

A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission

A Call for Evidence

This consultation begins on 28 February 2012

This consultation ends on 21 May 2012



Department of
**Finance and
Personnel**

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**The Scottish
Government**



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

A joint consultation produced by the Ministry of Justice, the Department for Business, Innovation & Skills, Scottish Government and Northern Ireland Executive. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this Call for Evidence

- To:** This Call for Evidence is aimed at individuals and organisations with an interest in the cross-border sale and purchase of goods and digital content, including through e-commerce.
- Duration:** From 28 February 2012 to 21 May 2012
- Enquiries (including requests for the paper in an alternative format) to:** Jean McMahon
Ministry of Justice
102 Petty France
London SW1H 9AJ
- Tel: 020 3334 3208
Email: Jean.McMahon@justice.gsi.gov.uk
- How to respond:** Please send your response by 21 May 2012 to:
Jean McMahon
Private International Law Team,
Justice Policy Group
Ministry of Justice
102 Petty France
London SW1H 9AJ
Tel: 020 3334 3208
Email: Jean.McMahon@justice.gsi.gov.uk
- Additional ways to feed in your views:** For further information please use the “Enquiries” contact details above,

Contents

Foreword	2
Introduction	3
• The purpose of the paper	3
• Background	3
• Devolved Administrations and Gibraltar	7
PART I	
The Commission's Proposal - The Proposed Regulation	8
• The Common European Sales Law	8
• The principle a Common European Sales Law	8
• The scope of a Common European Sales Law	10
• The content of the Common European Sales Law	12
Impact Assessment	17
• Background	17
• Assessment of impact	17
PART II	
Assessing the Commission's proposal - Annex I	20
• General overview	20
Questionnaire	25
About you	27
Contact details / How to respond	28
The consultation criteria	30
Consultation coordinator contact details	31

Foreword

The European Commission (the Commission) has long pursued the idea of a European contract law as a solution to the challenges to cross border trade caused by the divergent contract laws of Member States. Published on 11 October 2011, the Commission's proposed Regulation for a Common European Sales Law (CESL) presents their solution to these challenges. The proposal specifically covers cross-border sale of goods, digital content and related services.

The Prime Minister in his pamphlet 'Let's Choose Growth'¹ made clear that the cost of businesses trading cross-border was too high and the processes involved too time consuming in the context of a fully functioning single market. The Commission views the Common European Sales Law as a tool to help kick-start growth in the single market. Its aim is to help the current economic problems affecting Europe by providing a simple and cost-effective way for businesses to increase their trading opportunities in the European market place. At present businesses seeking to direct their activities to consumers in other Member States may incur costs familiarising themselves, and complying with, the national consumer laws of the consumer's Member State. An optional Common European Sales Law could reduce these costs for businesses. This could foster more growth in the Single Market, particularly Digital Single Market, as more businesses, particularly SMEs, could be incentivised to trade cross-border.

A Common European Sales Law could bring new benefits to businesses and by potentially increasing cross-border trade also give consumers access to a greater choice of goods at possibly lower prices, while providing a high level of consumer protection.

The Commission's proposal would not replace existing national laws, but would be available as an alternative regime to the existing contract law regime in each Member State. The UK Government, in partnership with the Devolved Administrations of Scotland and Northern Ireland, is seeking views on whether the Commission proposals would actually deliver the suggested gains and what the costs would be. We are also interested in the impact of the Commission proposals on our legal profession and on our Courts and would welcome views on this.

The Government is not convinced that the benefits will be as significant as the Commission asserts and is concerned that there may be costs which should also be taken into account. We are therefore seeking views on the Commission's proposal to inform UK policy and provide the evidence base for negotiations in Europe.

¹ www.number10.gov.uk/wp-content/uploads/EU_growth.pdf

Common European Sales Law: A Call for Evidence

Introduction

The purpose of this paper

1. Initial EU level negotiations on the proposed Regulation started in November 2011. The Government now requires views and supporting evidence from UK interests to develop its position on the Commission's proposal. This document seeks those views and, where possible, specific evidence and numerical data to support those views.
2. The Government is particularly keen to determine the potential costs, benefits and risks for businesses and consumers of operating an alternative EU contract law regime for cross-border sales alongside national domestic laws. In addition, it seeks views on the specific provisions contained in the proposed Regulation and the Commission's accompanying impact assessment.
3. The proposed Regulation is in two parts. The first part (the Regulation) contains 16 Articles, which cover the objective, subject matter, scope, exclusions from the Regulation and other such matters. The second part (Annex I) contains 186 Articles providing the text of the Common European Sales Law.
4. This call for evidence paper is structured to cover both aspects of the Commission's proposal. In Part I we explore the proposed Regulation by theme and pose a number of questions about specific areas. In Part II, we address Annex I of the Regulation and outline some of the questions and issues posed by these Articles.

Background

5. The European Commission has overseen a long-standing project looking at the issue of European contract laws in the European Union (EU). For nearly a decade a project has been underway which has been seeking to improve general legislation that affects contract law, during which time a number of different proposals and approaches have been considered.

What is the problem?

6. The Commission states that a number of problems exist that prevent the smooth functioning of the single market and cause insufficient volumes

of cross-border trade. Their proposal, the Common European Sales Law, aims to address some of these problems:

- a. *Contract Law barriers*: The Commission believe that the divergence in national Member States' contract laws presents a serious barrier to cross-border trade within the EU, particularly for the small business sector, as well as to the smooth functioning of the single market.
 - b. *Cost for businesses*: The Commission argue that it is currently too complicated and expensive for businesses to expand easily into new markets, especially smaller businesses.
 - c. *Choice for consumers*: The Commission believe that the 500 million consumers across the European Union do not have access to the widest range of goods, at potentially lower prices, that could be achieved through greater cross-border trade.
7. In their Impact Assessment the Commission state that; *“Currently on average only 9.3% of all EU businesses involved in trade in goods export within the EU. The majority of them (62% in B2B [Business to Business] and 57% in B2C [Business to Consumer] export to no more than 3 other MS [Member State])”*² They go on to argue that action needs to be taken in order to enhance growth and trade in the single market.
8. The Government recognises that the current economic climate creates significant pressure on businesses. The costs of cross border³ trading are too high and the processes involved too time consuming for a fully functioning Single Market.
9. An increased willingness to sell and trade cross-border has the potential to stimulate the Single Market offering easier access to new markets for businesses and greater choice for consumers at potentially lower prices. These would be considerable benefits, if deliverable. The Government needs to understand the scale and importance of any potential gains and whether the Commission's proposal is likely to deliver them.

What is the Commission's proposal to resolve this problem?

10. The Commission's proposal is for *“a comprehensive set of uniform contract law rules covering the whole-life cycle of a contract, which*

² Pg.1 of Commissions Executive Summary of their IA
http://ec.europa.eu/justice/contract/impact-assessment/index_en.htm

³ For the purposes of the Commission's proposal and this Call for Evidence document the UK is a single member state and therefore the term “cross-border” does not refer to trade or business between the constituent jurisdictions of the UK.

*would form part of the national law of each Member State as a 'second regime' of contract law"*⁴

11. In July 2010 the Commission published a Green Paper⁵ containing seven policy options for progress towards a European Contract Law for consumers and businesses. The Green Paper started from the premise that the current divergence in national laws was a hindrance to the proper functioning of the single market and suggested a number of options to address this. Following consultation the UK Government's response to this Green Paper⁶ asserted that insufficient evidence of need had been provided by the Commission to justify any of the options beyond the Common Frame of Reference (CFR), which could be used as a 'legislator's toolbox' to improve the quality of European Union legislation.
12. On 11 October 2011, the European Commission published the proposal under consideration here for a Regulation on a Common European Sales Law⁷. This would provide an alternative contract law regime which would form part of the national law of each Member State. This alternative regime would be available for cross-border business-to-consumer or business-to-business contracts where at least one of the businesses was a Small or Medium Enterprise (SME – defined in Article 7 of the Regulation).

What are the possible implications of the Commission's proposal?

13. The implications of the proposal are potentially significant for a number of groups. Much is dependant on whether or not the Common European Sales law is used as the basis of the contract between the parties; it is an optional instrument. If its use is widespread it would particularly affect UK consumers making cross border purchases and SMEs involved in contracts with other business and consumers across borders. If chosen as the basis of the contract, the Common European Sales Law would mean a change in the way cross-border transactions are conducted, one which the Commission assess would make the process easier for businesses and more certain for consumers, but this would have implications for consumer protection rights.

Digital Implications

14. Individuals and bodies involved in digital trade and the development of the digital single market would also be affected by the Commission's draft Regulation, if it were used. The Digital Single Market (DSM) is an

⁴ Pg7 of doc.15432/11,k 13 October 2011, Communication from the Commission
http://ec.europa.eu/justice/newsroom/news/20111011_en.htm

⁵ http://ec.europa.eu/justice/newsroom/contract/opinion/100701_en.htm

⁶ http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm

⁷ http://ec.europa.eu/justice/newsroom/news/20111011_en.htm

extension of the existing Single Market to take account of the massive impact created by the greater use of Information and Communication Technology (ICT) by businesses and individuals when buying and selling goods and services online within the EU. The creation of the DSM is considered to be a necessary action to ensure future growth within the EU. Ministers have endorsed the importance of this agenda in terms of economic growth and job creation and the UK is fully in support of efforts which lead to the creation the DSM.

15. The Commission's proposed Regulation for a Common European Sales Law may act as an enabler for releasing this growth. Respondents to this paper are invited to consider the possible implications of this proposed Regulation on the development of the Digital Single Market.

Legal Implications

16. The legal community and consumer advisers and enforcement bodies would also be affected as they would be required to have a sound knowledge of the new law, its implications and its comparison with national law, to advise their clients. Moreover, English law is very commonly used in international contracts, with particular implications for the legal professions and courts in the UK. It is possible that the Common European Sales Law would have an impact on this position.
17. The Commission's proposal also interacts with other European Community legislation that regulates contractual issues. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") determines which law applies to contracts having connections with more than one country.
18. This is particularly relevant to this proposal as there are special rules regarding consumer contracts in Rome I (Article 6) which offer an important consumer protection. These rules provide that where a trader directs his activities to consumers in another state, that consumer (who is presumed by the Rome I legislation to be the weaker party in the contract) will be protected by the compulsory consumer protection laws of their home state, even if the law that applies to the contract is that of another country.
19. The effect of this rule is that a trader therefore currently needs to know the consumer laws that will apply, in addition to the law which otherwise governs the contract. This could involve the trader incurring additional legal costs. The Commission believes that a business using the Common European Sales Law would no longer need to be familiar with the consumer protection laws in the home state of the consumer and can therefore operate across borders at lower cost.
20. On the other hand, as a result of the Rome I rule, consumers currently only rarely need to consider the application of any law other than that of their country of residence (except, of course, when they are travelling).

In future they would have to be aware of both the domestic law framework and the CESL as a consumer contract could be subject to either law. From the consumer perspective, the question is whether business will respond to CESL by increasing cross-border supply and thus offering greater consumer choice and potentially lower prices, and whether any such benefit outweighs the greater complexity for consumers of facing two different legal systems, each offering slightly different rights and remedies.

21. The Ministry of Justice and the Department for Business, Innovation and Skills commissioned the Law Commissions to produce advice on the draft Regulation. Their report⁸ has provided an extremely useful basis for our consideration of the Commission's proposal. We have drawn on a number of their examples in this call for evidence paper. We would like to take this opportunity to thank them for their invaluable input on this project.

Devolved Administrations

22. The UK consists of distinct legal jurisdictions. Domestic contract law is generally a devolved matter: responsibility rests with the Devolved Administrations for Scotland and Northern Ireland, and with the UK Government for England and Wales. Responsibility for consumer policy is devolved for Northern Ireland, but reserved to the UK Government for England, Wales and Scotland.

⁸ Law Commissions Report - <http://www.justice.gov.uk/lawcommission/publications/1698.htm>

PART I

The Commission's proposal: the Proposed Regulation

The Common European Sales Law

23. The Commission's proposed Regulation contains a uniform set of contract law rules which parties to a contract could choose to cover their contract. This would form part of the national law of each Member State and provide an alternative regime from those currently offered under national laws.
24. This alternative regime would **be available for cross-border business-to-consumer contracts, or business-to-business contracts where at least one of the businesses is a Small or Medium Enterprise (SME)**⁹.

The principle of a Common European Sales Law

25. The principle reason for the Commission's proposal is to stimulate greater volumes of cross border trade by resolving the barriers to trade that they suggest exist because of the divergent contract laws of the Member States. It is important to establish to what extent these barriers are experienced by UK consumers and businesses, and whether the proposed Common European Sales Law is the most effective and proportionate way to respond to these challenges.
26. The Government needs to assess whether a Common European Sales Law is necessary and/or desirable and whether it could deliver advantages for both consumers, businesses and for the UK more generally. If there are advantages, how these advantages will be delivered through the scope and substance of the proposed Regulation will need further consideration. The views of consultees would be welcome on this.
27. Earlier consultations by the Government during the Commission's Green paper and Feasibility Study stages revealed that other issues, such as language, scope for fraud, trader reputation, taxation differences, were widely considered as far greater obstacles to businesses trading and consumers shopping across borders. It was felt that a separate European contract law would not necessarily resolve those matters.

⁹ A definition of a Small or Medium Enterprise is provided in the Regulation at Article 7

Consultees will note that the current proposal does not address the issue of jurisdiction, i.e. the question of which country's courts will hear a dispute over the contract should one arise – that is a matter being considered in the review of Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”). The Commission have also recently published proposals on Alternative Dispute Resolution¹⁰ and Online Dispute Resolution¹¹ for business-to-consumer disputes, including cross-border disputes.

28. There is evidence to suggest that some companies, especially SMEs, are frustrated by the costs arising from having to seek legal advice on the compulsory consumer laws that apply in different Member States in order to conduct trade with a particular country. Some business representatives suggest that a single, simple contract law regime for the sale of goods, that provided legal certainty and enabled the easy resolution of disputes, would increase their opportunities to trade in the EU. This would provide consumers with a wider range of goods and services, possibly at cheaper prices.
29. The Common European Sales Law is available for use in business-to-business contracts where one of the parties is a SME, as well as business-to-consumer contracts. The Commission anticipates that the greatest potential for use of this law may be between SMEs negotiating a cross-border contract, where neither is in a position to insist on the use of their own law, but familiarity with, and the universality of, the Common European Sales Law would make it an acceptable and cheaper alternative to accept in negotiations. Article 4 of the Regulation stipulates that at least one party to a contract under the CESL must be resident in a Member State of the European Union.
30. The Common European Sales Law cannot be interpreted by reference to national laws, but only by reference to its underlying principles, objectives and all its provisions. Principles such as “good faith and fair dealing” (Article 2) will bear an autonomous European interpretation. This may take many years to develop and may mean that in the interim its effects are uncertain, and its application in different European Member States uneven and unpredictable.
31. The proposal would provide a contract law regime that was common to all Member States, but it would be optional for parties to choose to use it. It would not harmonise national laws or replace them, but would be available as an alternative regime to the existing contract law regime in each country. Parties would have the choice on whether to use the Common European Sales Law regime, or a pre-existing national law regime.

¹⁰ http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

¹¹ http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

The scope of the Common European Sales Law

32. The Common European Sales has a wide application covering business-to-business and business-to-consumer contracts for the sale of goods and digital content whether concluded by distance (e.g. online), away from business premises (e.g. doorstep selling) or on premises (in shops). The scope also stipulates that at least one of the parties to a business-to-business contract under the Common European Sales Law must be a SME.
33. There are a number of different issues that arise in relation to the scope of application of the proposal, some of which are raised below in relation to the options given to Member States under Article 13 of the Regulation.

Coverage of contract law issues

34. First, the rules in Annex I of the proposal do not cover all possible problems that may arise in the legal relationship between the parties. In any cross-border transaction there will be matters that cannot be regulated by the law of contract – for example, matters of taxation. However, respondents' attention is drawn to recitals 26 and 27 in particular. Recital 26 states that the proposal should "cover all the matters of contract law that are of practical relevance during the life cycle" of the contracts within its scope. Although the proposal purports to be a "stand alone" code of contract law, recital 27 goes on to give particular instances of those matters which it does not cover. Where a dispute about a matter not governed by the proposal arises, it will be governed by the relevant applicable law.
35. A trader contemplating cross-border transactions will need to know, or obtain legal advice about, the law of the other State relating to any issue which could arise but is not covered by the Common European Sales Law. If matters are not covered by the Common European Sales Law but are sufficiently significant, that could undermine the stated objective of minimising the legal costs of doing business across borders. The fact that different issues would be governed by different applicable laws could also complicate litigation, making it more expensive.
36. Further, the Commission takes the view that there is no need to amend the Rome I Regulation by reason of adoption of a Common European Sales Law. The reasons for this view are given at Recital 12. The Commission considers that, because the Common European Sales Law will form part of every Member State's law, there will be no difference between the levels of consumer protection offered by the Common European Sales Law (where chosen) and between the consumer's state of habitual residence and the law chosen by the parties. They suggest that the provisions of Rome I (in particular Article 6) will make no

difference in this situation. We are interested in the views of consultees as to the impact of the proposed Regulation on Rome I.

Limitation to cross-border contracts

37. In Article 13(a) of the proposed Regulation, the Commission have drafted the possibility for individual Member States to adopt the Common European Sales law for domestic transactions. It is not entirely clear that domestic use would be optional in the way that is proposed for cross-border use. As drafted, however, extension of the sales law to domestic use is purely an option for individual Member States. If it were the case that the Common European Sales Law was indeed suitable and beneficial for use by businesses and consumers across borders, that does raise the question as to why it should not be equally available in all Member States for domestic use (whether optionally or not). From the perspective of traders in particular, it might be helpful to be able to use one law for *all* transactions, whether domestic or cross-border. It would though be important to mitigate any potential to undermine domestic consumer protection if domestic use were to be permitted.

Types of contract

38. The next issue is the type of contract for which the Common European Sales Law would be available. At present, the scope is very wide, taking in all sales of goods and digital content contracts regardless of the method of sale.
39. The Government needs to consider whether it would be more appropriate and proportionate if the proposal applied to a more limited range of sales contracts. It may be more appropriate to target types of sales where the Common European Sales Law has the potential to bring the greatest benefits. This would be driven by consideration of where differences in contract law currently have the most effect and where there is the most potential for growth in cross-border sales. The Law Commissions suggest that there is perhaps little sense in allowing the use of the law for internet sales and not for other distance selling methods. In their advice to the UK Government the Law Commissions concluded that there may be a case for a new optional code to cover all distance selling across the EU. They had concerns, however, as to whether the Commission's current proposal meets the needs of this method of sale.
40. There are some areas of commerce where the existence of the Common European Sales Law would be likely to have a lesser impact, such as where a trader proposes to set up a shop in another Member State. In this situation the differences in contract law are unlikely to be the key factor influencing a decision to go to the expense of establishing those premises. The Law Commissions have questioned whether the Common European Sales Law offers sufficient protection for consumers in doorstep selling situations.

41. Article 6 of the Regulation excludes “mixed purpose” contracts. Article 6 itself does not appear to be particularly easy to apply, particularly in business-to-business contracts, which are dealt with at paragraph 40-47 below. However, a more general question is raised by the Law Commissions as to whether mixed use contracts should be excluded in this way. Article 6 would take a large number of contracts outside the scope of the Common European Sales Law, which may remove some of the advantages it could potentially bring.

The content of the Common European Sales Law

Business-to-Business (B2B)

42. In terms of material scope, the Common European Sales Law covers business-to-business cross-border contracts, provided that one party is a SME and one party is based in a member state (see Article 7). The contracts covered are sales contracts (defined in Article 2(k)), but also contracts for the supply of digital content irrespective of whether supply is in exchange for a price, and “related service” contracts (defined at Article 2(m)). The Common European Sales Law could be used for distance sales, on premises and off premises contracts.
43. The Law Commissions suggest that the restriction of the availability of the Common European Sales Law, as set out in Article 7 of the Regulation (that one of the parties must be a SME), is unprincipled. It restricts free choice of law, a principle reflected in Rome I. In addition, it is unnecessarily complex because of the difficulty of assessing whether one party is an SME or not. In any event, the restriction will become unenforceable as soon as just one Member State exercises a choice under Article 13 to make the Common European Sales Law available to any size of business because then it will be part of a domestic national law which can be chosen by any contracting party under Rome I (i.e. two non-SME traders could decide to use the Common European Sales Law of the Member State that permits the Common European Sales Law to be used by any trader, regardless of size).

Proposed advantages for business

44. Current arrangements for business-to-business contracts are that any law can be chosen as the law applicable to the contract. In that sense the trader can choose the governing law of the contract (probably his own) for cross-border trade. The anticipated added value of having a Common European Sales Law therefore seems to be that the other party will already be familiar with its provisions and would be willing to enter into a contract with the trader using those terms (whereas they may not be so keen to do under an unfamiliar law such as that of the vendor). This net benefit in terms of increased cross-border trade remains to be tested and quantified and set against any likely costs from introducing a new law.

45. The use of the Common European Sales Law is intended to ease the negotiation of the applicable law for the small business sector as it claims to be easier to agree on a neutral law that is accessible to both parties. There is potential for SMEs to be assisted in accessing EU markets, provided the detail of the substantive law is sufficiently certain.
46. The Government can see some potential gain in the areas the Commission identifies. It is not sure, however, how businesses would react in practice to the availability of the Common European Sales Law and to what extent any gains would be deliverable. Would larger businesses be interested in switching to use the CESL if available for their cross-border contracts, in place of the law they currently use (which will often be the law of their home state) and if not, how often would the European sales law be used in practice?
47. The Government is also interested in what impact there would be on the legal community if companies which currently contract in English or Scots law overseas were to switch to using the Common European Sales Law in its place.

Potential disadvantages for businesses

48. Securing the advantages in business-to-business contracts foreseen by the Commission would depend on a number of factors and the proposal could produce a number of disadvantages.
 - a. Firstly, it may not produce or guarantee choice for businesses entering in to a contract. The relative bargaining strength of the business parties means it would seem likely that in many situations, one business would be in a stronger situation than another and therefore more able to insist upon its preferred choice of law, which might not be the Common European Sales Law.
 - b. Secondly, the cost of applying and implementing the CESL may outweigh any savings made. The genuine utility of the Common European Sales Law will depend to a large degree on how truly comprehensive it is as a code of contract law. If traders find that, notwithstanding agreement to use the European regime in their cross border contracts, there are significant areas of contract law that it does not cover, that could require them to incur further costs in legal advice about the applicable law that will govern those particular factors.
 - c. Thirdly, it may create legal uncertainty rather than the intended clarity. The benefits of the law will also depend on the quality of its provisions as drafted. The content of the Common European Sales Law is considered in more detail in Part II, and views invited regarding the detail of the provisions there. But the manner in which the actual provisions of the law strike a balance between certainty and discretion in a judge to “rewrite” the parties’ bargain will matter in terms of the costs of litigation if the legal relationship

between the parties breaks down. A connected problem is that existing national laws are usually a “known quantity” in that the application and interpretation of those laws is reasonably predictable. The autonomous European nature of the Common European Sales Law could mean that arriving at that level of predictability could take some considerable time. The need to negotiate applicable law and jurisdiction clauses could well remain relevant.

Business-to-Consumer (B2C)

49. The Common European Sales Law aims to provide rules for business-to-consumer contracts that will provide a high level of protection for the consumer. The provisions on consumer protection reflect the existing Consumer “Acquis”, the existing body of EU consumer law, covering sale of goods and unfair contract terms and include the provisions in the recently agreed Consumer Rights Directive. The level of consumer protection would be the same in all Member States when the Common European Sales Law is used.

Proposed advantages for consumers

50. The Commission asserts that the Common European Sales Law will provide a high level of protection for consumers. The level of protection provided aims to be at least equivalent to the protections under existing EU Directives and in the case of minimum harmonisation directives (on sale of goods and unfair contract terms) will provide a higher level of protection in some areas. Further analysis is provided in Part II of this document.
51. Additionally, the proposed Regulation anticipates that increased trader confidence in cross-border transactions through use of the Common European Sales Law will encourage new entrants to cross-border markets, resulting in increased competition and choice, to the benefit of consumers.
52. Digital content contracts (e.g. music downloads) would also fall within the scope of the new rules, providing clarity for the consumer in an uncertain area of law. This increased certainty for consumers, particularly the knowledge that they have the right to money back in the event of non-conformity of digital content, could increase consumer confidence to purchase digital content cross border and to try out new suppliers thus increasing consumer choice and encouraging the development of the digital single market.

Potential disadvantages for consumers

53. The introduction of a Common European Sales Law would create the existence of two separate systems of rights in the UK (national UK

consumer laws and the Common European Sales Law which could be used in cross-border contracts). This could create confusion for consumers at a time when the Government intends to simplify consumer rights through a proposed Consumer Bill of Rights. Arguably, complexity itself is disempowering and it may be considered unlikely that consumers would be sufficiently aware of their rights under the Common European Sales Law for such rights to have any confidence-enhancing effect.

54. The use of the Common European Sales law in cross-border contracts would be optional. In reality, however, this choice would be that of the business as traders would be unlikely to allow consumers the choice of using the Common European Sales Law or their own national law. The consumer choice would therefore be limited to either accepting the use of the Common European Sales Law or not buying from that trader. In their proposal the Commission have attempted to address these concerns by requiring that the consumer must give their express agreement to the use of the Common European Sales Law and the trader would be required to provide a consumer with standardised information outlining their core rights (see Article 9 and Annex II to the Regulation). The Government is seeking views on whether these provisions will be adequate to meet concerns and if not, whether other provisions could be introduced instead to have better effect.
55. There are also concerns that the Common European Sales Law could result in a reduction in consumer protection. Currently the consumer protection rule in the Rome I Regulation provides that where a business directs its activity to consumers in a particular Member State, the consumers' own national mandatory rules apply where these provide a higher level of protection than the law of the contract. Under the proposal the Common European Sales Law will form part of the consumer's home state law, and the Commission therefore asserts that the level of protection is that set out in the Common European Sales Law. The level of consumer protection provided by the Common European Sales Law is discussed in more detail in Part II.

Digital Content

56. The Common European Sales Law covers the sale of goods and digital content, such as music downloads and related service contracts ("related service" being defined in Article 2(m) of the Regulation to cover service agreements undertaken with the seller of the goods or digital content which relate to the goods or digital content, for example installation). The proposal does not define digital content as either goods or services but introduces a discrete digital content category. The rights and remedies applied to this digital content category are identical to those for goods.

57. The scope of 'digital content' is further defined in article 5(b) of the Regulation which states that the Common European Sales Law can be used for: *'contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.'* This way of defining digital content as something that can be 're-used', has the result of excluding digital content that is more service like (e.g. the streaming of a live event) from the digital content definition. It does however raise questions about the exact meaning of re-use. It is unclear for example whether something that is bought for multiple but not permanent re-use would be included. The Common European Sales Law also covers digital content not supplied in exchange for a price but applies limitations to the remedies available.
58. As mentioned above the Common European Sales Law applies identical quality standards for goods as for digital content. These include that the digital content is fit for purpose and possesses such qualities and performance capabilities as the buyer may expect. The Common European Sales Law applies a different set of quality standards for related services, including that the service provider must perform the related service with reasonable care and skill.
59. The Common European Sales Law proposes identical remedies for goods, digital content and related services. These remedies include the right;
- a. to repair or replacement;
 - b. to a reduction of the price;
 - c. to terminate the contract and claim the return of any price paid and;
 - d. to claim damages.
60. The Common European Sales Law introduces a new approach to digital content. The scope is limited by the cross border and voluntary nature of the proposal. However, an ongoing debate of the ideas will be a useful step towards developing a framework for clearer, harmonised rights for consumers purchasing digital content.
61. If the Common European Sales Law were adopted in its current form, as drafted, this would put pressure on Member States to clarify domestic law in this area.

Impact Assessment

Background

62. The introduction of the Common European Sales Law potentially has a significant effect on various groups in the UK. We wish to use this call for evidence period to identify more clearly, and where possible quantify, what the economic impact might be and how the UK might be affected overall.
63. The potential impact of the proposal is huge. If the Common European Sales Law were to attract widespread use even in cross-border contracts alone, it would cover contracts worth billions. UK trade with the EU is currently worth approximately £31.9 billion. EU imports amount to some £18 billion, with UK exports to the EU amounting to a further £13.9 billion.
64. Even if the proposal were limited to cross-border consumer contracts the impact could be significant, if businesses choose to use the new instrument. In 2010 approximately 62% of UK adults (31 million people) bought goods or services online. Collectively they spent around £50 billion on goods and travel. A breakdown of how much of this is spent on cross-border on-line purchases is not available, but the European Commission estimates that for Europe as a whole about 9.5% of on-line consumer sales are cross-border purchases.

Assessment of impact

65. As the Regulation is optional, it is difficult to quantify how many businesses are likely to use this system. SME's may find it more favourable to use as it could help to make contracting cross-borders simpler and less expensive in the sale of goods to consumers / businesses from other EU countries. The extent of the benefits suggested by the Commission and the likely savings in terms of cost will be tested during consultation.
66. In an earlier Call for Evidence by Government on EU contract law, it was suggested that the divergence in national contract laws was not necessarily the main barrier to cross-border trade in the internal market. As a result, the net impact and the benefits suggested in the Commission's impact assessment could be less than presumed. Other barriers such as language, different tax regimes and difficulties in obtaining redress would still exist as would other regulatory and practical barriers. These issues will also need examination during the consultation phase.

67. It is also suggested by the Commission that the Common European Sales Law would benefit consumers in terms of providing them with a wider choice of products, potentially at lower prices. Nor would it be necessary for them to be refused the sale or delivery of goods by a trader from overseas on the basis that national contract laws posed a barrier. The Commission also claims that consumers would have greater certainty about their rights which would in turn increase their confidence in shopping across-borders.
68. However, there are three key points which need to be considered.
- a. First, a trader would have to decide to use the Common European Sales Law and the terms it contains to govern the contractual relationship with the consumer in order for the consumer to gain the benefits presumed by the Commission. It cannot be presumed that the trader will use the Common European Sales Law as it is optional.
 - b. Secondly, consumers expect to resolve any disputes at the moment under their domestic law, and because of Rome I, this is often a realistic expectation. It is far from clear that they will be clearer about their rights under the new European legal regime than they are under their domestic law regime.
 - c. Thirdly, they already have the choice to buy products abroad but they don't always choose to do so, mainly because of concerns that if something goes wrong they may not be able to return the product; get an exchange or refund and/or they prefer to buy goods in support of local and national businesses. The assumptions made by the Commission will need to be tested more robustly.
69. In terms of internet sales, it is difficult to determine the likely costs and benefits that could accrue in this area as it remains dependant on the use of the Common European Sales Law by traders. An initial analysis suggests that this is an area where the different contract laws of the Member States do inhibit the internal market for consumer sales over the internet. There could be benefits to be accrued through better regulation of this area but it remains to be seen whether the Commission's proposal achieves that. This is an area where further views/evidence is needed, in particular whether efforts would have been better spent on developing proposals for consumer sales over the internet rather than the proposed all encompassing Regulation.
70. A checklist document has been prepared which indicates that the following groups are likely to be affected:

- **Businesses:** The proposals may directly affect any business organisation involved in cross-border business transactions or those contemplating new business links with overseas traders or consumers. This includes those trading online and / or those set up in those countries where they are directing services (depending on where the business's "habitual residence" as determined by Article 4 of the Regulation is found to be).
 - **Consumers:** Any consumer involved in a sales contract where the contract terms are those based on the Common European Sales Law. This would include those purchasing goods online, but not necessarily restricted to those.
 - **Legal Services:** When involved in advising clients on contractual matters, especially as to whether to use the Common European Sales Law rather than another applicable law, its interpretation, and also in litigation where the contract in question, or part of that contract, is governed by it.
 - **Judiciary:** When considering cases where the applicable law to the contract is the Common European Sales Law.
 - **Advisory bodies:** Consumer and business advisory bodies, for example, who provide advice to consumers or businesses on legal and/or consumer matters.
 - **Consumer enforcement bodies:** When considering contracts where the applicable law is the Common European Sales Law.
 - **Academic / Education establishments:** In establishing education programmes relating on the Common European Sales Law.
71. The checklist document assessing the impact of the proposed Common European Sales Law has been published in parallel with this Call for Evidence by the Ministry of Justice. It sets out a more detailed consideration of the potential impact of the CESL. Comments on this checklist document would be particularly welcome.

PART II

Assessing the Commission's Proposal: Annex I

General Overview

72. The substance of the Common European Sales Law is contained in Annex I (although it should be noted that the definitions in Article 2 of the Regulation itself apply throughout the text).
73. The Government has been greatly assisted by the advice received from the Law Commissions on the detail of the proposal. This part of the Call for Evidence draws out a number of issues of substance which have arisen as a result of consideration of Annex I. It is intended that this part of the paper should encourage views from consultees with a particular interest in the technical detail of the proposals. We ask that they consider the points raised below, and contribute views and evidence not only upon those matters, but also other issues of detail which they identify.
74. The Law Commissions explain (at paragraphs 7.57 and 7.58 of their report¹²) that there is a tension between certainty and fairness in all systems of commercial contract law. This centres on the degree to which parties should be held to the precise agreement they have reached, or to which a judge should be able to re-interpret their agreement to do justice between them. All systems have to find an appropriate balance between the two. The Government's initial impression is that the Common European Sales Law relies heavily on concepts of good faith and fair dealing. This may be less problematic in the business to consumer context, where, as a result of European initiatives, these concepts are already used in some legislation. However, UK legal systems have no such general duty of good faith (outside the business-to-consumer context), and have traditionally placed greater emphasis on certainty in upholding bargains properly arrived at, and only seeking to interfere in the parties' bargains primarily to prevent abuse or where strictly necessary. The question is where the balance should be found in the Common European Sales Law. This is discussed further by the Law Commissions in Part 7 of their report, in particular at paragraph 7.62 and following.

¹² Law Commissions Report - www.justice.gov.uk/lawcommission/publications/1698.htm

The duty of good faith and fair dealing

75. In paragraph 7.59 of their report, the Law Commissions highlight some of the instances of reliance upon good faith and fair dealing. Article 2 requires each party (including in business-to-consumer contracts) to act in accordance with good faith and fair dealing (further defined in Article 2 of the Regulation itself). This provision is mandatory wherever the Common European Sales Law is chosen. Breach of the duty is actionable in itself, and also raises the further possibility that the party in breach can be prevented from relying upon a legal right, remedy or defence that they would otherwise have had, at the discretion of the court. Recital 31 gives further guidance upon the application of the principle. In particular, the expected standard varies according to the relative expertise of the parties, and will differ between the consumer and commercial contexts.
76. Article 23 imposes specific duties of disclosure on traders in business-to-business transactions to disclose such characteristics of goods and services which it would be contrary to good faith not to disclose. This is contrary to the general approach in the UK for business-to-business contracts, where the law seeks to control only the use of misleading pre-contractual statements rather than impose these quite general duties of active disclosure. In respect of business-to-consumer contracts, the prohibition of misleading omissions and the general duty to trade fairly is incorporated into the Consumer Protection from Unfair Trading Regulations 2008 which means that UK law is already much closer to European practice of active disclosure.
77. Articles 13 to 22 deal with disclosure in business-to-consumer transactions. Articles 13 to 19 deal with disclosure in distance or off-premises contracts. The disclosure required here tracks the requirements of the Directive on the protection of consumers in respect of distance contracts 97/7/EC, which has been implemented into the law of the UK through the Consumer Protection (Distance Selling) Regulations 2000. Articles 13 to 19 do not therefore introduce new concepts into our law. However, Article 20 provides for specific disclosures to be made in other types of business to consumer contracts. Our law currently does not have any specific disclosure requirements in relation to such contracts, although the lack of disclosure may, depending on the circumstances, be caught as an unfair commercial practice which is in breach of the Consumer Protection from Unfair Trading Regulations 2008¹³.

¹³ Which transposes the Directive concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450EEC, Directives 97/7EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and Council 2005/29/EC

78. Article 55, read in parallel with Article 48, gives a mistaken party the ability to claim against the other party who knew of the mistake but failed to point it out. This again goes further than the UK position, which simply requires that parties do not misrepresent the position. It should be noted that this is not a mandatory provision.
79. Article 51 allows a party to avoid a contract on the basis of their own “economic distress, urgent needs” or improvidence, ignorance or inexperience. Concepts of “undue influence” in the UK are probably narrower than this, certainly in a commercial context.
80. Article 86 – regarding the meaning of “unfair” in contracts between traders - allows a court to strike out a term that “grossly deviates” from good commercial practice, and covers a range of terms, not being confined to exclusion clauses (as in UK systems). It does not deal with terms that have been individually negotiated. However, it exposes commercial parties to a much greater risk of a clause being struck out as “unfair”, although it should perhaps be noted that the test is that it “grossly” deviates from good practice. The situation is different in the business-to-consumer context (to which Article 86 does not apply), where law in the UK has the Unfair Terms in Consumer Contracts Regulations 1999¹⁴ which provides a definition of what can be considered an “unfair” term and provides that such a term is not binding on the consumer. It is therefore not a new concept in our laws. The UK regulations implement the EU Directive on unfair terms in consumer contracts¹⁵, and it is clear that Articles 82 to 85 of this proposal are meant to track the EU Directive.
81. Article 89 requires the parties to negotiate in good faith where “performance becomes exceptionally onerous because of an exceptional change of circumstances”. There may be damages if one party fails to do so, and a party can effectively ask a court to re-write the contract in this situation. This would not occur in our laws. It may not be a workable solution in a fast-moving commercial situation.

Duty to raise awareness of not individually negotiated terms – Article 70

82. The Common European Sales Law also goes further than our laws in that, under Article 70, any term of the contract which has not been “individually negotiated” (defined in Article 7) is unenforceable if the other party was unaware of it. It imposes an obligation on one party to take “reasonable steps” to make the other party aware of the term (and in the consumer context, it is insufficient that it is referred to in the

¹⁴ The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) implement the Directive on unfair terms in consumer contracts (93/13/EEC)

contractual document itself). The provision is mandatory, and there is no need to show that a term is substantively unfair.

Conflicting standard contract terms

83. Where businesses deal with one another on the basis of their standard terms without either giving thought to the “small print” provided by the other, our laws treat the last form sent as representing the terms of the contract. By contrast, Article 39 provides that only those terms “common in substance” to both sets of standard terms can form the contract. This seems potentially problematic. It can be difficult to establish what is or is not “common in substance”, and a number of terms that may have been essential to the operation of the contract could be excluded. The contract might ultimately represent something that neither party intended (and indeed that might have consequences for the law governing the contract, as the Law Commissions point out at paragraphs 7.42 and 7.43).

Interpreting the contract

84. Articles 58 and 59 deal with the interpretation of a contract. Our laws assess the meaning of terms of a contract on an objective basis (what a reasonable person would think the words of the contract meant) and the subjective intentions of the parties are not relevant. Article 58 makes this the default position, and the main rule (Article 58(1)) is what was the actual intention of the parties. This may be a source of uncertainty, and also increase the costs of litigation by widening the need for the court to enquire into the facts. The factors in Article 59 which guide interpretation of the contract include the contents of the parties’ preliminary negotiations, and their conduct subsequent to the conclusion of the contract. These would not be taken into account by the courts within the UK largely because they make the task of interpretation difficult.
85. Article 64, however, provides that where there is doubt about the meaning of a contract term in a business-to-consumer contract, the interpretation most favourable to the consumer shall apply. This provision already exists in the laws of the UK in regulation 7(2) of the Unfair Terms in Consumer Contracts Regulations 1999. The provision in Article 64 therefore does not introduce a new concept into our judicial interpretation in relation to business-to-consumer contracts.

Exclusion or modification of non-mandatory provisions of the Common European Sales law in commercial contracts

86. The Common European Sales Law must be applied in its entirety, where chosen, in a business to consumer contract (Article 8(3) of the Regulation). This guarantees to the consumer the protections provided by the Common European Sales Law. In a business to business contract, there is greater scope for the parties to exercise the right in Article 1(2) (of Annex I) to exclude or modify provisions of the Common European Sales Law by agreement. This may not be done with

mandatory provisions, but there are fewer such provisions. This does raise issues regarding how a dispute will be resolved where the parties have chosen to exclude significant elements of the Common European Sales Law. Here, another law (indicated by Rome I) will apply, by default or design, to the issues not governed by these proposals. It would be helpful for the Government to receive views on how this might operate in practice.

Level of consumer protection

87. The Commission clearly intends that the Common European Sales Law should set a high level of consumer protection. Its aim is to set this at a level that will give consumers confidence to contract under the Common European Sales Law, even if the provisions are not identical to, and in some cases may be less generous than, national laws. The Commission argue that the fact that a high level of protection exists under the Common European Sales Law and the advantages to consumers of greater choice and price competition will outweigh concerns about difference in domestic and Common European Sales Law rights.
88. Whilst it appears that in many areas the Common European Sales Law, as currently drafted, provides a high level of consumer protection the Law Commissions have identified a number of areas of potential concern. One issue is that the proposal does not provide for damages for distress and inconvenience which may result in a reduction of consumer protection in some circumstances. The issue of damages for consumer contracts is a matter for national law. Currently in English and Scots law, damages for distress and inconvenience are allowed in exceptional circumstances. Under the Common European Sales Law, damages for “non-economic loss” are not allowed in any circumstances.
89. The Common European Sales Law would provide consumers with an extended right to terminate the contract as a remedy for non-conformity (see article 106 of the annex). This would run up to two years from the date from which the consumer could be expected to be aware of the fault (see article 180 of the annex). It is, however, possible that prolonged delay by the consumer in notifying the trader of a fault may constitute a lack of good faith, thereby making the remedy unavailable. A trader may also make a deduction from use when refunding the consumer if the consumer was “aware of the ground for avoidance or termination” but delayed taking action, or if “it would be inequitable to allow the recipient the free use” of these goods (see article 174 of the annex). Although a two year termination period provides a high level of protection it may in fact deter traders from using the Common European Sales Law if they perceive the level of protection is set at too high a level. The questions of whether the consumer has acted in good faith or should give allowance for use are likely to lead to uncertainty and scope for dispute between the parties.

Questionnaire

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.
- 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?
- 3) The proposed Common European Sales Law is an optional instrument. Is it, as drafted, something you would choose to use or advise others to use? Please outline the nature of your interest in the Common European Sales Law and give reasons for your answer.

The 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.
- 5) The proposed Regulation purports to be a "stand alone" code of contract law rules. Does the proposal achieve this objective? Is there anything currently excluded that ought to be brought in to scope or is there anything that ought to be removed?

The 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.
- 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?

- 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?
- 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.

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.
- 11) Do you believe it would provide the benefits identified in the Commission's Impact Assessment?
- 12) Do you have any views on changes that could be made to the proposal to increase its potential benefits for the UK?

PART II: Assessing the Commission's Proposal: Annex I

- 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?

Thank you for participating in this Call for Evidence exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name / organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	(please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details / How to respond

Please send your response by 21 May 2012 to:

Jean McMahon
Ministry of Justice
Private International Law Team, Human Rights & International
Directorate
6th Floor
102 Petty France
London SW1H 9AJ

Tel: 0203 334 3208
Email: Jean.McMahon@justice.gsi.gov.uk

This Call for Evidence is also available on-line at
www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from Jean McMahon (Jean.McMahon@justice.gsi.gov.uk or on 0203 334 3208).

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic

confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the Call for Evidence must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the Call for Evidence process you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice Consultation Co-ordinator
Legal Policy Team, Legal Directorate
6.37, 6th Floor
102 Petty France
London SW1H 9AJ**

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Jean.McMahon@justice.gsi.gov.uk