Bar Council of England & Wales
response to UK Government call for evidence on the

Common European Sales Law

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Introduction

1. This paper is submitted on behalf of the General Council of the Bar of England and Wales (“the Bar Council”). It responds to the Ministry of Justice (MoJ) and the Department for Business, Innovation and Skills (BIS) call for evidence on “The Common European Sales Law for the European Union, a proposal for a Regulation from the European Commission” (CESL), adopted on 11 October 2011 (Document reference: COM (2011) 635 final).

2. The Bar Council represents the interests of some 15,000 barrister members. As the Bar’s governing body, its role is to promote and improve the functioning of the Bar and its services to its clients; and to represent the interests of the Bar on all matters relating to the profession, including on changes to law or procedure.

3. The Bar Council has been following closely the work of the European Institutions on European Contract law for more than a decade. We have responded to all public consultations on same; provided practitioner experts to join the Common Frame of Reference (CFR) network of stakeholders, which was most active in the years 2004-7; supported their work; and contributed to hearings and working groups within the European Parliament. We have also played an active role in debates organized by the Ministry of Justice, and by other UK-based stakeholder groups; as well as in similar exercises in other Member States and at international level.

4. The Bar Council thus approaches this present call for evidence with an in-depth expertise and knowledge, not only of the substantive law and its application in practice in England and Wales and internationally, but also of the history of this file at EU level.

The Bar Council’s position

5. The Bar Council does not support the Commission’s October 2011 proposal for a regulation creating a Common European Sales Law (CESL).

6. The Bar Council does support the underlying aim of the proposal, to improve the functioning of the Internal Market, and encourage intra-EU cross-border trade, particularly involving consumers and Small and Medium sized Enterprises (SMEs). We do not believe that the CESL as proposed will achieve that.

7. We consider that the Commission has failed to prove its case that there is a significant problem for businesses generally, or for consumers and SMEs in particular, in their cross-border contractual dealings. Further, if there is such a problem, that it is not caused by differences in contract law as such, nor could it be fixed by any EU measure in the contract law field, much less the CESL as proposed.

8. Rather, as we have stated in previous responses to Commission consultations on the file, and in greater detail below, we believe any obstacles to cross-border sales/purchases involving consumers and SMEs are attributable to
other factors such as language, variable tax rates, variable advertising rules, difficulties with delivery, lack of knowledge of/confidence in the trader, the cost of returning unwanted goods and dispute resolution.

9. We believe that the Commission should be focusing its efforts in these areas, by improving the implementation of existing EU measures (such as the EU Small Claims Procedure), advancing the adoption of pending proposals (such as ADR and ODR in consumer cases), and giving time for other relevant and recently adopted EU measures, most notably the Consumer Rights Directive, to enter into force and for its expected positive effects on the Internal Market to be ascertainable.

10. We consider that the CESL, were it to be adopted in anything like its proposed form, would prove to be both too costly and too legally uncertain to be usable in practice, with a possible consequence that, as noted below, legal services would be exported outside the EU to third country locations such as New York and Singapore.

11. That said, the Bar Council would wish to underline its view that the work that has been done over many years in the lead up to the 2011 proposal is very valuable and should be put to practical use. We therefore advocate a reversion to the original idea of developing a non-binding toolbox based on the comprehensive content of the draft Common Frame of Reference (DCFR), possibly in tandem with the development of EU standard terms and conditions for certain types of contracts (developed in close cooperation with the legal profession, with the relevant industry and with consumer bodies where applicable).

12. In finalising its response to this call, the Bar Council has had the benefit of sight of the detailed response by the Law Society of England and Wales, which we endorse and support.
PART I: 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.

13. No. The Bar Council’s reasoning can be summarised under the following headings:
   - Lack of evidence of need for an EU contract law instrument
   - Even were need shown, the Common European Sales law (CESL) as proposed by the Commission would not solve the identified problems. Indeed, we believe it would add to them.
   - We take this early opportunity to make some positive alternative proposals as to outcome.

Lack of evidence of need

14. The Commission has failed to prove its case, either that there is a significant problem for businesses generally, or for consumers and SMEs in particular, in their cross-border contractual dealings, or that, if there is, it is caused by differences in contract law as such, or could be fixed by any EU measure in the contract law field, much less the CESL as proposed. We consider that for both businesses and consumers, obstacles to trading cross-border lie elsewhere. For businesses, these would include: language, variable tax rates, variable advertising rules, difficulties with delivery and cost of dispute resolution.

15. For consumers, they would include: language; lack of knowledge of / confidence in the trader, concerns about delivery and the cost of returning unwanted goods and dispute resolution.

16. In line with the principles of subsidiarity and proportionality, the Commission is bound to show that action at EU level is needed, and that that action is proportionate to the problem that it seeks to address, before it proceeds with an EU measure such as the CESL or indeed, anything similar.

17. It is the Bar Council’s long-held and oft-stated view that there are many existing and envisaged EU measures, on a smaller scale, that may, if properly implemented and applied, resolve most of the problems that in reality are likely to be acting as a brake to growth in EU cross-border trade. The Bar Council considers that the Commission was and remains Treaty-bound first to concentrate its energies on ensuring that existing EU instruments are implemented and utilised to the full extent possible - both general civil law instruments and in the consumer field; and then to move to other targeted initiatives.

18. Examples of existing EU measures that should assist include: the EU Small Claims Procedure, the E-Commerce Directive, the Rome I Regulation, the European Order for Payment procedure, the European Enforcement Order, the
Unfair Contract Terms Directive, the Consumer Rights Directive, and in the services field, the Services Directive.

Examples of proposed EU measures include: the European Asset Preservation Order, and ADR and ODR in consumer cases.

19. If, having achieved all of the above, the perceived problems continue, at that point, it might be worth considering whether there were other actions that could be taken at EU level to encourage more cross-border activity by consumers and SMEs. Even then, it would still be necessary to carry out far more extensive analysis of the actual difficulties experienced, and identify the least invasive, most proportionate actions that could be taken to resolve them.

Unsuitability of the CESL as proposed

20. Notwithstanding the lack of substantiated independent evidence of need or of the appropriateness of a contract law solution, the Commission has pressed ahead with this proposal for a European optional sales law.

21. It is clear that for the CESL as proposed to work in practice, it would have to be truly optional, simple and easy to understand and apply, provide legal certainty and flexibility, and save business both time and money. It needs to provide the right level of consumer protection so as to attract consumers, and not deter business. The Bar Council’s view is that the October 2011 proposal fails on every count. Moreover, we question the legal basis upon which the proposal was adopted. We set out our reasoning in greater detail in response to the later questions.

Some positive, practical suggestions

22. The Bar Council recognises the political reality that the Commission having adopted a proposal in October 2011, some form of EU contract law measure is likely to emerge. Moreover, we consider that the work that has been done over many years in the lead up to the proposal is very valuable, and should be put to practical use.

23. That being the case, our strong preference would be to revert to the original idea of developing a non-binding toolbox based on the comprehensive content of the draft Common Frame of Reference (DCFR), which should be kept up-to-date, possibly in tandem with the development of EU standard terms and conditions for certain types of contracts (developed in close co-operation with the legal profession, with the relevant industry and with consumer bodies where applicable). We believe that this combination would be a proportionate response; could avoid the difficulties inherent in the CESL as proposed and would have a positive effect on cross-border SME / consumer trade.

24. Even in its most limited possible form – a cross-border only, internet only, B2C only, sale of goods only, optional instrument, we would have difficulty
supporting an adopted EU legislative instrument, based on the CESL as proposed, for the reasons we set out in greater detail below.
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?

25. The Bar Council believes that the weaknesses and threats of the CESL as proposed by the Commission far outweigh any strengths and opportunities that it might bring. There are two primary elements informing this view:

- The CESL as proposed would be available for both B2C and B2B transactions, albeit that the latter would only be covered if one of the parties to the contract were an SME (as very widely defined in EU law). The Bar Council considers that the policy considerations underlying B2C and B2B contract rules have evolved to become entirely separate. Further, we are of the view that applying B2C principles to B2B transactions, even if one of the parties is a “small” enterprise, will produce very undesirable results for businesses, and by extension, for the credibility of contract law in Europe.

- Despite the Commission’s protestations to the contrary, it is a widely-held belief that were an instrument like the CESL to enter the statute books, other, more ambitious EU contract law proposals would follow. Indeed, the Commission’s 2012 Work Programme indicates that it is looking at developing a similar instrument in the insurance field, the scope of which is as yet undefined. This work is underway.

The global market place for legal services

26. The Bar Council is thus concerned about the potential negative impact that the proposal may have, directly or indirectly, in the fiercely competitive global market place for legal services. In maximizing the economic potential offered by that global market place, the EU is fortunate in possessing several globally recognized centres of excellence. That diversity is important because sophisticated consumers of specialist professional services do not accept that a "one size fits all" solution will best meet their particular needs. Any measure that renders the EU (and individual Member States) relatively less attractive as a centre for legal services (or even creates that perception) will have a direct adverse effect on the EU, to the benefit of global competitors such as the US, Singapore and Switzerland.

27. Even domestically (i.e., looking only at England and Wales, and London in particular), the annual fee income of the 100 largest law firms is approaching £15bn, with over half of that revenue being generated by London-based international law firms. The experience and expertise in advocacy, for which barristers are particularly recognised, contributes significantly to those invisible earnings. Earnings within the EU, derived from the provision of legal services to parties outside the EU, generate a substantial inward flow of money into the EU. Such earnings make the EU economy larger, and more liquid. The economic benefits are clear. If any of those earnings were to migrate, the EU as a whole would be the loser. The Bar Council is concerned that that could, indeed, be the result were the CESL as proposed, to become law, possibly paving the way for other more far-reaching EU contract law instruments in the future.
28. We wish to underline that these concerns are not driven by a lack of confidence in our own system of law, or in the Bar’s ability to adapt and itself rapidly develop the expertise necessary to advise clients on a new legal regime. In fact, it is quite the opposite. Our concern is that big B2B will not only not use the CESL, but may view its existence with suspicion, by extension undermining the credibility of English contract law (and by extension the contract laws of other Member States). The potential transfer of international legal business would not be to elsewhere within the EU – it would go to third countries.

The Cost implications of the CESL and its inherent legal uncertainty

29. There are several aspects of “cost” which must be considered:
(i) information and compliance costs to EU businesses;
(ii) communication costs to EU consumers; and
(iii) legal operator costs.

In respect of (i) and (ii) above, so far as the Bar Council is aware, there are no reliable estimates of the cost of informing, communicating to and familiarising businesses and consumers across the EU with the CESL, nor the costs of compliance. Nor has any model been developed to estimate the impact on EU business competitiveness. On any view, those cost factors would be considerable.

(iii) Legal operators will, above all else, be seeking to maximise legal certainty for their clients, whether they be economic operators or consumers, in their contractual relations. The Commission’s proposal contains on its face many concepts that lead to legal uncertainty. By way of example:
• It is far from clear how the CESL will interact with the provisions of the Rome I regulation, in particular as regards consumer protection (see further below)
• It is far from clear how legal operators are to advise their clients on matters not covered by the CESL, e.g. capacity and illegality
• CESL includes an overarching duty of good faith which cannot be derogated from or varied, and breach of which may preclude reliance on rights or remedies, or make a party liable for loss. This is a very vague obligation, and likely to provide fertile ground for uncertainty and disputes
• CESL also seeks to introduce a number of wide-ranging and potentially onerous and uncertain pre-contractual duties, discussed in greater detail below
• CESL (Article 38) allows for “modified acceptance” of an offer, even if the acceptance implies additional terms. Thus a party could be compelled to contract on terms which it has neither offered, nor agreed to
• CESL also introduces broad and vague additional principles of contractual interpretation (again, discussed further below).

30. Moreover, to achieve legal certainty in relation to these types of provisions, they would need to be interpreted and applied in a uniform manner in all 27 Member States, not least because as noted below they are expressed in the
CESL to be autonomous concepts not dependent on national laws or their interpretation. A Czech or Irish judge would not only need to be able to interpret and apply national contract law correctly, but would need to be able to interpret and apply the CESL correctly, too. This raises several problems for which we have yet to hear a satisfactory solution:

- Judges and legal advisors will need to be able to suspend their “national law” approach.
- Judges and legal advisors will need to grapple with terms that have a harmonised and autonomous EU meaning.
- Judges and legal advisors will need to wrestle with how very open-textured concepts (e.g. good faith and fair dealing) are to be applied.

31. Not only will the judges and the legal professions of the Member States be faced with these problems, but the parties who have chosen the optional instrument will be faced with problems too. In the event of gaps or ambiguities arising (as would be inevitable), the only court competent to articulate an autonomous EU meaning, or resolve an ambiguity, would be the Court of Justice of the EU (CJEU). But references to the CJEU are notoriously slow, cumbersome and costly.

32. The challenge, and cost, of overcoming those problems should not be underestimated. In the Bar Council’s view, it is inevitable that the workload of the CJEU would increase.

**Legal Uncertainty and lack of legal basis**

33. Last, but by no means least in the context of a discussion on legal uncertainty, the Bar Council has repeatedly raised serious doubts about the legal basis chosen by the Commission for its October 2011 proposal, being Article 114 TFEU. Rather than reproduce the full argument here, may we refer you to our January 2012 position paper on same, at: http://www.barcouncil.org.uk/media/112927/bar_council_of_e_w_preliminary_views_on_cesl_legal_basis_-_january_2012.pdf

34. We are aware of the views taken, reportedly, by both the Council of the EU and the European Parliament’s Legal Services, on this issue. That said, we also note that national parliaments, including those of Germany and Austria, have formally expressed their concerns about this issue, as indeed has the Council of the Bars and Law Societies of Europe (CCBE), which represents the European Legal profession. We consider that the issue remains live and undecided, and will thus undermine the credibility of the CESL unless and until the CJEU has given judgment on the issue.

35. In our view, that, in and of itself, is likely to dissuade economic operators from relying on the CESL and cause our practitioners to hesitate to recommend it.

**Use of the CESL in EU public procurement contracts**

36. One possible hidden threat, which the Bar Council would raise here, but not
seek to dwell on, is the risk that, in the future, companies wishing to bid for EU public procurement contracts might find themselves having to choose the CESL, were it to be adopted in anything like its current form, as the governing law.
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.

37. No. The Bar Council believes that its barrister members, who would be called upon to advise their clients, whether business or consumer, on the choice of contract law, and its implications will be unable to recommend the CESL. Our primary reasons for this view are the following:

The CESL is plagued with legal uncertainty

38. The Bar Council has serious doubts that the CESL as proposed is based on the correct legal basis under the Treaties (see above). As legal professionals, we could not advise our clients to rely on a contractual instrument that may yet prove to be ultra vires.

39. Further, there are many other questions that undermine legal certainty:
   - How does the CESL fit into existing national/ EU/International Private law?
   - How are lawyers to advise on the interpretation of terms such as “good faith and fair dealing” without recourse to national law, nor to any existing body of jurisprudence, nor even any non-binding guidance?
   - How are judges to arrive at decisions thereon?
   - What court will have the final say on interpretation and how will it/ they cope? We assume that it will be the CJEU, but as stated above; it does not currently have the resources to fulfill this important role.
   - Moreover, references to the CJEU for a preliminary ruling are, intrinsically, costly in time and money. Yet, unless such references are pursued, the law will remain uncertain, and interpretation of the instrument will inevitably diverge as between the Member States over time. This is particularly relevant given that the Commission has repeatedly stressed that a key constituency for the CESL would be consumers.
   - How are businesses to predict the effect of the applicable law in areas that the CESL does not cover – e.g. agency, and legal capacity (see further in answer to question 5 below)?
   - What will be the advice in the event of conflict between the CESL and a provision of national law that applies to the contract alongside it, if that is even permissible?

The Bar Council believes that for these, and other reasons already set out in response to questions above, our practitioners will be advising clients that the costs of entering contracts governed by CESL will be higher than they would be under existing applicable contract law regimes.

40. The CESL also introduces a number of practical difficulties, making it unattractive to businesses. Two examples among the many are the calculation of time limits and how to comply with the pre-contractual information requirements, in particular if the CESL is only chosen after negotiations have begun.
41. For clients involved in B2B transactions who would normally wish to take advantage of the flexibility and freedom of contract offered by a system such as English contract law, it is not obvious why any legal advisor would recommend CESL, particularly as it has at its core B2C-driven policy assumptions that do not transpose to B2B contracts, but rather, are likely to contribute to their legal uncertainty.

42. From the consumer’s point of view:

- In practice, the CESL will be optional in name only. The only option for the consumer will be whether to contract or not, with that particular trader.
- Moreover, it is not obvious what advantage the consumer would derive from the CESL and thus why any lawyer, were he to be asked to advise on it, would recommend it. The UK, along with many other EU Member States, already provides a high level of consumer protection to consumers, mostly derived from EU measures. In the UK, these include the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979, the Consumer Credit Acts 1974 and 2006, the Consumer Protection Act 1987, the Unfair Terms in Consumer Contract Regulations 1999 and the Office of Fair Trading and Trading Standards. When entering contracts with traders in other Member States, such consumers can rely on these national protection provisions, thanks to Rome I, Article 6. In addition the CRD, and planned reviews of, for example, the package travel directive and unfair contract terms are likely to resolve any known problems in those areas in the consumers’ favour.
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;
   b. the availability for distance, off-premises and on-premises contracts;
   c. the limitation of the draft Regulation to cross-border contracts;
   d. the requirement that at least one party to a business-to-business contract must be a Small Medium Enterprise.

43. As stated above, the Bar Council would have difficulty supporting the adoption of an instrument based on the CESL, as proposed, even were its scope significantly more limited, and only applied to cross-border, B2C, internet-based sale of goods contracts. Accordingly, we do not support its present scope, including as categorized in this question.

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?

44. For ease of reference, we will separate this response into two sections:

Boundary problems

45. The Bar Council considers this to be one of the greatest areas of difficulty with the proposal, likely in practice to create numerous problems. The CESL is said to be an autonomous code, but it applies only to certain areas of the contractual relationship:
   • Reg Art 3 – application is limited to territorial, material and personal scope set out in Arts 4 to 7
   • Art 11 – CESL when chosen “governs the matters addressed in its rules”
   • Art 5 – can only be used for sales contracts, and contracts for supply of digital content
   • Art 6: mixed purpose contracts or contract linked to consumer credit are excluded.

46. The Explanatory Memorandum observes that “since the CESL will not cover every aspect of the contract (e.g. illegality of contract, representation) the existing rules of the Member State civil law that is applicable to the contract will still regulate such residual questions”. The practical consequence of this would be to create great uncertainty about how and when the CESL applied to contractual relations - particularly when (as is likely), the national laws of one or other party conflict with the CESL.

Interaction with Rome I

47. This is a further intractable problem arising from the nature of the CESL, i.e. an autonomous but partial system, dependent on national laws to fill in gaps. The Explanatory Memorandum states that the Rome Conventions “will continue to apply and will be unaffected by the proposal”.

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48. However, as the Scottish Law Commission (and others) has pointed out (see SLC’s Advice to the UK Government re the CESL, November 2011 - http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), CESL purports to restrict the use of CESL by preventing it from being chosen by two large businesses. This arguably cannot be done without amending Rome I.

49. In any case, at the moment it is generally recognised and accepted that Rome I permits the choice only of systems of national law, or (possibly) systems which are equated with national law. The underlying assumption of the instrument is that the CESL would be deemed to be a system of national law, or equivalent for these purposes. The Bar Council has doubts about that in law, but even if it were the case, the CESL could not govern the whole relationship between the parties, because it is of limited scope. One would therefore have to find a method of choosing national law to fill the gaps. This is likely to be highly complex, and might also not be possible without amendment of Rome I.
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.

50. The Bar Council understands the superficial attraction to SMEs of the concept of needing only one set of contract rules to apply to all sales, whether cross-border or not. The CESL as proposed, of course does not go that far, and we would not expect the UK to be among the Member States that might choose to adapt national law to mirror it, in line with the Commission’s express invitation.

51. Thus, even as proposed, traders are dealing with at least two contract law systems. However, even if they opt to use the CESL for all their cross-border sales, the Bar Council would point out that the choice of law may not be that simple. We have already commented on so-called boundary issues relating to the scope of the CESL and how national law and the CESL are to interact when the latter does not cover a particular eventuality (e.g. capacity to contract, if a minor purchases a good online that he is not legally allowed to purchase in his country of origin).

52. We can also foresee difficulties arising when sales do not readily fall into the cross-border category. For example, what if a consumer places an order (via the internet) from another Member State, but providing a delivery address and / or payment method in the Member State of the trader?

53. Even setting aside these relatively minor points however, the Bar Council believes that the many disadvantages of the CESL already referred to, in particular in the areas of legal uncertainty and the inevitable increase in costs that that would occasion, outweigh any possible superficial benefit.

7) Does the proposal, as drafted, provide an appropriate level of consumer protection – is set too low or too high? Are there any particular changes you would like to see made?

54. The Bar Council does not consider this to be a matter within its specific expertise. Instead, we would refer you to the consumer-related section of our response to question 3) above.

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?

55. Minimal or negative. The question as framed immediately excludes domestic purchases, which account for the majority of B2C sales transactions in the UK. Most such transactions are domestic in nature for the simple, non-contract-law-related reasons set out in answer to question (1) above – language, lack of familiarity with the foreign trader, concerns about delivery and the cost of returning faulty or unwanted goods and dispute resolution, for example.

56. The question is thus automatically looking at a minority of UK consumer purchases, albeit one in which it is hoped that the numbers might grow. By application of Rome I, Article 6, UK consumers currently can avail themselves...
of the relatively high levels of protection offered by their domestic consumer protection rules when purchasing from traders in Member States that have lower standards. If the trader is from a Member State with equivalent or higher levels, the consumer’s risk is negligible. So in either case, the CESL adds little, and could indeed take away, if a UK consumer were bound by it, and if in its final form, the standard of consumer protection it applied were lower than that offered by domestic law. The only possible advantage to him might be to be able to purchase a good from a trader that might not, without the CESL, have been willing to contract with him. We are not aware of any statistics, but find it difficult to believe that this will represent a very high proportion of possible sales to UK consumers, who are already well served, both in terms of internet penetration and the availability and choice of consumer goods; and sellers willing to sell to them.

57. Finally, if the CESL were to be adopted as proposed, or similar; we believe that the inevitable costs that will be incurred by traders in dealing with the legal uncertainty and other inherent flaws already referred to, in the instrument, will eventually be passed on to the consumers. Thus, price increases might be the one tangible impact.

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.

58. The Bar Council does not take a view on this question. We refer you to the response of the Law Society of England and Wales, whose concerns about the lack of stakeholder consultation / expert input on this aspect of the proposal we share.
Impact Assessment

10) What, in your view, would be the impact of the Common European Sales Law? We are interested to hear from all affected sectors; consumers, business, advisory groups and the legal sector.

59. For the reasons provided in answer to earlier questions, we believe that the CESL, were it to be adopted in anything like its proposed form, would not be attractive to well-advised businesses, owing to the many aspects of its inherent legal uncertainty and the inevitable increase in transaction costs that traders would thus incur. As already stated, we believe that the impact on UK consumers would likewise be minimal. We accept that there may be consumers in other, smaller Member States, perhaps with low levels of internet penetration or those where, for practical geographical reasons, difficulties in making cross-border deliveries may reduce their choice of consumer goods or traders, for whom the CESL might conceivably bring a wider choice. We do not see the need for an EU wide contract law instrument to bring this about.

60. The most immediate impact of the CESL will, in the Bar Council’s view, be the considerable bill that will have to be paid to educate the legal profession and the judiciary, at national and EU level, on how it works, how to interpret and apply it, how it interacts with other systems of law; and the cost to businesses of obtaining that legal advice, and of adapting their own business practices and the terms and conditions of their contracts, all of which would be needed. Most of these costs would be incurred whether or not the CESL is actually ever used. We doubt they could ever be justified.

11) Do you believe it would provide the benefits identified in the Commission’s Impact Assessment?

61. No. Please see our other answers generally, and also the specific response of the Law Society of England and Wales.

12) Do you have any views on changes that could be made to the proposal to increase its potential benefits for the UK?

62. We have set out as part of our answer to question (1) above a positive case for how the extensive and valuable work that has culminated in the adoption of this proposal might be put to positive use in the creation of a toolbox, possibly accompanied by standard terms and conditions. We would be delighted to assist further in developing specific proposals / drafting suggestions / amendments to advance that objective.
PART II: Assessing the Commission’s Proposal

13) What is your view of the practical utility of the Common European Sales Law, as drafted?
   a. Do you feel the provisions provide sufficient clarity and legal certainty? If not, why not, and how could the provisions be improved in this regard?
   b. Is it sufficiently clear whether a provision is or is not mandatory?
   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?
   d. Are there any provisions that give rise to particular concerns, and why?

63. In our responses to question (2) and others above, the Bar Council discussed the legal uncertainty inherent in many of the provisions of the CESL and their interpretation and by extension our concerns about the cost implications for all operators as a result. By way of adding further detail to those observations, we take this opportunity to highlight a few provisions that give rise to particular concerns.

Overarching duty of good faith Art 2

64. The CESL includes an overarching duty of good faith which cannot be derogated or varied, and breach of which may preclude reliance on right or remedy, or make a party liable for loss. This is a very vague obligation, applied and interpreted differently in the Member States that are familiar with it; and unfamiliar to common lawyers. It is likely to provide fertile ground for uncertainty and disputes, leading, we believe, to a gradual divergence in interpretation as lawyers and judges from the various national legal traditions move away from any central CESL-based interpretation. We are not confident that the CJEU would ever be faced with a case that could draw a line under such divergence, of such a vague and over-arching concept.

Pre-contractual duties

65. CESL also seeks to introduce a number of wide-ranging and potentially onerous and uncertain pre-contractual duties, such as:
   - Re consumer – Section 1 – onerous pre-contractual information to be provided by trader
   - Re B2B - Section 2 – general obligation to disclose information concerning “main characteristics” of goods or services
   - Section 4 – duty of care to ensure information correct.

66. Quite apart from the difficulty that these duties give rise to in and of themselves, the Bar Council is also concerned about how a trader is meant to handle cases in practice in which the duty may not have been apparent at the outset of negotiations, for example, where the choice to use the CESL is taken some time after negotiations for a B2B contract involving one SME have begun.

Offer and Acceptance
67. Art 38 allows for “modified acceptance” of an offer, even if the acceptance implies additional terms. Thus a party could be compelled to contract on terms which he has neither offered, nor agreed to.
Contractual interpretation

68. CESL also introduces broad and vague additional principles of contractual interpretation, which, being unfamiliar to lawyers and judges in some Member States, will add to the educational burden and cost, as well as increasing the likelihood of divergent interpretation of the provisions of CESL over time. These include:

- Art 58 - allows reference to subjective intention where the other party could be expected to be aware of it
- Art 59 – sets out relevant matters for interpreting contractual provisions, including:
  - negotiations
  - post-contractual conduct
  - the obligation of “good faith and fair dealing”

69. For a detailed examination of these and the other provisions of concern, we refer you to the thorough analysis of the provisions contained in the response of the Law Society of England and Wales under its Annexes I, II and III.

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