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THE CITY OF LONDON LAW SOCIETY RESPONSE TO THE MINISTRY OF JUSTICE DOCUMENT "A COMMON EUROPEAN SALES LAW FOR THE EUROPEAN UNION – A PROPOSAL FOR A REGULATION FROM THE EUROPEAN COMMISSION: A CALL FOR EVIDENCE"

INTRODUCTION

This document is a response to the Ministry of Justice's document "A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission: A Call for Evidence" the consultation period for which commenced on 28 February 2012 and ends 21 May 2012 (hereafter "the Call for Evidence").

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. Members of the CLLS advise a variety of clients from multinational companies, financial institutions, SMEs and individual businessmen to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees.

The CLLS has already submitted various responses in connection with the proposed Common European Sales Law ("CESL"), namely:

- In November 2010 the CLLS responded to the Ministry of Justice's Call for Evidence on the European Commission's Green Paper on Contract Law;
- In January 2011 the CLLS responded to the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses ("the Green Paper Response"); and
- In June 2011 the CLLS responded to the European Commission's document "A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback" (issued 3 May 2011).

Many of the points raised in these responses are repeated in this document, as they are central to any consideration of a CESL and remain unanswered.

The CLLS has seen a draft of the Law Society of England and Wales' response to the Call for Evidence and, on the basis of that document, endorses the Law Society's final response.

EXECUTIVE SUMMARY

The CLLS has real concerns over the proposed CESL initiative, ranging from objections over the fundamental principles underlying the proposals to significant practical implementation barriers.

These include:

- The need for a CESL has not been established;
- The legal basis for the Commission to enact a CESL is highly questionable;
- A CESL would breed uncertainty and confusion;
- The CESL would attract disproportionate cost at a time when EU Member States (and the businesses who operate in them) can least afford it;
- The proposed "optional" instrument is not optional at all;
- There are numerous substantial practical obstacles to effective implementation;
- The broad scope of the CESL is not a substitute for failing to deal with important issues in sale of goods contracts;
- The CESL may damage cross-border EU trade by driving businesses to adopt non-EU based legal systems; and
- The need to consider other more flexible solutions, which take account of the speed of technological change and how consumers actually contract online and via mobile platforms.

PART 1: THE COMMISSION'S PROPOSAL - THE PROPOSED REGULATION

THE PRINCIPLE OF A COMMON EUROPEAN SALES LAW

1) DO YOU SUPPORT THE PRINCIPLE OF A COMMON EUROPEAN SALES LAW AS PROPOSED BY THE COMMISSION? PLEASE GIVE EVIDENCE AND REASONS FOR YOUR ANSWER.

The CLLS does not support the principle of a CESL and believes that the Commission has failed to establish any unequivocal need for a CESL, both in respect of consumer (B2C) and business (B2B) transactions.

Indeed, the Commission seems to be relying on overly simplistic surveys rather than assessing in hard terms the benefits of the current system and providing a compelling case for why there is a need for change.

The CLLS repeats its views set out in its 2011 Green Paper Response on the surveys used by the Commission to supposedly justify the demand for a harmonised European contract law. The following text is taken from that Response:

> "It is not clear that the current regulation of contract law or any divergence of national laws present a significant barrier to trade as suggested by the Green Paper. Even the introductory section to the Green Paper is only prepared to go so far as to say that *"differences between national contract laws **may** entail additional transaction costs and legal uncertainty', and that consumers and businesses having limited resources **may** be*

reluctant to engage in cross-border transactions" (emphasis added). In a survey undertaken by the University of Oxford, a slight majority indicated that they thought that the existing diversity of contract laws might have a negative impact on their business, but most surveyed indicated that this would not be a deal breaker[1].

The Green Paper refers to the survey in Special Eurobarometer 292 (2008) to justify the argument that there is a demand for harmonised European contract law. The question in the survey was, however, unduly simplistic and only asked whether a party would prefer a contract to be based on the other party's national law or on harmonised European law. By contrast, other surveys (and particularly Flash Eurobarometer 128 (2002)) do not support contract law harmonisation as polls have shown that more than 50% of consumers already have the same or even greater confidence in cross-border transactions as in domestic transactions while only 26% have less trust in cross-border transactions, and for these 26% the perceived problems do not include the lack of a harmonised contract law.

Against the background of these figures it is very unlikely that harmonisation of contract law in Europe will significantly reduce trade barriers, not least because such an approach will not tackle obstacles of a more practical nature. Many consumers frequently travel on business or holiday to other countries and enter into contracts (hotels, car hire, purchases etc). If their ignorance of local laws does not significantly deter them from entering into such transactions, it is not clear that even consumers currently perceive the divergence of national laws to be problematic.

Additionally, from the point of view of businesses, according to Flash Eurobarometer 278 (2009), about 70% of retailers surveyed currently refrain from cross-border transactions with consumers and, even if the laws regulating such transactions were harmonised, about 60% would still not be interested in making sales to consumers in other Member States. In the assessment of most businesses, even complete legal harmonisation would leave the proportion of cross-border sales either unaffected (49%) or lead to just a small increase (37%), while only 9% would expect a substantial impact.

Most importantly, the survey evidence suggests that any benefits would depend on legal certainty. Yet the work to date, focused on the needs of consumers, provides for legal uncertainty in its terms (with overrides of the strict terms of an agreement on a number of different bases) and also would wholly lack the jurisprudential basis needed to resolve those uncertainties. There is no evidence to suggest the optional law would add anything but cost and confusion (and resentment by those induced to choose the option on the basis the law would be simpler for them). On the other hand, targeted measures, such as the Directive on Unfair Terms in Consumer Contracts fit into the national legal systems and provide immediate benefits to consumers throughout the EU, have fewer costs to implement and impose fewer burdens on the European Courts. However, even there the lack of resources for speedy resolution at EU level is a burden for affected litigants."

We also consider that the evidence put forward by the Commission to quantify the deterrent effect of differences in contract law does not stand up to detailed scrutiny. For example, the press materials accompanying the proposals (IP/11/1175 and MEMO/11/680) suggest that businesses face costs of €10,000 for each additional Member State into which they sell and €3000 in relation to website costs.

The reality, however, is that many businesses are in a position to avoid these costs altogether; for example, a business looking to sell to other businesses on an EU-wide basis can elect to make its

[1] As discussed by Professor Stefan Vogenauer at page 8 of the "Evidence" section of the House of Lords European Union Select Committee Report on *European Contract Law: the Draft Common Frame of Reference.*

offer subject to one set of terms governed by a single national law, rather than creating different sets of terms for each Member State in which they expect to make sales. In practice, many businesses do this without encountering significant resistance. If customers insist on contracting on the basis of their own national law, the business can then take a view as to whether it is worth obtaining local legal advice to adapt its standard terms – having first established the probable value of the customer's business. Translation costs could be minimised by restricting the number of different language versions to one or only a small number of widely spoken EU languages. Clearly, businesses selling to consumers are likely to incur translation costs – but this will apply to the whole of their sales operation and is simply part of the cost of doing business in a market with numerous language zones. It therefore seems to us that the figures offered by the Commission tend to create an exaggerated impression of the extent (if any) to which differences in contract law act as a deterrent to cross-border trade, without providing any proof that such an effect actually exists.

The entire justification for the proposal rests on the unproven assumption that substantial numbers of businesses are deterred from engaging in cross-border trade because of perceived difficulties relating to *contract terms alone*. We would accept that some businesses are deterred from cross-border trade because of the perceived difficulties of trading under a different framework of law and regulation. However, contract terms are only *one element* of that framework and are frequently the least controversial, especially in sectors where the parties have clearly established expectations as to what the contract will provide. Other differences, such as licensing or regulatory requirements which do not apply in the home state of the business in question or concerns over the difficulty of actually enforcing contractual rights, have a far more significant deterrent effect - yet the proposal does nothing to tackle these obstacles. For that reason, we doubt that the CESL will have any significant positive impact on cross-border trade.

2) DO YOU SEE ANY MAJOR STRENGTHS, WEAKNESSES, OPPORTUNITIES OR THREATS ASSOCIATED WITH THE PROPOSAL? IF SO, WHAT ARE THEY AND WHO DO THEY AFFECT?

Financial Burden

The financial impact of implementing a CESL does not seem to have been acknowledged in the process of the development of this instrument.

These costs cannot be underestimated and would be far reaching, including:

- the entire re-training of students, teachers, lawyers (including in-house lawyers) and judges across the EU and all the subsequent on-going costs of monitoring the application of the new law throughout the EU. The proposal that the use of a CESL is optional means that it will not replace existing national law, therefore training on CESL (including judicial developments) will need to continue to be run concurrent with training in developments in national contract law, leading to increased and on-going costs;

- the education of consumers about the new law. In particular, as a CESL will not replace existing law, explaining differences between a CESL and national law to consumers in a clear and comprehensible manner will be time-consuming and costly;

- the need for businesses to put in place parallel contract systems for domestic and cross-border transactions, depending on which law is chosen;

- the development of more detailed and lengthy contracts to counter the uncertainty of the new law, not least given the absence of jurisprudence. High levels of uncertainty are inherent in any new legal system, but particularly so where there is an absence of any established and consistent jurisprudence to enable parties to structure their transactions or

draft contracts with any confidence. Monitoring the different interpretations by national courts of a CESL pose significant challenges and costs;

By way of example, the Dutch Civil Code "Burgerlijk Wetboek" took 45 years to complete, from 1947, when the Dutch government instructed Eduard Meijers with the task of completely revising the Code, to 1992 when the new Code was finally introduced. A uniform code applied across 27 or more Member States is likely to be considerably more challenging than a code applicable at a national level only;

- an increase in litigation because of the universal lack of familiarity with a new instrument, resulting in many more, and considerably longer cases and more appeals. The appeals would often be referred to the European Courts, creating lengthy delays and, for parties who are not prepared to wait, decisions likely to be inconsistent across the EU. This would impose greater costs on businesses as well as both national and European judicial systems;

- the need to equip the EC with deeper resources and more staff to perform the role of the final court for commercial cases. If they are required to cope with an even greater workload their budget will need to be greatly increased at a time when Member States are cutting budgets in far more critical areas.

These costs are separate to the significant time and costs already incurred by governments, businesses, their lawyers and professional and trade associations in tracking and commenting upon the proposals for a European-wide contract law and which will only escalate as the debate continues.

It goes without saying that, considering the current economic climate, this is not the time to embark on this type of exercise, yet the above costs would inevitably attach to the proposed optional instrument. Nor would these costs be “one-off” – they would continue for decades before any modest degree of legal certainty and consistency emerged for the new system.

Legal Framework

Whatever the superficial attractions of a uniform system of law, and notwithstanding the multitude of practical problems which weigh against this initiative as a whole, the legal basis on which the EU can enact a CESL is highly questionable.

Measures can only be adopted on the basis of Article 114 of the Treaty of the Functioning of the European Union ("TFEU") if it can be demonstrated that (1) disparities in contract law have an actual, rather than theoretical, effect on market integration and (2) the proposed instrument would actually contribute to eliminating these obstacles.[2] *"[A] mere finding of disparities between national rules and of the abstract risk of obstacles*" to trade is insufficient to provide a legal basis under this provision[3].

There is a lack of any conclusive evidence of disparities in contract law actually deterring cross-border trade in the EU (see section 1 above). Furthermore, the optional nature of the instrument would, rather than reducing any such deterrent effect, increase it by adding yet another possibility to the equation.

[2] See the analysis of William Blair QC and Richard Brent in their article *A Single European Law of Contract*, EBL Rev 2004, 15(1), 5-21 at page 14.

[3] The Tobacco Directive case (joined cases C-376/9B and C-74/99 *Germany v European Parliament and Council*), at paragraph 84.

Other potential legal bases for competence in this matter have also been thoroughly discussed in a working paper produced by the Centre for the Study of European Contract Law.[4] The authors conclude that Article 352 TFEU (formerly Article 308 TEC) would be the most likely legal basis for the new instrument but that, under this measure, the content of the new instrument would have to be restricted to subjects that are most pertinent to the internal market. This implies that an entire instrument of European contract law would be difficult to justify on any presently available grounds.

Article 345 TFEU (formerly Article 295 TEC) also prohibits interference with the system of property ownership within Member States. As there are grey areas between contract and property issues, which vary from Member State to Member State, this may be an obstacle to the adoption of a sensible code.

Even if a CESL were created, there is a strong chance that this would be challenged before national and European courts, raising unnecessary uncertainties and costs, particularly if a proper analysis of a need for action had not been carried out beforehand.

Social Disruption

On a broader level there is the additional threat to the wider harmony of the EU through social disruption. A CESL may begin life as an optional instrument, but it may develop towards the complete abandonment of Member States' systems of contract law, thereby cutting across principles of preservation of cultural identity and of subsidiarity enshrined in the Treaties. Coupled with other moves in the legal field (European arrest warrants, proposed EU attachment orders etc.), this may unnecessarily add to the anti-EU feeling currently existing in many Member States as it produces results which are unfamiliar and perceived as wrong under national cultural norms.

3) THE PROPOSED COMMON EUROPEAN SALES LAW IS AN OPTIONAL INSTRUMENT. IS IT, AS DRAFTED, SOMETHING YOU WOULD CHOOSE TO USE OR ADVISE OTHERS TO USE? PLEASE OUTLINE THE NATURE OF YOUR INTEREST IN THE COMMON EUROPEAN SALES LAW AND GIVE REASONS FOR YOUR ANSWER.

The CLLS represents approximately 15,000 lawyers advising a variety of commercial clients, including businessmen, SMEs, multinational companies and government departments, often in relation to complex, multi-jurisdictional legal issues. Lawyers will be required to advise their clients on the proposed CESL and whether it is a good option for contractual cross-border arrangements both for business to consumer transactions and business to business transactions.

One of the fundamental problems underlying the instrument is in its status as an optional choice as it is unclear how the "optional" element of the optional instrument could work. In the context of transactions between a trader and a consumer, under the CESL proposal, a trader can state that goods are offered under the CESL and provide the required relevant information. If the consumer explicitly agrees, the law governing the contract will then be the CESL.

Such a choice, for the consumer at least, will be no choice at all, as traders will be unlikely to allow consumers to choose whether to contract under the CESL or their own national law. The choice in fact would be either to accept the law chosen by the trader (whatever that may be) or not to buy from the trader at all.

[4] Hesselink, Martijn W., Rutgers, Jacobien W. and De Booys, Timothy Q., The Legal Basis for an Optional Instrument on European Contract Law (October 31, 2007), Centre For the Study of European Contract Law Working Paper No. 2007104. Available at SSRN: http://ssrn.com/abstract=1091119.

In addition, the suggestion of a “blue button” approach of enabling the consumer to select the CESL through clicking on an icon for an online transaction seems impractical, not least as the consumer would be practically speaking completely in the dark as to the comparative benefits of the CESL against the laws of his/her home state for the transaction. In other words, no business would incur the cost needed to present the relative merits, nor would the Commission expect them to do so, as it is exactly these types of costs it is expressly trying to avoid.

In the context of a contract between a large business and a SME, the choice of whether to use the CESL will be decided by the party that has the strongest bargaining position; in most cases this is likely to be the large business and not the SME. Businesses are unlikely to choose a CESL instrument to govern their contracts with its inherent risk of uncertainty, unpredictability and divergence of interpretation when a large business could continue to rely on freedom of choice to pick a more suitable law to govern their cross-border contracts. Suppliers in particular are likely to be deterred from using the CESL because of its bias towards customers (see 13(c) below). SMEs will also be reluctant to bear the cost burden of drafting a set of terms to be used in a domestic situation and a different set of terms for cross-border transactions.

For all the reasons set out in this Response, legal advisers are unlikely to recommend the CESL for cross-border contracts as it will add additional complexity, uncertainty and costs for clients.

Previous attempts at creating optional frameworks to govern cross-border contracts do not offer an encouraging precedent. For example, the Convention on International Sale of Goods (CISG) is not particularly widely used, even though it is (in our view) significantly less prescriptive in its approach than the CESL (and as such might be expected to be more attractive to businesses).

THE SCOPE OF THE COMMON EUROPEAN SALES LAW

4) WHAT ARE YOUR VIEWS ON THE PROPOSED SCOPE OF THE DRAFT REGULATION, INCLUDING:

A. THE KIND OF TRANSACTIONS IT CAN BE USED FOR; SALE OF GOODS OR DIGITAL CONTENT AND RELATED SERVICES;

The proposed CESL has a very broad scope but at the same time the proposal does not deal with important issues in sale of goods contracts, such as the passing of title. Any transaction using CESL will need to be supplemented by national laws, creating added complications for parties and leading to a further increase in costs.

Digital content is defined in the CESL as "*contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price*". Digital content in the CESL is treated in the same way as sale of goods which limits the use of CESL as in many cases digital content is made available via a copyright licence. Provisions related to the sale of goods are not appropriate to copyright licences and substantial work would be needed to create a law that would be suitable for this mode of contract. This would need to recognise the intangible nature of the rights granted and the fact that a licence does not involve the passing of any title at all, nor can the licensed information be "returned".

Traders providing stand-alone goods and services (not related to the goods) will not be able to use the CESL for all their agreements, often with the same customer.

B. THE AVAILABILITY FOR DISTANCE, OFF-PREMISES AND ON-PREMISES CONTRACTS;

The CESL will cover contracts concluded at a distance (e.g. online and telephone sales), off premises (e.g. doorstop selling) and on-premises (e.g. in shops). These are very different channels of sale and, for example, have different pre-contract information requirements.

Traders selling to consumers via distance selling currently have to comply with existing directives on distance selling and e-commerce; the optional CESL instrument, which can only be used for cross-border sales (and not domestic distance sales), will burden traders with an additional set of pre-contract information requirements and will discourage traders from using CESL. The CESL is also difficult to use for telephone sales as it has impractical pre-contract information requirements.

The CESL is not suitable for off-premises contracts where consumers are particularly vulnerable to aggressive practices. The CESL does not provide adequate safeguards against such abuse, particularly where a consumer may need to take action against a trader for mis-selling.

C. THE LIMITATION OF THE DRAFT REGULATION TO CROSS-BORDER CONTRACTS;

The CESL requires traders to have potentially three sets of terms, namely one for domestic consumers in the trader's home country appropriate to that country's laws, a second set for use by cross-border consumers in other Member States appropriate for the CESL and a third set of terms for worldwide contracts. The Commission's proposal also allows Member States to permit the CESL to be used in domestic transactions – meaning one set of terms throughout the EU. The effect would be to allow businesses to opt out of domestic consumer protection law into that provided by the CESL. Making the CESL available for domestic sales is problematic, not least because it could seriously undermine consumer protection in those Member States that choose to do so and weaken their ability to respond to specific abuses in problematic areas, such as doorstep or other off-premises selling.

There are also problems in determining when a cross-border sale is actually being made. Article 4 defines a "cross-border" sale essentially in terms of a consumer providing a billing or delivery address in one country and the trader being "habitually resident" in another country, where at least one of those countries is an EU Member State. However, it is not always clear where a multi-national internet trader is "habitually resident". Most websites do not make it clear where the trader is resident and a trader may use a website with a national domain address eg. '.co.uk' or 'fr.', where the trader is not "habitually resident" in that country. Consumers will not know if they are in fact dealing with a cross-border sale and in circumstances where a trader's terms refers to the CESL it will be unclear which national law the trader will use in conjunction with those CESL terms. Even if a trader is obliged to state this clearly, it is far from certain that a consumer will understand the significance of this information, particularly if using what appears to be a domestic website.

Ultimately consumers themselves are likely to be left confused – they will not understand why they might be asked to contract with the same brand under potentially three different legal regimes, especially when they will not know, and won't particularly care, where that brand's different trading entities are geographically located.

D. THE REQUIREMENT THAT AT LEAST ONE PARTY TO A BUSINESS-TO-BUSINESS CONTRACT MUST BE A SMALL MEDIUM ENTERPRISE.

The CLLS considers the CESL is unsuitable for all B2B transactions, not least because it interferes with fundamental principles of freedom of contract.

As a result, the CLLS does not consider it appropriate to comment on the multiple complications which would arise from attempts to include an SME classification within the CESL.

5) THE PROPOSED REGULATION PURPORTS TO BE A "STAND ALONE" CODE OF CONTRACT LAW RULES. DOES THE PROPOSAL ACHIEVE THIS OBJECTIVE? IS THERE ANYTHING CURRENTLY EXCLUDED THAT OUGHT TO BE BROUGHT IN TO SCOPE OR IS THERE ANYTHING THAT OUGHT TO BE REMOVED?

The proposed CESL is not a 'stand alone' instrument as it does not deal with several important contractual and legal issues (Recital 27). In any contractual arrangement, it is likely that some of those issues will need to be dealt with as part of the contract, and as a result, the CESL will need to be supplemented by domestic legislation, leading to a more complex system for creating, interpreting and enforcing cross-border contracts.

For example, the decision to omit title matters from the CESL means that title retention clauses commonly used in some Member States may offend against the law or require special measures to perfect them in some other Member States: these issues would have to be determined according to the relevant national system of law, taking into account the Rome I Regulation and any applicable mandatory laws of the forum.

Enhancing cross-border trade across the multiplicity of laws, languages and cultures that form modern day Europe is a highly complex, and risky, challenge.

The CLLS believes that the place to look for a solution lies not in sweeping “one size fits all” contractual reform, which by its nature will be self-defeating (and costly). Instead, it believes that the Commission should be looking clinically at the way technology is impacting on the relationship between business and consumers, in order to develop a set of codes which set a world standard for online/mobile trade and which protect the single most crucial ingredient in any decision to transact, namely trust.

THE CONTENT OF THE COMMON EUROPEAN SALES LAW

6) WILL THE PROPOSAL, AS DRAFTED, PROVIDE BENEFITS FOR BUSINESSES, PARTICULARLY SMALL MEDIUM ENTERPRISES, WISHING TO SELL TO CONSUMERS IN OTHER MEMBER STATES? PLEASE GIVE REASONS FOR YOUR ANSWER.

It is a policy matter whether there are any circumstances where SMEs would benefit from being afforded some of the protections currently proposed for consumers. Considerations include, for example, whether the business is genuinely in the same position as consumers (we would suggest this could only apply to "micro-businesses", not the potentially multi-million euro businesses potentially covered by the CESL), the difficulty of treating businesses differently according to imprecise criteria and the correct treatment of businesses within larger groups of companies or co-operative organisations from which they gain the characteristics of a larger business.

Much is made of the importance of extending consumer protection laws to SMEs. SMEs also need certainty of meaning and enforceability in relation to their contracts with other businesses. While larger businesses are better placed to deal with the significant additional costs of understanding a new optional instrument, the cost in time and money for SMEs will be disproportionately high. The experience of the Netherlands in relation to the implementation of their new civil code in 1992 was that this resulted in increased costs to businesses and had a disproportionate adverse impact on SMEs.

7) DOES THE PROPOSAL, AS DRAFTED, PROVIDE AN APPROPRIATE LEVEL OF CONSUMER PROTECTION - IS IT SET TOO LOW OR HIGH? ARE THERE ANY PARTICULAR CHANGES YOU WOULD LIKE TO SEE MADE?

The CLLS is concerned that there are some aspects of the CESL which provides for less consumer protection than consumers in some Member States currently expect to receive.

8) WHAT DO YOU BELIEVE WILL BE THE IMPACT ON UK CONSUMERS IF THE COMMON EUROPEAN SALES LAW IS AVAILABLE FOR CROSS-BORDER BUSINESS-TO-CONSUMER CONTRACTS?

There is also a fundamental issue of inequality for UK consumers as a consumer buying under the CESL will receive less protection than buying either under its own national law or any other national law chosen by the trader, as Article 6 of the Rome I Regulation would allow protections at least as high as those in the consumer's national law, except, potentially, when the CESL is used.

9) DO YOU SUPPORT THE APPROACH TAKEN TOWARDS DIGITAL CONTENT IN THE COMMON EUROPEAN SALES LAW, INCLUDING THE USE OF A SPECIFIC DIGITAL CONTENT CATEGORY, THE SCOPE OF DIGITAL CONTENT COVERED AND THE APPLICATION OF RIGHTS AND REMEDIES THAT ARE IDENTICAL TO THOSE FOR GOODS? PLEASE GIVE REASONS.

The CLLS does not believe that the approach taken towards digital content in CESL is correct. Digital content is almost invariably copyright protected material and is generally provided via a licensing structure. As drafted, it is unclear how the CESL will work for such transactions as the CESL links the sale of digital content with the sale of goods and fails to acknowledge that nothing has been 'sold'. We believe that any harmonised law covering this matter would require a different approach.

IMPACT ASSESSMENT

10) WHAT IN YOUR VIEW, WOULD BE THE IMPACT OF THE COMMON EUROPEAN SALES LAW?

The impact of the CESL could be twofold:

(1) The CESL may damage cross-border EU trade by driving businesses to adopt non-EU based legal systems. Evidence indicates that many companies prefer their international dealings to be governed by English law rather than the law of any other legal system.

A new optional instrument would dilute the effect of English law as a gateway for attracting trade into the EU and may be more likely to benefit the economies of New York or Switzerland, whose law might increase in popularity when contrasted against the difficulties outlined in this response.

The loss of trade and revenue for the EU and for businesses providing legal and related services may in fact exceed any supposed benefits from the creation of a competing legal system, while limited resources would be exhausted by the unnecessary costs and uncertainties of developing and applying new laws.

There could be particular difficulties for Europe's financial centres and for legal certainty. In particular, and as set out above, the proposals are wholly unsuited for major financial transactions where legal certainty is an imperative.

Concerns that the CESL might become a mandatory law for cross-border transactions could lead to a flight to non-EU jurisdictions for choice of law and dispute resolution.

(2) The CESL would not be used widely due to concern about using an untested and unfamiliar system. The optional nature of the CESL would lead to businesses and SMEs opting not to use the CESL and instead retaining the law of their home Member State to govern their agreements as it provides more certainty and would avoid the necessity for a two-tier contract system for domestic and cross-border contracts. In effect, consumers will have no choice as to whether to use the CESL as businesses and SMEs will be unlikely to select the CESL for consumer contracts for the reasons stated in this Response.

11) DO YOU BELIEVE IT WOULD PROVIDE THE BENEFITS IDENTIFIED IN THE COMMISSION'S IMPACT ASSESSMENT?

The CLLS believes that the CESL will not provide the benefits identified in the Impact Assessment.

12) DO YOU HAVE ANY VIEWS ON CHANGES THAT COULD BE MADE TO THE PROPOSAL TO INCREASE ITS POTENTIAL BENEFITS FOR THE UK?

As stated elsewhere in this Response, the CLLS believes that there is no benefit in the CESL proposal for business to business contracts (regardless of the size of the business) or business to consumer contracts. There may be some scope in developing a set of best practice codes which set a world standard for online/mobile trade.

PART II: ASSESSING THE COMMISSION'S PROPOSAL: ANNEX 1

13) WHAT IS YOUR VIEW OF THE PRACTICAL UTILITY OF THE COMMON EUROPEAN SALES LAW AS DRAFTED?

A. DO YOU FEEL THAT THE PROVISIONS PROVIDE SUFFICIENT CLARITY AND LEGAL CERTAINTY? IF NOT, WHY NOT, AND HOW COULD THE PROVISIONS BE IMPROVED IN THIS REGARD?

The drafting style is too high level and lacks certainty. The fluid concepts proposed for the CESL (for example, the general duties of good faith, fair dealing and good business practice and the powers given to the court to substitute its own view of what the parties should have agreed) will also give rise to significant levels of uncertainty and unpredictability.

The wish to keep the text concise and "user-friendly and clear" is understandable. But while this may be appropriate as a high level description (e.g. as a user's guide for citizens), it lacks the precision and guidance which would be necessary to give it the clarity of meaning needed in practice, especially if there were any desire for it to be used in business transactions.

As for consumers, the uncertainty of the provisions on allowance for use may lead to difficulties, and the lack of damages for distress and inconvenience (currently permitted under English and Scots law but not under the CESL) may reduce the level of consumer protection.

Essentially, the lack of clarity in the drafting of the instrument risks uncertainty, unpredictability and divergence of interpretation under a veneer of uniformity.

If a European contract law is to gain widespread international acceptance, these basic conceptual issues and their consequences need to be addressed thoroughly before the adoption of such a law.

In addition, an optional European law would not be one that national courts could leave to the parties to lead evidence on. They would have to be equipped to apply it, where chosen, with the same objectivity as if it were national law. Therefore the courts and each Member State's lawyers would need to know the law and how it differs from their own and be prepared to refer uncertain areas to the European Courts.

B. IS IT SUFFICIENTLY CLEAR WHETHER A PROVISION IS OR IS NOT MANDATORY?

The CESL provides that some provisions are mandatory, and that other non-mandatory provisions may be excluded. However, many non-mandatory provisions cannot be excluded when a trader is dealing with a consumer.

C. DO YOU FEEL THAT THE PROVISIONS STRIKE AN APPROPRIATE BALANCE BETWEEN CONSIDERATIONS OF "FAIRNESS" WHEN THINGS GO WRONG, AND PROVIDING SUFFICIENT CERTAINTY TO CONTRACTING PARTIES THAT WHAT THEY HAVE AGREED WILL BE UPHELD? IF NOT, HOW COULD THE PROVISIONS BE IMPROVED?

No, we do not consider that the provisions strike an appropriate balance. The provisions on interpretation (especially in relation to prior negotiations and to standard and/or non-negotiated terms), good faith and fair dealing, good business practice and the powers given to the court to substitute its own view of what the parties should have agreed, give rise to significant levels of uncertainty and unpredictability.

In a B2B context, the CESL displays an inappropriate bias towards customers. For example, "caveat emptor" is effectively reversed, because prior to entering into a contract, suppliers are under a duty to "disclose…the main characteristics of the goods…to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party" (Article 23). In a similar reversal of the general position under English law, there is also a presumption that pre-contractual statements by the supplier about the characteristics of goods etc are incorporated as terms, unless they were obviously not intended to be relied upon (Article 69).

We also consider that the CESL imposes an unequal burden on a business under Article 70. Under this Article, any term of the contract which has not been individually negotiated is unenforceable if the other party is unaware of this term (Article 70). This provision has almost the same effect as one of strict liability, in that if a party is unaware of the term, it is automatically deemed unenforceable. The Article includes no mechanism to allow for it to demonstrate that the term in question is fair, even if the other party has not seen it and, further, this Article is a mandatory provision. If the CESL intends to remove burdens and encourage trade all at a lower cost, this provision runs in direct contraction to this aim. How a business can satisfy itself that the consumer or business is aware of all the terms which have not been individually negotiated is an additional onerous obligation.

The CESL provides the right to consumers to terminate any contract as a remedy for non-conformity within two years from the date from which the consumer could be expected to be aware of the fault. We believe that this provision strikes an inappropriate balance between considerations of fairness for the following reasons. We believe it will be a major reason for traders choosing not to select the CESL as the legal framework, on the basis that the time period in question stems from when a consumer notifies the trader of their concern. This leaves the trader open to any unfair claims from consumers, and it may be hard to assess the validity and truth of such a claim. Further, there is no carve out from this Article to take into consideration the level of use of a product by a consumer, which would inevitably impact on how fair it is for the consumer to be making the claim.

D. ARE THERE ANY PROVISIONS THAT GIVE RISE TO PARTICULAR CONCERNS, AND WHY?

Right to Reject

In the UK the consumer has a "right to reject" goods. This right must be exercised within "a reasonable time". Under the CESL, consumers also have a right to terminate, but this right is not time-limited. However, it is not clear how this right sits alongside the requirement on the consumer (under Article 2) to act in accordance with "*good faith and fair dealing*". If the consumer fails to do so, he will lose his right to a remedy under the CESL. So not only will traders be discouraged from using the CESL for fear that such an extended right could be abused, but they will be unsure as to the scope of that right, with too much scope for argument over whether the consumer has acted in good faith and should be given an allowance for their use of the product.

Impractical information requirements

The Commission is seeking to impose strict obligations on businesses to alert consumers to the fact that they are entering a contract subject to the CESL and to ensure that they understand its terms.

The Commission is also seeking to specify the manner in which the choice of the contract is made. For example, the provisions require that:

- traders include a standard form notice (as set out in Annex 1 of the proposed CESL) "in a prominent manner", plus a hyperlink to a website for the full text of the CESL;
- consumers give explicit consent to the application of the CESL "separate from the statement indicating the agreement to conclude the contract";
- traders also provide consumers with confirmation of the agreement on a durable medium (which includes a digital copy);
- consumers, when buying on the telephone, are not bound until they have received this information together with the standard form notice and have then signified their consent.

In the event that a business fails to provide the pre-contractual information, consumers will not be bound until they have received confirmation of the agreement, accompanied by the standard form notice and expressly consented to the use of the CESL.

What these proposals seem to fail to recognise is that consumers want *less* obstacles when contracting online or over the telephone, not more (e.g. by way of multiple tick boxes confirming agreement to a sale). Indeed, it is debatable how many consumers actually read terms and conditions in any event, let alone accompanying additional information which they may well struggle to understand in the first place. This issue is particularly relevant when considering the future of online transactions, in particular the increasing use of mobile platforms, which may render the concept of burdensome information requirements nonsensical.

As for businesses, the information requirements may discourage them from adopting the CESL, both because of the practical implementation costs and because of the penalties that Member States would be required to impose on traders for failure to comply, noting that these penalties must be "effectively proportionate and dissuasive".

Linguistic obstacles

Under the CESL, as under the proposed Consumer Rights Directive, Member States may require that contractual information is given in a particular language.

Thus if an online trader uses the CESL it must still comply with each Member State's linguistic requirements. The cross-border online trader would have to find out what language requirements are imposed in other Member States and must either comply with them or ensure that it does not direct its activities to that Member State. Whilst this protects consumers, traders wishing to start a pan-European business are unlikely to start by translating their site into all Community languages.

Whose business terms prevail

When businesses negotiate terms and conditions they do so in the knowledge that such terms govern the relationship between the parties. Under the CESL, only the terms "common in substance" to both sets of standard terms can form the contract (Article 39) if there is any dispute between the parties. Our concern here is under what basis "common in substance" can be assessed. This method effectively creates more uncertainty and an increased likelihood to have to resort to lawyers to assess what is "common in substance". This type of provision leaves scope for plenty of argument. Of further concern is what happens to the rest of the terms that are not "common in substance" and if these other provisions include core terms of the agreement. Often many terms are linked within an agreement, and for those terms which are not "common in substance" to just fall away may cause some major contractual issues regarding the functioning of the rest of the agreement. Finally, there may well be linguistic obstacles to this article working, setting the scene for more scope for dispute. Linguistic differences can often mean even individual words are subject to a divergence of interpretation. As the CESL is intended to roll out in twenty-seven European countries, it is hard to imagine there will not be linguistic issues of interpretation to arrive at what is "common in substance". We believe that this provision runs in direct contradiction to the aims of the CESL.

Economic obstacles

The CESL creates uncertainty at a difficult economic time, given its non-mandatory nature and its attempts to create an entirely different legal platform where there is no jurisprudence to assist with interpretation and enforcement. In many instances, the priority is to ensure the survival and endurance of a business, rather than invest time and expense to interpret, assess and comply with an additional legislative framework, which may or may not apply from contract to contract. To ask businesses, at what is a very volatile and difficult economic time, to consider the CESL, is to our mind, not appropriate.

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