



EUROPEAN SALES LAW PROPOSAL

AN OPPORTUNITY FOR U.S. COMPANIES

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INTRODUCTION

The EU market is composed of more than 500 million citizens. Do American SMEs (small to medium-sized enterprises) fully exploit it? The answer is no, they do not, and one of the main reasons is that despite the existence and success of the EU's single market, in reality only large multinational companies with armies of legal staff can exploit it to its full potential.

Barriers to cross-border trade remain in regards to America (and even among the EU Member States). And not only because of custom duties, tax regulations, administrative requirements, difficulties in delivery, language and culture, but also because of the existence of 27 different contract laws regimes.

The EU legislation contains a number of common rules (Directive 2011/83/EU on consumer rights, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market, Directive 2011/7/EU on combating late payment in commercial transactions, Directive 93/13/EEC on unfair terms in consumer contracts, etc.), but they do not cover all areas of contract law.

The current legal framework in the EU is characterized by differences within the national legal systems and contract laws of the 27 Member States.

As a consequence, companies operating in the EU are obliged to use a wide variety of contracts governed by different national contract laws when operating in Europe's Single Market. Many of these result from divergent sales laws between the 27-Member States. This makes selling abroad complicated and costly, especially for SMEs which cannot afford to trade across the EU borders, because selling abroad means adapting sales contracts to up to 27 different legal systems. This cost supposes an average of \$12,000 (U.S. Dollars) for each additional country (apart from the extra expenses for translation to the local language, adapting websites when firms want to sell online, etc.).

There is no doubt that contracts are essential for running businesses and selling to consumers and, therefore, the current 27 different sets of national rules lead to additional transaction costs, a lack of legal certainty for businesses and a lack of confidence for the consumers. This acts as an obstacle for both consumers and businesses to shopping and trading across EU borders. SMEs are particularly affected by higher transaction costs and most of the times they renounce to do it.

As a result, 55% of the EU companies refuse cross-border transactions due to the legal-contractual obstacles. At the same

time, only 7% of EU consumers buy online in another EU Member State, whereas 33% do it in their own country. This situation contrasts with the United States' internal market, where a company in Detroit can easily sell its products to a consumer in L.A.

The potential of the internal EU market and cross-border electronic trade is still under-exploited and, on most occasions, it is being exploited by large companies of third countries (mostly from USA). Traders who are dissuaded from cross-border transactions due to contract-law obstacles forgo at least €26 billion in intra-EU trade every year. Meanwhile, 500 million consumers in Europe lose out on greater choice and lower prices because fewer companies make cross-border offers, particularly in smaller national markets.

FUTURE NEW REGIME: OPTIONAL COMMON EUROPEAN SALES LAW

The European Commission has committed to resolve this problem. On October 11th 2011, an optional Common European Sales Law (CESL) was proposed, offering a single set of rules for cross-border contracts in all 27 EU countries. The Commission's proposal now needs approval from the EU Member States and the European Parliament, that will pass the CESL at the end of 2012 or the beginning of 2013.

The CESL should help to break down the current barriers, and give consumers more choice and a higher level of protection. Why? Because companies will have a unique legal framework to rule their relations all around the EU, providing them with an easier and cheaper instrument to sell their products. Consumers will also have the option of choosing a user-friendly European contract with a high level of protection, as long as the traders offer their products on the basis of the CESL.

The CESL will be applicable:

- only if both parties voluntarily and expressly agree to it;
- to cross-border contracts, where most of the problems of additional transaction costs and legal complexity arise; Member States will have the choice to make the Common European Sales Law applicable to domestic contracts as well.
- to goods-selling contracts, digital-content contracts (such as music, movies, software or smart-phone applications) and services contracts related to the latter.
- for both business-to-consumer and business-to-business transactions if at least one party is established in a EU Member State. Traders could use the same set of contract terms when dealing with other traders both from inside and outside of the EU, giving the CESL an international dimension.

MAIN LEGAL ASPECTS OF THE COMMON EUROPEAN SALES LAW

The Consumer European Sales Law (CESL) is an optional framework, chosen by the parties. The consumer must explicitly declare whether he/she agrees to apply the CESL; this declaration is different from the one in which the consumer expresses his/her agreement to conclude the contract.

It is desirable that the Commission approves some accompanying measures to make the exercise of the free right to choose this regime easier for SMEs and consumers, when they contact with big companies – or companies in a dominant market position – in accordance with the voluntary nature of the CESL.

In addition, the Common European Sales Law is an alternative set of contract law rules, identical in every Member State and applicable throughout the EU, which will co-exist with the national legislation in force in the field of contract law.

As a regulation, the Common European Sales Law will be generally and directly applicable. The CESL includes a comprehensive (183 articles) but non-exhaustive set of contract law rules, covering:

- the general principles of contract law;
- the pre-contractual obligation (information) and its content, rules on how agreements are concluded, consumers' right to withdraw and the avoidance of contracts;
- rules to interpret the contract terms, rules on the content and effects of contracts as well as contract terms presumed to be unfair; risk and delivery; payment conditions, etc.
- obligations and remedies of the parties to a sales contract or a related services contract;
- supplementary common rules on damages for loss and on interest for late payment;
- restitution; and
- prescription.

Certain aspects continue to be governed by applicable national legislation, on the basis of the Rome I Regulation.

ADVANTAGES FOR COMPANIES

Providing one common (yet optional) regime of contract law that is identical for all 27-Member States so that traders no longer need to wrestle with the uncertainties that arise from having to deal with multiple national contract systems has proven to be of benefit. According to a recent survey (Eurobarometer), 73% of European companies stated that if able to choose, they would use one single European contract law for all cross-border sales to consumers from other EU countries.

Ultimately, the primary benefit to small and medium-sized companies is an easier route to expansion into new markets and a great reduction in transaction costs for those companies that wish to trade cross-border.

ADVANTAGES FOR CONSUMERS

A chief benefit to the consumer is a wider choice of products at lower prices due to the increased competition; all the while providing the same high level of consumer protection in all Member States, transparency and a good knowledge of consumer rights in cross-border transactions.

Once it comes into force, a few European model contracts will be drawn up, designed for specific trade areas or fields of activity, containing comprehensive standard terms and conditions, and available in all the official languages of the EU. These will be very useful tools for both business-to-business and business-to-consumer relationships.

OPPORTUNITY FOR BUSINESSES... AND LAWYERS

Some EU solicitors and in-house

lawyers are afraid of the possible decrease of legal advice requests once the CESL comes into force. But, on the contrary, legal work will increase.

On the one hand, in many places, references are made to domestic law (for example, legal personality, invalidity of a contract arising from lack of capacity, illegality, determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts) which will force companies to seek legal advice regarding the legislative framework and also increase the legal uncertainty. In the beginning, the regulation wouldn't be applied uniformly throughout the EU. National courts, which are competent for the interpretation and application of the regulation, will offer various possible interpretations, and the legal incertitude will increase.

On the other hand, the CESL will entail a significant increase of cross-border business-to-business and business-to-consumer transactions, resulting in an increase in the advice needed in other areas of law such as commercial, litigation, etc.

Summarizing, we welcome the Commission's initiative that will (1) promote the cross-border trade for businesses (especially SMEs), (2) encourage cross-border purchases by consumers, and (3) consolidate the advantages of the internal EU market.

The CESL will be a win-win solution after the current legal diversity for cross-border trade in the EU single market. It will allow SMEs to expand their business to new markets in Europe and help consumers get better deals. We encourage U.S. companies to benefit from it.



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