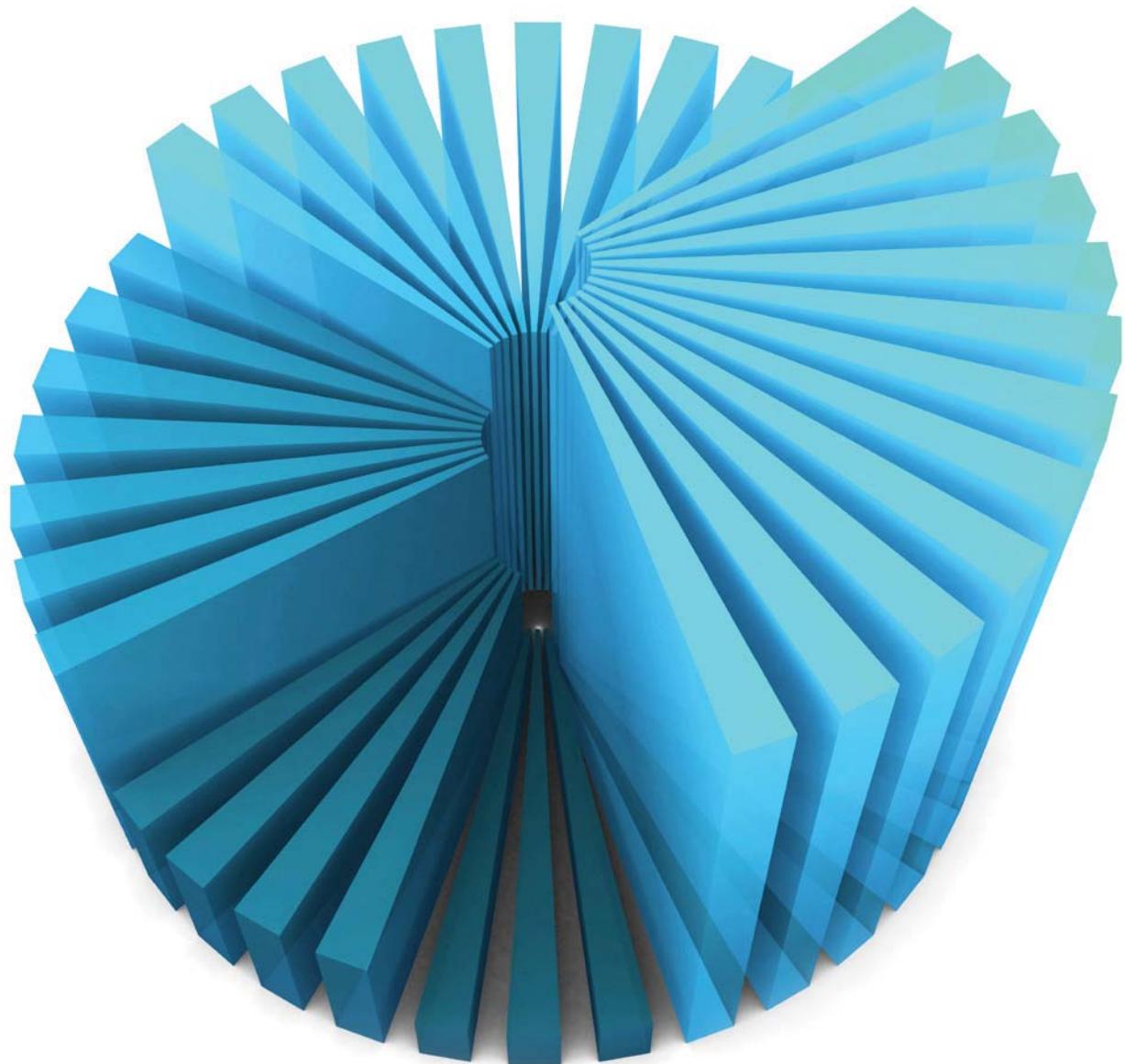


ALLEN & OVERY



Response to European Commission green
paper on policy options for progress
towards a European contract law
for consumers and businesses

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About Allen & Overy LLP

Allen & Overy LLP (**A&O**) is an international legal practice with over 5,000 staff, including nearly 500 partners, working in 36 major cities worldwide. Its European offices are in Amsterdam, Antwerp, Athens (representative office), Bratislava, Brussels, Bucharest (associated office), Budapest, Düsseldorf, Frankfurt, Hamburg, London, Luxembourg, Madrid, Milan, Munich, Paris, Prague, Rome and Warsaw.

A&O's clients include banks, corporations, sovereign states and individuals. The efficiency and effectiveness of contract law are matters of immense concern to A&O and its clients.

A&O's response to this Green Paper is based, broadly, on the views of its practitioners in Europe and it responds without attributing any particular view to any particular lawyer. To the extent that there are divergent views on particular issues, we have tried to capture these while at the same time making a single submission.

Overview

We welcome a debate on the questions posed in the Green Paper. It is of course legitimate for the Commission to explore the merits of any greater coherence, in the long term, of the laws of contract in the EU. We do not, however, support the current approach by the Commission. We believe the Commission's preferred "optional instrument" is too radical, potentially risky and appears to be being rushed through without proper consideration. We also question the current need for such widespread reform.

To raise awareness and prompt debate, we asked Ipsos MORI to conduct a survey of approximately 3,000 consumers across Europe. The survey covered France, Germany, Italy, Poland, Spain and the UK. These Member States were selected on the basis that they are the largest by GDP (with Poland being added as a significant economic force and relatively new member of the EU). We focused on consumers since they are expressed by the Commission to be the beneficiaries of the proposals. The survey findings are available at: <http://www.allenovery.com/AOWeb/binaries/59807.PDF>. Our study asked online shoppers to select two or three issues that most concerned them when purchasing goods from abroad. One issue stands out from the rest – the security of the website payment. Other concerns followed, such as the ease with which goods can be returned, shipping costs and the ease with which problems could be addressed. Just one quarter (26%) referred to the laws governing terms and conditions as something that worries them when buying online.

It is difficult to comment on whether the proposals are "good" or "bad" when there is so little clarity as to what the proposals are and, in respect of each proposal, what its substance is. There is currently no draft European contract law to consider. Moreover, the options identified in the Green Paper vary from merely publishing an expert group's recommendations to the adoption of a uniform civil code across Europe. Even within the Commission's preferred "optional instrument", the Green Paper invites debate about the scope and applicability of that instrument (including whether it should apply to "related topics" such as non contractual liability and property). It is also not possible assess whether an "optional instrument" is truly optional, since certain parties may be able to insist on its adoption. Practitioners from Belgium, the Netherlands and Slovakia were less concerned about these ambiguities.

Reform or harmonisation of the laws of contract is not like many other Commission initiatives. Not least because there are significant differences between the common and civil law approach to contracts and within European civil law there are the Napoleonic and Roman-Germanic traditions. Contract law is deeply entrenched in the history and economics of the Member States: for example, the French *Code Civil* is inextricably linked with Napoleon and

the national identity and the German *Bürgerliches Gesetzbuch* is closely associated with German unification. These are not subjects to be tackled lightly. The apparent aim of the Commission to improve intra-Member State trade of consumers and SMEs can be tackled by far more targeted and proportionate measures.

We have real concerns with the present initiative and the process by which it has been proposed. There has been no clear public call for a new contract law made by businesses or consumers. Further, there has been no legislative proposal put forward or impact assessment carried out. If the initiative is fast-tracked without careful consideration and expansive and continuing consultation, it risks being counterproductive – driving business away from the EU or a choice of pan-European law. This could give rise to confusion and uncertainty among consumers and businesses.

We are not aware of significant problems (economic or legal) arising from a divergence of contract laws at a national level in the EU. We believe there is widespread satisfaction with the national laws of the Member States.

In our experience, commercial parties simply choose the national contract law that best suits them and are, more than any other factor, concerned to ensure certainty. Less sophisticated parties may give little or no thought to the matter.

Rome I addresses any conflicts of laws that may arise and affords protection to consumers and others. The existing laws of contract in Member States are long established and most have been in place for many years. Their strengths and weaknesses are known and have been tested before the courts. There is a body of case law and/or academic opinion which allows lawyers to advise on, and clients to assess, the risks. The effectiveness of standard contractual provisions, such as those limiting liability or confirming the parties' non-reliance on representations, has been thoroughly explored.

The importance of certainty is confirmed by the Law Society of England & Wales' Firms Omnibus Survey in November 2010 which indicates that the most important factors, from the list of options which influenced firms' choice of governing law when they advised on contracts with a party from another jurisdiction, were legal certainty and familiarity with the legal system of the contracting parties.

We also believe that the Commission should be cautious about diluting the attraction of the national courts/national law model and the international reputation of these courts in applying their national law.

Given that the Commission Work Programme 2011 already includes a "legal instrument on European contract law" and an expert group was appointed by the Commission prior to the opening of the consultation and asked to try to draft an "optional instrument", we believe that there is an urgent need for an

impact assessment of the key options in the Green Paper before progressing further with any potential instrument.

Process

We have a number of overarching concerns about the process behind this proposal. Reforming the law of contract is not like any other legal or regulatory reform. Contract underpins business and affects many of the assumptions about trade that we have. Reforming contract law is not something that should be undertaken lightly nor without widespread public engagement and consultation. It is potentially as significant as the introduction of the Euro and yet we fear is it not currently in the public consciousness.

The legal basis on which the Commission is entitled to act

The Green Paper does not set out the legal basis for the Commission's proposals or, in particular, its favoured option (Option 4). The Commission could rely, potentially, on article 81 or articles 26 and 114 of the Treaty on the Functioning of the EU. However, the UK, Ireland and Denmark would not be automatically bound under article 81, which in any event seems ill-suited as a justification since it is concerned with judicial cooperation, not substantive law. In relation to articles 26 and 114, it is not clear that the Commission's stated aims behind the proposals are about protecting fundamental freedoms (as they are required to be). The Commission needs to clarify this as a matter of urgency.

The need for reform

For the reasons set out in this submission we do not believe that the Commission has established an unequivocal and significant need for these proposals. In our view there has not been a coherent impact assessment (at least from a business-to-business perspective) looking at what we already have, ascertaining whether there really is a need for something different and assessing the impact of any changes when compared with the status quo. The Commission's proposal of an assessment of any legislative proposal would seem to be rather too late.

The cost of the new law

No account has been taken of the cost of the proposals (in particular Options 4-7).

There will inevitably be a cost involved in re-educating lawyers (including in-house lawyers) and judges in the EU. This is exactly the sort of information that a full regulatory impact assessment ought to reveal (and the Member States' governments and stakeholders should be able to assess). The costs of

retraining are likely to be more significant in Member States with a common law background for whom a codified system would be unfamiliar.

It is also unclear how consumers would be educated about the new law and, given what a challenging question it is for lawyers, how consumers would assess the advantages and disadvantages of opting for it. It is also unclear whether the Commission has consulted with Member States' respective departments of justice on where the necessary money would come from.

Interaction with Rome I

Rome I is concerned with the applicable law of contractual obligations. Recital (14) anticipates the possibility of an instrument on contract law but says no more than that any such instrument may provide for the parties to choose any new substantive rules of contract law. In the Green Paper, the Commission acknowledges that it will be necessary to address the relationship with Rome I, but does not elaborate. At the moment, "European contract law" could not be the governing law where the parties have made no choice. The rules in Rome I for determining the governing law of a contract in the absence of choice would identify the law of a country as the governing law.

The content/substance of reform

If the legal basis and a need for reform can be identified, it seems to be difficult, if not impossible, to decide which of the Commission's proposals is appropriate while the substance of the contract law is still unknown. To reach a consensus across the whole of the law of contract will be extremely difficult especially given the different approach of common law to contracts as compared to civil law. The United Nations Convention on Contracts for the International Sale of Goods (also known as CSIG) is an interesting comparison here and has been subject to criticism on the basis that the drafting style is too abstract.

Those from a common law background are anxious, for example, about importing more fluid concepts where parties favour autonomy and certainty. Examples of these areas include: general duties (of good faith, fair dealing or to cooperate), making pre-contractual negotiations binding, the need for "consideration" or "cause", and whether the meaning of a contractual term should be determined subjectively, contextually or objectively. The treatment of these topics would have a significant bearing on which proposal was favoured.

The minutes of the expert group published to date suggest that, among other things, (i) good faith/fair dealing requirements, (ii) liability for non-disclosure and (iii) the binding nature of pre-contractual negotiations are all being proposed. These principles would represent novel and significant developments from the perspective of a common law lawyer.

This is not the place to debate the substance of a law that has not yet been proposed. However, we would reiterate the comments and analysis of the House of Lords, European Union Committee's [Twelfth Report on European Contract Law: the Draft Common Frame of Reference](#) of 19 May 2009.

Professor Vogenauer (one of the witnesses who presented evidence to the committee) identified a number of specific areas of difference between the English common law and the Draft Common Frame of Reference (**DCFR**) including: the concept of contract as a bargain under English law whereas in civil law the concept may extend to gifts; pre-contract negotiations being inadmissible as an aid to interpretation under English law whereas this is not the case for civil law systems; the doctrine of mistake being much broader in the DCFR than under English law. Professor Vogenauer noted that the DCFR had been the subject of considerable criticism, not merely in England, but also in Germany and France, both as being too detailed and at the same time, paradoxically, as involving too much discretion, and so uncertainty, by use of "an astonishing number of vague and ambiguous terms, concepts such as 'reasonableness' and 'good faith'".

Pre-selection of Option 4

It seems to us to be (or at least it risks being) prejudicial for the Commission to have asked the expert group to proceed on the assumption of Option 4 when the Green Paper seeks views on which option is appropriate.

Need for greater involvement of economists, businesses and other stakeholders

We believe that there has not been sufficiently wide consultation. In particular, there is a need for far greater involvement of businesses (small and large), economists and other stakeholders in the wider public.

Timing

It is unclear to us why, as appears to be the case from the Commission Work Programme 2011 and the briefing to the expert group, an initiative which is so important, and where no concrete proposals are even under detailed debate, is being rushed through. Nor is any convincing case put forward for suggesting that any further time taken to consult upon more concrete proposals would cause a faltering of the strong and steady increase of cross-border (and particularly online) trade which is demonstrated by a comparison of the Ipsos MORI survey with the Commission's previous data. Two years ago the Commission found that cross-border online shopping was undertaken by just

20% of online shoppers in the EU. Our survey finds that the proportion has more than doubled to 46% today.

No problem to be solved

Large-scale satisfaction with national laws

No unequivocal and significant need has been demonstrated by the Commission for its proposals. On the contrary, parties have used their freedom of choice to agree an applicable law other than that of the territory. As the following surveys suggest certain national laws appear to be chosen above others for this purpose. The Oxford Institute of European and Comparative Law and the Oxford Centre for Socio-Legal Studies carried out a survey in 2008 of 100 European businesses entitled “Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law”. This found that in answer to the question “When conducting cross-border transactions, what is your preferred choice of governing contract law?”, 23% of respondents favoured English law, 19% favoured Swiss law and 14% favoured German law. Another survey carried out by Queen Mary College, University of London in 2010 entitled “International Arbitration Survey: Choices in International Arbitration” found that 40% of respondents use English law most frequently, followed by 17% who use New York law.

Applicable law is not the problem

Business to consumer

We disagree with the assertion by the Commission in its press release and in the Green Paper that the reason there is less online trade between Member States than within them is as a result of a divergence of the national laws of contract.

We suggest that there are many other, more practical, reasons, apart from the law of the contract, which influence why consumers buy online from their own state and not from another Member State. These include: trust, familiarity, language, currency, shipping costs and so on.

This is borne out by the survey that Ipsos MORI carried out on our behalf which shows that only 26% of people surveyed regarded the governing law of the contract as one of the three things that would concern them most, in contrast to 50% who felt that the security of the website was one of their top three concerns. That is not to say, however, that online consumers are not aware of the need to give consideration to the terms under which they are buying goods and services. Overall, 46% claim to check the terms and conditions every time they make a purchase, but the majority (52%) say they do not always do so. This research probes further, to ascertain the extent to which consumers are aware of the law governing the T&Cs. 77% fail to always check which country’s law is applicable, and the younger age groups,

who are also the most frequent online buyers, are least likely to do so. There is a clear division of opinion as to the potential impact of any new pan-European contract law. 46% of respondents said they would be more likely to buy online from another European Union country if the Commission introduced a new Europe-wide contract law, whilst 43% said it would either make no difference or that it would actually make them less likely to buy from suppliers in other EU countries. Once again, stark differences in attitude are apparent across Europe, with Italian online consumers emerging as the most likely to favour such a law, and the majority of the British (52%) saying that it will make no difference to their online buying habits.

In March 2009, the Commission itself published an in-depth analysis of cross-border e-commerce within the internal market. The study listed a range of barriers including: “languages, demographics, individual preferences, technical specifications or standards, internet penetration or the efficiency of the postal or payment system”. A range of practical issues were identified, as set out in the Executive Summary of the report, including the “inability of consumers to access commercial offers”, “lack of information on cross-border offers” and regulatory barriers (which may result in “significant compliance costs for business”) in the domains of consumer law, VAT, “the territorial management of copyright” and “the national transposition of the European legislation on electronic waste disposal”. There was also a need “to promote online trust by strengthening online and cross-border enforcement, putting in place efficient and speedy dispute resolution, and by enhanced market monitoring, information and awareness raising”.

The Green Paper refers to the survey in Special Eurobarometer 292 (2008) to argue that citizens would like a harmonised European law. However, the question posed in that survey seems unduly simplistic. Respondents were asked if, when signing a contract with an individual or business based in another Member State, they would prefer a contract to be based on the other party’s national law, the national law of their own Member State or on harmonised European law. If the question had been phrased differently, the answer might have been different. The question also ignored the complexities which arise where parties have non-contractual rights in tandem with their contractual rights and also issues, even in contract, regarding importance of certainty of outcome, familiarity with a particular system and freedom of contract, all of which are important considerations for commercial parties.

According to Flash Eurobarometer 278 (2009), approximately 71% of retailers surveyed currently refrain from cross-border transactions with consumers and, even if the laws regulating such transactions were completely harmonised, 58% of retailers would still not want to sell to consumers in other Member States. This limited benefit in the response is on the basis that harmonisation of the entire law regulating cross-border trade would take place, and therefore such harmonisation would have to include not only contract law, but also other

areas such as tax law, tort law, product safety and liability law as well as other product requirement regulations. This makes it impossible to attribute the result of predicting an increase in cross-border trade to any one element (such as harmonisation of contract law).

The existing surveys on consumer behaviour (see in particular Flash Eurobarometer 128 (2002)) do not appear to support the need for contract law harmonisation because the polls showed that more than 50% of consumers already have the same, or even greater, confidence in cross-border transactions than in domestic transactions, while only 26% have less trust in cross-border transactions. For this 26% of less confident consumers, the survey noted that “[t]he answers reveal that the top reasons for consumers’ lack of confidence are difficulties to resolve after-sales problems and to take legal action through the courts”.

Business to business

The Commission asserts that a European contract law also has a business-to-business benefit (particularly for SMEs). The rationale behind this is not clearly stated. If it is a fear that SMEs may be forced into adopting the national law favoured by large businesses, then this would presumably also apply to European contract law. It is the party with the bargaining power that will choose the governing law. In any event, as the Commission goes on to acknowledge in the Green Paper, in the case of specialised contracts with a large international dimension, businesses are familiar with the laws that apply. The Commission gives the example of shipping contracts. To this can be added international finance and many commercial agreements, where the risks are well understood. We believe that it will be extremely difficult to incorporate all of the nuances required by sophisticated international businesses into a 150 article code (the challenge entrusted to the expert group).

The Green Paper refers to a study sponsored by Clifford Chance in 2005 of 175 companies, which showed support for an “optional instrument”, in principle, and hinted that different national legal systems might pose some form of barrier to internal market trade. The conclusion from the Clifford Chance survey was that “business wants the European Commission to continue its deliberations on an ‘optional instrument’. Business in the EU is very interested in a neutral, EU contract law, and would be likely to use it. But this does, of course, depend upon it being a good law that enables trade and gives business the predictability it needs”. The survey also asked businesses “how important do you feel the following factors are in developing good contract law?” Fairness received the highest score, followed by a preference for predictability.

However, we are unconvinced that an “optional instrument” would serve the needs of business. As explained above, it appears that much depends on how a question is framed. In the research that, for example, the Law Society of

England & Wales recently conducted, both in-house legal departments and private practice firms indicated that legal certainty and familiarity with the legal system of contracting parties were the most important factors for the choice of governing law, rather than the attractiveness of the legal principles within a particular legal system. There appears to be little hard evidence to show that differences in national legal systems significantly affect cross-border trade in the internal market. As with the Clifford Chance survey, asking respondents whether they would favour an optional European contract law presumes that they have thought through the implications. In 2005, it was even less clear than today what the substance of the law would be and it would therefore have been difficult for businesses to envisage whether there could, for example, be financial or reputational implications from selecting a new instrument as a governing law in contracts. When answering the question, there was no consequence, whereas, in reality, this might not be the case.

There are other, better-suited, existing initiatives

International codes and conventions

There are already a number of existing initiatives, which may be instructive to the Commission, that have attempted to harmonise (contract) law and to which the Commission briefly refers in the Green Paper. These include: the United Nations Convention on Contracts for the International Sale of Goods (also known as CISG), which has been widely adopted (though not by the UK); the UNIDROIT Principles of International Commercial Contracts, which have been used in CISG arbitrations and have acted as a gap-filling neutral option in arbitrations where parties have come up with unusual applicable law provisions, or even where there is no choice; and, in the US, the Uniform Commercial Code (UCC), a legislative proposal addressed to 50 state legislatures and now adopted by 49 of them. Consumers and businesses (small and large) are already able to incorporate uniform codes into their contracts but, from what we can see, they have not done this, preferring instead to use national laws.

Pre-existing consumer EU initiatives

As we have set out below, we believe that there is already a great deal of consumer protection available within the EU and this should be the area of focus, if any.

Rome I

A less ambitious (and less expensive) course may already be available to the Commission, at least for consumers. Under Rome I, the overriding mandatory provisions of the law of the forum and the law of the place of performance can

“trump” the governing law of the contract. There are also mechanisms for the public policy of the forum to come into play. More importantly, in certain circumstances, Rome I also limits the ability to choose the governing law and, depending on the circumstances, what can be governed by a permitted choice in relation to consumer contracts, contracts of carriage, insurance contracts and employment contracts. So, for example, a choice of law may not have the result of depriving a consumer of the protection afforded to him by provisions that would otherwise apply. Accordingly, there are already significant safeguards available to consumers. It is not clear that these matters have been considered fully. If there is a concern about harmonisation it should be focused consumer protection rather than the law of contract generally.

Consumer Rights Directive

Alternatively, the answer may lie in the proposal for a Consumer Rights Directive. Among other things, this draft Directive seeks to replace four existing Directives: on the sale of consumer goods and guarantees, on unfair contract terms, on distance selling and on doorstep selling. If Rome I does not already afford sufficient protection or cannot be amended (which would be a far more proportionate approach than the Green Paper), then, before tackling something as complex and sensitive as contract law we suggest the focus be on consumer protection contained within a Consumer Rights Directive.

Allen & Overy's views on the relative advantages and disadvantages of the options identified in paragraph 4.1 of the Green Paper

Options 1-3 and 5-7

A&O is not opposed to the concept of European contract law. However, focusing specifically on this Green Paper and its proposals, A&O only supports wholeheartedly Option 1 (Publication of the results of the expert group).

As for Option 2 (An official “toolbox” for the legislator), we can see the merit in an initiative for a non-binding “toolbox” that could serve as a guide or manual for use by European legislators in order to improve the quality, coherence and consistency of European legislation. A common terminology could be of assistance and could lead to an improved, shared understanding of relevant concepts, and a more consistent transposition of EU law throughout Member States. However, in the absence of a better understanding of the meaning of “toolbox” as intended by Option 2, A&O is not able to give unequivocal support to Option 2. Whatever form it took, we would not want it to undermine the continued co-existence of common and civil law systems in the EU.

As a firm, A&O does not support the other options (3-7) as described in the Green Paper without a detailed impact assessment and a proper understanding of the law proposed by the expert group. Some practitioners from Belgium, the Netherlands and Slovakia were more supportive of these options irrespective of the detailed proposals; some from France, Germany and the UK were more sceptical in the current climate and felt either that the proposals should be narrowed to consumers' and SMEs' transactions online or that there should be far more engagement with the public before the more significant proposals (options 3-7) are developed.

In relation to Option 5 (Directive on European Contract Law), we agree with the Commission's analysis in the Green Paper that the existing consumer contract acquis demonstrates the limitations of minimum harmonisation directives in reducing regulatory divergences. Moreover, in business-to-business, cross-border contracts, the Directive (Option 5) would not be able to deliver the necessary legal certainty and businesses would thus continue to incur compliance costs.

The Commission acknowledges that Option 6 (Regulation establishing a European Contract Law) and Option 7 (Regulation establishing a European Civil Code) raise sensitive and unresolved issues of subsidiarity and proportionality.

Contract law is one of the cornerstones of any legal system and is vital in commercial and financial affairs where the enormous amounts of money involved necessitate a very high degree of predictability and certainty. This affects such matters as the validity of clauses in pre-contract negotiations and term sheets to the effect that nothing is legally binding, the exclusion of good faith duties in contracts, the validity of acceleration and cancellation clauses with immediate effect, the efficacy of exculpation clauses and so on.

Option 4

The Commission has made clear that it favours Option 4 (Regulation setting up an optional instrument of European Contract Law). We have a number of concerns, which we outline below, and these are the reasons for our objection to this option.

Additional complexity

We believe that Option 4 would severely complicate the legal environment. By adding a parallel system to the existing 27 national legal systems for contract law, the legal environment would become more challenging and it would become more (not less) difficult for consumers and businesses (small and large) to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis. We understand that the aim of a short code would be to simplify matters but fear that the opposite may be true.

No clear legal basis has been set out

For the reasons set out above we do not believe that the Commission has yet set out the legal basis for Option 4. The legal case for an “optional instrument” is, arguably, harder to make than for a complete replacement of an existing legal system, since an “optional instrument” does not guarantee harmonisation.

Rise in number of disputes

Depending on the scope of any instrument, the interaction (and conflict) between any proposed new law and the 27 longstanding national systems of law (and their many differences) may create disputes and therefore risk undermining the benefit of a binding contract in the first place. Option 4 does not obviate the need for national law, so there may be a duplication of costs and an increase in complexity in any dispute.

Interaction with non-contractual disputes unclear

Frequently, the same set of facts is capable of giving rise to different causes of action, of which breach of contract may be just one. For example, in an English law “mis-selling” case, it may be alleged by the investor (who may be a consumer) that there has been (i) a negligent misrepresentation, (ii) a breach of contract and (iii) a breach of statutory duty. In a dispute, the English court would have to determine the torts of misrepresentation and breach of statutory duty under the relevant national law, while looking at the contract under European law if European contract law had been chosen. This would increase the costs and duration of any proceedings and add to the uncertainty. Additionally, under current national systems, what may be viewed as a contractual obligation in one Member State may be a tortious one in another.

Costs

Even if the law is optional, EU citizens, businesses (small and large), lawyers and the judiciary all need to be trained.

Increase in uncertainty

It will take a significant amount of time, possibly a generation, to create a solid volume of case law and/or academic consensus in this new law. The uncertainty until such a body of law and/or opinion has been reached will be unwelcome and a concern for businesses (including SMEs) and consumers.

Pressure on the ECJ and consequent risk of delay

There would be huge pressure to refer matters to the Court of Justice of the European Union (**ECJ**), giving rise to extended periods of limbo while these are resolved. The European Parliament Resolution on Brussels I has recognised the need to improve how the ECJ handles these types of cases observing “on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law … it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law”. If the ECJ also had to decide on European contract law matters further capacity would be needed.

Scope of application of any instrument

If it is accepted that there are significant problems with the current 27 national laws of contract (which we do not believe there to be, or at least not caused by the applicable law – see our Ipsos MORI survey), it is clear from the Green Paper that the Commission believes that consumers and SMEs will be the ones affected. The proposals in the Green Paper should be confined to an attempt to harmonise the law affecting consumers and SMEs (or even consumers' and SMEs' transactions online) rather than a far more expansive and disruptive exercise involving (at the very least) the creation of an entirely new contractual legal framework for both businesses and consumers.

We do not believe that there is a need for any instrument to cover business-to-business contracts. As we have stated, we believe that there are other existing (and proposed) instruments that ought to be assessed properly and proportionately before the introduction of any new contract law instrument.

Content (or “material scope”) of any instrument

We believe that the content (or “material scope”) of any instrument should be confined only to that area where a significant need has been demonstrated. To date, we have not seen evidence that any such need has been clearly demonstrated.

An alternative approach

A suggestion that has been put forward is that of the Commission recommending a set of Terms and Conditions that could apply to online sales of goods and services to consumers. The detail of this would need to be fleshed out but the idea would be that the Terms and Conditions represented a “gold standard” that would be compliant with the national law of all Member States (ie “maximum harmonisation”). Businesses would not be obliged to use them, but if they did they would know that they did not contravene the national law of any Member State and consumers would know that they were protected.

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