



European Economic and Social Committee

INT/524
European contract law

Brussels, 19 January 2011

OPINION

of the
European Economic and Social Committee
on the
**Green Paper from the Commission on policy options for progress towards a European contract
law for consumers and businesses**
COM(2010) 348 final

Rapporteur: **Mr Pezzini**

On 1 July 2010 the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses
COM(2010) 348 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 17 December 2010.

At its 468th plenary session, held on 19 and 20 January 2011 (meeting of 19 January), the European Economic and Social Committee adopted the following opinion by 148 votes to five with eight abstentions.

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1. Conclusions and recommendations

- 1.1 The European Economic and Social Committee (EESC) concurs with the Commission's view regarding the need to complete the EU's internal market, inter alia in respect of European contract law, and recognises the importance of the academic work done on the Common Frame of Reference, which ought to be put to practical use.
- 1.2 Of the various options proposed by the Commission, the Committee favours a hybrid option which takes account of the need to reduce costs and provide legally certain solutions by means of:
 - a "toolbox" serving as a common frame of reference available to parties drawing up cross-border contracts, accompanied by,
 - an optional regulatory regime establishing an "optional advanced new regime" which could be used by the parties as a more favourable basis when entering into cross-border contracts, as an alternative to national rules, provided that both the toolbox and the regulation are available in all EU languages and ensure legal certainty based on the most advanced forms of protection for individual citizens and companies. Such regulation shall not prevent any Member State from maintaining or introducing more stringent protective measures for consumers.
- 1.3 The Committee believes that these objectives should be achieved incrementally, starting with cross-border commercial sales contracts for goods (B2B) on a pilot basis, as a useful means of putting the coexistence of the regimes to the test and monitoring how they are applied in practice.

- 1.4 The Committee believes that the toolbox provided by the common frame of reference could help ensure the overall coherence of European contract law, reduce obstacles to trade and promote competition in the internal market.
- 1.5 Moreover, the Committee believes that incorporating the "optional advanced new regime" into the body of EU law and into the Member States' national laws, by means of an EU regulation, should ensure that it is all-encompassing, straightforward to implement and provides legal certainty to contracting parties that opt to use it in cross-border commercial transactions.
- 1.6 The scope of the two new instruments – the "common toolbox" and the "optional advanced new regulatory regime" – should encompass cross-border commercial sale-of-goods contracts (B2B). Labour contract law and social security contract law are excluded from the scope of the new instruments.
- 1.7 The Committee supports the freedom of contract and of freely negotiating contractual terms . For Business to Consumer (B2C) contracts, and those involving SMEs, maximum effective protection in addition to legal certainty and safeguards for consumers must be secured.
- 1.8 The Committee believes that before potentially proceeding to extend the two new instruments to cover other types of cross-border sale-of-goods contracts, the Commission should undertake an impact analysis of the instruments on the internal market – after they have been in place for a number of years – and review their added European value, in terms of costs and benefits for economic operators and consumers.
- 1.9 The Committee considers it vital that the Commission identify forthwith the obstacles posed by transaction costs and legal uncertainty; these obstacles prevent full advantage being taken of the benefits and opportunities of the single market, particularly by SMEs – i.e. 99% of EU businesses – and by consumers.
- 1.10 The EESC calls on the Commission to carry out an impact assessment of the means available in the single market and an examination of the European value added brought by this new legislative system when it comes to costs and benefits for economic operators and consumers.
- 1.11 The Committee also asks the Commission to immediately launch training and information initiatives regarding the newly established legal instruments to cover both legal theory and practice, for all legal operatives, academics and final users.
- 1.12 The Committee asks to be more closely associated – in the role of an observer – with the work of the expert groups set up by the Commission, as is the case with the European Parliament, in order to more closely scrutinise the development of these initiatives,

particularly as regards the common frame of reference for European contract law and the follow-up to the findings of the current public consultation.

2. Introduction

2.1 The internal market is built on a multitude of contracts governed by different national contract laws. Yet, differences between national contract laws may entail:

- additional transaction costs;
- legal uncertainty for businesses;
- a lack of consumer confidence in the internal market; and
- barriers to trade.

2.1.1 The Lisbon Treaty makes action at the European level easier in the field of judicial cooperation and consumer protection in civil matters:

- by guaranteeing the primacy of national rules – under Articles 12, 38, 164, 168, and 169(4) of the Treaty – where these are more advantageous for consumers;
- by increasing use of the Community method¹;
- with the Commission's proposals being adopted by qualified majority;
- by boosting the role of the European Parliament;
- by boosting democratic scrutiny via national parliaments; and
- by enhancing the Court of Justice's role in monitoring legality.

2.1.2 Under the Stockholm Programme – aimed at *an open and secure Europe serving and protecting the citizens* – the Union may adopt common minimum rules in order to facilitate mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters.

2.1.3 Every day businesses and members of the public are faced with the reality that bottlenecks to cross-border activity remain despite the legal existence of the single market. They realise that networks are not sufficiently interconnected and that enforcement of single market rules remains uneven.

¹

The Community method is based on the idea that the public's general interest is better protected when the Community institutions play their full role in the decision-making process, whilst respecting the principle of subsidiarity.

2.1.4 The Commission proposes action to tackle bottlenecks in the single market by²:

- "• pressing ahead with the *Smart Regulation* agenda, including considering the wider use of regulations rather than directives;
- making it easier, more efficient and less costly for businesses and consumers to conclude contracts with partners in other EU countries, by offering harmonised solutions for consumer contracts, [and] EU model contract clauses; and
- making it easier and less costly for businesses and consumers to enforce contracts and to recognise court judgments and documents in other EU countries".

2.1.5 Establishing an optional contract law instrument is also one of the key measures of the European Digital Agenda presented by the Commission on 19 May 2010.

2.1.6 Back in 2001, the Commission launched a debate on European contract law, involving the European Parliament and the Council, as well as the various stakeholders, including businesses, legal practitioners, academics and consumer groups.

2.1.7 The European Parliament adopted a series of resolutions on the possible harmonisation of substantive private law. In 1989 and 1994 the Parliament called for work to be started on the possibility of drawing up a common European code of private law.

2.1.8 The European Parliament pointed out that harmonisation of certain sectors of private law was essential to the completion of the internal market. It further stated that unification of major branches of private law in the form of a European civil code would be the most effective way of carrying out harmonisation.

2.1.9 The Committee has previously stated, in a 2002 opinion, that "creation of a uniform, general European contract law, for example by means of a regulation, a solution the Committee considers preferable in order to avoid disparities, could be a lengthy process and require further studies, but it should be based on the work already carried out by the various commissions and institutions referred to previously and on current international rules and practice"³.

2.1.10 In a subsequent opinion in 2010, the Committee pointed out that "*the network on "Common Principles of European Contract Law" (CoPECL-Network) has recently finished its Draft Common Frame of Reference [DCFR] and submitted it to the European Commission. Clearly, those rules provide the European legislator with a model which it could use when enacting an optional instrument as advocated by Commissioner Reding*"⁴.

² Europe 2020. A strategy for smart, sustainable and inclusive growth. COM(2010) 2020 final.

³ OJ C 241, 7.10.2002, p. 1.

⁴ Opinion CESE 758/2010 of 27 May 2010.

2.1.11 The Committee also made the point that *"the DCFR, which covers general contract law, is in fact not drafted as an optional instrument. However, the editors of the DCFR highlight in their introduction that it might be used as "the basis for one or more optional instruments". In the Committee's view, "this proposal could also be implemented in a restrictive manner by introducing the general provisions of the DCFR into an optional instrument which applies only in specific areas of contract law. This would help to avoid regulatory gaps which would necessarily appear if only provisions specific to particular types of contracts were enacted"*.

3. The new Commission Green Paper

3.1 In the Green Paper, the Commission proposes a number of different approaches aimed at increasing the coherence of contract law, including:

- publication online of (non-binding) model contract rules which could be used within the European single market;
- a (binding or non-binding) "toolbox" available to EU legislators when adopting new legislation, to ensure better, more coherent rules;
- a recommendation on contract law, which would urge Member States to incorporate the European contract law instrument into their respective national legal systems, partly based on the United States model, where all but one of the 50 states voluntarily adopted the uniform commercial code;
- an optional European contract law (or a "28th system"), which could be chosen freely by consumers and businesses in their contractual relations. This optional law would be an alternative to the existing national contract laws and would be available in all languages. It could apply in cross-border contracts only, or in both cross-border and domestic contracts. It would have to guarantee a high level of consumer protection and legal certainty throughout the life cycle of a contract;
- harmonisation of national contract laws by means of an EU directive;
- full harmonisation of national contract laws by means of an EU regulation; or
- the creation of a fully-fledged European civil code, replacing all national rules on contracts.

3.2 The European Parliament gave its backing to the idea of a European contract law in a resolution on 25 November 2009. Former Internal Market and Competition Commissioner Mario Monti also identified in his Single Market Report of 9 May the advantages that an optional "28th system" would bring for consumers and businesses⁵.

3.3 On 7 September 2010, the Commission held the first meeting of business, consumer and legal practitioners' groups to discuss European contract law.

⁵ Opinion CESE 758/2010, 7.6.2010 (rapporteur: Mr Pegado Liz).

3.4 The Commission has also set up an expert group, which includes observers from the European Parliament, to transform the so-called "Draft Common Frame of Reference"⁶ – a first draft of a European contract law developed in the last few years under the EU's FP6 RTD.

3.5 A public consultation has been launched by the Commission on its strategic policy paper, due to conclude at the end of January 2011.

4. **General comments**

4.1 The EU's single market is built on contract laws. The Committee is deeply concerned, however, that despite the efforts to complete the single market, businesses – particularly small and medium-sized companies – are hampered in cross-border sales because they must follow different contract laws for each of the EU's 27 Member States. Only 8% of consumers buy online from another Member State.

4.2 At the moment, different national contract laws lead to higher transaction costs for businesses. Companies – particularly small businesses – cannot exploit economies of scale in the EU's single market. Consumers suffer because there are fewer goods sold across borders, leading to less choice and higher prices.

4.3 In addition, 61% of cross-border sales fail to go through because traders refuse to serve the consumer's country. This is largely due to regulatory barriers and legal uncertainty about the applicable rules.

4.4 To address some of these problems and boost the potential of Europe's single market, there is a need to ensure more legal certainty for businesses – particularly small companies – and simpler rules for consumers, providing a higher degree of protection.

4.5 The Committee believes that the Commission should do more in this area and go beyond measures for judicial cooperation in civil-law matters, which, while necessary, are not sufficient to ensure the proper functioning of the internal market.

4.6 The debate proposed by the Commission is relevant, in light of the experience of a European single market built on a multitude of contracts governed by different national contract laws,

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The Common Frame of Reference (CFR) is a long-term project which aims at providing the European legislators (Commission, Council and European Parliament) with a "toolbox" or a handbook to be used for the revision of existing and the preparation of new legislation in the area of contract law. This toolbox could contain fundamental principles of contract law, definitions of key concepts and model provisions. Under the 6th Framework Programme, the Directorate General for Research has funded, from 2005 until 2009, in the area of Social Sciences and Humanities, the Network of Excellence COPECL - "Common Principles of European Contract Law". This network comprised more than 150 researchers as well as several institutions and organisations operating in all EU Member States in the field of European private law. The final product was the text entitled the "Draft Common Frame of Reference (DCFR)".

entailing additional transaction costs, which, according to recent studies, amount to an average of around EUR 15 000⁷.

- 4.7 Both consumers and businesses face significant barriers when seeking to take advantage of the EU's single market. Transaction costs (for adapting contractual terms and commercial policies or obtaining a translation of the rules) and legal uncertainty make it particularly hard for small and medium-sized enterprises to expand within the single market and for consumers to be accorded a high level of protection.
- 4.8 Coherence in contract law could be extremely useful; this could be achieved by means of an optional European contract law (or "28th system"). References to the possible use of a so-called 28th regime have begun to appear in various Commission and EP documents, mainly relating to important subjects where the desired full harmonisation would have been neither easy nor achievable at all.
- 4.8.1 Apart from the undertaking initiated with the EESC own-initiative opinion on *The European Insurance Contract*⁸, and carried out by the Project Group on "Restatement of European insurance contract law" with the recent publication of the "Principles of European insurance contract law (PEICL)", only on a few occasions has a similar approach been followed by the European legislator in the area of company law, intellectual property law and international law.
- 4.9 The introduction of standard contract terms could benefit all contracting parties on condition that:
- the most robust guarantees are put in place to safeguard the weaker party and the highest possible level of consumer protection is taken as a point of departure when framing those standard terms;
 - the social partners and all parties representing civil society – especially consumer organisations and SMEs – are given an active role in the negotiations towards the creation of standard contract terms;
 - contractual terms comply with the provisions of the Directive on unfair terms and with the Directive on compliance with payment terms in commercial transactions, implementing the Small Business Act – SBA;
 - freedom of contract is still guaranteed, e.g. with recommended standard contracts;
 - access to justice is untouched;
 - the standard contract terms are monitored and reviewed at certain intervals.
- 4.10 In the Committee's view an incremental approach is needed, starting with cross-border commercial sales contracts for goods on a pilot basis, as a useful means of putting the

⁷ <http://www.europe.org>.

⁸ OJ C 157, 28.6.2005, p. 1.

coexistence of the regimes to the test, monitoring how they are applied in practice by the parties concerned and carrying out effective impact assessments.

4.11 It is particularly important to define the following substantive law concepts:

- legal persons;
- consumers and professionals;
- unfair contract terms;
- duty to provide pre-contractual information on goods and services;
- duty to provide information when concluding a contract with a consumer who is at particular disadvantage;
- remedies for breach of information duties;
- delivery – time of delivery – link with the transfer of risk;
- point in time for and means of assessing conformity and hierarchy of remedies for non-conformity;
- situations when termination of the contract can take place;
- notification to the seller of defects which were discovered/ought to have been discovered by the buyer;
- right of withdrawal; scope of application; exercise of the right of withdrawal; cooling-off period and time limits for withdrawal;
- notion of strict liability;
- inclusion of the notion of loss of profits and resulting damage;
- producers' liability and burden of proof; and
- e-commerce.

4.12 The Committee could suggest a combination of legislative and non-legislative measures:

- increase the coherence of the Community acquis in the field of contract law;
- promote the establishment of standard contract terms applicable EU-wide;
- examine further whether problems in the European contract law area may require non-sector-specific solutions.

4.13 In the Committee's view, an optional European contract law should be able to co-exist in parallel with national contract laws, providing standard terms and conditions, along with the possibility of opting for the 28th regime.

4.14 In any case, new developments (such as e-contractors and their influence on contract rules) and emerging legal issues present a number of challenges to applying the Rome Convention⁹.

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Rome Convention on the law applicable to contractual obligations, 19 June 1980.

- 4.15 With regard to the scope of the "common toolbox" in respect of the optional European contract law and of the "optional advanced new regulatory regime", the Committee advocates starting with a pilot implementation project, limited to cross-border commercial sale-of-goods contracts.
- 4.16 The Committee believes that greater coherence should be ensured between horizontal and vertical rules, with particular regard to the need for transparency, clarity and simplicity, not only for the sake of legal practitioners and their ability to incorporate the new guidelines, but also and most importantly for the small business and the average consumer, who stand to be particularly affected by legal complexity and opacity, and the ensuing excessive burden in terms of additional cost and time.

Brussels, 19 January 2011

The President
of the
European Economic and Social Committee

Staffan Nilsson
