Position for a Common European Sales Law

The Notaries of Europe have always contributed to the development of European civil law. In this context, they have participated actively in the Sounding board and expressed their view on the Feasibility Study on European Contract Law. The Notaries of Europe now welcome the opportunity to express their opinion on the instrument on a Common European Sales Law (CESL) as proposed by the European Commission on 11 October 2011 (COM (2011) 635 final).

We are pleased to see that some of our comments have been included in the proposal to the benefit of legal certainty. A number of issues, esp. those aspects which have not been treated by the Expert Group, however, still require some adaptation. This paper should be understood as an attempt of constructive guidance on the way towards a more accomplished Sales Law. We therefore believe that the Common European Sales Law can become a useful tool for consumers and businesses provided that the general principles of legal certainty and subsidiarity are fully respected.

The following objections are made after a first overall analysis of the proposed instrument. We are convinced that respecting these objections in the further legislative process would not only facilitate the acceptance and implementation of the optional instrument on the political level, but above all assure a higher level of legal certainty and consumer protection as major guidelines for any European instrument:

1. We advise the Commission to reconsider the legal basis the Common European Sales Law is currently based on. There is strong support from case law and academia that Art. 114 might in fact not be the accurate legal basis for an optional European Sales Law.

2. The Common European Sales law might help circumvent mandatory lois de police that request universal applicability in some Member states. We believe that such effects would thwart a broad acceptance of the sales law in the Member states. This is why the instrument preferably clarifies that any lois de police must be regarded under any circumstances.

3. Furthermore, there might be a need to reconsider the non-application of Art. 6 par. 2 of the Rome I Regulation to ensure that traders may not sidestep national protection provisions to the detriment of the consumer.

4. Moreover, we strongly believe that a clear substantive scope of application within the statutory text and more carefully worded definitions would avoid considerable interventions in property law and real estate contract law that are otherwise imminent.

5. Finally, it seems advisable to align the Common European Sales Law Proposal to the current acquis according to which rights of withdrawal are not compatible with the notarial authentication of contracts. To this end, the respective definitions of “off-premise contracts” and “distance contracts” could be amended in accordance with the Consumer
Rights Directive. Moreover, the optional instrument should not apply to sales effected at public auctions maintained by public office-holders.

In detail:

1. **The Legal Basis of an optional Common European Sales Law**

   The Commission’s proposal is based on Art. 114 TFUE. There are, however, strong arguments voiced by case law and academia that suggest Art. 114 might not be the appropriate legal base for an optional Sales Law instrument. In contrast to what is required by Art. 114, the optional instrument does not aim at a harmonization of laws, but rather constitutes an alternative to the national contract law regimes. According to the case law of the European Court of Justice\(^1\), such an optional instrument can only be based on Art. 352 TFEU.\(^2\) This decision of the European Court of Justice refers to a matter of corporate law, but can well be applied to the introduction of an optional Common European Sales Law. The mere fact that the Common European Sales Law is designed as a 2\(^{nd}\) regime, rather than as a 28\(^{th}\) regime cannot serve as a distinction. Apart from the purely formal character of this reasoning, the implementation as a 2\(^{nd}\) regime only relates to the instrument’s legal relation to the Rome I Regulation, but might not create a legal competence that is not available otherwise. The choice of an inappropriate legal basis would not only have a bearing on later amendments or extensions of the instrument, but would also intervene with the constitutional architecture of the European Union.

2. **Conflicts with Lois de Police**

   The Common European Sales Law excludes on the one hand all matters of illegality from the scope of application as a matter not addressed in the instrument (recital 27). On the other hand, however, the Common European Sales Law exhaustively governs all matters of “contract law that are of practical relevance during the life cycle of the types of contracts” (recital 26). As a result, legal provisions in Member states that affect the “life cycle of a contract” and are construed as *loi de police* in that state are vulnerable to be circumvented easily by opting for the Common European Sales Law. The French code, for instance, requires a written agreement for any sales contract on vessels registered in France. Such provision is understood and interpreted as a *loi de police*. If the parties agree on the

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\(^1\) Judgment of the Court of 2 Mai 2006 on the SCE Regulation, Case C-436/03, paragraph 44. The SE Regulation was also based on article 352 TFEU. The preponderant opinion of jurisprudence equally considers only Article 352 TFEU to be an appropriate legal basis for an optional contract law: Max Planck Institute for Comparative and International Private Law, RabelsZ 2011, p. 371, 388f., 393f., 396; Herresthal, EuZW 2011, p. 7, 9; Roth, EWS 2008, p. 415. Also see Judgment of the Court of 5 October 2000, Case C-376/98, on tobacco advertising where the court stated that market divisions as a result of legal diversity in the Member states do not as such justify legislative acts by the European lawmaker.

applicability of the Common European Sales Law, however, that *loi de police* might be inapplicable since Art. 6 CESL-Annex I provides for the principle of formlessness.

Consequently, we suggest that the Common European Sales ensure that all *lois de police* are duly respected by positively stating the applicability of Art. 9 of the Rome I Regulation.

3. Maintaining the Standard of Consumer Protection

The Common European Sales Law is supposed to be optional and provides for an additional statement indicating the agreement to conclude a contract in Art. 8 par. 2 CESL. But practically spoken, the optional instrument will possibly be used more frequently in consumer contracts than the national regimes:

a) Despite the required separate consumer consent, the parties might predominantly opt for the Common European Sales Law:

- Companies will certainly attempt to base their business on the Common European Sales Law wherever possible in order to achieve synergy effects. Keeping two different contractual regimes means significant costs for companies. As a consequence, companies will offer their goods – if at all - at a higher price when consumers do not consent to the applicability of the Common European Sales Law.

- But even if the price is the same the consumer likely agrees on the applicability of Common European Sales Law. The standard information notice on the applicability of the Common European Sales Law might give the impression that (only) the choice of the optional instrument safeguards a high level of consumer protection. The text of the standard information notice indeed suggests that the Common European Sales Law has been created to ascertain a level of consumer protection that clearly exceeds the level under national contract law that would apply otherwise.

b) Against this background, the consumer is likely to approve of the applicability of European contract law regardless of any negative effects on his or her rights. As a matter of fact, the Common European Sales Law aims to maintain the degree of consumer protection which is foreseen in the Consumer Rights Directive (cf. recital 11). In some Member State jurisdictions, however, the extent to which consumer protection is granted fairly exceeds the directive’s level. So far, the excessive implementation of directives for the benefit of consumer protection has generally been recognized in Union law. However, Art. 6 par. 2 of the Rom I Regulation does not apply within the optional instrument (cf. recital 10 and 12). In contrast to current law, national specific consumer protection law in force at the consumer’s residence will not prevail regardless of any choice of law. We are afraid that those Member States that have opted for a higher standard might have to accept certain setbacks.
with regard to the level of consumer protection they adopted. Under French law, for instance, some of the contract terms only presumed to be unfair under Art. 85 CESL-Annex I (“grey list”) are deemed always unfair. Hence, in contrast to current French law, traders could successfully use contract terms from the grey list once they rebut the presumption of unfairness on the grounds of a particular set of facts.

Against this background, we encourage the Commission to consider the applicability of Art. 6 par. 2 of the Rome I Regulation within the optional instrument. The consent to the applicability of the Common European Sales Law would then mean a respective choice of law in the meaning of Art. 6 par. 2 of the Rome I Regulation. Recitals 10 and 12 should be modified accordingly.

4. **Clarifying the Substantive Scope of Application**

The current draft of the Common European Sales Law Proposal refrains from adopting a clear statutory provision that defines the scope of application exhaustively. We are concerned that the lack of such a provision might result in legal uncertainty and certainly unintended negative outcomes.

a) The Common European Sales Law proposal does not provide for a clear statutory provision on its scope of application. Art. 11 pursuant to which the Common Sales Law shall govern the “matters addressed in its rules” and the “compliance with and remedies for failure to comply with the pre-contractual information duties” might be worded too vaguely. Recitals 26 and 27 also seek to elucidate the instrument’s ambit. But these attempts seem insufficient to fully prevent legal uncertainty as the following examples may illustrate:

- The optional instrument promotes the principle of “formlessness” according to which the contract is not subject to any form (Art. 6 CESL-Annex I), without including a reservation regarding formal requirements established by national law. According to recital 26, all requirements of form are regulated in the optional instrument exhaustively. Thus, the catalogue of unsettled issues (recital 27) does not mention formal requirements although the impartial advice of a public office-holder is of particular relevance for the protection of contractual party with low bargaining power. We are concerned that the Common European Sales Law might be used to sidestep national formal requirements that are aimed at consumer protection and legal certainty.³

³ Consumer protection deserves particular attention in this regard since traders might try to obtain the consumer’s consent to the applicability of the Common Sales Law by shamming consumer benefits that ostensibly result from the circumvention of national form requirements otherwise applicable. Thus, even those form requirements would be put aside that actually purport to strengthen consumer protection. See for instance Spanish legislation such as art. 11 of the Ley de Ordenación del Comercio Minorista of 15 January 1996, art. 6 of the Ley de Venta a Plazos de Bienes Muebles.
Against this background, we strongly advise the Commission to allow for the recourse to national law for any additional formal requirements. To this end, a statutory reservation clause could be established. Such recourse for reasons of consumer protection would also be in compliance with current European law. Art. 11 par. 4 of the Rome I Regulation provides for the recourse to form requirements of the Member state the consumer has its habitual residence in. We suggest that recital 27 be amended as follows:

"These issues include, for example, legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the non-respect of additional formal requirements, the determination of the language of the contract, matters of non-discrimination, representation, the plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property and the law of torts."

The reference to “formal requirements” in recital 26 should be deleted. Art. 6 Annex I should be deleted entirely.

- Furthermore, we are concerned that matters of property law are not clearly and unequivocally exempt from the Common European Sales Law. It is true that property law shall be excluded from the scope of application pursuant to recital 27. Yet, this recital seems contradictory to Art. 2 (a) defining a contract as an agreement intended to give rise to obligations or "other legal effects" and Art. 2(k) that defines a sales contract as a “contract under which the seller transfers or undertakes to transfer the ownership of the goods to another person”. Any lack of clarity with regard to property law would, however, trigger substantial inconsistencies with national law.

We strongly welcome the exclusion of sales contracts on immovable property from the scope of application (see definition in Art. 5(10) CESL: "tangible movable items"). We are, however, concerned that the provisions laid down in Art. 6 on mixed-purpose contracts might lead, nonetheless, to an undesired extension of the optional instrument. The Common European Sales Law could cover the transfer of immovable property ownership if the simultaneous sale of movable and immovable property is not considered a “mixed purpose contract” in the meaning of Art. 6 par. 1 CESL. Such an argument could be made since the contract on the sale of movable and immovable property still only serves one purpose: the transfer of ownership. Hence, the instrument should preferably provide for an undisputable unequivocal exclusion of all contracts that contain the sale of immovable property by creating a new Art. 5 par. 2 which could be worded as follows:

Art. 63 of the Ley General para la Defensa de los Consumidores y Usuarios of 16 November 2007 or Art. 16 of the Ley de Crédito al Consumo of 24 June 2011.
"This instrument shall not apply to contracts relating to the formation, acquisition or conveyance of rights in immovable property or guarantees in immovable property, or relating to the construction or major modification of a building or the renting of a building or an apartment."

The same reasoning applies to in rem guarantee rights over movable goods. In that sense, and in order to protect consumers’ and creditors’ rights and interest, pledge or mortgage rights over movable goods agreed upon to finance the acquisition thereof (being the financial service provided by a third party different to the seller) must also be clearly excluded from the instrument’s scope of application.

- Finally, based on Art. 1 par. 2 of the Rome I Regulation, it seems appropriate to foresee a clause excluding certain areas close to contract law in order to ensure, in particular, that obligations arising from family relationships, matrimonial property regimes and succession law are excluded from the scope of the future instrument.

b) As a general advice, a clear statutory provision that lists the substantive scope of application exhaustively would improve the instrument and align it to other European regulations. All matters not addressed in this list would then be governed by the law applicable on the basis of the Rome I Regulation. Accordingly, recital 27 that lists external lacunas should be worded openly, but not exhaustively.

5. Public Office Holders and Consumer Protection

The current draft of the Common European Sales Law proposal does not take into account the involvement of public office holders and its particular effects on consumer protection:

a) Art. 40 par. 1 of Annex I entitles consumers to withdraw from off-premises or distance contracts. The definition of "business premises" in Art. 2 (r) includes only movable or immovable retail premises where a trader carries out activity on a permanent or usual basis. The office rooms of a civil law notary, however, would not meet these requirements. As a consequence, consumers may withdraw from a contract that has been concluded and authenticated under the supervision of a civil law notary.

The civil law notary gives advice during the authentication procedure and ensures that both parties are familiar with the content of the contract and its legal scope before they decide to sign the contract. Withdrawal rights, however, are based on the idea that a consumer might have unintentionally entered into a contractual relation.

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4 In Spain, in accordance with art. 3 of the Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento of 16 December 1954, the hipoteca mobiliaria and prenda sin desplazamiento require public documentation for their constitution and registration in the Register of Movable Goods created by Royal Decree of 3 December 1999. This is e.g. applicable to sales of cars, plains, aircrafts, industrial machines, intellectual property rights or works of art.
The incompatibility of withdrawal rights with the authentication procedure has long been recognized by the European lawmaker (see the provisions of the Consumer Rights Directive, point 5. c above). In accordance with the Consumer Rights Directive, the definition of off-premises contracts could be clarified in Art. 2 (q) by adding a clause that reads as follows:

"Contracts which, in accordance with the provisions of Member States, are established by a public office-holder, like a civil law notary, who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope shall not be considered as off-premise contracts."

The same applies mutatis mutandis to the definition of distance contracts laid down in Art. 2 (p).

b) Furthermore, the instrument’s scope of applicability covers sales at public auctions as defined in art. 2 (u). The European Common Sales Law, however, should not apply to those sales that are affected at public auctions maintained by public office-holders as is provided for in some Member states. The involvement of a public office-holder in such auctions alters substantially the situation in which the contract is concluded. The proposal itself – in compliance with the Consumer Rights Directive - acknowledges the particular circumstances of contracts entered into in the context of ordinary public auctions by denying a right of withdrawal (Art. 40 (h)). Consequently, we believe that the instrument should take a step beyond and exclude sales effected on public auctions maintained by public office-holders completely from its scope of application.

The Notaries of Europe thank the Commission for considering their suggestions and look forward to further contributing to the exciting process of developing a Common European Sales Law.

Council of the Notariats of the European Union
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