ORGALIME

Position Paper

Brussels, 23 July 2012

Comments on the Commission proposal for a new Regulation on the Common European Sales Law (2011/0284)

1. INTRODUCTION

Orgalime represents a fundamentally healthy industry that is a major export sector. We are very much committed to simplifying international trade for engineering companies, including SMEs, by for example issuing model contracts and general conditions that are widely used in cross-border business, both within as well as outside the EU. For many years, Orgalime has been following the discussion on the harmonised European contract framework (European Contract Law dossier, subsequently the Common European Sales Law (CESL)), and has contributed with its expertise and viewpoint of businesses actually involved in the field throughout the discussion.

We are confident to say that businesses within the engineering industry do not experience serious problems in cross-border trading. Thanks to the freedom of contract principle and to the possibility of using self-developed contracts or other standard contracts and general conditions, European engineering companies - of which the vast majority are SMEs - are coping well with the different national legal systems. We therefore do not see the need for a single set of rules creating a regime identical throughout the European Union and applicable to B-2-B relations, even if such an instrument were to have an optional character.[1]

Since the majority of industries represented by Orgalime concern the capital goods industry, we will here only comment purely from a B-2-B perspective. Orgalime will not comment here on the discussion in the B-2-C area.

2. FREEDOM OF CONTRACT AND THE NON-OBLIGATORY CHARACTER OF THE PROPOSAL

The principle of **freedom of contract**, a fundamental rule of Contract Law in all European legal systems, applies to transactions between businesses, and we believe that this principle should not be undermined in B-2-B relations. Unlike consumer law, in business relations there is generally no need to protect one party in a particular way. Therefore, in relation to the CESL too, a clear distinction needs to be made between the sales law on **B-2-B transactions and consumer law**.

While we take account of the fact that the proposed CESL regime would have an optional character, we fear that in the future the **CESL rules might take on obligatory character**. Thanks to the freedom of contract principle companies cope relatively easily with cross-border trade. Contract law differs from other areas of law such as company law, where companies are dependent on national legislation. In contract law – companies can chose the applicable law, negotiate the contract terms as they wish, and they can rely on established model contracts for

[1] Please note that the Italian association ANIMA does not share this view.

Orgalime, the European Engineering Industries Association, speaks for 37 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 10.2 million people in the EU and in 2011 accounted for some €1,666 billion of annual output. The industry not only represents some 28% of the output of manufactured products but also a third of the manufactured exports of the European Union.

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cross border transactions, such as, for example, the Orgalime model contracts and General Conditions. Obstacles arise when the freedom of contract is breached by mandatory legal provisions. This could happen when, for example, mandatory legal provisions that are being created for another area of law (i.e. consumer transactions) are being applied indiscriminately to commercial transactions at the same time.

3. CESL SHOULD NOT BE APPLICABLE TO B-2-B CONTRACTS

Orgalime does not see the need for the creation of an optional instrument of Common European Sales Law in the area of B-2-B relations. The differences between national systems of contract law generally do not cause major problems for cross border trade in the B-2-B field. The fact that in all legal systems in Europe the freedom of contract is a determining principle of contract law means that businesses can conduct cross-border commercial transactions based on self-negotiated contracts or **standard contracts and general terms and conditions of business** relatively easily.

According to the preamble of to the proposal "*contract-law-related barriers are (...) a major contributing factor in dissuading a considerable number of export-oriented traders from entering cross-border trade or expanding their operations into more Member States".* We strongly disagree with this statement. Many sub-sectors of the engineering industries have an export quota of up to 80%, which is a good proof that cross-border trade functions very well, despite of differences in the national law systems.

SMEs are also able to do business abroad and are not deterred from entering into deals. Thanks to freedom of contract, companies including SMEs can work with standard contracts and can rely on tried and tested tools such as the ORGALIME standard contracts for cross-border transactions or the standard contract clauses of the ICC. These are of great assistance to companies with limited financial and human resources.

Businesses are capable of protecting their own interests, and the imbalance in bargaining power present in B-2-C contracts is generally not present in B-2-B environment. We explicitly suggest that **consumers and SMEs should not automatically be treated in the same way** with regard to their vulnerability in business transactions. It is true that inherently, the parties to a B-2-B contract are not necessarily in an equally strong position. However, it does not follow from this that the weaker party to the contract should be treated like a private consumer. A party to a contract which is the weaker party in one business relationship may be the stronger one in a different business relationship.

In conclusion, Orgalime fails to see a practical or legal need for including B-2-B contracts in the proposal for a CESL.

4. LEGAL CERTAINTY AND TRANSACTION COSTS

Orgalime is in favour of **legal clarity and legal certainty**, the two key elements in the functioning of the Internal Market. We fear that a new, additional optional sales law instrument will considerably increase legal uncertainty, rather than reducing it as the Commission intends.

Contract law is inherently a legal matter that requires a great degree of interpretation. What is more, the draft text of the CESL works with many undefined legal concepts and the coexistence of rules for B-2-B and B-2-C may lead to demarcation difficulties. Accordingly, it will take decades for **case law on European contract law** to become established. Even then, it can be anticipated that the courts of the individual Member States, which are imbued with the application of their national sales law, will interpret the CESL in divergent ways.

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Due to the continuing legal uncertainty in the application of an additional optional instrument (and its coexistence with the existing European legal systems) it is to be feared that the transaction costs for SMEs will not only not be reduced, but instead increased significantly.

5. THE ROLE OF THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS

For many businesses within the EU, the commonly chosen regime is the United Nations Convention on Contracts for the International Sale of Goods (CISG), sometimes referred to as the **Vienna Convention**. It has now been ratified by 76 countries, including most EU Member States. In the light of the above, the need for a CESL also seems highly doubtful, since the UN Sales Law is already a useful "optional instrument", which leaves the parties considerable freedom of contract. Moreover, an important point about the Vienna Convention is that in most cases, it does not need to be chosen explicitly. Where parties have places of business in two different states, and both states have ratified the CISG, the CISG becomes the default regime for international sales of goods contracts. This means that the CISG applies unless the parties make an express choice of some other regime.

In this context, a question arises of the extent to which the Commission expects an additional optional instrument to bring greater benefits than the CISG which is already in use, and how the **relationship between the two instruments** should look. Currently, the parties to a commercial contract may choose any of the legal systems in the 27 Member States, but they may also choose a system from outside the EU, i.e. the law of Switzerland or New York (both widely used for international commerce). In our view, another instrument comparable to the Vienna Convention would cause confusion for those trying to do business, since new differentiation or demarcation issues will arise, and thus create new requirements for advice.

In conclusion, Orgalime considers the introduction of a new optional instrument at European level more confusing than practical, since its scope would be limited to Europe, whereas the CISG is recognised worldwide.

6. CONCLUSION

While Orgalime supports the objective of increasing the overall coherence of different national contract law systems as a contribution to a fully operational internal market, we believe that the **proposed optional Common European Sales Law instrument will not bring the claimed benefits for business**, and should not be applicable to B-2-B relations under any circumstances. Business needs a stable legal framework, and the Commission should focus on preserving legal clarity and legal certainty when introducing any new legal instrument.