

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

CESL represents both a challenge and an opportunity

Ireland assumes the presidency of the EU Council on 1 January 2013. One of the issues to be addressed by Minister Alan Shatter in his role as president of the justice ministers will be what priority to give to the ambitious proposal for a Common European Sales Law (CESL). CESL was put forward by the EU Commission on 11 November 2011 as a draft regulation.

The commission has been arguing for an initiative in the area of contract law since 2001. It sees the divergence between the contract laws of the various member states as a barrier to trade, particularly for consumers and SMEs. Of course, significant European legislation exists in the area of consumer protection, but it is uncoordinated and lacks coherence.

The commission funded a large research project on the contract laws of the member states and, arising from that research, has considered a number of suggestions to deal with the twin problems of differences between the contract laws of the 27 member states and the lack of coherence in European consumer protection. These suggestions range from the replacement of the contract laws of member states with a single European code of contract law, through to a voluntary instrument setting out specimen provisions that parties could adopt for their contracts.

At the same time, the commission was preparing a major consolidation and restatement of four major directives into one coherently drafted directive, the *Consumer Rights Directive*. This directive was to be based on maximum harmonisation, unlike the existing directives, which are based on minimum harmonisation. The latter requires only that the standards set out in the directive are achieved as a minimum, but with member states free to impose more rigorous standards. The re-

sult is that substantial differences remain in the laws of the various member states.

Maximum harmonisation, on the other hand, allows only the provisions in the directive within the scope of the directive, and nothing more.

The commission's proposals on the *Consumer Rights Directive* hit heavy opposition. This was particularly because of the requirement for maximum harmonisation, which would have impacted on the established laws of the member states. As a result of that experience, the commission has recognised that the heavy-handed route of maximum harmonisation has no future in this area.

Soft law: voluntary and optional CESL adopts a radically different 'soft law' approach. It provides a sales law that would be common throughout the EU and that the parties would be free to adopt.

It contains an extensive (but not comprehensive) statement of the main principles, definitions and rules that would be required for a contract for the sale of goods and related services and for the supply of digital content.

CESL would form part of the law of every member state. However, CESL does not replace or amend the existing laws. Rather, it exists as a parallel and alternative set of rules, which will be the same in all member states. Parties would be free to choose to contract on

the basis of CESL. The commission argues that this will encourage cross-border trade because a business in one member state will be able to contract with consumers and businesses in several different member states on the basis of a common set of rules, without the need to learn about the different contract and consumer laws of each member state.

The regulation applies to sales of goods and to contracts concluded at the same time for services directly related to those goods. Other contracts for the supply of services are not covered. As many transactions are now of digital information, such as music, entertainment or software supplied online, digital content contracts are embraced by the regulations.

The commission has identified that the need for sales law arises from the additional costs and legal problems that arise on transnational or cross-border transactions. Accordingly, the regulation applies to transnational contracts only. However, member states are given the power to extend the application of CESL to transactions between parties in the same member state.

Strong consumer protection

CESL sets out mandatory rules that cannot be varied to the detriment of a consumer in business-to-consumer transactions. One of the criticisms of the draft *Consumer Rights Directive* was that it

reduced the options available to a consumer in some member states. For example, in Ireland and Britain, a consumer has a right to terminate a contract and seek a refund of the price paid in the event of non-conformity of the goods with the contract. The consumer is not required to accept repair or replacement. Under the draft *Consumer Rights Directive*, the consumer could have been required to accept repair or replacement. CESL gives consumers a free choice of remedies, including the right of refund, repair or replacement. Some business organisations argue that this goes too far and will serve as a disincentive for business to use CESL.

Set of contractual rules

CESL is an impressive body of work, comprising 186 articles divided into eight parts. These deal with introductory provisions, the formation of contract, the content of the contract, the obligations and remedies of the parties, the passing of risk, the obligations and remedies of parties to a related service contract, and rules dealing with damages, interest, restitution and limitations of action. Although not a code in the Napoleonic sense, it is an attempt to set out the relevant rules in a systematic and structured fashion. Undoubtedly, there is scope for improving the drafting of the text.

It is the commission's view that CESL will cover the issues of contract law that are of practical relevance during the life cycle of a cross-border contract. However, there is much that is omitted, such as rules on legal capacity, rules in relation to joint liability, and of course the whole area of non-contractual liability, such as torts. In many cases, breach of the obligations of a seller will give rise not only to liability in contract, but also to liability in tort.

Those areas that are not cov-

B2C OR B2B WHERE ONE PARTY IS AN SME

CESL can only be used for:

- A business-to-consumer contract,
- A business-to-business contract where at least one party is an SME

However, CESL can be used where all the parties are traders, but none of them is an SME, where

a member state has decided to make CESL available for that purpose.

The limitation to SMEs is required for legal and political reasons, but there appears to be no logical justification why a business of any size should not have the option to offer CESL as a basis for contracting.



ered by CESL will continue to be governed by the relevant national law. That national law will be chosen by the application of the rules of private international law, as they have been modified by *Rome I* (regulation 593/2008 on the law applicable to contractual obligations).

Opposition to the proposal

The commission's proposal is an ingenious and innovative approach. It has, however, been criticised heavily. There are concerns as to whether such a proposal may be passed by qualified majority rather than unanimity (which is politically improbable). There are arguments about its compatibility with existing laws, such as *Rome I*.

There are also strong objections from consumer organisations that the consumer protection elements do not give protections that are currently available in certain member states and that, in practice, consumers will be given no choice but to contract on the basis of CESL. On the other hand, business argues that the consumer protection provisions go too far and will serve as a disincentive to business to choose CESL.

CESL sets out an obligation on each party to act in accordance

with good faith and fair dealing. This presents something of a challenge to the common law tradition. From a practical point of view, the introduction of such an over-arching obligation will give rise to uncertainty, at least until a body of jurisprudence has been amassed defining its limits.

Opponents argue that traders dealing with consumers throughout the EU would still need to be concerned with health and safety and other regulatory requirements and to take advice in relation to aspects of contract law that are not governed by CESL and in relation to non-contractual liabilities such as tort law.

Under CESL, the principle of freedom of contract applies to business-to-business transactions, save in respect of limited mandatory rules. Some of these mandatory rules that apply to business-to-business contracts are significant and represent a major change for Irish law. The commission would respond that no-one is obliged to contract on the basis of CESL, and if you do not like it, do not use it.

Solution in search of a problem?

There is widespread concern that CESL is a response to a political rather than a legal imperative.

Opponents argue that the legal obstacle posed by differing contract laws is one of many, including tax, language and culture, in relation to the enforcement of remedies. They argue that the costs and uncertainties involved in introducing a new regime will outweigh the marginal benefits.

The proposal set out in the regulation is a clever example of soft law. The instrument is voluntary. It will not affect the existing laws of member states directly. Undoubtedly, however, if it does become established for contracting throughout the union, there will be a tendency to gravitate towards it as a basis for legislation.

The test of its quality will be the extent of its use in practice. Clearly, the hope of the commission is that, over time, it will become well recognised and established. The commission hopes that traders will adopt CESL and offer it to their consumers as part of their marketing strategy and that consumers will regard it as an indication of quality.

For Irish lawyers and for Irish business, CESL is a challenge, but also an opportunity. If the commission is correct that the initiative will encourage cross-border trade, an export-led economy such as ours should embrace it. In

the initial stages at least, suppliers who are active in existing markets are unlikely to change their terms and conditions. However, for new markets with which they are unfamiliar and for those who wish to trade throughout the European Union, CESL may be an attractive basis for seeking to attract new business.

If the regulation becomes law, Irish lawyers will be in a position to advise their Irish clients and clients from abroad in relation to their terms and conditions of supply to a much greater extent than is possible at the moment.

It will be a major intellectual and diplomatic challenge to reconcile the differing views in relation to CESL. The Irish presidency affords Minister Shatter and his department the opportunity to mould the proposal to suit Irish interests before it passes to other hands.

Paul Keane is the managing partner of Reddy Charlton Solicitors, the vice-chair of the Business Law Committee, and the Society's representative on the CCBE committee responsible for European contract law. Dr Cliona Kelly, Cardiff Law School, has assisted the Business Law Committee in preparing its response to the commission's proposal.