

Legal Costs Under Article 5 of the Rome I Regulation

Article 5 of the Rome I regulation represents a substantial change from the current rule in the Convention. The Commission has argued this change is justified in terms of convenience (no need to apply two sets of law) and economic fairness because a business will be able to spread the costs of learning about one or more legal systems over a large number of transactions. The Commission failed to undertake any study of exactly what the likely costs to a business would be. This CBI paper attempts to quantify the legal costs to business under Article 5 of the Rome Convention and Article 5 of the Rome I Regulation.

The following costs are based on a business moving into a market for the first time. However, because the Rome I regulation includes all applicable law as opposed to only another Member States' mandatory rules, this will mean that firms currently engaged in B2C cross border trade will face a substantial portion of these costs to continue their existing business. Additionally, it should be noted that these are estimates of the direct legal costs alone; it ignores the significant indirect costs imposed on a business, notably management time. The advice not only has to be given by the lawyers, but it has to be read, absorbed and acted upon by the business.

(i) Rome Convention

The current Rome Convention rules provide that where a business seeks out customers in a Member States, the choice of law made in a Business to Consumer contract shall not deprive a consumer of any protection afforded under their national law. A business expanding into a new Member State would need to ask what mandatory laws govern B2C transactions in their proposed line of business.

This is a fairly limited question, which a consumer law specialist should be able to answer. A specialist law firm would be required if only for linguistic reasons. It is estimated such a task would be likely to require one to two days' work for a relatively junior lawyer to research the point and write a letter of advice. That together with some supervision would amount to costs of **€2-4,000**.

(ii) Rome I

Article 5 of the Rome I requires a business to decide if it wants to use the same set of standard terms across the EU or to have a single set of standard terms with national annexes.

Drafting the same set of standard terms compliant in all Member States presents formidable drafting barriers and would be extremely expensive. Drafting a single set of terms with national annexures is probably technically easier. It would still involve sending one set of terms to a law firm in each relevant country for advice on relevant issues and the drafting of an annex to meet that country's legal requirements. This would involve a number of legal specialists to check local compliance with all applicable laws. The estimated legal costs are around **€10,000 per EU market**.

If a business decided it wouldn't bother with standard terms but simply rely on the local default laws, it still has to obtain detailed advice on all applicable law, not just mandatory laws. For example, it has to ask whether its proposed mode of doing business creates a binding contract, what its rights against the consumer are, what the consumers' rights against it are, cancellation rights, and so forth. That again is not likely to cost significantly less than **€10,000 per EU market**.

The CBI has concluded that the direct costs of a pan-EU contract for a business seeking to trade in other member states to be at least €10,000 per market – or **€260,000 for all other Member States**. When combined with the associated indirect costs, the revisions to Article 5 represents a significant burden on business. In our view these estimated costs represent a major – and in our view, unnecessary – barrier to entry in EU markets. We are concerned that faced with initial costs like these, many firms, particularly SMEs will not expand into cross border trade, thereby reducing competition and consumer choice and increasing prices either due to the passing on of costs or a result of reduced competition.

