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OPINION OF THE LEGAL SERVICE*

Subject: Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (the "Sales Law" Regulation)¹
– relationship with Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I" Regulation)²

I. INTRODUCTION

1. The Working Party on Civil Law Matters has requested the opinion of the Legal Service on the relationship between the future "Sales Law" Regulation – should the Commission proposal be adopted as it stands – and the "Rome I" Regulation.
2. The present opinion responds to that request.

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¹ 15429/11.

² OJ L 177, 4.7.2008, p. 6.

II. AIM AND CONTENT OF THE "SALES LAW" REGULATION

3. The objectives and content of the proposal have already been analysed by the Legal Service in points 9 to 15 of its opinion of 16 March 2012, referred to here³.

III. THE "ROME I" REGULATION

4. Article 3 of the "Rome I" Regulation establishes that the parties to a contract are free to choose the law which should govern it (paragraphs 1 and 2):

"1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties."

However, *"Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."* (Article 3(3)).

Paragraph 4 of that article sets out the same rule for provisions of Community law "[...] as implemented in the Member State of the forum".

5. Article 4 sets out the applicable rules in the absence of choice by the parties.

³ 7139/12.

6. Article 6 derogates from the general rules of Articles 3 and 4 for matters relating to consumer contracts. Paragraphs 1 to 3 of Article 6 of the Regulation read as follows:

*"Article 6
Consumer contracts*

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*
- (b) by any means, directs such activities to that country or to several countries including that country,*

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4."

7. Article 9 establishes the primacy of so-called overriding mandatory provisions of the Member State of the forum (defined in the first paragraph) over the rules applicable under the Regulation itself. Paragraphs 1 and 2 of Article 9 read as follows:

*"Article 9
Overriding mandatory provisions*

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."

IV. RELATIONSHIP BETWEEN THE "ROME I" REGULATION AND THE "SALES LAW" REGULATION

8. The issue raised is the extent to which adoption of the "Sales Law" Regulation would create a situation in which the application of these three articles of the "Rome I" Regulation (and possibly others) would be modified.

9. The "Rome I" Regulation was adopted at a time when there was no regime established by Community law which comprehensively and coherently covered a type of contractual legal relationship, such as the future Common European Sales Law. Therefore its wording could not take into consideration the situation which would only exist if the "Sales Law" Regulation is adopted.

10. However, in its recital 14, the "Rome I" Regulation envisaged the potential future adoption of a Community legal instrument relating to contract law, specifying that "*should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules*". Therefore the "Rome I" Regulation was not intended to represent an obstacle to this choice by the parties.

11. The adoption of the "Sales Law" Regulation would result in the introduction in the Member States' legal orders of a second sales law regime, parallel to that which already exists. In fact, it is inherent in a European Union Regulation, such as the future "Sales Law" Regulation, that it is integrated directly into the legal order of each of the Member States, by virtue of Article 288 of the Treaty on the Functioning of the European Union (TFEU).

Consequently, parties which choose the common sales law regime established by the "Sales Law" Regulation would be making a choice from amongst the various regimes available within the national legal order of a single Member State. They would not be making a choice between the legal orders of different Member States.

12. The choice of applicable law as mentioned in the "Rome I" Regulation does not refer to the choice between two different regimes within the same national legal order. It consists of the choice of applicable law within the meaning of private international law, which for the parties means choosing which national legal order will be applicable to their contract, a legal order which includes a series of rules governing contracts to a greater or lesser extent – such as the rules cited in recital 27 of the proposal for the "Sales Law" Regulation (see paragraph 20 below).

Therefore, when the parties choose to subject themselves to the common regime established by the "Sales Law" Regulation, they must also indicate which national legal order they wish to subject their contract to, i.e. they must choose the applicable law, and this choice will itself be governed by the provisions of the "Rome I" Regulation (including in the event that they do not make a choice, in which case Article 4 of that Regulation, on applicable law in the absence of choice, will apply).

13. Consequently, since the choice to be made by the parties when they opt for the common sales law regime will take place within the legal order of a specific Member State, and not between legal orders of different Member States, this choice will not constitute a "choice of applicable law" within the meaning of the "Rome I" Regulation, and the entry into force of the future "Sales Law" Regulation will not affect the application of the "Rome I" Regulation.

14. This holds true not only with regard to Article 3 of the "Rome I" Regulation (freedom of choice), but also with regard to Articles 6 (consumer contracts) and 9 (overriding mandatory provisions).

With regard to Article 6, the derogations introduced by this provision, specifically by paragraph 2, are only operative in relation to a choice of applicable law within the meaning of the "Rome I" Regulation and not in relation to the choice of one of the two regimes available within the legal order of an individual Member State.

15. This result, necessary from a legal point of view, could be seen as calling into question the objective pursued by Article 6 of the "Rome I" Regulation, namely consumer protection. However, the regime established by that article was necessary due to two main factors: varying levels of consumer protection in the national legislation of Member States, and the impossibility, or extreme difficulty, for a consumer to know the rights granted to him/her by a law other than that of his/her country of residence.

16. There are two reasons why these two factors are not relevant to the situation in which, following the adoption of the "Sales Law" Regulation, there would be two parallel national regimes. Firstly, the new second national regime would quickly become as familiar to consumers as the pre-existing one. Secondly, according to the Commission's analysis, this regime provides for an overall level of protection equivalent to that of the existing national laws.

17. The arguments set out above in relation to Articles 3 and 6 of the "Rome I" Regulation are applicable *mutatis mutandis* to Article 9 of that Regulation. This article cannot be applicable to a law whose content and scope would be identical in all Member States and which would therefore itself form part of the legal order of the Member State of the forum.

18. However, in order to ensure clarity and legal certainty, the Legal Service considers it advisable to insert a recital in the "Sales Law" Regulation specifying that the choice made by the parties between the pre-existing national regimes and the new common European regime does not constitute a choice of applicable law within the meaning of the "Rome I" Regulation.

IV. OTHER APPLICABLE CIVIL LAW RULES

19. Finally, it should be made clear that the Common European Sales Law will not cover certain general aspects of civil law which could be relevant to a sales contract.

Recital 27 of the proposal reads as follows:

"All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the 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. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law."

These matters therefore continue to be governed by the applicable national law according to the relevant rules. The contracting parties would therefore have to make a double choice: that relating to the application of a European sales law and that relating to the applicable law within the meaning of the "Rome I" Regulation. In the absence of a choice by the parties, the law applicable to the abovementioned matters shall be determined in accordance with Article 4 of the "Rome I" Regulation. Moreover, in relation to those matters, it goes without saying that the provisions, such as Articles 6 and 9, of the "Rome I" Regulation remain applicable.

IV. CONCLUSION

20. The Legal Service is of the opinion that:

- 1) The option, available to the parties to a contract, to choose the future Common European Sales Law to be applicable to their contract does not constitute a choice of applicable law within the meaning of the "Rome I" Regulation;
- 2) consequently, the application of the "Rome I" Regulation will not be affected by the adoption of the "Sales Law" Regulation;
- 3) it is advisable to insert a recital in the future "Sales Law" Regulation clarifying the points made above.