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# **An Optional Common European Sales Law: Advantages and Problems**

Advice to the UK Government

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# AN OPTIONAL COMMON EUROPEAN SALES LAW: ADVANTAGES AND PROBLEMS

Advice to the UK Government from the Law Commission  
and the Scottish Law Commission

## SUMMARY

- S.1 On 11 October 2011, the European Commission published a proposal for a “Common European Sales Law” (or CESL),<sup>1</sup> which traders may choose to use to govern their cross-border contracts. It covers the sale of goods, the supply of digital content and some related services.
- S.2 The Law Commission and Scottish Law Commission have been asked to advise the UK Government on the potential advantages and disadvantages of the proposal. Our aim is to promote discussion and debate. The European Commission’s draft is a complex document, which is not always easy to understand. We hope this paper will explain the contents of the proposed Regulation and highlight the policy choices which have been made.
- S.3 To inform the debate, we were keen to publish within a month of the European Commission’s proposal. This means that we have concentrated solely on sales contracts and have not had time to consider the supply of digital content.
- S.4 Effectively, the European Commission has made two separate proposals: one law for traders to use when selling to consumers; and one law for businesses selling to other businesses. The two proposals will operate in different ways, and we look at them separately.

### CONSUMER SALES: THE CURRENT LAW<sup>2</sup>

- S.5 Under the current law, as set out in the Rome I Regulation, a trader which directs its activities to an EU member state must comply with the mandatory consumer protection laws of that state. This may be a problem in internet and other distance selling where traders are dealing with consumers from many different states at once.

<sup>1</sup> European Commission, Proposal for a Regulation on a Common European Sales Law, 11.10.2011, Com (2011) 635 final.

<sup>2</sup> See Part 2.

- S.6 If an English business merely sets up a website offering items for sale which can be accessed from France (for example), there is no reason why the contract should not be subject to English law. However, if a business “directs” activities to France it must comply with the mandatory provisions of French law. The concept of “directing activities” is fluid and uncertain. If an English website regularly accepts orders from France, and starts to make changes to facilitate those orders, then it risks being found to be directing its activities to France.<sup>3</sup> The changes do not need to be large or dramatic. They may include quoting reviews from French customers, or spending money on an internet referencing service in France.
- S.7 Businesses are concerned that at some indefinite point they will tip from operating a website accessible from France to operating a website directed at France. At this stage, the contracts may remain under English law but become subject to the additional mandatory provisions of French law.
- S.8 A mandatory provision is one which may not be excluded by contract. In consumer law, many provisions cannot be excluded, including remedies for non-conformity and unfair terms protection. These provisions are not necessarily very different across member states: many follow the basic structure of the EU Consumer Sales Directive and Unfair Terms Directive. However, these directives are minimum harmonisation measures: member states may add to them. Without legal advice, businesses will probably not be aware of what these additions are.
- S.9 This may discourage businesses from selling across borders. An EU-wide survey asked businesses about the impact of cross-border contract law obstacles. Of the businesses which sold to consumers across borders or were planning to do so, 9% reported that consumer contract law obstacles had a major impact and always or often deterred them from selling cross-border; 23% reported that although these factors had some impact on them, they were “not very often” deterred; and 68% said they were never deterred.<sup>4</sup>

## **THE PROPOSED SOLUTION**

- S.10 Under the proposal, in cross-border sales, the trader could offer to contract under the new system of consumer contract law set out in the CESL.
- S.11 The trader would state that the goods were offered under the CESL and would provide a short information leaflet about it (around a page and a half long). If the consumer explicitly agreed, the law governing the contract would then be the CESL rather than a national system. The CESL would effectively be a separate legal regime which, if chosen, would take precedence over the mandatory rules of domestic law.
- S.12 Traders are unlikely to allow consumers to choose whether to contract under the CESL or their own national law. That would simply add another legal system to the current confusion. Thus consumer choice would usually be limited: either to accept the CESL or not to buy from the trader.

<sup>3</sup> See paras 2.21 – 2.27.

## IS THE CESL SUITABLE FOR DISTANCE SALES?

- S.13 We think there is a case for a new optional code to cover distance selling across the EU.
- S.14 We are not sure, however, that the current text always strikes the right balance. Distance selling needs its own clear rules, designed around automated processes. The CESL is based on more general contract law principles and we think that it would benefit from greater focus on distance sales. More could be done to clarify when the contract is formed;<sup>5</sup> the effect of a change of circumstances;<sup>6</sup> and unfair terms protection.<sup>7</sup> Provisions on the transfer of property could also usefully be inserted.<sup>8</sup>
- S.15 There are three main problems with the text as currently drafted:
- (1) It is not always easy to understand. It would be a more accessible document if:
    - (a) there were separate codes for business-to-consumer contracts and business-to-business contracts;
    - (b) notes and internal references were provided;
    - (c) it was accompanied by an authoritative guide.
  - (2) From the trader's point of view, the proposal is limited in the following ways:
    - (a) Unless member states exercise an option to extend the CESL to domestic sales, traders must use one contract law system for domestic sales and one for cross-border sales.
    - (b) It is cumbersome to use for telephone sales. This is a problem where traders use both online and telephone methods alongside each other.
    - (c) Traders must still find out about and comply with the linguistic requirements of any member state to which they direct activities.
    - (d) The CESL provides consumers with an extended right to reject, for up to two years from the date the consumer could be expected to be aware of the fault. This may discourage traders from using the CESL at all.

<sup>4</sup> The Gallup Organization, Flash Eurobarometer No 321, *European contract law in consumer transactions*, accessible at: [http://ec.europa.eu/public\\_opinion/flash/fl\\_321\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_321_en.pdf).

<sup>5</sup> See paras 4.48 to 4.71.

<sup>6</sup> See paras 4.105 to 4.111.

<sup>7</sup> See paras 4.91 to 4.104.

<sup>8</sup> See paras 4.41 to 4.44.

- (3) From the consumer's point of view,
  - (a) The uncertainty of the provisions on allowance for use may lead to difficult arguments, which disadvantage consumers.
  - (b) The lack of damages for distress and inconvenience may reduce the level of consumer protection in some circumstances.

S.16 We hope these issues can be addressed in the forthcoming EU legislative process on the proposed Regulation.

### **PROBLEMATIC ISSUES**

S.17 Below we list the most problematic issues. These are whether the CESL should be confined to cross-border sales; language; the right to terminate; damages for distress and inconvenience; telephone selling; and doorstep selling.

#### **Should the CESL be confined to cross-border sales?<sup>9</sup>**

S.18 Most internet traders wish to use only one system of law for all their sales. If the CESL is confined to cross-border sales, they will need to use two: one for domestic sales, and one for cross-border sales. On the other hand, consumer groups fear that if the CESL may be used domestically, it could undermine consumer protection in member states.

S.19 Article 4 of the proposed Regulation provides that the CESL may be used for cross-border contracts. However, under Article 13, member states may also decide to make the CESL available for domestic sales if they wish. Article 4 defines a "cross-border" sale: the consumer must provide an address in one country (which may be a billing address or delivery address) and the trader must be habitually resident in another country. At least one country must be an EU member state.

S.20 As we discuss in Part 3, it is not always clear where a multi-national internet trader is "habitually resident". We think one needs to look at the operation centre that receives the consumer's agreement to use the CESL, rather than the location of the warehouse that dispatches the goods. But if it is acceptable for a firm based in Luxembourg to use the CESL for its considerable UK trade, why should it be unacceptable for a firm based in Leicester to do the same? If a multi-national retailer based abroad is entitled to use the CESL in the UK while a retailer based in the UK is not, the CESL might become a factor discouraging multi-national traders from basing their internet operations in the UK.

S.21 If the CESL is adopted, and becomes successful, we think the UK Government should consider exercising its option to extend the CESL to domestic distance sales. Unfortunately, under Article 13 of the proposed Regulation, the option would require the CESL to be extended to all consumer sales, not just distance selling. This has the potential to undermine a member state's ability to respond to specific abuses in problematic areas, such as doorstep or other off-premises selling.

<sup>9</sup> See paras 3.19 to 3.47

## **Language<sup>10</sup>**

- S.22 Difficult questions arise about how far traders who sell across the EU should be obliged to translate information into the language of the different states. The CESL, like the Consumer Rights Directive, leaves the issue of language to the discretion of the member state. If a state wishes, it may require that contractual information is given in a particular language. For example, French law currently requires that certain contractual information be in French.
- S.23 Even if an internet trader uses the CESL it must still comply with each member state's linguistic requirements. A small business trading across borders must find out what language requirements are imposed in the 27 member states. Where language requirements exist, it must either comply with them or ensure that it does not direct its activities to that state.
- S.24 This protects consumers. When people are dealing in unfamiliar languages, they will be less able to absorb information. On the other hand, traders wishing to start a pan-European business are unlikely to start by translating their sites into all Community languages. A small British company selling its products abroad will probably start with a site only in English, to test the market, and add a few more languages slowly, over time, as sales start to take off. Linguistic requirements may limit small business start-ups and prove a barrier to trade.

## **The right to terminate for faulty goods<sup>11</sup>**

### ***The current law***

- S.25 The current EU Consumer Sales Directive sets out minimum remedies for faulty goods. The Directive provides a fairly low level of protection. Where goods are faulty, consumers must first ask for a repair or replacement. Consumers are only entitled to rescind the contract if a repair or replacement cannot be provided without unreasonable delay or significant inconvenience. Where consumers do rescind the contract, traders may retain a proportion of the price to allow for the use the consumer has had from the product.
- S.26 Member states may add to this minimum level of protection. In the UK, the consumer also has a long-established "right to reject". The consumer may require the seller to take the goods back and return the price straight away (without first seeking repair or replacement), provided rejection is made within "a reasonable time".
- S.27 In 2009 the two Law Commissions published a report on remedies for faulty goods.<sup>12</sup> We concluded that this right to reject was particularly valuable to consumers. However, we thought that the right should be time-limited: in normal circumstances the consumer should only be able to exercise the right to reject for 30 days following the sale. After 30 days, if the goods proved to be faulty, the consumer should start by seeking a repair or replacement.

<sup>10</sup> See paras 4.14 to 4.29.

<sup>11</sup> See paras 4.112 to 4.139.

<sup>12</sup> (2009) Law Commission and Scottish Law Commission, Consumer Remedies for Faulty Goods, Law Com No 317, Scot Law Com No 216.

S.28 We argued that where consumers did reject goods, they should receive their money back in full. Our focus groups with consumers found that the allowance for use was extremely unpopular: consumers felt that no reputable trader should sell them a faulty product, fail to repair it, and then require them to pay for whatever use they may have had from it.

***The right to terminate in the CESL***

S.29 Under the CESL, consumers have a right to terminate. At first sight, this is similar to the right to reject. The consumer may return the faulty goods and receive their money back, without first asking for a repair or replacement.

S.30 Unlike the UK position, however, this right is not time-limited. At first sight, the only time limit is the prescription period. The consumer must act within two years from the time they knew or could be expected to know of the fault, or within ten years of the sale, if this is a shorter period.

S.31 That said, it is possible that prolonged delay by a consumer may constitute a lack of good faith. Article 2 provides that a consumer who breaches the duty to act in accordance with “good faith and fair dealing” may not be able to exercise a remedy which they would otherwise have under the CESL. A consumer may also have to give an allowance for use, if they were “aware of the ground for avoidance or termination” but delayed taking action, or if “it would be inequitable to allow the recipient the free use” of the goods.

S.32 We are pleased that that the CESL recognises a right to terminate, but we have two concerns about how it operates:

- (1) It is too long. Retailers may be discouraged from using the CESL for fear that such an extended right could be abused.
- (2) It is too uncertain. Consumers and traders need quick, simple solutions to resolve problems. Too much scope for argument may disadvantage the weaker party, who is often the consumer. Under the CESL as currently drafted, there is too much scope to argue over whether the consumer has acted in good faith or should give an allowance for their use of the product.

**Damages for distress and inconvenience<sup>13</sup>**

S.33 In English and Scots law, damages for distress and inconvenience are allowed only in exceptional circumstances. One exception is where the main purpose of the contract is to provide pleasure or to avoid distress.<sup>14</sup> Damages are also available where the consumer has suffered some physical inconvenience and discomfort, for example where they have been prevented from using their home for a prolonged period.

<sup>13</sup> See paras 4.140 to 4.147.

<sup>14</sup> See para 4.143. we give the example of a wedding dress that falls apart during the wedding.

- S.34 Under the CESL, damages for “non-economic loss” such as distress and inconvenience are not allowed in any circumstances. This represents a reduction in consumer protection in some cases.

#### **Telephone selling<sup>15</sup>**

- S.35 As presently drafted, the CESL is difficult to use for quick telephone sales. This may cause difficulties for website traders who use online selling and telephone selling alongside each other.
- S.36 As discussed in Part 5, it may be cumbersome for the trader to send an information notice to the consumer before obtaining agreement to use the CESL. The CESL also includes a provision that a contract concluded by telephone is valid only if the consumer has signed the offer or has sent written consent. We think this provision needs to be looked at again.

#### **Doorstep selling<sup>16</sup>**

- S.37 Consumers are particularly vulnerable to doorstep selling. Member states need to be able to retain the power to reform their laws to provide consumers with clear, simple remedies. We think that initially the use of the CESL should be confined to distance selling. It should be permitted for off-premises sales only once it has become established.
- S.38 If the CESL were introduced for doorstep selling, further changes would be needed. In particular, Article 50 (on threats) should be clarified to include aggressive practices within the meaning of the Unfair Commercial Practices Directive. We would also welcome a clear remedy where Article 50 is breached; and the inclusion of negotiated terms within unfair terms protection.

### **BUSINESS TO BUSINESS CONTRACTS**

#### **The case for a new system<sup>17</sup>**

- S.39 At present, for business contracts, the Rome I Regulation allows a free choice of law. Parties to a commercial contract may choose any of the legal systems in the EU, or a national legal system outside the EU (such as New York law).
- S.40 For most businesses within the EU, the default regime for international sales contracts is the UN Convention on Contracts for the International Sale of Goods (CISG), also known as the “Vienna Convention”. This has been ratified by 76 countries, including most EU member states.<sup>18</sup> 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. It applies unless the parties expressly choose another regime.

<sup>15</sup> See paras 5.2 to 5.27.

<sup>16</sup> See paras 5.28 to 5.44.

<sup>17</sup> See paras 6.1 to 6.36.

<sup>18</sup> The exceptions are the UK, Malta, Portugal and the Republic of Ireland.

- S.41 For most businesses, contract law is rarely a high priority. The overwhelming majority of contracts simply work. Even when problems arise, most are resolved without recourse to law or lawyers. Where businesses do worry about choice of law, however, they are faced with a confusing array of possibilities.
- S.42 The main problem appears to be that businesses have too much choice. It is difficult for small and medium enterprises to find out about different legal systems, as this usually involves expensive legal advice. Businesses tend to favour their own legal system, making it difficult to negotiate on choice of law with businesses from other states.
- S.43 The CESL would provide another possible choice. If the CESL provides such obvious benefits that everyone would agree to use it without difficult negotiations, it would remove a source of business stress. It is supported by many small business organisations on this basis. On the other hand, if the CESL is just one more choice, it would add to the current complexity.

#### **The content of the CESL<sup>19</sup>**

- S.44 All systems of commercial contract law must grapple with the tension between certainty and fairness. English and Scots law have a reputation for leaning towards the certainty end of the scale. By contrast, the CESL is firmly towards the fairness end. It sets high standards of good faith and fair dealing and provides many discretionary remedies to a party who has suffered from a lack of good faith.
- S.45 This may protect a weaker party in negotiations – though this is less helpful in an optional regime, where a weaker party may have a choice of law imposed on them. The open ended nature of the discretion may also disadvantage the party least able to litigate.
- S.46 There may be a market for the CESL, but we are unsure whether the market would be sufficiently large or significant for the CESL to develop the critical mass it needs. Those who would most benefit from it are the least likely to use it. Where a weaker party contracts with a stronger party, the choice of law is likely to be dictated by the stronger party.
- S.47 Trade associations drafting standard term contracts may use the CESL as the governing law for the contracts. There may also be interest from small and medium sized enterprises dealing with other small or medium sized enterprises, but those who contract without legal advice are unlikely to give much thought to choice of law. And where they do, they will be naturally risk averse. They will be wary about using an untried legal system, unfamiliar to lawyers and judges alike.

#### **Restrictions on the use of the CESL<sup>20</sup>**

- S.48 Under the proposed Regulation, two restrictions are placed on the use of the CESL. The first is that the CESL could not be chosen by a large business contracting with another large business: at least one business must be a small or medium sized enterprise. We have three concerns about this restriction:

<sup>19</sup> See part 7.

<sup>20</sup> See paras 6.37 to 6.65.

- (1) It conflicts with the principle that businesses should be given a free choice of law.
- (2) We are not sure it is feasible to restrict choice of law without amending the Rome I Regulation.
- (3) The definition of an SME adds unnecessary complexity to the process.

S.49 Member states are given the option to remove this restriction, and we think that the UK Government should consider exercising its option.

S.50 Secondly, the CESL may not be used for “mixed-use” contracts, which include any elements other than the sale of goods, the supply of digital content or the provision of related services. This would make the CESL difficult to use in cases where (for example) one party provides training, or loans, or supplies equipment on hire. This exclusion may cause problems.

### **Conclusion**

S.51 The CESL offers the parties a free choice – which we welcome. Even if the CESL is hardly ever used, no harm would be done. On the other hand, we are not convinced that developing a CESL for commercial parties should be seen as a priority. We think efforts would be better spent on developing a European code for consumer sales over the internet, where there is stronger evidence that the current variety of contract laws inhibits the single market.