BUSINESSEUROPE

POSITION PAPER

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CONSULTATION ON POLICY OPTIONS FOR PROGRESS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES

EXECUTIVE SUMMARY

- BUSINESSEUROPE supports the European Commission's objective of increasing the overall coherence of European contract law as a contribution to a fully operational internal market and in the spirit of the better regulation agenda.
- Since the beginning, BUSINESSEUROPE has been participating actively in the Commission's project to create a Common Frame of Reference for Contract Law and has welcomed the fact that stakeholders are involved in the process from an early stage.
- Further analysis and assessment needs to be carried out about where problems exist and if any of the options in the Green Paper are appropriate to address them. This is a complex issue which should not be rushed.
- The interaction between the consumer rights directive and the European contract law project must be taken into account. Both projects should work in tandem rather than in parallel.
- In the light of the information provided, BUSINESSEUROPE is not in a position to support an optional instrument (so-called '28th regime').
- BUSINESSEUROPE strongly opposes any initiative that could undermine the principle of contractual freedom in business-to-business relations.
- There is a lack of a substantive foundation for evaluating the different options presented in the green paper. Not until it is known which norms are to be adapted to fit the instrument, can a proper verdict be reached on the different options.
- Finally, if this initiative is to bring added value to the internal market, it is necessary that the needs and expectations from market operators are given due consideration. As with the Draft Common Frame of Reference, this project risks placing the focus on theoretical or academic considerations. Likewise, an impact assessment should be carried out prior to adoption of any proposal.

1. Challenges to the internal market – comments to section 3 of the green paper

Business-to-consumer contracts and link with directive on consumer rights

As described by the Green Paper in section 3.1, in business-to-consumer contracts the differences in legislation are a greater problem for the businesses than for the consumers. A business that wants to attract customers in different countries has to take into account the law in each country.

With regards to business-to-consumer contracts, BUSINESSEUROPE agrees that a harmonised European legal framework would contribute to the better functioning of the internal market. Different national approaches to consumer protection legislation have resulted in legal fragmentation across Europe which has caused problems for business and consumers as described in point 3.1. of the green paper. The Commission's proposal for a consumer rights directive was initially meant to address these problems through full harmonisation and this is why BUSINESSEUROPE has been supportive of it.

The interaction between the consumer rights directive and the European contract law project is key. Both projects should work in tandem rather than in parallel. For BUSINESSEUROPE, the preferred option should be to ensure that negotiations on this directive lead to a balanced and clear outcome that improves the business environment in the internal market.

The Directive is proving extremely difficult to negotiate given the resistance to full harmonisation. Member States are divided on the value of full harmonisation and are inclined to protect their individual level of national consumer protection. Given the lack of political willingness to reach agreement on a strictly limited measure which brings together four consumer protection directives, it is likely to be more difficult to secure agreement on an instrument with a much wider in scope.

Business-to-business contracts and contractual freedom

BUSINESSEUROPE strongly opposes any initiative that could undermine the principle of contractual freedom in business-to-business relations. This principle has been an essential enabler in the development of dynamic trade in the European Union.

With respect to business-to-business contracts, legal fragmentation does not seem to be causing any significant obstacle to cross-border trade. Businesses have freedom to contract and are capable of protecting their own interests. The special circumstances resulting from an imbalance in bargaining power which underpin the need for additional protection for consumers do not apply to business.

The description of the situation in the Green Paper fails to acknowledge the important role played by general conditions (standard-form contracts) in business-to-business contracts, domestically and, even more important, in cross-border trade. The Commission seems to assume that anyone entering into a cross-border contract must know the material rules of

the applicable law. The truth is, however, that the parties generally will rely on their individual contract and the general conditions that they choose to apply.

There should be no spill-over from the business-to-consumer area to the business-to-business area. SMEs should be treated as businesses and not consumers. There is no evidence that SMEs, any more than other businesses, regard lack of convergence of national contract laws as crucial in their decisions over cross-border trading or that they need special protection.

Furthermore, as the Commission points out there are already international instruments available to business-to-business relations such as the Vienna Convention on the International Sale of Goods, Principles of European Contract Law and the UNIDROIT principles which must be taken much more into account. Likewise, the effects of well balanced general/standard conditions need to be further highlighted and assessed; general conditions often simplify the entering into contract considerably. For certain industries, such documents exist also at European and international level, e.g. in the engineering sector and the construction industry. A CFR based instrument may not work as an impediment to the use of general conditions.

2. Comments on the different options

Option 1: Publication of the results of the Expert Group

Publication of the results of the Expert Group (Option 1) could be helpful and could start the process of Member States considering whether there are areas from the Common Frame of Reference on which they could draw in their national law. The principle of contractual freedom, which is accorded a high degree of importance in all European legal systems, would be best served by this option. It interferes the least on Member States' law and will leave all the other options open.

However, the current move to compile relevant norms in a single work with about 150 articles of the Common Frame of Reference needs to be completed before a final evaluation can occur.

Option 2: An official "toolbox" for the legislator

As far as the "toolbox" for EU legislators is concerned (Option 2), BUSINESSEUROPE has in the past supported this concept. We can see value in this approach but it is necessary to be clear exactly how it would be used and whether it would be effective in achieving the aim of bringing greater coherence and systematic shape to Community legislation.

We believe that there may be value in some form of non binding guide ('toolbox') to legal principles, model rules and definitions in different Member States which could be used when formulating EU legislation in the future. Nevertheless, more clarity on the content is necessary before verdict can be reached over such option.

Option 3: Commission Recommendation on European Contract Law

BUSINESSEUROPE is opposed to a Recommendation to Member States encouraging them to adopt an instrument of European Contract Law developed by the Commission

(Option 3). We believe that this could be used as a first step in introducing such an instrument which might in due course become mandatory.

In BUSINESSEUROPE's view, it is unlikely that, as option 3 a) suggests, Member States would be prepared to replace their contract laws to the extent required to genuinely simplify cross-border trade. The differences in the legal traditions are too great for that. In this context, the comparison with the situation in the United States is not very apt because the differences in legal tradition between the US federal states are much less significant than in Europe.

Whether Member States would be more willing to incorporate the instrument as an optional regime (option 3 b) is more difficult to predict. As regards consumer law, Member States have until now been reluctant to accept any other rules beyond their own. We also believe that there is a risk that, if Member States incorporate such recommendation, the legal fragmentation and complexity would simply increase.

Option 5: Directive on European Contract Law

It is unclear what the reach of a directive as referred to in option 5 would be and what its link to the consumer rights directive would be. It resembles the approach taken by the current consumer acquis directives, based on minimum harmonisation which is responsible for legal fragmentation in business-to-consumer relations in the single market.

This approach would thus not constitute progress in the sense of full harmonisation, and would represent a serious encroachment on national law. As the Commission recognises in its green paper, this option '*would not necessarily lead to uniform implementation and interpretation of the rules*'.

In addition, if they cover business-to-business contracts there is a risk that the freedom of contract is curtailed, which must be avoided.

Option 6 and Option 7: *Regulation on general contract law or a fully-fledged civil code*

BUSINESSEUROPE is strongly opposed to the Green Paper options which would introduce a mandatory harmonised EU contract law, whether by means of a Regulation or a fully-fledged European civil code. There is no empirical evidence to support a move towards comprehensive harmonised EU legislation on contract law.

Seeking to replace national contract laws with an EU regime would be highly interventionist and the legal basis for doing so would need to be clear beyond question. If the evidence base and legal justification to support an optional instrument have not been made out, they have certainly not been established in respect of the binding and mandatory options for a fully harmonised EU contract law as set out by the Commission.

Option 4: Regulation setting up an optional instrument of European Contract Law

Though it intends to lead an open discussion on the subject, the Commission seems to have already settled for Option 4, judging by its pre-assessment of Options 1 to 3, classified as insufficient, and of Options 5 to 7, regarded as too extreme.

In BUSINESSEUROPE's view, the need for such an instrument, even if optional, has not been established and it sees a significant number of problems arising if it were introduced.

BUSINESSEUROPE believes that far from reducing costs and burdens, the practical impact of introducing an optional instrument as an alternative system to each Member State's national law could add an additional layer of legislation and complexity which would increase costs and uncertainty for all parties.

BUSINESSEUROPE has particular concerns over uncertainty in the interpretation of the provisions of the instrument. Ultimately, where differences of interpretation by national courts arise it might be necessary to refer to the Court of Justice of the European Union, which generally takes considerable time. It will take many years to develop certainty over how the instrument will be interpreted and defined. Lack of certainty is damaging for businesses which are unlikely to opt for a regime which lacks clarity in the way in which it will be operated and applied.

If the 28th regime is to attract both parties to opt in, it must offer them an incentive. Even though businesses are willing to offer a high level of protection, consumer demands would inevitably raise a complex discussion over the level of protection. The solution for this disparity of interests would not be easy to find.

The optional instrument would also present challenges to day-to-day operations of the majority of companies, in particular SMEs. For example, two separate systems of orders, logistics, bookkeeping, warranty processing, insurance and customer financing would need to be set up in order to implement parallel rules.

It is all the more difficult to support this option when the content is yet unknown.

The present work by the Expert Group has been described by the Commission as a 'feasibility study' to see if a user-friendly optional instrument of European Contract Law is possible. This means that the results of the Expert Group must not be seen to be final.

In conclusion, BUSINESSEUROPE cannot evaluate Option 4 before the results of the works of the Expert Group have been presented.

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