

**Committee recommendation and report
of the Committee on Legal Affairs (6th committee)**

on the communication

- Printed Paper 17/7713 no. A.5 -

**Proposal for a Regulation of the European Parliament and the Council on a
Common European Sales Law**

Council Document 15429/11; COM(2011)635 final

here: Opinion pursuant to Protocol 2 of the Treaty on European Union and the Treaty
on the Functioning of the European Union
(application of the principles of subsidiarity and proportionality)

A. Problem

On 11 October 2011, the European Commission presented a proposal for a Regulation on a Common European Sales Law, based on Article 114 of the Treaty on the Functioning of the European Union (TFEU). In the opinion of the Commission, the fact that contract law varies from Member State to Member State prevents enterprises, in particular small and medium-sized enterprises, from entering into cross-border transactions within the EU. In order to engage in cross-border business relations, enterprises have to adapt to the relevant contract law; as a general rule, according to the Commission, this entails additional transaction costs. The draft Regulation, in contrast, is intended to encourage the Internal Market by the introduction of an independent and unified European Sales Law, whose application can be agreed in all cross-border transactions between enterprises and consumers. With regard to the principle of subsidiarity and proportionality laid down in Article 5 of the Treaty on European Union (TEU), the Commission assumes that the additional transaction costs and the legal complexities of cross-border transactions cannot be removed by the Member States implementing measures which are not coordinated with each other. The goal of the proposed Regulation can therefore, it believes, be better realised on the European Union level.

The deadline for submitting a reasoned opinion under Article 6 of Protocol 2 of the Treaty on European Union and the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality will expire on 12 December 2011. In this, the German Bundestag can explain the Presidents of the European Parliament, the Council and the Commission why the proposed Regulation on a Common European Sales Law is, in its opinion, incompatible with the principle of subsidiarity.

B. Solution

Taking notice of the proposed Regulation and adopting a resolution in which it shall essentially be set out, in a reasoned opinion under Article 6 of Protocol 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality, that

1. the review standard of the subsidiarity objection under Article 6 of Protocol 2 is to be understood comprehensively and comprises, in addition to the principle of subsidiarity in the narrow sense under Article 5 (3) TEU, both the choice of the legal basis and also the principle of proportionality under Article 5 (4) TEU,
2. Article 114 TFEU is not a sound legal basis for the proposed Regulation,
3. the diversity of national contract law systems does not in fact appreciably hamper business activity in the EU legal area,
4. a uniform European sale of goods law on Union level is therefore not necessary,
5. the draft Regulation entails the danger of leading to greater legal uncertainty in the European judicial area and
6. the draft Regulation for these reasons is incompatible with the principle of subsidiarity.

Unanimous adoption of a resolution taking notice of the proposed Regulation.

C. Alternatives

Not adopting any resolution.

D. Cost

Not discussed by the committee.

Recommendation for a decision

The German Bundestag is requested to adopt the following resolution:

taking notice of the communication on Printed paper 17/7713 no. A.5, to adopt the following resolution as a reasoned opinion under Article 6 of Protocol 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality:

“In the opinion of the German Bundestag, the proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (KOM(2011)635; Council Document- no. 15429/11) is incompatible with the principle of subsidiarity.

The Bundestag refers to its resolution on the Commission’s Green Paper, ‘Options for the introduction of a European contract law for consumers and enterprises’ (KOM(2010)348 final; Council Document no. 11961/10) in Printed Paper 17/4565. It reaffirms its conviction that before EU provisions on contract law, in particular including those on sales law, are implemented, it is necessary for a meaningful assessment of consequences to be carried out with regard to the legal consequences to be expected and the de facto effects on the market and on consumers.

Reasons:

1. According to Article 6 of protocol No 2 to the Treaty on European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU) on the Application of the Principles of Subsidiarity and Proportionality, national parliaments may submit a reasoned opinion stating why a draft legislative act does not comply with the principle of subsidiarity.

The Bundestag believes it is necessary for national parliaments to apply a comprehensive standard of review which should include the choice of legal basis, as well as compliance with the principle of subsidiarity in the narrower sense in accordance with Article 5 (3) of the TEU and the principle of proportionality in accordance with Article 5 (4) of the TEU.

The Bundestag calls attention to its resolution on the Commission’s Green Paper on “Policy Options for Progress Towards a European Contract Law for Consumers and Business” (COM(2010)348 final; Council doc. 11961/10) in printed paper 17/4565. It reiterates its belief that, before EU regulations on contract law, in particular also on sales law, are implemented, it is essential to undertake a meaningful assessment of the likely legal consequences and actual impact on the market and on consumers.

The Bundestag believes it is supported in this opinion by a large part of legal literature (*Hans Hofmann*, Europäische Subsidiaritätskontrolle in Bundestag und Bundesrat, Das 8. Berliner Forum der Deutschen Gesellschaft für Gesetzgebung (DGG), ZG 2005, 66, (70, 73); *Christine Mellein*, Subsidiaritätskontrolle durch nationale Parlamente, Eine Untersuchung zur Rolle der mitgliedstaatlichen Parlamente in der Architektur Europas, Baden-Baden, 2007, p. 200 f.; *Ingolf Pernice/Steffen Hindelang*, Potenziale europäischer Politik nach Lissabon – Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und die Bürger, EuZW 2010, 407 (409); *Jürgen Schwarze*, Der Verfassungsentwurf des Euro-päischen Konvents – Struktur, Kernelemente und Verwirklichungschancen, in: *Jürgen Schwarze*, (ed.), Der Verfassungsentwurf des Europäischen Konvents, Verfassungsrechtliche Grundstrukturen und wirtschafts-verfassungsrechtliches Konzept, Baden-Baden 2004, p. 489, 522 f.; *Elisabeth Wohland*, Bundestag, Bundesrat und Landesparlamente im europäischen Integrationsprozess, Zur Auslegung von Art. 23 Grundgesetz unter

Berücksichtigung des Verfassungsvertrags von Europa und des Vertrags von Lissabon, Frankfurt (Main) 2008, p. 201 f.; *Alexandra Zoller*, Das Subsidiaritätsprinzip im Europäischen Verfassungsvertrag und seine innerstaatliche Umsetzung in Deutschland, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Hrsg.), Jahrbuch des Föderalismus 2005, Baden-Baden 2005, p. 270; *Peter Altmaier*, Die Subsidiaritätskontrolle der nationalen Parlamente nach dem Subsidiaritätsprotokoll zum EU-Verfassungsvertrag, in: *Hans-Jörg Derra* (Hrsg.), Freiheit, Sicherheit und Recht, FS für Jürgen Meyer zum 70. Geburtstag, Baden-Baden 2006, p. 314; *Marco Buschmann/Birgit Daiber*, Subsidiaritätsrüge und Grundsatz der begrenzten Einzelermächtigung, DÖV 2011, 504, (505, 506)).

At an expert discussion in the Subcommittee on European Law of the Committee on Legal Affairs on 16 June 2010 on the subject of “Examining the principle of subsidiarity under Community law”, the majority of the experts, namely Prof. Dr. Christian Calliess, Prof. Dr. Adelheid Puttler, Oliver Suhr, Dr. Joachim Wuermeling and Prof. Dr. Ralph Alexander Lorz, spoke out in favour of this broad interpretation of the subsidiarity objection. At an expert discussion in the Subcommittee on European Law of the Committee on Legal Affairs on 16 June 2010 on the subject of “Examining the principle of subsidiarity under Community law”, the majority of the experts, namely Prof. Dr. Christian Calliess, Prof. Dr. Adelheid Puttler, Oliver Suhr, Dr. Joachim Wuermeling and Prof. Dr. Ralph Alexander Lorz, spoke out in favour of this broad interpretation of the subsidiarity objection.

The Bundesrat also believes the subsidiarity principle is infringed if the European Union does not have competence for a legislative act (cf, for example, Bundesrat printed paper 43/10 (Decision)).

2. The European Commission adopted its proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (hereafter: Regulation) on 11 October 2011. The Commission uses Article 114 of the TFEU as the legal basis for the Regulation.

The Bundestag is of the opinion that Article 114 of the TFEU cannot constitute the legal basis for the Regulation on a Common European Sales Law.

Article 114 (1) sentence 2 of the TFEU states that the European Parliament and the Council shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. In terms of its purpose and content, however, the Regulation does not intend and cannot achieve such an approximation of provisions through the introduction of a Common European sales law.

a) The intention is that the Common European Sales Law will be applied on an optional basis to cross-border contracts if the parties to the contract explicitly decide this should be the case. Guidelines governing the choice to apply the Common European Sales Law by the parties to a contract are set out in Articles 3ff of the Regulation. If the parties to a contract do not reach agreement on applying the Common European Sales Law, the relevant national law applies under the terms of Regulation (EC) No. 593/2008 of the European Parliament and of the Council and/or other conflict of law rules.

Under the Regulation national laws relating to sales contracts and other types of contract covered by the Common European Sales Law will not be affected. It is explicitly stated in recital 9 of the Regulation that the Regulation harmonises the contract law of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second contract regime for contracts within its scope.

b) The case law of the European Court of Justice makes it clear that a legislative act which leaves intact existing national laws does not aim to achieve an approximation of the provisions laid down by law, regulation or administrative action in Member States in the meaning of Article 114 (1) of the TFEU (cf ECJ judgement of 2.5.2006, C-436/03, Parliament ./ Council, ERC 2006, I-3733). Thus legislative measures which determine a single set of rules for the entire Union which exist in parallel to national laws and simply overlap these cannot use as their basis Article 114 of the TFEU.

This interpretation of Article 114 of the TFEU is supported by a systematic comparison with the legal basis of Article 118 of the TFEU. According to this provision introduced with the Treaty of Lisbon, European legal instruments to provide uniform protection of intellectual property rights can be established by way of the ordinary legislative procedure. Such legal instruments exist in parallel to the corresponding legal instruments in Member States without changing or replacing them. Thus the Treaty of Lisbon gives the Union the power exclusively for the limited area of intellectual property rights to enact laws which run parallel to the provisions of Member States. This means in turn that Article 114 of the TFEU cannot be used as a legal basis for European regulations in all other areas insofar as these regulations operate in parallel to national laws and leave these otherwise intact.

This is also in line with the Union's legislative practice to date: legal instruments and legal forms of Community law which exist in parallel to corresponding national laws without changing or replacing them have up to now been based not on Article 114 of the TFEU but on Article 352 of the TFEU (cf, for example, the Regulations on creating the European Economic Interest Grouping, a European company and a European Cooperative Society). The same applies to European regulations on plant variety protection, the Community trade mark and European designs, which all supplement national laws but have not replaced or approximated them.

In a public hearing of the Committee on Legal Affairs of the Bundestag on 21 November 2011, the experts Prof. Dr. Hans Christoph Grigoleit, Dr. Peter Huttenlocher, Prof. Dr. Karl Riesenhuber, Prof. Dr. Wulf-Henning Roth, Prof. Dr. Marina Tamm and Prof. Dr. Gerhard Wagner confirmed doubts about the choice of Article 114 of the TFEU as a legal basis for the Regulation.

There may be recourse here to the powers outlined in Article 352 of the TFEU, but this legal basis provides for a different procedure. According to Article 352 (1) of the TFEU, the Council acts unanimously to adopt measures after obtaining the consent of the European Parliament. Furthermore, the German representative in the Council can only vote in favour once the Bundestag, with the consent of the Bundesrat, has authorised him to do so by a law in accordance with Article 23 (1) of the Basic Law (Section 8 of the Responsibility for Integration Act).

3. The Bundestag furthermore doubts that the Regulation is compatible with the principle of subsidiarity in the narrower sense and the principle of proportionality.

a) According to Article 5 (3) of the TEU, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Action at Union level presupposes that the objectives of the proposed action can reasonably be achieved with this specific measure. The Commission claims that differences in the contract laws of Member States create obstacles to cross-border trade.

The Bundestag doubts that the different contract laws in the Member States noticeably impede economic activity in the European legal area. Attention is drawn here to experiences with the UN sales law (United Nations Convention on Contracts for the International Sale of Goods). They show that it is above all linguistic barriers and geographical distance which act as obstacles to cross-border economic activity. This applies equally to consumers and to business, as proved by feedback from consumer and business groups.

If the variations in contract laws are therefore of lesser importance in cross-border trade, there is no need for a Common European Sales Law and hence no reason for the measure in the meaning of Article 5 of the TEU.

Furthermore whether or not the proposed legislation would achieve its objectives is also doubtful in view of the fact that significant issues in connection with the drawing up of an effective contract are not regulated in the Common European Sales Law but rather continue to be subject to the national law that is applicable under Regulations (EC) No. 593/2008 and (EC) No. 864/2007 or any other relevant conflict of law rule (recital no. 27). These issues include important questions such as legal personality, the invalidity of a contract arising from lack of legal capacity, representation, illegality and immorality, assignment, set-off, plurality of creditors and debtors, and change of party. Against this background and contrary to recital no. 8, parties will not have the possibility of concluding their contract on the basis of one single set of contract law rules. The Common European Sales Law therefore has the effect not of removing legal uncertainty and lack of clarity brought about by different contract laws in the internal market for those applying the law, but rather of making it greater.

Moreover, in the area of the rules covered by the Regulation, the Bundestag sees the danger of considerable legal uncertainty which warrants serious concerns as to whether the proposed Regulation can achieve its objectives. By its nature the Common European Sales Law can only make available general regulations which also contain numerous undefined legal terms. Contract law in Germany as in other Member States has been essentially shaped by case law. The vast majority of rules relevant to the parties will therefore first have to be created and made concrete by the courts through case law. This is clearly demonstrated by the evolution of national contract laws in Europe. There is, however, no single civil jurisdiction in the Union which would enable the creation of a body of regulations which would generate legal certainty. The European Court of Justice is not in a position, by virtue of its function and structure, to ensure legal unity. Furthermore such a process – as a comparison with the development of national contract laws once again shows – would take many years if not decades, a point emphasized by the experts at the hearing on 21 November 2011. This is time in which, contrary to the objective of the Commission, there would be more, not less, legal uncertainty. During this time, legal uncertainty and the associated higher transaction costs would have the effect of restricting cross-border trade rather than encouraging it

b) Article 5 (4) of the TEU states that, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

For the reasons listed under a), the Bundestag takes the view that the proposed Regulation also fails to comply with the principle of proportionality since doubts already exist about the suitability of the proposal to achieve the stated objectives.”

Berlin, 30 November 2011

The Committee on Legal Affairs

Siegfried Kauder

Chairperson

Dr. Jan-Marco Luczak
Rapporteur

Dr. Eva Högl
Rapporteur

Burkhard Lischka
Rapporteur

Marco Buschmann
Rapporteur

Raju Sharma
Rapporteur

Ingrid Hönlinger
Rapporteur

Report of the Members Dr. Jan-Marco Luczak, Dr. Eva Högl, Burkhard Lischka, Marco Buschmann, Raju Sharma and Ingrid Hönlinger

I. Referral

The **proposed Regulation in Council Document 15429/11** was, by referred Printed Paper 17/7713 no. A.5 of 14 October 2011, pursuant to section 93 (5) of the rules of procedure, referred to the Committee on Legal Affairs as the committee responsible and to the Committee on Economic Affairs and Technology, the Committee on Food, Agriculture and Consumer Protection, the Committee on Tourism and the Committee on the Affairs of the European Union as the committees asked for an opinion.

II. Opinions of the committees asked for an opinion

The **Committee on Economic Affairs and Technology** discussed the item in its 56th meeting on 30 November 2011 and unanimously recommends that the decision apparent from the recommendation for a decision should be adopted.

The **Committee on Food, Agriculture and Consumer Protection** discussed the item in its 56th meeting on 30 November 2011 and unanimously recommends that the decision apparent from the recommendation for a decision should be adopted.

The **Committee on Tourism** discussed the item in its 44th meeting on 30 November 2011 and, by the votes of the parliamentary groups of the CDU/CSU, SPD, FDP and Alliance 90/The Greens with The Left Party parliamentary group abstaining, taking note of the communication on Printed Paper 17/7713 no. A.5 recommends that the decision apparent from the recommendation should be adopted.

The **Committee on the Affairs of the European Union** discussed the item in its 51st meeting on 30 November 2011 and, by the votes of the parliamentary groups of the CDU/CSU, FDP and Alliance 90/The Greens against the votes of the SPD parliamentary group with The Left Party parliamentary group abstaining, established that the proposed Regulation is incompatible with the principle of subsidiarity. The Committee emphasised that the standard for the review of subsidiarity by the national parliaments comprises the choice of a legal basis, compliance with the principle of subsidiarity in the narrow sense (Article 5 (3) TEU) and the principle of

proportionality (Article 5 (4) TEU). Article 114 TFEU, which is relied on by the Commission, is not an adequate basis in law for the proposed Regulation. It stated that the current practice is for European Union acts which are to exist parallel to national legal provisions without altering or replacing these to be based on the “flexibility clause” of Article 352 TFEU. The Committee also doubts that the draft Regulation is compatible with the principle of subsidiarity in the narrow sense and with the principle of proportionality.

III. Discussion process and discussion results in the committee responsible

The **Committee on Legal Affairs** commenced the discussion of the Regulation in its 65th meeting on 9 November 2011 and decided to hold a public hearing; it held this – following preparatory discussions in the Subcommittee on European Law – in its 67th meeting on 21 November 2011. The following experts attended this hearing:

Gerd Billen	Executive Director, Federation of German Consumer Organisations e. V., Berlin
Prof. Dr. Hans Christoph Grigoleit	Ludwig Maximilians University Munich (LMU) Faculty of Law, Chair of Civil Law, Commercial Law and Corporate Law, Theory of Private Law
Dr. Peter Huttenlocher	Bundesnotarkammer, Berlin
Prof. Dr. Karl Riesenhuber	Ruhr University Bochum Faculty of Law
Prof. Dr. Wulf-Henning Roth, LL.M. (Harvard)	Rheinische Friedrich Wilhelms University, Bonn Institute for Private International and Comparative Law
Prof. Dr. iur. Reiner Schulze	Westfälische Wilhelms University, Münster Institute for Legal History

Christian Steinberger German Engineering Federation
(VDMA), Frankfurt am Main

Prof. Dr. Marina Tamm University of Wismar
Faculty of Economics

Prof. Dr. Gerhard Wagner,
LL.M. (Chicago) Bonn University
Department of Jurisprudence
Institute for German and
International Civil Law

Berlin, 30 November 2011

Dr. Jan-Marco Luczak
Rapporteur

Dr. Eva Högl
Rapporteur

Burkhard Lischka
Rapporteur

Marco Buschmann
Rapporteur

Raju Sharma
Rapporteur

Ingrid Hönlinger
Rapporteur

With regard to the conclusion of the hearing, reference is made to the record of the 67th meeting with the annexed opinions of the experts.

In its 68th meeting on 30 November 2011, the Committee on Legal Affairs completed the review of compliance with the principles of subsidiarity and proportionality and unanimously recommends, with notice of the communication in Printed Paper 17/7713 no. A.5, that the decision apparent from the recommendation should be adopted.