

How far will a Common European Sales Law facilitate cross-border trade?

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Commercial analysis: The European Parliament's Economic Affairs Committee has voted in support of Commission proposals for a Common European Sales Law. David Webster, a partner in the Corporate & Commercial Team at Russell-Cooke LLP, discusses the advantages and disadvantages of a commercial law intended to facilitate cross-border trade in the single market.

Original news:

Press Release: European Parliament Committee backs Common European Sales Law

The European Parliament's Economic Affairs Committee (ECON) voted to support EC proposals for a Common European Sales Law to facilitate cross-border trade in the Single Market. The proposed legislation involves new optional contract rules for consumers and businesses in cross-border sales in its Opinion on the proposed legislation.

What are the key changes being proposed?

The envisaged Common European Sales Law (CESL) would create a new set of legal rules regulating primarily the sale of goods and digital content within the EU. The EU views the CESL as a 28th commercial law, which would be introduced into the national commercial laws of each of the current 27 member states. If and when the CESL does come into force, it will be an option for the parties to adopt it, rather than a mandatory set of rules which will apply to cross-border sales.

While it is clear there is support for the general idea of a CESL, both the Opinion of the Economic Affairs Committee, published on 11 October 2012, and the Working Document of the European Parliament Committee on Legal Affairs issued on 8 October 2012, acknowledge there are key areas requiring further work.

What problems does the proposed legislation seek to address?

The CESL is part of a drive to remove remaining barriers to cross-border trade in the single market. The Commission believes these obstacles hinder consumers from dealing with businesses in other member states, and put off businesses from looking to deal with consumers and other businesses in different parts of the EU.

In particular, the CESL is designed to tackle issues arising from the differences in contract law across the 27 member states, which the Commission sees as a significant barrier to cross-border trade. For example, it is felt the uncertainty created by lack of knowledge of local sales law deters businesses from exploring cross-border opportunities.

What impact will the measures have for businesses and consumers?

For certain businesses the CESL may be an attractive proposal offering strategic benefits. In particular, e-commerce businesses may find it is a useful tool to drive sales and to expand their business into markets they had previously ignored. Using the CESL could be a useful branding pitch for some businesses--showing a business is open for cross-border trade.

Using the CESL will involve some initial implementation costs; however we would anticipate that, depending on the nature of the business concerned, those initial costs need not be prohibitively expensive.

While there are undoubtedly positive aspects to the introduction of the CESL, it is by no means a panacea for tackling all the problems and blockages which businesses and consumers face when undertaking

cross-border sales. It is certainly helpful that parties in different states who contract using the CESL would have a clear idea of what their mutual rights and obligations are, but if this is not coupled with practical enforcement mechanisms this could be of limited use when the other party defaults.

Both businesses and consumers operating cross-border and using the CESL will have more certainty in relation to consumer protection rules. The intention is that the rules relating to consumer protection if a business is using the CESL will fall outside of the consumer's national law.

However, certainty about the rules which apply may be undermined by the fact the CESL will be optional, with the result that while some businesses may use the CESL many will surely opt not to do so. Furthermore, even where the CESL is used there are concerns about how feasible it is to ensure uniform application of the CESL across the EU.

Are the measures capable of being effectively implemented and enforced?

It is fundamental for the success of the CESL, which is targeted primarily at SMEs and consumers, that it should be practical and capable of being effectively implemented and enforced without imposing material additional costs.

At the moment it is too early to say whether this will be the case, as the draft legislation is still under review. Certainly, some aspects of that draft gave cause for concern. For example, given that much of the cross-border trade which will be conducted under the auspices of the CESL is likely to be internet-based, there is a fear that the combined nature of the consents, opt-ins and pre-contract information required under the current draft rules may make its use prohibitively cumbersome. These general concerns are also acknowledged within the EU.

Although the recent Parliament vote was broadly supportive, the Opinion produced by the Committee on Economic and Monetary Affairs acknowledges that:

'the crucial question is whether the cost of the existing diversity is greater than the cost of the new regime...the responses of stakeholder organisations to this proposal show that they anticipate relatively minor 'benefits'. In order to ensure that traders actually opt for the instrument, it must possess substantial added value'.

The Parliament Committee on Legal Affairs Working Document also notes that 'they believe that the text could be improved, so as to be more user-friendly, clearer and more coherent with the *acquis* as regards terms and definitions, and less vague in its terminology'.

There are many complex legal questions surrounding the CESL, for example, whether the Commission is relying upon the appropriate treaty article as legislative base, the inter-action with the Rome I Regulation, and the perceived introduction of civil law concepts which common law lawyers seem to be less than comfortable with. However, the success of the CESL is likely to be judged not on those issues but on the level of take-up and the practical experience of those who use it. If it isn't sufficiently user-friendly, this will quickly become clear, and the danger is that it becomes another white elephant along the lines of the *Societas Europaea*.

Will a CESL kick-start the single market?

Not by itself. There is a general awareness, even in the EU, that the CESL is not a panacea. For example, in the explanatory memorandum accompanying the draft regulation issued in October 2011, the Commission referenced other obstacles to successfully establishing the single market such as tax regulations, administrative requirements, difficulties in delivery, and language and culture.

Even within the narrower scope of sales law, the CESL itself is unlikely to work in practice if it is not supported by other 'flanking measures', such as having appropriate arrangements for enforcement proceedings, and ensuring people generally within the EU have sufficient information available to understand the content and scope of the CESL, particularly as it changes over time.

What should lawyers keep in mind when advising clients?

Given that the precise text of the CESL is still subject to change, our general guidance to businesses at the moment, particularly those who currently trade cross-border within the EU, or who are considering doing so, is that whilst it is important to be aware of the CESL and the opportunities which it presents, it is perhaps too early to focus on the detail of the legislation.

However, despite some of the legal concerns noted above, the Commission seems determined to push some version of the CESL through, so practitioners should not assume the proposals are going to go away.

For businesses considering utilising the CESL, as currently drafted it imposes a fairly high level of formality in terms of notifications and information which needs to be provided, and businesses may need some time to make the necessary changes. For example, businesses may also need to update their record keeping systems to differentiate between those contracts entered into on the basis of English law, and those under the CESL.

What are your predictions for future developments?

There is a clear determination at EU level to drive the single market project forward and so further legislative developments--not necessarily as major as the CESL--can be expected. The general intentions of the Commission in this area are set out in, for example, the Small Business Act, which the EU adopted on 25 June 2008, and the 2020 agenda launched by the European Commission on 3 March 2010.

Further developments in this area are likely to include both items linked directly to the introduction of the CESL--for example, the development of 'European model contract terms' for specific trades/sectors--and those with no obvious direct linkage, but which nevertheless form part of the general push to facilitate trade within the EU. Although some of these proposed changes have perhaps been too radical for member states to approve, further changes are likely, such as the introduction of a 'venture capital passport'.

At a domestic level, a new Consumer Rights Act is proposed which will replace 'implied terms' with statutory guarantees, strengthen consumer protection in relation to the provision of services, set out clear rules in relation to digital content and clarify existing consumer protection law.

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Interviewed by Kate Beaumont.

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