shares. Companies that already had preferred shares before listing on *BOVESPA Mais* may keep them but cannot issue additional preferred shares after the listing;
- a minimum of 25 per cent of the shares of the capital stock must float in the market, with a grace period of seven years should the company not comply with this requirement at the time of the listing;
- mandatory tender offers in the case of a delisting from *BOVESPA Mais,* a delisting from BM&FBOVESPA and a deregistration from CVM, for fair value, as determined by an independent, specialist firm with certain qualifications and experience, appointed by the board and approved by the shareholders; and
- any disputes arising between shareholders and the company must be resolved by arbitration conducted by the *Câmara de Arbitragem do Mercado.*

This type of special listing has not been widely used, which suggests that Brazilian SMEs are still not familiar with the use of funding from capital markets It also suggests that many Brazilian SMEs still have difficulties in complying with regulatory requirements.

Highlights regarding the EC proposal for a common European sales law

EUROPEAN UNION

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On 11 October 2011, the European Commission launched a proposal (COM (2011) 635 final) for a Regulation on a Common European Sales Law (CESL), seeking to foster cross-border trade within the EU by introducing a set of uniform rules for business-to-consumer and business-to-business cross-border sale agreements (in the latter case, provided that one of the parties is a SME). With a timeframe for adoption that is yet unclear, the proposal is currently at the heart of debates amongst stakeholders and legal practitioners. This article provides a quick briefing on the main principles of the CESL proposal as well as on some of the questions surrounding the CESL both from a legal perspective and a practical standpoint.

Principles of CESL proposal

The Commission's proposal relies on Article 114 TFEU regarding approximation of laws of the Member States as required for the establishment and functioning of the internal market, and aims to enshrine a single set of fully harmonised contract law rules regarding sale contracts, contracts for the supply of digital content as well as related service contracts. As per the Commission's explanatory memorandum to the CESL proposal, said rules are to be considered as a second contract law regime within the national law of each Member State.

CESL does not apply to contracts lacking a cross-border dimension, nor to contracts entered into by parties if none of which is a SME. Nonetheless, as per the CESL regulation proposal, Member States may individually choose to have CESL contract rules apply to both such types of contracts. Contracts granting or promising to grant any form of credit to a consumer are also excluded from the current scope of the CESL, along with 'mixed-purpose' contracts (ie, contracts including any other elements than those pertaining to the three categories of contracts falling under the material scope of the CESL). CESL does however apply to contracts under which goods, digital content or related services are supplied on a continuing basis and paid for by consumers in instalments, for the duration of the supply.

CESL should govern a contract falling under its scope only if the parties opt out in this respect, and it should further to

such option implicitly exclude, as per its terms, both: (i) national laws governing matters within its scope, including consumer protection laws enacted by the Member States further to the existing European directives (save for the information requirements laid down according to Directive 2006/123/EC on the services in the internal market, which should complement those within the CESL); and (ii) the UN Convention on Contracts for the International Sale of Goods (CISG).

Born on a background of ambitious endeavours relating to the creation of a single European contract law, the proposed CESL was designed to regulate the 'full lifecycle' of the contract (save a few aspects such as illegality of contracts and representation, which the Commission has arguably presented as a point with minor impact) as well as consumer protection rules and pre-contractual information duties.

With a view to facilitate access to jurisprudence related to the CESL, the Commission is set to create a database of final decisions rendered by both the European Court of Justice and national courts, the Member States being required to promptly communicate to the Commission any national judgments applying the proposed CESL Regulation.

A highly debated instrument

The Commission's proposal has received mixed feedback. Whilst some stakeholders (notably including online sellers) welcomed the CESL initiative, others have questioned a relatively large number of aspects, including compliance with EU treaties, the overall efficiency of the measure, the drafting quality of the CESL and its effects in terms of legal certainty.

For instance, voices have been raised against the suitability of Article 114 TFUE as a legal basis for the Commission's proposal, to the extent that CESL is an optional instrument which does not modify existing national laws, but rather adds a separate set of rules and as such could not be seen as approximating the laws of the Member States. The compliance of the proposal with the subsidiarity and proportionality principles is also at the centre of debates, along with the interaction between CESL and Rome I Regulation on the law applicable to contractual obligations. The CESL was equally said to increase legal uncertainty due, amongst other things, to certain inconsistencies and a considerable room left for interpretation to the relevant courts.

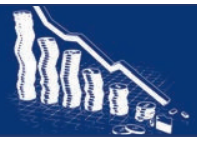
There are in addition several aspects that may under practical terms deter both parties and their advisors from choosing to have contracts governed by the CESL. First and foremost, the complexity of the issues to be considered upon the drafting and negotiation of a contract governed by CESL are likely to dramatically increase as compared to those entailed in case of contracts governed by national laws. Causes are, amongst others:

- the existing doubts as to the validity of the proposed CESL regulation, which obviously trigger uncertainty as regards the rules that would eventually be applied to a contract;
- the considerable size of the contract rules set out by the CESL coupled with the fact that they leave aside certain contract law matters and therefore bring in other laws which may be conflicting with the principles and mechanisms within the CESL; and
- the fact that CESL may not be used for the so-called mixed-purpose contracts, which are broadly defined and therefore increase the risk that a less straightforward agreement conceived in consideration of the CESL be eventually construed in accordance with other laws, possibly conflicting with the parties' intentions.

Since the making of a contract requires one to anticipate as much as possible the potential difficulties triggered by the (non)performance thereof as required to implement legal carve-outs conferring a certain degree of protection, it is obvious that such aspects may render the CESL exercise substantially more cumbersome and therefore unwanted. It is for the same reason that insofar there has been reported a rather scarce number of references within contracts to similar instruments such as the CISG and the UNIDROIT Principles of International Commercial Contracts (although the latter seems to be increasingly used in arbitration for support in interpreting contracts, even where these are exclusively governed by national laws).

Moreover, parties and practitioners from common law jurisdictions may be reluctant to embrace some of the fundamental principles within the CESL which are of Romano-Germanic tradition, such as for instance good faith and fair dealing, which are contrary to the highly pragmatic nature of common law contracts.

Since the declared purpose of the CESL was to encourage cross-border consumption,



enhance consumer protection and provide a less cumbersome framework for SMEs, another important question is, of course, whether the optional nature of the CESL would under practical terms actually result in its being applied by the parties, bearing in mind that the content of the contract is normally within the hands of the party holding the leverage, and which party is usually not the consumer or a SME (at least not when dealing with large corporations).

As regards business-to-consumer contracts, undertakings may find appealing the uniform set of consumer protection rules offered by the CESL, as opposed to Rome I regulation provisions which subject such contracts to the mandatory provisions of the laws at the consumer's habitual place of residence and which, in the Commission's opinion, should be circumvented by the choice of the CESL. It should be however also noted that the amendment of Rome I Regulation by means of the proposed CESL regulation is one of the matters under debate.

In respect of business-to-business contracts, it may seem unlikely that large corporations, which normally use contract templates pre-defined at group level, would be willing to undertake the cost of bringing the templates to which they have grown accustomed to in line with the CESL rules (which cost would include not only attorney fees but also time and expenses for training of the legal and commercial staff handling the contracts). Moreover, a potential argument that costs triggered by validation of group templates under national laws would decrease if they would be subject to a uniform set of rules under the CESL is not likely to hold, bearing in mind that CESL, as said, does not settle all relevant aspects pertaining to the contracts and that practice shows that such templates usually exclude the application of uniform rules such as CISG.

All in all, current arguments for and against the CESL are many and a number of others may still be raised, depending on future developments. Their sequence however seems to show that, at the current stage of development of the national legal systems as well as of the EU framework, efficient harmonisation of contract law on a large scale, although clearly desirable, may remain for the time being just a desire.

Direct selling in Italy*

ITALY

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The purpose of this article is to summarise some general principles concerning direct selling in Italy both from a legal and a tax perspective. The topic will be examined with particular attention to the case of a company based in an EU Member State which intends to expand its business in Italy.

Legal background

Direct selling in Italy is governed by Law No 173 dated 17 August 2005 (the 'Law 173/2005') as well as Legislative Decree No 206 dated 6 September 2005 (the 'Consumers' Code').

Before starting direct selling in Italy, sellers are required to submit to the municipality where their registered office is based, an application whereby details of the company and the legal representative as well as the specific trade sector they are going to commence are declared. Such an application must be submitted on the same day when the business starts.

Within 30 days of such submission, an additional application must be filed with the Companies' Register. Legal representatives are required not to have been declared habitual criminals nor been convicted of money laundering crimes, receiving of stolen goods, fraudulent bankruptcy, robbery, usury, trade fraud or other wilful crimes for which at least a three year sentence is provided for. Such prohibition remains in force for a five year period after the sentence has been served.

Companies are entitled to entrust the following three different categories of sellers: