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**THE DRAFTING OF THE
CESL: AN ASSESSMENT
AND SUGGESTIONS FOR
IMPROVEMENT**

NOTE



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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

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ASSESSMENT AND SUGGESTIONS FOR
IMPROVEMENT

NOTE

Abstract

The drafting of the Commission's current proposal for a CESL is analysed and assessed. Recommendations for improving the drafting are made. The most important recommendation is to allow for sufficient time during the legislative process in order to avoid the technical mistakes that can be found in the proposal in its current form.

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LIST OF ABBREVIATIONS

Art(s) article(s)

B2B business-to-business

B2C business-to-consumer

BGB Bürgerliches Gesetzbuch (German Civil Code)

CESL Common European Sales Law (proposal, as set out in Annex I to Reg-CESL)

ch chapter

CJEU Court of Justice of the European Union

DCFR Draft Common Frame of Reference

ed(s) editor(s)

ERPL European Review of Private Law

EU European Union

FS Feasibility Study

para(s) paragraph(s)

PECL Principles of European Contract Law

Reg-CESL Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final

TFEU Treaty on the Functioning of the European Union

UK United Kingdom

EXECUTIVE SUMMARY

The success in practice of a Regulation on a Common European Sales Law will crucially depend on its accessibility and user-friendliness. This will in turn depend on the quality of its drafting: potential users will only be incentivised to opt into the instrument if it is well drafted. The acceptability of the instrument will further depend on whether it strikes an appropriate balance between the different drafting styles prevailing in Europe: potential users will be deterred from opting into the instrument if it has an alien 'feel' to it.

The current proposal of the Commission is written in accessible language and strikes an appropriate balance with regard to the level of detail it aims to provide for. In many regards it represents a good compromise between the traditional styles of drafting in continental Europe and England. However, the drafting should be improved in various regards.

Most importantly, the proposal employs too many vague and ambiguous terms. It aims to provide for a maximum of flexibility, at the expense of legal certainty. The use of indeterminate language gives parties issues to argue about and invites legal disputes. It also facilitates the development of pockets of diverging case law in different Member States and thus leads to further uncertainty. Therefore it is recommended that, wherever possible, vague and ambiguous terms should be replaced with more precise and determinate language. Only clear and bright-line rules enable the parties to know their rights and obligations at the time of contracting.

Moreover, it is recommended to improve the drafting of the proposal by making some changes of a purely technical nature:

- the document has many redundancies and these should be avoided;
- inconsistencies between different provisions, parts and language versions of the instrument abound and they should be removed;
- the quality of the translations from the English version is not uniformly high, so the translations should be reassessed;
- the proposal is unnecessarily complex and structural changes should be made in order to develop a more user-friendly structure.

It will be relatively easy to implement these recommendations if the drafters and the translators involved are given sufficient time during the legislative process. The current deficiencies seem to be attributable to the haste with which the proposal was designed. Ample time for reflection and redrafting should be allowed once the relevant policy decisions will have been made. An instrument of such importance for the development of private law in Europe will only be successful if its quality of drafting is of the highest standard.

1. INTRODUCTION

1.1. Remit

This Briefing Paper has been prepared for an Inter-parliamentary Committee Meeting of the European Parliament's Legal Affairs Committee with national Members of Parliament in Brussels on 27 November 2012. The Committee will discuss the proposal of the European Commission for a regulation on a Common European Sales Law ('Reg-CESL') which has a draft of a Common European Sales Law ('CESL') annexed to it.¹

The remit given to me by the European Parliament's Policy Department C is 'to provide an overall assessment and suggestions for improvement of the drafting of the Annex to the CESL Regulation', with a 'focus on how to render the CESL more attractive to its future users, notably on the basis of empirical research'.

I will therefore assume for the purposes of this Paper that the policy decisions made in the Commission's existing proposal are justified and will not question them. I will address issues of form rather than substance and focus on how the solutions chosen have been implemented by the drafters and how they might be better implemented by improving the drafting.

1.2. Overview

In order to do so, I will first give an account of the benchmark that the European Commission has set itself for the drafting of a European contract law instrument and show how the potential of the CESL to attract users is linked to its style of drafting (2.). I will then analyse various features of the drafting of the current proposal (3.): the level of detail it provides (3.1.) and the extent to which its provisions are concise (3.2.), linguistically determinate (3.3.) and consistent (3.4.), as well as the legal language used (3.5.) and the complexity of the instrument (3.6.). I will conclude with some recommendations for improvement (4.).

1.3. Disclosure

I was a member of the United Kingdom Ministry of Justice Expert 'Committee on the Technical Legal Aspects of the Common European Sales Law (CESL) Proposal'. This was established to inform the Ministry's response to the Call for Evidence on the proposed CESL which it had launched on 28 February 2012.² The Committee held a series of meetings between 10 February and 25 May 2012. Members of the Committee were not remunerated.

The views expressed in this Briefing Paper are purely personal. They must not be taken to represent those of the UK Ministry of Justice Expert Committee.

¹ European Commission, *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, Brussels, 11 October 2011, COM(2011) 635 final.

² Ministry of Justice, *A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission: A Call for Evidence*, 28 February 2012.

2. THE BENCHMARK: USER-FRIENDLINESS

The CESL is currently designed as an 'opt in' instrument. As such, it will only be viable if many parties who conduct cross-border transactions agree to use it. Parties can only be expected to make such agreements if the instrument is sufficiently attractive to them: a European contract law regime will only attract users if they have sufficient incentives to opt into it, and these incentives will only exist to the extent that potential users are convinced that the new regime will improve their position vis-à-vis the law they currently use for conducting cross-border trade.

This is firmly supported by the available empirical evidence on choice of contract law: the single most important factor for such choices is familiarity with the law chosen.³ National contract laws, for all their deficiencies, are 'known quantities', and businesses and their legal advisors tend to act according to the maxim 'better the devil you know than the devil you don't'. Therefore, in order to entice businesses to switch from the law that they currently use, the CESL must provide them with a regime that is, from their perspective (or, more realistically, from the perspective of their lawyers), not only better but *significantly* better than the national contract laws that are currently chosen.

Broadly similar considerations apply to consumers. They will not consent to the use of the instrument (Art 8 Reg-CESL) if they have reason to suspect that their position would be worse under the CESL than under their home law. This would certainly be the case if consumer associations were to warn systematically against the use of the instrument.

Of course the attractiveness of the instrument will primarily be determined by its substantive solutions: its rules will appeal to contracting parties and those advising them if they are generally perceived to be fair and balanced and if they facilitate, rather than complicate, cross-border trade. One of the most important issues, from the perspective of both buyers and sellers, will be whether the instrument is set at an appropriate level of consumer protection.

However, the attractiveness of the instrument will also crucially depend on its accessibility. Parties will only agree to use it if they and their advisors understand it. Both buyers and sellers will want to be clear about their rights and obligations. As the UK Ministry of Justice has argued, the 'benefits of the law will also depend on the quality of its provisions as drafted', and consumers in particular will only agree to use it if 'they will be clearer about their rights under the new European legal regime than under their domestic law regime'.⁴

The Explanatory Memorandum preceding the text of the proposed Regulation on a CESL does not mention this feature. Yet, the European Commission has been very much aware of the need to employ 'user-friendly language'⁵ in its measures aimed at harmonising contract law ever since embarking on its 'European Contract Law initiative'.⁶ In a similar vein, the Council repeatedly requested that a European contract law instrument be 'clear, concise and easy to understand'.⁷ The authors of the Draft Common Frame of Reference ('DCFR'),

³ The available evidence is summarised by S Vogenauer, 'Regulatory Competition Through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' in H Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Munich: CH Beck forthcoming).

⁴ Ministry of Justice (n 2 above) paras 48, 68.

⁵ European Commission, *Green Paper on European Union Consumer Protection*, 2 October 2001, COM(2001) 531 final, para 4.5.

⁶ The term was first used in European Commission, *First Annual Progress Report on European Contract Law and the Acquis Review*, 23 September 2005, COM(2005) 456 final, para 1.

⁷ Council of the European Union, *Press Release: 2908th Council meeting, Justice and Home Affairs*, Brussels, 27 and 28 November 2008 (16325/08) p 30, adopting Presidency, *Draft report to the Council on the setting up of a Common Frame of Reference for European contract law*, Brussels, 7 November 2008 (15306/08) para 9; General Secretariat of the Council, *Consolidated version of the conclusions of the Council*, Brussels, 27 January 2009 (5784/09) para 22.

an academic project preparing the ground for the proposed CESL, equally aspired to set out a text that was 'well-organised, accessible and readable', designed with 'a clear and coherent structure' and written in 'plain and clear wording'.⁸ When the Commission established an Expert Group to develop a study on a possible future European contract law instrument in April 2010, it asked the Group to produce:

'a self-standing and comprehensive text [...] that would not only be concise, but also be user-friendly, both in its language and structure so it could be understood and used by businesses and consumers who would not necessarily be specialists in the area of contract law.'⁹

The resulting 'Feasibility Study' (FS) would become the point of departure for the further elaboration of the CESL. According to the Commission, the FS reflected:

'the necessity to ensure the text is as concise as possible and as comprehensive as necessary, in order to cover the vast majority of practical problems which take place in practice in a cross-border contractual relationship. In order to ensure its user friendliness and clarity, the Group has used explanatory headings and simple language.'¹⁰

The more the current proposal for a CESL meets this benchmark, the better its chances of gaining acceptance among its potential users and incentivising them to opt into it.

The acceptability will also depend on the extent to which lawyers advising potential users will feel at ease with the instrument simply because its style of drafting is familiar or at least not too alien to them. The success of a pan-European instrument will therefore also depend on whether it is framed in a manner that strikes an appropriate balance between the different drafting styles prevailing in European jurisdictions.

⁸ C von Bar, H Beale, E Clive and H Schulte-Nölke, 'Introduction' in C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference: Outline Edition* (Munich: Sellier 2009) 1, 29-30 (para 48).

⁹ Expert Group on European Contract Law, 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, 3 May 2011, available at http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf, p 6.

¹⁰ *ibid*, p 7.

3. DRAFTING OF THE CESL: SELECTED FEATURES

3.1. Level of detail

Legislation can be drafted at various levels of detail. The typical style of drafting in the common law tradition is casuistic and specific. Drafters seek to provide for all eventualities and contingencies. The idea is to draft, within the limited scope of the enactment, as many rules as possible (which are as detailed as possible) so that they are of the utmost precision and provide a conclusive solution to all legal issues that may arise under the relevant Act.

By contrast, the continental style of drafting is much less detailed. Legislation has a lesser degree of specificity or, as is sometimes said, considerably less 'intensity' or 'density'. Statutory rules are framed in general and abstract terms that do not enumerate specific instances and are intended to cover a multitude of scenarios, including those which were not foreseeable at the time of drafting. No attempt is made to cover every conceivable case and to elaborate conclusive solutions to all of the problems that may arise under a particular rule.

Like most EU legislation the proposed CESL is framed in relatively general and abstract language. The style of drafting represents a welcome shift away from the highly casuistic style of the DCFR.

The latter is often unnecessarily verbose. For example, it deals with contracts for the benefit of third parties in an entire Section (Book II, Chapter 9, Section 3) running to 365 words. Some of the provisions in this Section set out solutions that go without saying, e.g. that the third party's 'rights' include not only the right to performance, but also the right to invoke remedies for non-performance. The proposed CESL covers all the important issues concerning such contracts within a single Article with five highly readable paragraphs running over 196 words.

'Unilateral statements or conduct' are also covered in a single Article (Art 12 CESL), rather than in two specific Sections (Arts II.-4:301 to II.-4:303 and II.-8:201 to II.-8:202 DCFR). The manner in which they are covered is not geared towards ensuring doctrinal purity but rather towards providing solutions for the scenarios where rules for such statements or conduct are actually needed.

Overall, the proposed CESL is pitched at an appropriate level of detail. Within its scope it provides a fairly comprehensive set of rules that sets out solutions for the most important issues without attempting to micro-manage the remotest scenario.

3.2. Conciseness

Another hallmark of good drafting is conciseness. An instrument will not gain acceptance if it is redundant. Again, the proposed CESL scores much better on this account than the DCFR with its many repetitions and redundancies. The CESL even omits superfluous wording still found in the Feasibility Study, such as the textbook-style phrase in Art 182 FS ('There are two periods of prescription').

However, although redundancy has mostly been avoided, there is still massive potential for shortening the text.

- The separate treatment of the obligations and remedies of buyers and sellers in Chapters 9-13 CESL and those of service providers and customers in Chapter 15 of the CESL leads to frequent repetition.
- The entire Chapter on the passing of risk (Chapter 14 of the CESL) is arguably largely superfluous. Its provisions matter in one particular scenario only and this could be addressed by way of a minor amendment to the provision dealing with the effects of non-performance caused by the buyer. It has been suggested that the Chapter has only been included out of habit since provisions on risk have been part and parcel of sales laws for centuries.¹¹
- Chapter 1 of the CESL has the heading 'General principles and application', so the reader expects its rules to apply throughout the instrument. Thus, it is not necessary for Art 10 CESL ('Notice') to explicitly state in paragraph (1)(1) that the provision applies 'for any purpose under the rules of the Common European Sales Law and the contract'. It is equally superfluous for the first paragraph of Art 11 CESL ('Computation of time') to spell out that 'The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law' – this is clear from the context. Incidentally, the phrase 'provisions of this Article' is itself redundant: 'This Article' would be sufficient.
- The provision on 'Acceptance' (Art 34 CESL) stipulates in its first paragraph that 'Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer'. This renders the additional explanation in the provision on 'Requirements for the conclusion of a contract' (Art 30 CESL) superfluous: there is no need to spell out once again that acceptance 'may be made explicitly or by other statement or conduct' (Art 30(2)(2) CESL). Even worse, once it has been clarified that conduct can constitute acceptance, it is not necessary to have specific rules on acceptance by conduct with regard to the time of conclusion of the contract (Art 35(2) CESL) and the time limit for acceptance (Art 36(3) CESL).
- Art 98 ('The effect of delivery on the passing of risk is regulated by Chapter 14') is a vacuous cross-reference. It does not add anything material, nor can it be justified as providing a service to non-lawyers who use the document: they would not normally know what 'passing of risk' means.
- Art 13(3)(b) and (4)(b) CESL require the pre-contractual information provided when concluding a distance or off-premises contract to be 'in plain [and] intelligible language' although arguably 'intelligible language' would be sufficient.
- The mandatory character of the consumer protection rules in the Chapter on pre-contractual information is stipulated in four virtually identical articles or paragraphs in four different places (Arts 22, 27, 28(3), 29(4) CESL). It would be much more economic to have a single article at the outset or at the end of the Chapter that mentions all of the relevant provisions, e.g. a hypothetical Art 29A CESL:

'In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effects.'

The drafters would probably argue that their chosen approach is more appropriate for non-lawyers who may not be familiar with the technique of cross-referencing. However, the proposed CESL uses the very same technique in this specific context (cf Art 22) and also in other places. A good example is Art 5(2), which clarifies that

¹¹ cf K Lilleholt, 'Passing of Risk and the Risk of Mystification: Some Drafting Issues' (2011) 19 ERPL 921. The article refers to the corresponding provisions in the Feasibility Study which have not been amended for the purposes of the CESL proposal.

any reference in the instrument to 'what can be expected of or by a person, or in a particular situation' is a reference to 'what can reasonably be expected'. This avoids the multitude of references to reasonableness that clutter the DCFR.

It would be easy to multiply these examples. Redundancies such as those mentioned above can be avoided without detrimental effect to the substance of the instrument. Avoiding them is particularly important in light of the fact that the Commission specifically required the Expert Group that drafted the Feasibility Study to ensure that the instrument would not run over more than 185 articles. It is understood that this arbitrary requirement led to a serious reduction of the scope of the FS which means that it was not impossible to include important aspects of cross-border contracting, particularly the law of agency (or 'representation').

3.3. Linguistic determinacy

A further feature of any piece of legislation is the extent to which the drafters employ more or less precise and determinate concepts and phrases. It is possible to distinguish three types of legal rules. First, there are clear, 'bright-line' rules which leave a minimum of discretion to those who are charged with applying them to a given scenario. As a result, the outcome of individual cases falling within the scope of such rules is highly predictable. An example of this first type of rule can be found in Art 179(1) CESL:

'The short period of prescription is two years.'

Secondly, there are open-textured rules that do not articulate the specific criteria which must be considered in their application. These rules are often called 'standards'. They confer broad discretion on those who have to apply them. As a result, the outcome of individual cases falling within the scope of such rules is more difficult to predict, at least until a body of settled case law has built up. A paradigm example of this type of rule is Art 3 CESL:

'The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.'

Thirdly, there are open-textured rules that enumerate the relevant factors, or at least some of the factors, to be considered in their application without spelling out a hierarchy of these factors or otherwise specifying the relationship among them. In the absence of such a hierarchy the enumerated factors only have indicative value. Thus, those who are charged with applying this third type of rules also enjoy broad discretion and the outcome of cases decided under them is only marginally more predictable than with regard to rules of the second type. A rule of the third type can be found in Art 49 CESL ('Fraud'). The first paragraph of this provision refers to the 'fraudulent non-disclosure of information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose'. The third paragraph of the provision clarifies that:

'In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:

- (a) whether the party had special expertise;
- (b) the cost to the party of acquiring the relevant information;
- (c) the ease with which the other party could have acquired the information by other means;
- (d) the nature of the information;

- (e) the apparent importance of the information to the other party; and
- (f) in contracts between traders good commercial practice in the situation concerned.'

This provision gives some guidance on the factors that might be taken into account in fleshing out the meaning of 'good faith and fair dealing' for the purposes of Art 49 CESL. However, it leaves it open to the courts (a) to disregard any of these factors ('regard *should* be had'), (b) to have regard to any other factor ('*all* the circumstances, *including*') and (c) to weigh and balance all the enumerated and all the other potentially relevant factors at its discretion in the event that some of the factors point towards a requirement to disclose and others point in the opposite direction. This makes it difficult for parties to assess *ex ante* whether a particular non-disclosure will be held to be fraudulent or not.

The degree of linguistic (in)determinacy of an individual provision does not necessarily correspond to the level of detail generally employed in the instrument to which it pertains. It is true that casuistic statutes normally contain a high number of very precise provisions, while more general and abstract legislation is usually characterised by vague and ambiguous rules. However, casuistic and detailed statutes may equally include highly indeterminate provisions. At the same time, even general and in turn abstract codes sometimes employ very tightly circumscribed terms.

National drafting styles in Europe differ strongly with regard to the degree of linguistic determinacy employed. English drafters have traditionally framed their provisions in very narrowly circumscribed and precise terms. This is achieved in particular through the frequent use of long enumerations and statutory definitions. In the comparatively rare cases where English statutes employ vague and open-textured language, every attempt is made to flesh out the standard with a number of tests that provide guidance to the interpreter, resembling the approach of Art 49(3) CESL which furnishes 'circumstances' that provide further meaning to the notoriously vague concept of 'good faith and fair dealing'.

In contrast, continental drafters frequently use open-ended standards. The German Civil code, for example, employs a number of important 'general clauses' (*Generalklauseln*) or 'indeterminate legal concepts' (*unbestimmte Rechtsbegriffe*), such as 'good morals' (§ 138 BGB), 'in accordance with good faith and commercial practice' (§§ 157, 242 BGB), 'grossly disproportionate' (§ 275(2) BGB), 'unreasonable disadvantage' (§ 307 BGB) and 'equitable discretion' (§ 315 BGB), normally without specifying these further. Statutory definitions (*Legaldefinitionen*) are used comparatively rarely.

The drafting style of the proposed CESL can be situated somewhere between those opposite ends of the spectrum. On the one hand, the proposal sets out many definitions that attempt to provide stable and definite meanings for key concepts (Arts 7-10 CESL), including an attempt to circumscribe more closely the notion of 'reasonableness' (Art 5 CESL). A lengthy list of definitions in Art 2 Reg-CESL defines terms such as 'contract', 'good faith and fair dealing', 'trader', 'consumer', 'digital content', etc.¹²

On the other hand, the proposed CESL contains many provisions falling into the second category of rules outlined above. It makes ample use of open-textured language, for example by stipulating the duty to act 'in accordance with good faith and fair dealing' (Art 2(1) CESL), by requiring 'an excessive benefit or unfair advantage' as a condition for invoking unfair exploitation (Art 51(b) CESL), by subjecting the interpretation of contracts to the standard of 'a reasonable person' (Art 58(3) CESL), and by making the duty to re-negotiate dependent on performance having become 'excessively onerous' (Art 89(1) CESL). Even the definitions of 'reasonableness' and 'good faith and fair dealing' rely, perhaps unavoidably, on vague concepts such as 'the circumstances of the case' (Art 5(1)

¹² For the definitions in the CESL and the Reg-CESL, see further below at 3.6.

CESL) and 'honesty, openness and consideration for the interests to the other party to the transaction' (Art 2(b) Reg-CESL).

Moreover, there are many rules of the third type. Examples include Arts 23(2), 49(3) (cited above), 59, 68 and 87 CESL.

Neither type of rule is inherently preferable. The preference of a legal system for the use of determinate or indeterminate language ultimately depends on the balance it strikes between the two major competing legal values of legal certainty and substantive justice. Legal systems that value legal certainty highly tend to favour clear and precise language. Legal systems that want to enable their judges to apply rules flexibly to the circumstances of a given case in order to find an appropriate, fair and just outcome tend to favour the use of more vague and ambiguous terminology.

The drafting of the proposed CESL is strongly influenced by the second school of thought. Professor Clive, who has perhaps been the most influential member in the drafting of the DCFR and who was also a member of the Expert Group that prepared the Feasibility Study, has made it clear that the use of open-textured language was a deliberate choice:

'One of the perennial questions in relation to any set of legal rules is the balance between certainty and flexibility. Should an optional instrument err on the one side or the other? It seems clear that it should err on the side of flexibility. It has to cater for a wide variety of contracts. Any fixed rules would be likely to be inappropriate in relation to many such contracts. For example, fixed time limits or fixed penalty clauses would be quite likely to be unsuitable for many contracts. It is safer to have default provisions of a general type, using such vague criteria as reasonableness and good faith and fair dealing, which would not surprise the parties and would never be totally unsuitable, than to have specific rules which might surprise the parties and prove unsuitable for their situation. Parties who wish to have precise rules for their particular situation can always agree on them (subject to any mandatory rules applicable). This question of certainty versus flexibility is a question of balance. There is one sure way of finding out if the balance is right and that is to see if people opt for the instrument. If they do not, then some adjustment one way or the other would be required.'¹³

Professor Clive thus shares the view advanced above, i.e. that there is a direct link between the style of drafting of the instrument and its attractiveness to potential users. However, the EU legislator is well advised to make a serious attempt at striking the right balance from the outset rather than wait and see whether parties opt for the European contract law regime or not. Once the instrument has acquired a reputation for being uncertain in its application it will be very difficult to regain the trust of potential users, even with a comprehensive overhaul.

It is difficult to predict whether the use of more determinate or more indeterminate language will appeal to potential users. Ultimately this will depend on whether they put a premium on predictability of outcomes or whether they are more concerned about the fairness of outcomes.

Empirical research amongst European businesses engaging in cross-border contracts suggests that the approach chosen by the proposed CESL cannot be discarded from the outset: while businesses value predictability of outcomes very highly, the fairness of the outcomes is even more important to them, albeit only slightly.¹⁴ Moreover, recent empirical

¹³ E Clive, 'An Introduction to the Common Frame of Reference' (2008) 9 ERA Forum S13, 30.

¹⁴ cf the results of the business surveys conducted by S Vogenauer and S Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in S Vogenauer and S Weatherill (eds), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Oxford: Hart 2006) 105, 136-37; S Vogenauer, 'Perceptions of Civil Justice

evidence casts doubt on the widely held assumption that the enactment of a greater number of more detailed rules necessarily leads to more predictable outcomes than the promulgation of a relatively small number of broadly phrased principles. A study undertaken by members of the Law Reform Commission of Victoria (Australia) suggests that more loosely drafted contract law regimes might actually increase predictability.¹⁵

Yet the extent to which the proposed CESL uses indeterminate language arguably leads to a disproportionate loss of legal certainty, while only generating a modest gain in fairness. The point has been made most forcefully by the UK Law Commissions in their Joint Advice on the proposed CESL. They claim that, from a UK perspective, the proposed CESL 'is firmly towards the fairness end' of the scale from certainty to fairness.¹⁶ They argue that the strong emphasis on discretionary remedies will not appeal to consumers and traders alike. Both tend to prefer quick and simple solutions to resolve problems with minimum scope for dispute.

In order to make their point the Law Commissions single out the proposed provisions on termination and claim that these 'give the parties too many issues to argue about'.¹⁷ According to Art 119 CESL, the right to terminate for non-performance must be exercised 'within a reasonable time' where the buyer is a business. Surely, reasonable minds will often differ as to whether a buyer giving notice of termination did so 'within a reasonable time'. That reasonableness is 'to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved' (Art 5(1) CESL) will only be of limited guidance.

No such time-limit applies in B2C contracts. Thus, prima facie, the consumer's right to terminate only expires at the end of the prescription period that applies in the circumstances of the case. However, it is perfectly conceivable that the consumer delays the notice of termination for such a long time that he violates his duty to act in accordance with good faith and fair dealing (Art 2 CESL). As a result, the consumer would be precluded from exercising the right to terminate. The Law Commissions suggest that it would be 'better to set a time limit for the right to reject, however arbitrary, rather than allow disputes to escalate' through competing arguments about whether the delay in asserting the right was in good faith or not.¹⁸

Once the contract has been terminated, Art 174(c) CESL requires a recipient of goods who has made use of them to pay the supplier the monetary value of that use for any period where 'having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.' In the view of the Law Commissions, 'the open-ended discretion over whether the consumer must give an allowance for use' renders the provision 'too uncertain' and gives 'too much scope for disputes':¹⁹ they predict that businesses will ask for an allowance whenever they consider the consumer to be acting unreasonably. Again, the Law Commissions suggest replacing a vague standard with a clear

Systems in Europe and their Implications for Choice of Forum and Choice of Contract Law: an Empirical Analysis' in S Vogenauer and C Hodges (eds), *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law* (Oxford: Hart forthcoming) ch 1 (the data is available at <http://denning.law.ox.ac.uk/iecl/ocjsurvey.shtml>, Question 19).

¹⁵ MP Ellinghaus and EW Wright, 'The Common Law of Contracts: are Broad Principles Better than Detailed Rules? An Empirical Investigation' (2005) 11 *Texas Wesleyan Law Review* 399, 420.

¹⁶ The Law Commission [of England and Wales] and The Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems – Advice to the UK Government*, 10 November 2011, available at <http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/>, para 7.58.

¹⁷ *ibid* para 4.133; cf the discussion in paras 4.116 to 4.139.

¹⁸ *ibid* para 4.136.

¹⁹ *ibid* paras 4.137, 4.176.

bright-line rule: no allowance should be due when termination was made within a set period.²⁰

As has been said before, the use of indeterminate language is not necessarily bad. To some extent it is indispensable to provide the necessary degree of flexibility that makes it possible to adapt the instrument in the light of new and unforeseen circumstances. However, the frequent use of indeterminate wording is particularly problematic in a document aimed at parties and lawyers with different national backgrounds. Such statutory language just about works in domestic legal systems, where lawyers share a common legal culture, certain legal values and an established structural and conceptual framework. In a supranational setting, where such shared background knowledge is absent, the frequent use of indeterminate language unnecessarily increases the risk of diverging interpretations in national jurisdictions. This concern is a constant refrain of British responses to the proposed CESL. The official reaction of the United Kingdom Secretary of State for Justice, for example, pointed out that

‘There also seems to be a heavy reliance on concepts such as “fair dealing” and “good faith”, subjective concepts which are not necessarily clear and certain in terms of their meaning or interpretation and which are more familiar in the continental legal traditions than they are in the jurisdictions of the UK. Doubts about this may remain until resolved in jurisprudence, which may take some time to accumulate, and this could limit the practical utility of the new law.’²¹

Such interpretative divergences can of course be remedied by preliminary references of national courts to the CJEU under Art 267 TFEU. However, it is widely believed that the Court will be unable to cope with the flood of references bound to arise under a European contract law instrument. As a result, it is to be expected that it will take much longer to build up a uniform body of case law than it would for a purely domestic instrument. There will be a prolonged period of uncertainty during which the new instrument will be significantly less attractive to potential users than a regime that is characterised by the use of clear bright-line rules that will enable parties to know where they stand.

The Commission would therefore be well advised to limit the number of vague and ambiguous provisions in the current proposal to the absolute minimum and set out more linguistically determinate rules.

3.4. Inconsistencies

The text of the proposal contains a number of apparent inconsistencies. There are, at various places, slight terminological nuances which seem to be inadvertent because there is no sensible explanation for them. These are exacerbated by inconsistent uses of terminology in the different language versions.

I will focus on one instance. Article 23 CESL deals with the general duty to disclose information about goods and related services in the pre-contractual phase. According to Art 23(1) CESL, the supplier has a duty to disclose information ‘which it would be contrary to good faith and fair dealing not to disclose to the other party’. Art 23(2) CESL further specifies that:

‘In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:

²⁰ *ibid* para 4.139.

²¹ Explanatory Memorandum dated 31 October 2011 by the Secretary of State for Justice (Kenneth Clarke), as cited in House of Commons European Scrutiny Committee, ‘Reasoned Opinion concerning a draft Regulation on a Common European Sales Law for the European Union’ in *id*, *Forty-seventh Report of Session 2010–12* (HC 428-xlii of 9 December 2011) 21, 30 (para 5.15).

- (a) whether the supplier had special expertise;
- (b) the cost to the supplier of acquiring the relevant information;
- (c) the ease with which the other trader could have acquired the information by other means;
- (d) the nature of the information;
- (e) the likely importance of the information to the other trader; and
- (f) good commercial practice in the situation concerned.'

If compared to Art 49(3) CESL, cited above, it is apparent that the two provisions are virtually identical. The only material difference ('supplier' rather than 'party') is due to the fact that Art 23 CESL only deals with duties of the supplier while Art 49 CESL imposes duties on both parties.

Incidentally, the similarity of the provisions indicates another redundancy. There is a massive overlap in substance: whenever there is a specific information duty under Art 23(2) CESL there is, by the same token, an information duty under Art 49(3) CESL.²² The redundancy could have been avoided by using the cross-referencing technique which provides for the application of specific provisions to other contexts 'with appropriate adaptations'. For example, Art 12(4) CESL stipulates that the provisions on the interpretation of contracts 'apply with appropriate adaptations to unilateral statements indicating intention'. In a similar vein, a hypothetical Art 49(3) CESL could be phrased as follows:

'In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including those enumerated in Article 23(2), which applies with appropriate adaptations.'

More importantly in the present context, there are slight differences in wording between Arts 23(2) and 49(3) CESL which cannot be easily explained:

- According to Art 23(2) CESL, regard 'is to be had' to all the circumstances; Art 49(3) CESL requires that regard 'should be had' to all the circumstances. This suggests that there is a duty of the court to have regard to the circumstances enumerated in Art 23(2) CESL while it has a discretion to disregard some of the circumstances enumerated in Art 49(3) CESL. The French version also indicates that the two provisions have a slightly different import ('*il est tenu compte*' and '*sont prises en considération*'). There is no obvious reason for such a distinction, and the German language version does indeed use an identical phrase in both provisions which makes clear that there is no such discretion ('*sind ... zu berücksichtigen*').
- In cases of fraud, Art 49(3)(e) CESL stipulates that it is contrary to good faith not to disclose information if it is 'apparent' ('*apparent*', '*offenkundig*') that the information is important to the other party. Under the general duty to disclose in the pre-contractual phase that flows from Art 23(2) CESL, it is contrary to good faith not to disclose information if it is 'likely' ('*probable*', '*wahrscheinlich*') that the information is important to the other party. If this distinction is taken seriously, it means that the threshold for violations of the duty to act in accordance with good faith and fair dealing is higher in cases of fraud than in the pre-contractual phase in general. As a result, a victim of fraud would enjoy less protection than a victim of simple non-disclosure. It is unlikely that this was intended.
- The phrase 'good commercial practice in the situation concerned' in lit (f) of both provisions is reproduced in the German version as '*gute Handelspraxis in der betreffenden Situation*' in Art 23(2) CESL and as '*gute Handelspraxis unter den*

²² Thomas Pfeiffer, 'Art 49' in Reiner Schulze (ed), *Common European Sales Law (CESL) – Commentary* (Munich and Oxford: CH Beck and Hart 2012) para 5.

gegebenen Umständen in Art 49(3) CESL. The reader of the German version is led to believe that the legislator intended a different emphasis although, as the French version suggests, this is probably not the case. It uses the same term in both instances (*dans la situation en cause*). However, the French version employs, without apparent justification, two distinct notions for the concept of 'good commercial practice' in Art 23(2) CESL (*bonnes pratiques et usages commerciaux*) and in Art 49(3) CESL (*bonnes pratiques commerciales*).

Such drafting infelicities abound. Why, for example, does Art 42(1) CESL refer to 'the day *on which* the consumer has taken delivery' in four instances (lits (a)-(d)) and to 'the day *when* the consumer has taken delivery' in another one (lit f)? The obvious explanation for such inconsistencies is that the drafting was done under enormous time pressure. However, they ought to be remedied as a matter of urgency. They create unnecessary confusion in the application of the instrument, invite the bringing of unnecessary claims and have the potential of generating diverging interpretations of a supposedly uniform text in different Member States.

3.5. Language and legal terminology

The proposed CESL is drafted in relatively simple and readable language. Most sentences are short and intelligible. It may be doubted whether terms such as 'anticipated non-performance' (Arts 8(2), 116 and 136 CESL) and 'stipulated performance for non-performance' (Art 85(e) CESL) are indeed 'user-friendly', easy to understand and accessible to non-lawyers, as requested by the Commission. Yet, the proposed CESL is arguably better drafted than most of the existing secondary EU law and certainly more accessible to readers without a formal legal education than the DCFR, which puts greater emphasis on technical terms such as 'unilateral juridical act' (Art II.-4:301 DCFR) and 'effect of stipulation in favour of a third party' (Section II.-9:3 of the DCFR). The proposed CESL speaks instead of 'unilateral statements and conduct' (Art 12 CESL) and 'contract terms in favour of third parties' (Art 78 CESL). It uses the non-technical phrases of 'Making a binding contract' and 'Assessing what is in the contract' as headings for two of its main Parts (Parts II and III), although other headings are of a more traditional, technical nature.

As an official legislative proposal of the Commission, the proposed CESL has been published in all the official languages of the EU. As has been shown in Section 3.4 above, there are inconsistencies between the various language versions which must be remedied. It is too early to assess whether all the language versions are of equal quality. However, a first survey of a group of German scholars has noted a number of serious deficiencies of the German version:

'The awkwardness of, and the mistakes in, the German version of the CESL, which has quite clearly been translated from the English original, may also be attributable to the great hurry with which the [CESL] has been produced. *Abhilfe* (instead of *Rechtsbehelfe*) for "remedies"; *Vertragsbeendigung* (instead of *Aufhebung des Vertrages* or *Rücktritt*) for "termination"; *Personenschäden* (instead of *Verletzung persönlicher Rechtsgüter*) for "damages for personal injuries"; and some other terms used are uncommon in German legal language, and may easily lead to misunderstandings. *Forderung nach Erfüllung* (for "requiring performance") is simply bad German. *Ein Recht, die Erfüllung einer Verbindlichkeit zu vollstrecken* (for "[a] right to enforce performance") [Art 178 CESL] is just as wrong as *die Rechte des Käufers bestehen ungeachtet der Heilung der Nichterfüllung durch den Verkäufer* (for "the buyer's rights are not subject to cure by the seller") [Art 106(3)(a) CESL]. It is also interesting to note that some of the German headings in the [CESL] are more "legalistic" than the deliberately colloquial English ones

[“Zustandekommen eines bindenden Vertrags” for “Making a binding contract”; or “Bestimmung des Vertragsinhalts” for “Assessing what is in the contract”].²³

The somewhat unconventional terminology used in the various language versions might be due to the drafters' desire to avoid the use of terminology that has a given meaning in a particular legal system. This was a particular challenge for the drafters of the DCFR who dealt with areas of law beyond contract where there is not even a minimum of terminological uniformity across Europe, such as tort/delict, restitution/unjustified or unjust enrichment and *negotiorum gestio*. They therefore invented artificial and unwieldy neologisms such as 'non-contractual liability arising out of damage caused to another' and 'benevolent intervention in another's affairs'.

In the law of contract it is easier to avoid terminology that is intimately linked to specific national contract laws. For example, the notions of 'consideration' and 'rescission', each of them highly charged with meaning in English contract law, are absent throughout the CESL. However, it is extremely difficult to translate even well-established legal concepts, such as 'consequential damage'. It is possible to identify five potential meanings of the notion in English and American law. The French concept that is frequently used for its translation (*dommage indirect*) also has three different meanings, only one of which overlaps with one of the established English meanings.²⁴

Problems might occur because the proposed CESL uses the concept of 'misrepresentation', which has a highly specific meaning in English law. This is particularly so, since 'fraud' is defined in the same terms as in English law (Art 49(2) CESL). At this point the German language version speaks of '*arglistige Täuschung*'. This is a notion that for a German lawyer immediately evokes an association with § 123(1) BGB. A similar association will be conjured up by the German version of the provision on 'threats' ('*Drohung*') in Art 50 CESL which reads like a combination of the text of § 123(1) BGB and the standard German textbook definitions of this term. Nevertheless, it seems that the proposed CESL can avoid a charge frequently levelled against the DCFR, i.e. that it relied too strongly on quintessentially German legal concepts such as '*(einseitiges) Rechtsgeschäft*', '*(subjektives) Recht*' and '*Anspruch*', which gave the impression that they had simply been translated into English.²⁵

It is nearly impossible to square the circle in drafting a multilingual set of rules: it requires avoiding misunderstandings that follow from terminological proximity or overlap with existing legal terminologies of the Member States and at the same time producing a readable document and ensuring that all of its different language versions carry precisely the same meaning. If the proposed CESL becomes law, it will immediately be the subject of a pan-European legal discourse, and its provisions will be interpreted by the CJEU. An autonomous European meaning of terms such as 'misrepresentation' or 'threats' will then be developed much sooner.

²³ H Eidenmüller, N Jansen, E-M Kieninger, G Wagner and R Zimmermann, 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law' (2012) 16 *Edinburgh Law Review* 301, 309-10.

²⁴ J Herbots, 'Why It Is Ill-Advised to Translate Consequential Damage by *Dommege Indirecte*' (2011) 19 *ERPL* 931, 948. However, while 'consequential loss' is used in the tort/delict provisions of the DCFR (e.g. Art VI.-2:201), it does not feature in the proposed CESL which speaks of 'foreseeability' (Art 161), translated as '*prévisibilité du préjudice*' in the French language version.

²⁵ A Vacquer, 'Farewell to Windscheid? Legal Concepts Present and Absent from the Draft Common Frame of Reference' (2009) 17 *ERPL* 487.

3.6. Level of complexity

The user-friendliness of a legal instrument depends on its simplicity. The more complex the instrument, the less user-friendly it is. The CESL is at times unnecessarily complex and there is ample choice for simplification without altering the substance of the rules.

First, the current proposal has three parts: the Regulation designed to give effect to the CESL with its so-called 'chapeau rules' (here referred to as 'Reg-CESL') and two Annexes one of which sets out the actual substantive provisions of the proposed CESL (here referred to as 'CESL') and the other of which prescribes the wording of the standard information notice which must be provided to the consumer in B2C contracts. It is not always clear why a certain rule has been placed in the chapeau rules or in the first Annex. The somewhat arbitrary division makes reference to particular Articles unnecessarily cumbersome because it has to be specified in each case whether a provision from the Reg-CESL or from the CESL is meant. Most importantly, the division into two main parts seems to have led the drafters to overlook certain duplications (i.e. further redundancies) and contradictions (i.e. further inconsistencies). The most obvious inconsistency is the apparent contradiction between Art 8(3) Reg-CESL and Art 1(2) CESL. According to the former, the CESL 'may not be chosen partially, but only in its entirety', in B2C contracts. This implies that parties to B2B contracts may opt into individual Chapters or even individual rules of the CESL. Art 1(2) CESL permits the parties to derogate from non-mandatory rules in the CESL once they have opted into it. The provision also covers B2B contracts but will be meaningless in this context, given that traders will be able to avoid the application of mandatory rules simply by selective partial choice of parts of the CESL under Art 8(3) Reg-CESL. Such inconsistencies can also occur in a consolidated single instrument but chances are that they will not be as easily overlooked. It is therefore recommended that the chapeau rules and Annex 1 be recast in a single instrument.

Secondly, and related to the first point, the definitions provided throughout the proposal are not set out in a rational way. Any legislator has two basic models of statutory definitions at his disposal. The first is the use of 'stand-alone definitions' of key concepts at a prominent place of the relevant instrument, normally at the outset or at the end. Such 'definition' or 'interpretation' clauses are a hallmark of statutory drafting in the common law tradition, and they can frequently be found in legislative measures of the EU. The second model is that of 'integrated definitions' which are set out not in specific lists but if and when they are considered to be relevant, usually at the end of a provision that employs a key concept for the first time. The use of integrated definitions is more elegant but requires at least a rudimentary understanding of the structure of the instrument on the part of the reader. Stand-alone definitions are cumbersome but more accessible to non-lawyers who can use them as a kind of legal dictionary or 'one-stop shop' whenever they encounter an unfamiliar term. In order to fulfil this function, such a legal dictionary must be comprehensive and cover all the definitions used for the purposes of the instrument. Mixing both techniques creates confusion. This, however, is what the Commission's proposal does. It sets out its definitions in four different places:

- Art 2 Reg-CESL contains a very comprehensive list of stand-alone definitions which defines terms such as 'contract', 'good faith and fair dealing', 'trader', 'consumer', 'digital content' etc.
- Other provisions of the Reg-CESL use the integrated approach and define terms used in them such as 'cross-border contract', 'habitual residence' and 'small and medium-sized enterprise' (Art 4(2)-(4) and Art 7(2) Reg-CESL).
- Section 2 ('Application') of Chapter 1 ('General principles and application') of the CESL (i.e. Annex I to Reg-CESL) provides stand-alone definitions of recurring key concepts such as 'not individually negotiated contract terms', 'termination of a

contract', 'mixed-purpose contract' and 'notice' (Arts 7-10 CESL) and attempts to flesh out the notion of 'reasonableness' (Art 5 CESL).

- Other provisions of the CESL that use particular legal concepts integrate definitions of these concepts, e.g. for the notions of 'agreement', 'offer', and 'acceptance' in the Chapter dealing with the conclusion of contracts (Arts 30(2), 31(1) and 34(1) CESL) and the 'short period' as well as the 'long period' of prescription (Art 179 CESL).

It is not clear why at least those definitions set forth in Art 2 Reg-CESL that define words or phrases exclusively used in the CESL (i.e. in Annex I rather than in the Regulation designed to give effect to it) are not set out in the CESL itself. Even less 'user-friendly' is the lack of any discernible pattern in the order of the concepts defined in Art 2 Reg-CESL: it is, of course, impossible to adopt a simple alphabetical sequence because the order would not be identical in all official languages. However, it would assist the reader considerably if the terms were at least grouped according to a discernible categorisation, e.g. persons ('trader', 'consumer', 'service provider', 'customer', 'creditor' and 'debtor'), general contract law terms ('obligation', 'mandatory rule', 'damages', 'loss', 'good faith and fair dealing'), types of contract ('sales contract', 'consumer sales contract', 'distance contract', 'off-premises contract'), and terms relating to specific types of contract ('goods', 'durable medium', 'digital content', 'related service' 'price', 'public auction'). It would be highly desirable to create such a more rational order and have all the definitions collated in one place.

Thirdly, despite the drafters' attempt to devise chapters that 'follow the life cycle of a contract' the proposal is not 'user friendly' in the sense that a trader or consumer can simply read through it and discern its legal position without legal advice. As the UK Law Commissions wrote in their Joint Advice on the proposal:

'The CESL is a long and complex document. As lawyers, we found the document difficult to get to grips with. Many provisions are general principles of contract law. It is not always easy to understand, for example, how the general provisions might apply to internet sales. We also found the text difficult to navigate'.²⁶

The Law Commissions give the example of the right to terminate. In order to describe it

'it is necessary to refer to Articles spread throughout the instrument, including Articles 2, 114, 174 and 179. The joint effect of these articles only becomes clear after several hours of study. We do not think that the average consumer would be able to understand the right to terminate by reading through the text'.²⁷

It will not be entirely possible to avoid this type of complexity which is, ultimately, a consequence of the complexity of life. If an instrument that deals with complex scenarios is meant to be short and concise a certain amount of cross-referencing is inevitable. As a result, it will never be easily accessible to non-lawyers.

Yet, the complexity could at least be reduced if the instrument were to adhere more closely to its own purpose. The proposal deals with cross-border transactions for the sale of goods, for the supply of digital content and for related services (Art 1(1) Reg-CESL) but it still shows traces of the academic projects which preceded it, the Principles of European Contract Law ('PECL') and the DCFR. These were both designed to create a general law of contract, applicable to all types of contracts. Thus they had to deal with more complexity and were more complex themselves. If the CESL were to focus on the rules necessary to perform its core task in the law of sales and the supply of goods and related services rather than attempting to provide a general law of contract that can later be used to for an

²⁶ The Law Commission and The Scottish Law Commission (n 16 above) paras 4.8 and 4.9; cf *ibid* para 4.176.

²⁷ *ibid* para 4.9.

instrument with an extended scope of application – a possibility that is clearly on the agenda of the Commission²⁸ – it would be possible to reduce its complexity. Some rules might simply be omitted, e.g. those on contracts for the benefit of third parties (Art 78 CESL) which are hardly relevant in the sale of goods.

Further reductions of complexity might be achieved if the Commission were to rethink two of its major policy decisions which are at least questionable. The first of these is the attempt to cover both B2B and B2C transactions in a single instrument. This makes the document more difficult to understand for both types of transactions. A good example is provided by Chapter 8 of the CESL that has to make provision for the control of unfair contract terms in B2C and B2B contracts, with both types of transactions requiring different standards of fairness. There are important policy reasons for dealing with B2C contracts alone and covering B2B transactions elsewhere (or, possibly, not at all).²⁹ More importantly in the present context, a pure consumer contract instrument would be much less complex than the current proposal.

The second policy decision is the *en bloc* inclusion of rules that are derived from the Consumer Rights Directive.³⁰ These are not always structured in a manner that sits well with the structure of the CESL. To place all of them in the Chapter on 'Pre-contractual information' (Chapter 2 CESL) rather than relegating some of them to the Chapter on 'Conclusion of the Contract' (Chapter 3 CESL) where they actually belong, leads to further complexity and invites confusion. Moreover, some of these provisions are as such excessively complex and would benefit from a thorough redraft.

²⁸ Explanatory Memorandum to Reg-CESL, p 11.

²⁹ S Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?' (2010) 6 *European Review of Contract Law* 143.

³⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64.

4. CONCLUSIONS AND RECOMMENDATIONS

In order to attract users a European contract law instrument must be accessible and user-friendly. The current proposal for a CESL is a good starting point in this regard. It is written in accessible language and strikes an appropriate balance with regard to the level of detail it aims to provide for. In many regards it represents a good compromise between the traditional styles of drafting in continental Europe and England.

However, there is scope for improvement. The proposal should undergo a comprehensive recast which should address the following points:

- Redundancies should be avoided.
- Inconsistencies should be remedied within and across the various language versions.
- Translations from the English language version should be reassessed and improved.
- The structure should be simplified by collating the two main parts of the proposal (the Regulation designed to give effect to the CESL and Annex I with the actual CESL rules) into one instrument.
- Definitions should be collated in a single place rather than scattered throughout the two main parts of the instrument.

All that is needed to implement these recommendations is solid draftsmanship which is available within the Commission and its translation services. The problem rather seems to be to find sufficient time for a proper redraft. Lack of time is the most plausible explanation for the current defects of the proposal. Therefore the most important recommendation is to slow down the legislative process once agreement is reached on the policy decisions. For an instrument of such importance for the development of private law in Europe it is crucial that time and effort will be spent in achieving the best possible quality of drafting.

A further recommendation will be more difficult to implement:

- Wherever possible, vague and ambiguous terms should be replaced by more precise and determinate language in order to provide more legal certainty, even if, occasionally, at the expense of flexibility and fairness.

This will require a real shift in the drafters' mindset. Moreover, such a move is ultimately linked to policy choices. However, for the reasons given above, it seems to be crucial for the attractiveness of the instrument.

Finally, the UK Law Commissions and the European Law Institute recommend the enactment of an official legislative guide with authoritative status, available online, which will provide straightforward explanation of how the CESL works out in practice.³¹ I would advise against such a document. Multiplication of texts will only increase complexity. A well-drafted instrument does not need an official commentary.

³¹ The Law Commission and The Scottish Law Commission (n 16 above) paras 4.12, 4.176; European Law Institute, *Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final*, 14 September 2012, available at <https://www.europeanlawinstitute.eu/projects/publications/>, para 58.

FURTHER READING

- Eidenmüller, Horst; Jansen, Nils; Kieninger, Eva-Maria; Wagner, Gerhard; Zimmermann, Reinhard: 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law' (2012) 16 *Edinburgh Law Review* 301-357
- European Law Institute: *Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final*, 14 September 2012, available at <https://www.europeanlawinstitute.eu/projects/publications/>
- Herresthal, Carsten: 'Zur Dogmatik und Methodik des Gemeinsamen Europäischen Kaufrechts nach dem Vorschlag der Kaufrechts-Verordnung' in H Schulte-Nölke, F Zoll, N Jansen, R Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich: Sellier 2012) 85-148
- The Law Commission [of England and Wales] and The Scottish Law Commission: *An Optional Common European Sales Law: Advantages and Problems – Advice to the UK Government*, 10 November 2011, available at <http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/>
- Vogenauer, Stefan: 'Elaborare il diritto europeo dei contratti', *Contratto e impresa/Europa* 2012, 125-156

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