fact that specific EU actions should aim at making cross-border sales and purchases within the internal market easier and cheaper by doing away with trade barriers.
11. Some Member States have expressed full support for the approach chosen in the Commission proposal and its potential to remove contract-law-related barriers within the internal market. It has in this regard been argued, that the severe economic conditions in Europe make it essential to enable European consumers and traders to benefit more effectively from the opportunities offered by the internal market.
12. However, several Member States have voiced criticism that the Commission proposal would create an unnecessarily complicated system which might deter stakeholders from having recourse to this set of rules. Concerns have furthermore been raised as to whether a comprehensive instrument as proposed by the Commission is needed in order to overcome existing obstacles to cross-border trade and whether, notwithstanding its optional nature, a less intrusive approach would not be more appropriate for achieving this aim.

13. In this connection a number of Member States have pointed to the fact that in the Stockholm Programme the European Council reiterated that the common frame of reference for European Contract Law should be a set of non-binding principles, definitions and model rules, that legislators at EU level should use in order to ensure better coherence and quality in the legislation.
14. Some Member States have also argued that due to the considerable scepticism that the proposal has met from business and consumer organisations as well as other stakeholders it is – in the light of the instrument’s optional nature – not likely that the instrument will be used in practice.
15. A number of Member States have pointed to the fact that the choice of legal basis is closely related to the question of the instrument’s ability to improve the functioning of the internal market.
16. According to the Commission's Impact Assessment the establishment of an optional uniform contract law regime is the most suitable proportionate action for remedying obstacles to the functioning of the internal market stemming from differences in national contract law. The Impact Assessment thus points to the fact that such an optional regime will reduce transaction costs and give consumers more product choice at a lower price and only create one-off costs for those traders wishing to use it.
17. A number of Member States have, however, questioned whether differences in national contract laws constitute a real obstacle to the functioning of the internal market as stated in the Impact Assessment. Some Member States have furthermore argued that due to the general nature of the Impact Assessment it does not provide a reasonable basis for determining how the detailed regulation of each of the multiple issues covered by the Commission’s proposal would in fact help to improve the functioning of the internal market. According to these Member States it is at this stage – despite the Commission’s Impact Assessment – questionable whether Article 114 TFEU is indeed the correct legal basis.

18. Further to the concerns expressed in the Working Party with regard to the Commission proposal, there appeared to be support for the development of model contract terms and conditions. In the view of several delegations, such model contract terms, if provided in all EU languages, could constitute a very useful tool capable of overcoming practical obstacles in cross-border trade.

III. Focus points for further discussion

19. The discussions held so far in the Working Party have shown that a number of general issues need to be considered closely in connection with future discussions on the Commission proposal.
20. Firstly, more consideration should be given to the **material and personal scope of the instrument**. As regards the material scope some Member States expressed the opinion that consideration could be given to basing further reflections on the material scope as proposed in the Commission proposal (sales contracts concerning goods and digital content and other related services), but limiting the instrument to contracts concluded on-line and consequently focusing the negotiations on provisions needed for an instrument covering such contracts. Discussions on the personal scope have demonstrated some support for focusing primarily on B2C. This issue should however be discussed further, particularly if the instrument is limited to contracts concluded on-line.
21. Secondly, there appeared to be sufficient support for continuing discussions on the adoption of a **binding instrument** such as a Regulation, provided that the principle of party autonomy is respected, and provided that the instrument is limited to what is strictly necessary in order to improve the functioning of the internal market.
22. Thirdly, it is suggested that discussions be continued on an **optional instrument** which would be binding on the parties when they have opted for it. However, before accepting an instrument with such a profile, the questions concerning the relationship of such an optional instrument with national and private international law, and with consumer protection rules have to be resolved.

IV. Questions put to the Council

23. Against this backdrop and on the basis of the discussions held so far in the JHA Council and the Working Party on Civil Law Matters, the Council is invited to debate the way forward for a Common European Sales Law.
24. In this connection ministers are invited to express their views on how to handle the negotiations on the Commission proposal, especially with regard to the following questions:
- a) In the light of the discussions held so far in the JHA Council and the Working Party on Civil Law Matters and despite the clear conclusion in the Commission's Impact Assessment, do ministers find that there is a need for further clarification as to the need for the Commission proposal, and if so, how could such further clarification be provided?
 - b) Do ministers agree that the final determination of the legal basis could await further clarification as to the content and shape of the instrument?
 - c) Do ministers agree that the Working Party on Civil Law Matters should examine the proposal for a Regulation on a Common European Sales Law by
 - i. paying particular attention to the issues described in Part II and III of this paper,
 - ii. ensuring that sufficient time is devoted to carefully assessing all issues deserving consideration, and
 - iii. duly taking all individual concerns of the Member States into consideration?
 - d) Should the Commission be invited to submit draft model contract terms and conditions for further discussions in the near future and if so, should this work influence the structuring of the examination of the Commission proposal in the Working Party on Civil Law Matters?