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DRAFT REPORT

on policy options for progress towards a European Contract Law for consumers and businesses
(2011/2013(INI))

Committee on Legal Affairs

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on policy options for progress towards a European Contract Law for consumers and businesses
(2011/2013(INI))

The European Parliament,

– having regard to the Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)0348),

– having regard to Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law[1],

– having regard to the Communication from the Commission of 11 July 2001 on European Contract Law (COM(2001)0398),

– having regard to the Communication from the Commission of 12 February 2003 entitled 'A more coherent European Contract Law – An Action Plan' (COM(2003)0068),

– having regard to the Communication from the Commission of 11 October 2004 entitled 'European Contract Law and the revision of the *acquis*: the way forward' (COM(2004)0651),

– having regard to the report from the Commission of 23 September 2005 entitled 'First Annual Progress Report on European Contract Law and the Acquis Review' (COM(2005)0456) and to the report from the Commission of 25 July 2007 entitled 'Second Progress Report on the Common Frame of Reference' (COM(2007)0447),

– having regard to the Communication from the Commission of 22 October 2009 on Cross-Border Business to Consumer e-Commerce in the EU (COM(2009)0557),

– having regard to its resolution of 3 September 2008 on the common frame of reference for European contract law[2],

– having regard to its resolution of 12 December 2007 on European contract law[3],

– having regard to its resolution of 7 September 2006 on European contract law[4],

– having regard to its resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward[5],

– having regard to its resolutions of 26 May 1989[6], 6 May 1994[1], 15 November 2001[2] and 2

[1] OJ L 105, 27.4.2010, p. 109.
[2] OJ C 295 E, 4.12.2009, p. 31.
[3] OJ C 323 E, 18.12.2008, p. 364.
[4] OJ C 305 E, 14.12.2006, p. 247.
[5] OJ C 292 E, 1.12.2006, p. 109.
[6] OJ C 158, 26.6.1989, p. 400.

September 2003[3] on the issue,

– having regard to Rule 48 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0000/2011),

A. whereas the European contract law initiative, which seeks to address internal market problems created by divergent bodies of contract law, has been under discussion for many years,

B. whereas, in the wake of the global financial crisis, it appears more important than ever to provide a coherent European contract law regime in order to realise the full potential of the internal market,

C. whereas the Expert Group set up to assist the Commission in preparing a proposal for a Common Frame of Reference (CFR) has started work, together with a stakeholders' round table,

D. whereas, according to a Commission survey of 2008, three-quarters of retailers sell only domestically, and cross-border selling often takes place in a few Member States only[4],

E. whereas the application of foreign (consumer) law to cross-border transactions under the Rome-I Regulation[5] has been seen to entail considerable transaction costs for businesses, in particular for SMEs, which have been estimated at €15 000 per business and per Member State[6],

F. whereas such transaction costs are perceived as important obstacles to cross-border trade, as confirmed by 60 % of EU retailers interviewed in 2008[7], and whereas 46 % said harmonised rules would help to increase cross-border sales,

G. whereas there is evidence that the online market remains fragmented: in a survey, 61 % of 10 964 test cross-border orders failed, *inter alia* because traders refused to serve the consumer's country[8]; whereas, on the other hand, cross-border shopping appears to increase consumers' chances of finding a cheaper offer[9] and of finding products not available domestically online[10],

H. whereas any steps taken in the area of European contract law must be coherent with the expected Consumer Rights Directive,

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[1] OJ C 205, 25.7.1994, p. 518.
[2] OJ 140 E, 13.6.2002, p. 538.
[3] OJ C 76 E, 25.3.2004, p. 95.
[4] Eurobarometer 224, 2008, p. 4.
[5] OJ L 177, 4.7.2008, p. 6.
[6] UK Federation of Small Businesses, Position paper on Rome I (2007).
[7] Eurobarometer 224, 2008, p. 4.
[8] COM(2009)0557, p. 5.
[9] Ibid, p. 3.
[10] Ibid, p. 5.

Legal nature of the instrument of European Contract Law

1. Looks forward to the publication of the Expert Group's results and the ongoing discussion as to how these should be used;

2. Favours the option of setting up an optional instrument (OI) by means of a regulation; believes that such an OI could be complemented by a 'toolbox' that should be endorsed by means of an interinstitutional agreement;

3. Believes that a 'toolbox' could possibly be put into practice step-by-step, starting as a Commission tool, and being converted, once agreed between the institutions, into a tool for the Union legislator; points out that a 'toolbox' would provide the necessary legal backdrop and underpinning against which an OI could operate;

4. Considers that an OI would generate European added value, in particular by ensuring legal certainty through the jurisdiction of the Court of Justice, providing at a stroke the potential to surmount both legal and linguistic barriers, as an OI would naturally be available in all EU languages;

5. Sees a compelling practical advantage in the flexible and voluntary nature of an opt-in instrument; calls, however, on the Commission to include in any proposal for an OI a mechanism for regular monitoring and review, with the close involvement of all parties concerned;

Scope of application of the instrument

6. Believes that both business-to-business and business-to-consumer contracts should be covered; emphasises that the level of consumer protection would need to be high, as mandatory national provisions, including in the area of consumer law, would be replaced;

7. Sees no reason why an OI should not be available as an opt-in both in cross-border and domestic situations, as this would have the advantages of simplicity and cost-saving, especially for the SME sector; believes, however, that the effects of a domestic opt-in on national bodies of contract law merit specific analysis;

8. Acknowledges that e-commerce or distance-selling contracts account for an important share of cross-border transactions; believes, however, that an OI should not be limited to these types of transaction;

9. Believes that the scope of a 'toolbox' could be quite broad, whereas any OI should be limited to the core contractual law issues;

10. Sees benefits in an OI containing specific provisions for the most frequent types of contract, in particular for the sale of goods and provision of services; reiterates its earlier call to include insurance contracts within the scope of the OI, believing that such an instrument could be particularly useful for small-scale insurance contracts; points out that some specific issues in connection with which an OI might be beneficial have been raised, such as digital rights and beneficial ownership; considers that, on the other hand, there might be a need to exclude certain types of complex public law contracts;

Application of a European contract law instrument in practice

11. Notes that there seems to be a clear constituency among SMEs which is expecting benefits from an OI, with the caveat that it should be drawn up in a manner which makes it simple and attractive to use for all parties;

12. Believes that whilst an OI will have the effect of providing a single body of law, there will still be a need to seek provision of standard terms and conditions of trade which can be produced in a simple and comprehensible form, available off-the-shelf for SMEs and with some form of trust mark system to ensure consumer confidence;

13. Recalls that further work on cross-border alternative dispute resolution (ADR), in particular for SMEs and consumers, remains a priority, but emphasises that, if the parties use one body of law provided by an OI, ADR will be further facilitated; calls on the Commission to consider synergies when putting forward a proposal;

14. Suggests that lack of confidence in cross-border redress systems could be further tackled by a direct linkage between the OI and the European Order for Payment Procedure and the European Small Claims Procedure;

15. Notes concerns that consumers seldom feel they have a choice with regard to contract terms and are confronted with a 'take it or leave it' situation; strongly believes that an attractive OI, by opening up business opportunities and strengthening competition, will actually broaden the overall choice available to consumers;

Stakeholder involvement, impact assessment

16. Emphasises the vital importance of involving stakeholders from throughout the Union and from different sectors of activity, including legal practitioners;

17. Appreciates that both expert and stakeholder groups already have a varied geographical and sectoral background; believes that stakeholder contributions will become even more important once the consultation phase is over and the legislative procedure as such, which will need to be as inclusive and transparent as possible, is launched;

18. Recalls, in accordance with Better Lawmaking principles, the need for a comprehensive and broad impact assessment, analysing different policy options, including that of not taking Union action, and focusing on practical issues;

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19. Instructs its President to forward this resolution to the Council and the Commission.

EXPLANATORY STATEMENT

I. Background

Contract law determines and organises transactions within the internal market, its potential for both hindering and facilitating those transactions is therefore obvious. Choosing the right way forward in the area of contract law can make a significant contribution to improving the functioning of the internal market and opening up its full potential for businesses, in particular SMEs, and consumers.

The potential benefits of European contract law to the internal market have been discussed in the interinstitutional framework and with the broad public for a many years; the Parliament pronounced itself for the first time on the issue in 1989. The Commission has broadened the debate by issuing its Communication of 2001, focusing on possible problems divergences in contract law might raise within the internal market and on possible options for action. Within the light of the responses to this consultation, the Commission has issued an Action Plan in 2003, proposing, *inter alia*, the elaboration of a Common Frame of Reference, containing definitions, common principles and model rules, with a view to improving the quality and coherence of European Contract Law. In a further Communication, in 2004, the Commission has set out the follow-up to that Action Plan and also proposed to review the Union *acquis* in the area, it submitted in 2008 a proposal for a Directive on consumer rights. As regards European Contract Law and the Common Frame of Reference, the Commission has reported twice on progress in this area, and has, now again, proposed a number of actions to take in the area in the form of a Green Paper.

It merits attention that the Parliament has, in its various resolutions on this matter, repeatedly acknowledged the benefits an improved contract law framework has on the internal market, has further welcomed the idea of a Common Frame of Reference, and has insisted on close involvement of itself and the stakeholders concerned.

The report intends to respond to the recent Commission Green Paper on European Contract Law, and to set out the Parliament's priorities in this area.

II. Evidence

Given that any initiative in contract law will have to closely respond to actual needs and concerns of businesses and consumers, the rapporteur believes that any reasoning in this area needs to be built on practical evidence relating to the current situation in contract law and any difficulties that businesses and consumers encounter, in particular in cross-border transactions.

The report therefore refers to several sets of recent data:

– The UK Federation of Small Businesses have calculated in their position paper on the Rome I Regulation, 2007, that it would cost a business an amount of € 15,000 to enter the e-commerce market of one Member State, the costs including legal fees, translation fees and implementation fees.

– For the Flash Eurobarometer 224, 2008, on "Business attitudes towards cross-border sales

and consumer protection", according to the information provided, a total of 7,282 managers in the 27 Member States and Norway were interviewed between 30 January and 7 February 2008. Among the main findings are the following results (Main findings, p. 4):

- Three-quarters of EU retailers sell only to their domestic markets. Furthermore, the businesses most likely to be involved in cross-border retailing are medium and medium-large retail enterprises.

- The perceived cost of complying with different national laws regulating consumer transactions was seen by 60% of the retailers as an obstacle that caused them concern.

- It was further found that 46% of the retailers agreed that if the provisions of the laws regulating consumer transactions were harmonised throughout the Union, their cross-border sales would increase. 41 % said the level of cross-border sales would not change. Furthermore, whereas 75% do not currently sell cross-border, only 41% say that they would continue not to do so if regulations were harmonised.

– The evidence used from the Communication from the Commission of 22 October 2009 on Cross-Border Business to Consumer e-Commerce in the EU (COM(2009)0557) has, according to the information contained in that communication, the following background: testers located in all the Member States were instructed to search for a list of 100 popular products on the internet and to record the total price, all delivery charges and costs included. Domestic and cross-border offers, if available, were compared. Also the availability of products and whether the transaction could be concluded was recorded. The following were some of the findings obtained:

- Price comparison: in 13 EU Member States out of the 27 (Portugal, Italy, Slovenia, Spain, Denmark, Romania, Latvia, Greece, Estonia, Finland, Hungary, Cyprus, Malta) for at least half of all the product searches, testers were able to find one cross-border offer that was at least 10% cheaper than the best domestic offer (COM (2009)0557, p. 3).

- Access to products: within the exercise described above, testers in Cyprus, Malta, and Luxembourg, but also in Lithuania, Latvia, Ireland, Belgium, Estonia, Portugal and Finland could not find domestic online offers for at least half the products contained within their search for 100 products (COM (2009)0557, p. 4).

- Failure of online transactions: Within the 10,964 cross border tests that were carried out, an order could be only placed in on average 39 % of the cases where the online shop was not located within the same country as the consumer. 61 % of the orders would have failed, because the retailer refused to serve the consumer's country or for other reasons.

The rapporteur believes that these data make a case that divergences in contract law discourage businesses, in particular SMEs, from engaging into cross-border trade and keep them from benefiting from opportunities and gains which the Internal Market offers. They further confirm that consumers are disadvantaged by limited product choice, higher prices and lower quality due to weak cross-border competition; consumers even may be refused access to

cross-border offers altogether.

III. Structure of the report

The report falls into four sections: in the first and second section, it provides responses to the questions raised by the Commission in its Green Paper; the third and fourth sections address issues the rapporteur believes to be of specific importance, in particular issues of the application of a European Contract Law instrument in practice and questions related to stakeholder involvement and the impact assessment.

Legal nature of the instrument of European Contract Law

The rapporteur takes the view that the option of setting up an optional instrument (OI) for European Contract Law by virtue of a regulation (Option 4) is to be favoured. It could be complemented by a "toolbox" for Commission and legislator (Option 2) which should be implemented by an interinstitutional agreement. The rapporteur believes that a toolbox has the advantage that it could be set up rather speedily; it could be introduced by a step-by-step approach, and could be made first available to the Commission when proposing legislation relevant to contract law, and then, in a second step, once an interinstitutional agreement has been concluded, to Parliament and Council when legislating in this area. The speed with which a "toolbox" could be drawn up would ensure first field testing of individual elements of the CFR and first jurisprudence, thus preparing the legal background against which an OI will operate.

The rapporteur sees it as a clear advantage of an OI, for instance compared against existing international sets of rules as the Vienna Convention on International Sale of Goods (CISG) or the UNIDROIT Principles of International Commercial Contracts, that it will provide legal certainty under the jurisdiction of the Court of Justice and language plurality. The rapporteur particularly sees it as advantageous that an OI will enlarge the choice of parties, and will have benefits should it be perceived as attractive by the parties and chosen. It will not be of any detriment if it is not chosen. The rapporteur further takes the view that a monitoring and review mechanism will be of crucial importance in order to ensure that the OI keeps up with market needs and legal and economic developments.

Scope of application of the instrument

The rapporteur considers that both business-to-business and business-to-consumer contracts should be covered by an OI. She believes that the level of consumer protection would need to be high in order to ensure the expected internal market effects.

She further takes the view that an OI could be available for opt-in both in cross-border and domestic situations, but wishes to see the question thoroughly analysed whether and how the availability of an OI for domestic transactions would affect the evolution of national contract laws; such analysis could be done in the framework of the impact assessment which will have to accompany the proposal of any contract law instrument.

The rapporteur notes that there are voices wishing to limit a future contract law instrument to e-commerce or distance selling and acknowledges that such contracts would be one of the main fields of application of a future instrument, but she does not wish to create an artificial

differentiation between "virtual"/distance and face-to-face transactions and therefore does not favour to limit the scope of an OI in that respect.

As regards the material scope of the instrument, the rapporteur believes that it should focus on core issues of contract law.

Concerning the coverage of specific types of contract, the rapporteur believes that provisions on sale of goods merit priority, as well as service contracts. She further wishes to recall that Parliament has already emphasised in its resolution of 2 September 2003 that an opt-in instrument in the areas of consumer contracts and insurance contracts should be a priority, she sees benefits for an OI in particular in respect of small scale insurance contracts. The rapporteur further is interested in exploring the opportunities the OI can offer as regards digital rights and beneficial ownership, issues that have been raised in the ongoing discussions. On the other hand, the rapporteur sees a need to clearly define the limits as regards types of contracts covered. For instance, it should be clear that complex public law contracts or certain large scale contracts in the area of public procurement would not fall under an OI.

Application of a European contract law instrument in practice

In this section, the rapporteur raises a number of issues that appear important for the practical application of an OI.

She above all emphasises that simplicity and readiness for use should be a key objective. Furthermore, an OI will have to be seen in the context of standard terms and conditions, and it will be crucial for those seeking to use the OI, in particular for SMEs, that simple and comprehensible sets of standard rules are available. If some form of trust mark system were in place, this would ensure additional consumer confidence.

The rapporteur further takes the view that synergies with ADR, and also with the European Order for Payment Procedure and the European Small Claims Procedure should be sought.

She finally emphasises that an OI will open up consumer choice.

Stakeholder involvement, impact assessment

The rapporteur recalls that broad and balanced stakeholder involvement is of crucial importance. She acknowledges that the present Commission working method involving an expert and a stakeholder group already assures participation of interested parties. But she believes it important to emphasise that the process has not yet left the consultation phase, the legislative procedure as such has not started yet; stakeholder involvement will in particular be essential during that legislative procedure, the inclusivity and transparency of which will have to be assured by all available means.

Finally, the rapporteur emphasises the importance of a broad and varied impact assessment, exploring a wide range of policy options and focusing on practical issues important for the functioning of an OI.