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European contract law: doubling up

The European Commission has long hankered after a European contract law. Many years of action plans, of academic investigations, and of reports and resolutions have now led to the first concrete step towards this goal, namely the Commission's proposal for a Common European Sales Law. This is limited in scope to the sale of goods and related matters (financial services are excluded - for now), would be optional only, and would be implemented by the insertion of the Common European Sales Law into national laws alongside, but not as a substitute for, those laws' current sale of goods legislation. If chosen, the Common European Sales Law would trump existing consumer protection laws - lowering the level of protection in some states, raising it in others - which will concern consumer representatives. The quality of the proposed Sales Law will concern everyone. The political and legal path to the implementation of any sales law could be long and bumpy, despite the Commission's wish to complete it within a year.

Key Issues

- **Commission proposes a Common European Sales Law**
- **CESL will be available for consumer and SME sales of goods**
- **Financial services excluded but a study on their addition is planned**
- **If chosen, CESL will deprive consumers of the protection of their home laws**
- **Is there a sufficient case that a CESL is necessary for the internal market?**
- **Does the EU have power to enact a CESL?**
- **Is there enough political clout behind the CESL to ensure its passage?**

"The optional Common European Sales Law will help kick-start the Single Market, Europe's engine for economic growth" boasted Commissioner Reding on the launch of the European Commission's proposal for a Regulation on a Common European Sales Law (COM(2011) 635). Few will believe that a Common European Sales Law (CESL) can overcome the economic problems currently afflicting the Eurozone and the rest of the EU, but Mrs Reding asserts that her CESL "will provide firms with an easy and cheap way to expand their businesses to new markets in Europe while giving consumers better deals and a high level of protection."

The path leading to this nirvana will not be straightforward. There are many who will be prepared to fight the proposal on the beaches and on the landing grounds, whether in the name of consumer protection, self-interest or politics. There are others who might be indifferent to the concept, but will query the manner of its implementation and its legality as a matter of EU law. There are others still who will approve of the concept, but consider the proposed text of the CESL not fit for purpose. The sight of an advancing Mrs Reding leaves many in Brussels trembling, but persuading the EU to accept this proposal may prove a hard task even for her, especially as the Commission wants it completed within a year.

In this briefing, we first explain the Commission's proposal and then discuss the political and legal obstacles in its path, before turning the content of the proposed law itself.

The mandatory scope of the Common European Sales Law

The Commission was at one time looking at an all-encompassing European contract law, but its ambition has reduced in scope, temporarily at least. As a result, its proposal is that those who wish to use the CESL must ensure that they and their transaction meet three criteria. These criteria relate to the territorial scope of the transaction, the subject matter of the transaction, and the parties to the transaction.

As to territorial scope, if the Commission's proposed regulation comes into force, the CESL will be available for cross-border transactions (proposed regulation, article 4). For these purposes, a business to business transaction is cross-border if the businesses have their habitual residences in different states, at least one of which is a member state. A contract between a consumer and a business is cross-border if the consumer's address, the delivery address for the

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Simon James +44 (0)20 7006 8405

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

goods or the billing address is located in a state other than the state of the business's habitual residence, and one of those is in a member state of the EU. Where a business operates through a branch, agency or other establishment, the location of that establishment is treated as its habitual residence.

On subject matter, the CSEL will be available for the sale of goods, for the supply of digital content and to related service contracts (proposed regulation, article 5). Sales of goods for these purposes are contracts under which tangible movables (but not utilities, like water and gas) are sold by one party to another in return for money. Digital content is defined as "data which is produced and supplied in digital form which can be stored by the user and re-used, whether or not supplied on a tangible medium", and includes videos, audio, video games and software, but excludes financial services (including online banking), electronic communication services and gambling. The CESL applies to service contracts related to the sale of goods or digital content, eg installation, maintenance and repair.

The CESL cannot be applied to "mixed purpose contracts", ie contracts that include elements other than the sale of goods, the supply of digital content and related contracts (proposed regulation, article 6). It also cannot be used for consumer contracts where the consumer is granted credit (eg deferred payment or payment by instalments). However, to avoid excluding digital subscription services, this exclusion does not apply to digital content of the same kind supplied on a continuing basis and paid for by means of instalments.

As to the parties, the CESL will only be available for choice if the seller of the goods or the supplier of the digital content is a business (defined as a "trader"), ie it will not apply if a consumer is selling goods, but it will be available if a trader is selling goods to a consumer (proposed regulation, article 7). If both parties are traders, the CESL can be used if at least one of those traders is an SME. An SME is defined as a business that employs fewer than 250 persons and has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million.

The effect on consumers of the Common European Sales Law

The parties to a consumer transaction can choose the law that governs their transaction (in reality, the business will propose the governing law and the consumer's only option is to accept or to shop elsewhere). However, article 6(2) of the Rome I Regulation on the law applicable to contractual obligations states that in most cases that choice will not deprive consumers of the benefit of the provisions of their home consumer protection law if those provisions cannot be derogated from by contract. This means that a business in, say, France selling to consumers in Germany and Italy must consider both German and Italian consumer protection laws in order to ensure that it complies with those laws and understand its obligations.

In order to avoid this multiplication of laws, the Commission's aim is that, if the CESL is chosen, consumers will gain the protections set out in the CESL but will lose the protections that currently exist in their national law. How the Commission seeks to achieve this alchemy without changing the Rome I Regulation is discussed further below.

The optional and future scope of the Common European Sales Law.

The Commission's proposal only allows the use of the CESL if all the three criteria described above are met. However, the proposal permits individual member states the freedom to expand the availability of the CESL in two of those three areas (proposed regulation, article 13).

With regard to cross-border business, the Commission's mandatory scope of the CESL would require a trader who wanted to use the CESL for consumer business to have two sets of standard terms: one for use by consumers in the trader's home country appropriate for that country's law; and one for use by consumers in other EU member states appropriate for the CESL. If the business operates through branches or subsidiaries outside its home state, it must have more than two sets of terms – transactions through a branch with a consumer in the same country as the branch are outside the mandatory scope of the CESL.

To avoid this potential duplication, the Commission's proposal allows member states to permit the CESL to be used in domestic transactions (proposed regulation, article 13(a)). This would have advantages for businesses in allowing them to use only one set of terms throughout the EU. However, the effect would be to allow businesses to opt out of domestic consumer protection law into that provided by the CESL.

The Commission plans a feasibility study as to whether financial services should be added to the scope of the CESL

With regard to parties, if a business wants to use the CESL for SME business, it must be satisfied that the other party is an SME. If the other party is not an SME, the applicable law must be determined in accordance with the normal rules laid down in the Rome I Regulation. In some cases, it will be obvious that the other party is an SME, but in many cases it will not be. Does a counterparty have 250 employees today, or has one just left? Is the turnover for the current year relevant (and therefore unknowable until after the end of the year) or is it last year's? To try to avoid this potential ambiguity, the Commission's proposal offers member states the option of allowing the CESL to be used in business to business transactions even if neither party is an SME (proposed regulation, article 13(b)). For reasons discussed below, however, the CESL is unlikely to be attractive to businesses.

The area in which the Commission's proposal does not allow member states to display greater liberality is the subject matter of the contract. That is because the

CESL does not contain provisions appropriate for other types of contract. The CESL contains a general section, and then provisions specific to the sale of goods (the equivalent of the Sale of Goods Act 1979). It contains nothing about, for example, financial services contracts, which will therefore remain outside even the CESL's optional scope. However, the Commission does not intend to rest at the sale of goods. It has plans for a "feasibility study" as to whether financial services should be added to the scope of the CESL. The Commission's last "feasibility study" comprised the drafting of what has become its CESL. Presumably a feasibility study into the addition of financial services will similarly involve appointing a group to draft terms that could be bolted on to the CESL to cover financial services. Sale of goods may be the point of departure for the Commission's plans, but there will be many more destinations before the journey terminates.

How can the Common European Sales Law be chosen?

If the parties to a contract choose, say, English law or German law to govern that contract, they will get the traditional versions of English or German law, not the CESL. If parties to a business to business contract wish to choose the CESL, no formality is required, but they must make clear their intention to use the CESL. For consumer transactions, presumably in the hope of appeasing the consumer lobby, the Commission has included strict provisions to try to ensure that consumers know that they are entering into a contract subject to the CESL and are briefed as to its terms. This is to be done through pre-contractual information and the manner in which the choice of the CESL must be made.

The Commission's proposed regulation requires traders to draw the consumer's attention to the proposed application of the CESL before the conclusion of the contract by providing to the consumer "in a prominent manner" a standard form notice set out in Annex II to the proposed regulation (proposed regulation, article 9). Annex II contains a side and a half's description of a consumer's core rights under the CESL, starting with the assertion that the CESL is identical throughout the EU and is designed to provide consumers with a high level of protection. The notice is required to include a hyperlink to a website where the consumer can obtain the full text of the CESL (all 186 articles, though inconveniently the definitions have been inserted in the proposed regulation rather than in the CESL itself).

Not only must the business provide pre-contractual information to a consumer but the consumer must give explicit consent to the application of the CESL "separate from the statement indicating the agreement to conclude the contract" (proposed regulation, article 8). The trader must also provide the consumer with confirmation of the agreement on a durable medium (which includes a digital copy). When buying on the telephone, consumers are not bound until they have received this confirmation together with the Annex and have subsequently expressed their consent.

Consumers buying on the internet are already required to tick numerous boxes to confirm their agreement to the transaction subject to the CESL. The Commission's proposal will add at least two more boxes, together with an email, in order to conclude the transaction. Do consumers now read the terms and conditions to which they confirm their agreement? Will they really read the Commission's notice, especially if the result of not agreeing to the CESL is that the transaction is aborted? How many will go on to read, let alone understand, the CESL itself?

The Commission is making "a pointless proposal" (Which?)

If a business fails to provide the pre-contractual information required, consumers are not bound by the contract until they have received confirmation of the agreement, accompanied by Annex II to the proposed regulation, and have then expressly consented to the use of the CESL. If the consumer does not give consent to the CESL separate from the agreement to conclude the contract, the agreement on the use of the CESL is not valid, but it is less clear whether the agreement will then take effect under the law that would otherwise govern it. Whether or not that is so, member states must introduce penalties for traders who fail to meet these two information requirements, the penalties being "effective, proportionate and dissuasive" (proposed regulation, article 10). The risk for the Commission is that the threat of penalties will dissuade businesses from using the CESL rather than persuading them to comply with the information requirements.

Standard terms

Although not part of the proposed regulation itself, the Commission says in a communication to the Parliament and the Council (COM(2011) 636) that it will take certain "flanking measures" to support its CESL. These include developing "European model contract terms" for specialist areas of trade or sectors of activity. The Commission's aspiration appears to be that not only will there be a CESL, but there will also be standard European terms and conditions that traders can use with the CESL, avoiding the need to draft their own.

The politics of a European contract law

The politics of European contract law is Byzantine in its complexity. The motivation behind the repeated pushes over many years from the European Parliament and Commission has less to do with the minutiae of contract law than with bringing about ever closer integration within the EU. The desire for a more perfect union is not, however, sufficient on its own to justify a legal act. The EU is based on laws, and a legal basis for legislation must be found. The Commission has alighted upon the needs of the internal market as its justification for its CESL, but the need to provide this justification also explains why, for now, the Commission's proposal is limited to the sale of goods.

The European Commission’s formal contention is that the current structure of contract law, under which each member state of the EU has its own law, adds to transaction costs, especially in consumer transactions. The Commission considers that this discourages

businesses from engaging in cross-border trade and, as a result, damages the internal market and reduces consumer choice. The CESL is necessary to correct the position.

Ironically, the starting point for the Commission's argument is another piece of EU legislation, the Rome I Regulation. Article 6(2) of Rome I provides that, for most cross-border consumer contracts, the choice of the governing law of the contract cannot deprive consumers of the safeguards provided by their home consumer protection law if those safeguards cannot be derogated from by contract. As the Commission concedes, this means that a business wishing to deal with consumers in another state must investigate that other state's consumer protection laws and adapt its contractual terms and its systems to ensure that they comply with that other state's laws. This is expensive, and discourages cross-border trade. It leads some suppliers to refuse to deal with consumers in a number of EU member states, particularly the smaller ones, because the cost of compliance renders it not worthwhile. The Commission estimates that three million consumers each year have internet transactions aborted because the seller will not deal with consumers in their countries.

There is an intuitive logic to the Commission's position. If a business was offered the chance of instructing 27 lawyers in 27 different countries to draw up 27 different sets of contractual terms or of instructing only one lawyer to draft one set of terms, the choice would not be hard for most. Doubtless for that reason, the Federation of Small Businesses and the British Retail Consortium both support the Commission's approach. The Director General of the British Retail Consortium said that the CESL "has the potential to boost British exports of goods throughout the EU and so boost growth and jobs in the UK."

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Few problems are susceptible of only one solution. The Commission adverts to another possible solution in a footnote to its communication to the European Parliament and Council about its proposal. Lauding the open internal markets of the US, the Commission says that "a trader established in Maryland, for example, can sell his products easily to a consumer based in Alaska, as under US law in such a situation the trader only needs to take account of the contract law rules applicable in Maryland and does not need to worry about the contract law of Alaska." Assuming that to be correct, why not adopt the same approach in the EU? Why not amend article 6(2) of Rome I to allow the seller's home consumer protection laws to prevail rather than the consumer's home laws. If this were done, the seller would avoid the costs of investigating the laws of other EU member states. Much consumer protection law is derived from other EU legislation, so consumers would not be cast to the mercy of exploitative traders.

This approach is, however, politically problematical. Although much consumer protection legislation indeed derives from EU law, the EU's legislation operates on the basis of minimum harmonisation, ie member states must provide at least the level of protection set out in the EU's directives, but member states can go further if they wish. Some states have so wished. Those that have implemented a higher level of protection do not now want to reduce that protection to the level offered elsewhere. Those that have implemented the minimum required do not now want to hamper business by imposing the higher level of consumer protection imposed in other member states. This issue came to the fore in the Commission's proposal for a Consumer Rights Directive, which would have set a uniform level of consumer protection across the EU. Years of difficult negotiations led to the Commission's original scheme being significantly restricted in scope and much watered down. Consumer protection law therefore continues to be different in each member state.

"I think of this as the Esperanto fallacy – a utopian belief that a perceived problem of diversity of languages can be solved by creating an extra one." (Kenneth Clarke)

Leaving consumers to the ravages of a seller's home consumer protection laws is not, therefore, likely to meet the Commission's version of realpolitik. It is, however, hard to see why the arguments about consumer protection will be any different when consideration turns to the CESL. Choice of the CESL will leave consumers to the ravages of a homogenised EU consumer protection law. The EU asserts that its CESL offers a high level of protection, but that protection will not be the same as the protection given by many member states. Consumer organisations are therefore reluctant to go along with the Commission on the CESL. The Consumers' Association has condemned the initiative as a "pointless proposal" with "no convincing evidence to support" it, and added that the proposal "could even lead to people having less protection". Similarly, BEUC, the European Consumers' Organisation, does not support what it describes as "this experimental and risky regulation". Politicians who may otherwise lean in favour of the proposal may therefore need to consider how they will justify themselves to their electorates.

One senior politician has already nailed his colours firmly to the mast. The Rt Hon Kenneth Clarke QC MP, the UK's Lord Chancellor (Minister of Justice), recently said:

> "There are 27 systems of contract law available for use in the single market. I have yet to see the evidence and am not yet persuaded that they are causing real difficulties for traders or consumers. But

> even if they were, it seems to me to be doubtful that the right solution can possibly be inventing a 28th.
>
> I think of this as the Esperanto fallacy – a utopian belief that a perceived problem of diversity of languages can be solved by creating an extra one. The wrong EU contract regime is rather more likely to do damage than the linguistic hobby-horse of good Dr Zamenhof – not least in tying up the Commission when it could be doing useful work elsewhere…"

Mrs Reding will require all her legendary firmness to overcome consumer representatives and sceptical politicians in order to secure implementation of her scheme. At one time, a debate between Mrs Reding and Mr Clarke was mooted, but it has not come to pass.

Can the EU enact a Common European Contract Law?

The EU must act within the powers given to it by its treaties (article 5 of the Treaty on European Union - TEU). The issue this raises for a European contract law follows the politics in its Byzantine obscurity.

There are three provisions in the treaties that might offer a legislative basis for a CESL. These are articles 352, 81 and 114 of the Treaty on the Functioning of the European Union (TFEU). Each has different criteria that must be met but, of equal importance, each engages different majorities. Article 352 requires unanimity amongst member states, which in practice will not be achieved. Measures under article 81 can be passed on the basis of qualified majority voting, with Parliamentary approval (unlikely to be an issue). However, article 81 has the problem that the UK, Ireland and Denmark are only bound by measures passed under it if they choose to be so bound (Protocol 21 to the TFEU). Article 114 operates on the basis of qualified majority voting, with all EU member states automatically bound.

Article 114 of the TFEU is the legal basis upon which the Commission relies for its proposal. Article 114 provides that:

> "Save where otherwise provided in the Treaties… [t]he European Parliament and the Council shall… adopt measures for the approximation [ie harmonisation] of the provisions laid down by law… in Member States which have as their object the establishment and functioning of the internal market."

The Commission cannot merely assert that its measures will support the internal market. Even the normally benevolent European Court of Justice (now the Court of Justice of the European Union) has repeatedly said that measures aimed at improving the internal market must genuinely have that as their object, must rest on objective factors and must actually contribute to the elimination of obstacles to the free movement of goods. The ECJ has, however, gone on to add that the legislature is entitled to a wide discretion in the area, with its decisions only capable of challenge if it has made a manifest error or manifestly misused its powers.

The Commission derives its objective justification for its proposal from its Flash Eurobarometer surveys into business and consumer attitudes, which are discussed further below. As mentioned there, those surveys are not entirely fulsome in their support for the Commission's position, and will doubtless come under very detailed scrutiny to determine whether they provide the objective evidence the Commission needs to allow the EU to implement the Commission's proposal. For example, do the statistics justify the EU moving beyond online business to consumer trade?

Even if the Commission can surmount this initial evidential burden, others still lie in its path. For example, article 114 refers to the "approximation" of laws. Does the proposal amount to approximation since it leaves existing laws in place (though the ECJ has said in the past that the legislature has a discretion as to the method of approximation most appropriate for achieving its desired result)? Any proposal must meet the requirement of proportionality laid down by article 5 of the TEU, ie the means employed to address a problem must be suitable for the purpose and not go beyond what is necessary to achieve it. Is the insertion of a whole new contract law proportionate in this sense or could other less invasive methods be used?

The Commission must also circumnavigate article 81 of the TFEU, under which the Rome I Regulation was introduced. Article 81(1) requires the EU to

> "develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments… Such cooperation may include the adoption of measures for the approximation of laws…."

Article 81(2) goes on that, for the purposes of article 81(1), the EU "shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring… the compatibility of the rules applicable in the Member States concerning conflict of laws…"

Article 81 is not easy to follow (eg if, as article 81(1) stresses, it is focused on the mutual recognition of judgments, how was Rome I passed under its predecessor, since it lays down rules to determine what law governs a contract, which has nothing to do with judgments). The substantive effect of the Commission's proposal is to amend article 6(2) of Rome I since it results in consumers no longer having the protection of their home laws but of a centralised EU consumer protection law. Should the measure have been tabled under article 81 (is it one of the provisions where the Treaties provide otherwise, as referred to in the opening words of article 114?) or under both articles, preserving the UK's opt out? (More radically, does the Commission's argument for its CESL demonstrate that article 6(2) of Rome I is itself outside the EU's powers since the Commission now argues that article 6(2) obstructs, rather than supports, the internal market ?)

It might even be questionable whether, on its current draft, the CESL does enough technically to achieve the Commission's objective, particularly as far as consumers are concerned. The Commission's scheme is that each member state will have two contract laws: its existing contract law; and the CESL (proposed regulation, recital (10)). However, the proposed regulation doesn't say that. The Commission's proposal says that parties may

in some circumstances agree that the CSEL should govern their contract and, if they do, that the CESL shall govern the matters addressed by its rules (proposed regulation, article 11). It doesn't say that the CESL is part of national law. The proposed regulation merely says that the CESL exists, and article 288 of the TFEU says that a regulation shall be directly applicable in all member states. EU legislation must take effect (as the German Supreme Court has emphasised) in accordance with national constitutional principles. But does that national law, like section 2 of the European Communities Act 1972, when coupled with article 288, render those measures part of national law for the purposes of the Rome I Regulation, especially as the emphasis in article 6(2) is on the consumer's home law?

Leaving that aside, the Commission's aim by inserting the CESL into national laws is that it can be chosen as the governing law of a contract under the Rome I Regulation, which probably only allows the choice of national laws, not supra-national laws. No amendment of Rome I is, on the Commission's hypothesis, necessary. But article 6(2) of Rome I remains in place, which provides that consumers cannot be deprived of the benefit of their home consumer protection law. The Commission's argument is that home consumer protection law will be set out in the CESL. So, for example, if consumers in the UK select the CESL that exists in German law, they will still be entitled under article 6(2) to the benefit of UK consumer protection laws. The Commission contends that UK protection will be the same as it is in Germany because the relevant laws in both countries will be set out in the CESL. As a result, article 6(2) will cease to have any "practical importance" (proposed regulation, recital (12)).

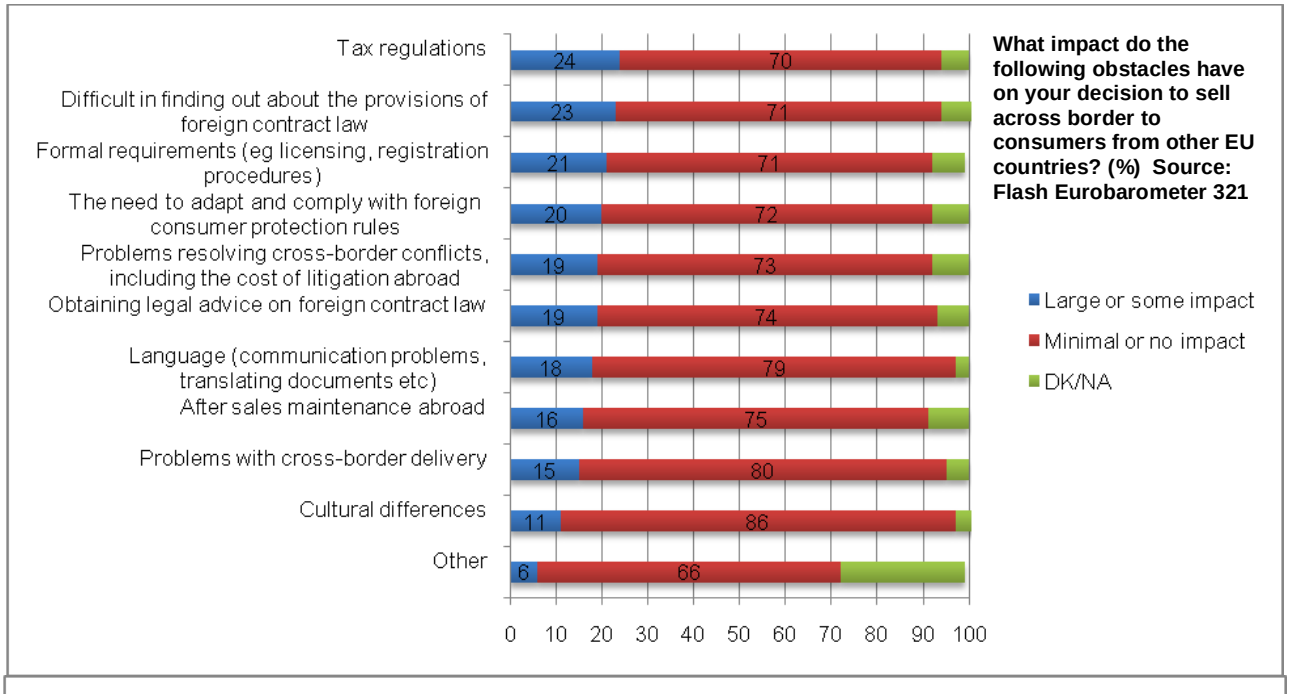
The result of the introduction of the CESL will be that the UK has two sets of consumer protection laws: those that existed immediately prior to the introduction of the CESL and which will continue to exist, and those set out in the CESL. Neither of these can be derogated from by contract. Why is the set of consumer protection laws referred to in article 6(2) of Rome I necessarily the set in the CESL? If the CESL overrides existing national laws introduced to comply with EU directives, does it need to be rather more specific about it? Recitals might explain why the legislation has been passed, but substantive provisions should go in the regulation itself.

The legal position is, like the political position, anything but clear and is beset by technicalities. The Commission has more thinking to do if it wants to get its way.

The Commission's statistical base

The Commission's evidential case on the need for its CESL rests heavily on two Flash Eurobarometer surveys, numbers 320 and 321, published with the Commission's proposal. These surveys offer business views on a business to consumer contract law and on a business to business contract law. The surveys were heavily weighted towards very small businesses (over 90% of respondents in each survey had fewer than 50 employees, and the vast majority of those had fewer than 10). Leaving aside how representative the surveys are, the surveys show that businesses would like a CESL but that it may make little difference to their conduct.

For business to consumer transactions, 71% of the businesses surveyed were likely or very likely to use a CESL (this ranged from 83% in Slovenia down to 49% in the UK; Clifford Chance's 2005 survey produced higher figures, with 82% likely or very likely to use an optional European contract law). 53% even wanted an EU contract law replacing national laws. But when asked what effect the availability of a CESL would have on their activities, only 10% thought that it would increase their business a lot and 30% that it would increase their business a little. This perhaps reflects respondents' views that the current legal position does not cause them much difficulty when dealing with consumers.



Respondents' views as to the impact of various potential obstacles to cross-border consumer transactions are set out in the box above. Only 23% of those surveyed identified difficulty in finding out about foreign contract law as having a large or some impact on cross-border trade - or, the other way round, over three-quarters do not seem to have difficulty with this.

The message of the Commission's own survey is, therefore, that business would welcome a CESL, but that the current diversity of contract law really isn't much of a problem. 73% of respondents said that, if the CESL was available, they would sell to no extra countries or up to five new countries. It is therefore unlikely that the CESL will help consumers in the smaller EU member states, who, according to the Commission, currently face limited choice and higher prices. The authors of Flash Eurobarometer 321 themselves comment that "consumer contract-law related problems were *typically not standalone burdens*, ie they usually occurred with other obstacles to cross-border trade" (emphasis in the original). Just addressing contract law related issues may not on its own achieve much.

Looking at it from the other end of the transaction, an earlier Commission survey (Flash Eurobarometer 299) reveals that only 7% of consumers buy online from suppliers in other EU member states but 33% from business in their own country (this ranges from 13% and 54% respectively in Sweden and 9% and 53% in the UK to, perhaps unsurprisingly, 39% and 7% in Malta). 44% of consumers say that uncertainty about their rights discourages them from shopping abroad. Whether this reflects uncertainty as to substantive legal rights or as to the ability to secure practical redress against a trader in a foreign country is a different question. Do consumers really fret about their rights under the Unfair Terms in Consumer Contracts Regulations or whether the seller will actually fix the problem?

With regard to business to business transactions, the results of the Commission's survey are similar. If there was a CESL, 70% said that they were very likely or likely to use it, but only 9% thought that it would increase their business a lot, and 25% a little. 79% said that a CESL would not increase the number of countries with which they did business or that they would consider dealing with up to five other countries if a CESL was available. Again, there are obstacles to business to business cross-border trade, but they are not desperately serious. 22% said licensing, registration and similar had a large or some impact, the figure was 21% for tax, 20% for finding out about foreign contract law, 17% for problems with cross-border conflicts, 16% for obtaining advice on foreign contract law, 15% for language and 14% for difficulties in agreeing the governing law of a contract.

Nor is the there the same intuitive logical attraction for the use of the CESL in a business context, even for SMEs, as there is for business to consumer trade. The best that can be said is that a business might feel more instinctively comfortable in dealing on the basis of its own laws than on the home law of the other side. One side must, however, accept the other's home law, unless the parties compromise on a neutral law. The Commission envisages its CESL as being everyone's home law, or at least everyone's neutral law. However, if a business takes legal advice, the cost of doing so is unlikely to differ hugely whether the advice is on English law, Estonian law or European law. If a business does not take legal advice, the cost of doing so is not an obstacle to the business.

The use and content of the Common Sales Law

The Commission's surveys asked whether, in the abstract, parties would use a CESL. That is the easy part. The content of the CESL is more difficult, and was not tested in the surveys (nor could it reasonably be tested in this way). The Commission published what has become its CESL earlier this year (see our briefing entitled *European contract law: draft code published*, of May 2011). Since then, the Commission has tidied up some of the more blatant mistakes (eg in the prescription provisions, which were previously incomprehensible) and fiddled with other bits (eg good faith is now "honesty, openness and consideration for the interests of the other party", "openness" replacing the "loyalty" of the earlier draft), but the core remains the same.

Businesses that sell to consumers, or wish to sell to consumers, across the EU's internal borders will want to consider using the CESL. If they only sell into a small number of markets, have no desire to expand, and already have in place terms appropriate for those markets, there may be no immediate incentive to switch to the CESL. Any change involves cost. In any event, they will need to compare and contrast the obligations arising from the CESL's consumer protection provisions with those arising under the national laws in the markets into which they sell to determine which are more suitable.

For businesses that sell, or wish to sell, to consumers in a large number of markets, the incentives to use the CESL are perhaps higher. A new entrant to the market would need strong reasons to incur the costs of dealing with the national consumer protection laws of a large number of member states rather than with the CESL alone - the CESL would need to be significantly more disadvantageous than national laws to justify using national laws. If an existing market participant already has in place terms and conditions appropriate for the national laws of each EU member state, changes in those national laws (frequently as a result of EU law) may emphasise the attractions of only having to amend one set of contractual terms rather than up to 27.

There could even be some arbitrage between the laws of member states. For example, if four of the six member states into which a business sells imposes particularly onerous obligations not replicated in the CESL, it would be possible to use the CESL for those member states but to retain national law for the remaining two. Choice of this sort, however, entails some cost.

The use of the CESL will not avoid the need to consider national laws altogether. Recital (27) to the proposed regulation cites a list of things on which even those choosing the CESL must fall back to national law. These include, the language of the contract, set-off, transfer of title and non-contractual claims. The CESL may provide some solutions for cross-border consumer

business, but it does not provide solutions for all the problems.

As far as business to business transactions are concerned, the CESL has few, if any, advantages. Business to business transactions enjoy far more genuine freedom of contract than consumer transactions. Accordingly, the precepts against which any contract law must be judged are whether it delivers that freedom of contract and provides certainty of outcome. The CESL comes up seriously short on both, for reasons discussed in greater detail in our earlier briefing, *European contract law: draft code published*. In summary, the CESL is a regulatory structure that allows too much scope for parties escape their obligations by crying unfair or similar, thus undermining any aspiration of contractual certainty.

If the Commission wants business to use its CESL, it must go about the process of preparing that law in an open and consultative manner. Instead, the Commission has treated the content as if it were a matter of insignificant technical detail for academic experts rather than the core of the project. The Commission's CESL contains 186 articles, each of which merits detailed consideration and debate. That might not be a quick process, but engaging potential users fully is the only way to produce a CESL suitable for those users.

Conclusion

The politics and legal basis of the CESL may yet prove difficult for the Commission to overcome, but if the Commission can surmount those obstacles, a CESL could have advantages for those dealing with consumers in cross-border transactions (though the CESL could be improved). For business to business transactions, the CESL needs radical revision before it is likely to prove acceptable.