Policy options for progress towards a European contract law for consumers and businesses

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PURPOSE: to launch a public consultation on policy options for progress towards a European Contract Law for consumers and businesses (Green Paper).

BACKGROUND: the internal market is built on a multitude of contracts governed by different national contract laws. Differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market. Divergences in contract law rules may require businesses to adapt their contractual terms. Partly for these reasons, consumers and businesses, in particular small and medium enterprises (SMEs) having limited resources may be reluctant to engage in cross-border transactions.

The Europe 2020 strategy recognises the need to make it easier and less costly for businesses and consumers to conclude contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law. The Digital Agenda for Europe refers to an optional contract law instrument to overcome the fragmentation of contract law, in particular as regards the on-line environment.

The idea of a European Contract Law has also received the support of the European Parliament, expressed in its resolution of 25 November on the Commission's Communication regarding the Stockholm Programme.

The Commission has set up an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty. The Group will assist the Commission in selecting those parts of the **Draft Common Frame of Reference** (DCFR) which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions. The DCFR covers principles, definitions and model rules of civil law, including contract and tort law. It contains provisions for both commercial and consumer contracts.

CONTENT: the purpose of this Green Paper is to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law, and launch a public consultation on them. Depending on the evaluation of the results of the consultation, the Commission could propose further action by 2012. Any legislative proposal will be accompanied by an appropriate impact assessment.

An **instrument of European Contract Law** should respond to the problems of diverging contract laws, without introducing additional burdens or complications for consumers or businesses. In addition it should ensure a high level of consumer protection. It should be comprehensive and self-standing, in the sense that references to national laws or international instruments should be reduced as much as possible. An instrument of European Contract Law could range from a non-binding instrument, aiming at improving the consistency and quality of EU legislation, to a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules. As a general observation, a Union instrument would be made available in all official languages. This would benefit all stakeholders involved, legislators seeking guidance, judges applying rules and parties negotiating the terms of their contract.

The Green Paper proposes **different options**:

Option 1: publication of the results of the Expert Group: the outcome of the work of the Expert Group could be made easily available, by immediate publication on the website of the Commission, without any endorsement at Union level. This could be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions.

However, divergences in contract law would not be significantly reduced by a text which has no formal authority or status for courts and legislators.

Option 2: an official "toolbox" for the legislator: the Commission could adopt an act (e.g. a Communication or Commission Decision) on European Contract Law to be used as a reference tool by the Commission to ensure the coherence and quality of legislation. A "toolbox" in European Contract Law could also be the object of an interinstitutional agreement between the Commission, Parliament and Council to make consistent reference to its provisions when drafting and negotiating legislative proposals bearing on European Contract Law.

The disadvantage of any "toolbox" is that it would not remove divergences in law and could not ensure a convergent application and interpretation of Union contract law by the courts.

Option 3: Commission Recommendation on European Contract Law: an instrument of European Contract Law could be attached to a Commission Recommendation addressed to the Member States, encouraging them to incorporate the instrument into their national laws. Such a Recommendation would allow the Member States to gradually adopt the instrument into their national laws on a voluntary basis. Furthermore, the Court of Justice of the EU would have jurisdiction to interpret the provisions of the Recommendation.

Such a solution bears the risk of an incoherent and incomplete approach between the Member States.

Option 4: Regulation setting up an optional instrument of European Contract Law: this would be conceived as a "2nd Regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law.

It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts. An optional instrument could constitute an alternative to full harmonisation of national laws, by offering a proportionate solution to internal market barriers stemming from diverging national contract laws.

On the other hand, a European optional instrument might be criticised for complicating the legal environment.

Option 5: Directive on European Contract Law: this could harmonise national contract law on the basis of minimum common standards. Member States would be able to retain more protective rules, subject to compliance with the Treaty. Such a Directive could decrease legal divergences, by achieving a degree of convergence between national contract laws. However, harmonisation through directives based on minimum harmonisation would not necessarily lead to uniform implementation and interpretation of the rules.

Option 6: Regulation establishing a European Contract Law: such a Regulation could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party. The Regulation could replace national laws in cross-border transactions only, or it could replace national laws in both cross-border and domestic contracts.

This solution would remove legal fragmentation in the field of contract law and lead to a uniform application and interpretation of the Regulation's provisions. However, it could raise sensitive issues of subsidiarity and proportionality.

Option 7: Regulation establishing a European Civil Code: this solution goes one step further than the Regulation establishing a European Contract Law, in the sense that it would cover not only contract law, but also other types of obligations (e.g. tort law and benevolent intervention). Such an instrument would reduce even further the need to fall back onto national provisions.

However, it is yet to be established to what extent an extensive instrument such as a European Civil Code could be justified on grounds of subsidiarity.