BUSINESSEUROPE

POSITION PAPER

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CONSULTATION ON THE FEASIBILITY STUDY ON EUROPEAN CONTRACT LAW

I. Objective of bringing more coherence to European contract law

- BUSINESSEUROPE welcomes the opportunity to comment on this feasibility study before the Commission advances further in the choice of a possible follow-up measure.
- 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.
- BUSINESSEUROPE supports the use of the Common Frame of Reference as a 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 (this position was reiterated in BUSINESSEUROPE's response to the recent green paper).

II. Lack of available data

- In BUSINESSEUROPE's view further analysis and assessment need to be carried out about potential problems to assess whether any of the options listed in the green paper are appropriate to address them. This is a complex issue which should not be rushed.
- The feasibility study delivered by the Expert Group is a factual/legal analysis of provisions inspired in the Draft Common Frame of Reference and other international contract law sources which could work as a future reference in the drafting of legislation. It does not offer any further analysis about where problems exist or a justification for an instrument on contract law.

III. Use of the feasibility study as a basis for a self-standing optional instrument on European contract law (so-called '28th regime')

In the light of the information provided, BUSINESSEUROPE is not in a position to support an optional instrument.

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Articulation with the consumer rights directive

The interaction between the consumer rights directive and the European contract law project is key. This directive is a vital piece of the business-to-consumer contractual framework in Europe. Therefore, any follow-up to the feasibility study needs to be aligned with the new consumer rights directive.

Clarity and simplicity

We believe that the document as it stands fails to meet the objectives of simplicity and ease of understanding. It is likely that its adoption would require massive amount of interpretation and clarification by courts and legal practitioners which would add costs and time to transactions.

Paradox of the level of protection

BUSINESSEUROPE highlighted in its reply to the green paper that if the 28th regime is to attract both parties to opt in, it must offer them an incentive. Even though companies are willing to offer a high level of protection, consumer demands would inevitably raise a complex discussion over the level of protection. Unfortunately, the feasibility study could not take full account of this disparity of interests. The level of protection, for example, in the chapter on unfair clauses is simply too high.

Business-to-business contracts (B2B)

With respect to business-to-business contracts, although the feasibility study explains that contractual freedom should prevail, it intends to introduce a number of protection rules for contracts under certain circumstances. BUSINESSEUROPE would oppose any initiative in this area.

Firstly, BUSINESSEUROPE believes that legal fragmentation does not seem to be causing any significant obstacle to cross-border trade when it comes to B2B relations.

Secondly, the special circumstances resulting from an imbalance in bargaining power which underpin the need for additional protection for consumers do not apply to business. Therefore, we do not think it appropriate to extend unfair contract terms to B2B contracts as proposed by the feasibility study.

Coverage of digital content

This is a complex area that should not be dealt with before proper analysis and impact assessment are carried out with the involvement of relevant stakeholders. Digital content which is downloaded cannot be assimilated to goods because it has a different nature. Furthermore, the Expert Group's analysis did not tackle the issue of digital content.

IV. Examples of specific articles of concern:

- The feasibility study does not provide clarity on who has the **choice** of the optional instrument. From business point of view if such an instrument is offered by a seller to the consumer, the former cannot be obliged to accept applying other rules to the contract other than the ones established by the optional instrument. This would contradict the voluntary nature of the alternative contract law instrument.
- The **information requirements by businesses in business-to-consumer contracts**, as established in Articles 13 to 22 of the feasibility study, **are too prescriptive**. For example, in a retail environment, whether it is a physical or an online shop, legally required information is often displayed with the product or in the business premises. Too much information kills information and adds burdens on companies.
- It is reasonable to expect that **absence of required pre-contractual information** might lead to damages or cancellation of the contract, but not the obligation to **execute it according to the understanding of the other party**. Therefore, Article 25 (1) seems to go too far on this aspect.
- Article 39 dealing with unsolicited goods sent to consumers is not sufficiently clear on whether **consumers are liable for the goods whilst under their control**.
- Article 43)(2) requiring a **refund to the consumer within 14 days** after withdrawal could impose a extra burden on companies, with a special impact on SMEs.
- Articles 48 (2) and (3), Article 92 (3) (a) give judges the **ability to adapt or to redo contracts**. It is not sure whether there are enough real-life situations that justify the introduction of such a complex and far-reaching legal provision at European level.
- The prohibition in Article 68 of **merger clauses** (clause stating that the contract embodies all the terms of the contract) in business-to-consumer contracts is inappropriate. Such clauses should be allowed if they are clearly understood and accepted by the consumer.
- It is difficult to understand how a **negotiated clause can be considered unfair** within the meaning of Article 81(2). This provision seems unbalanced.
- Articles 108 (1) (d) and 122 gives buyers a prerogative normally reserved for judges to **reduce the price unilaterally**. Such a price reduction, even if legitimate, should be the result of an agreement between the parties or of a decision of a court.
- It seems unbalanced not to **require the consumer to notify the seller in case of lack of non-conformity** (Article 108 (3) (b)).
- The **prescription (guarantee) periods** given in articles 182 and 183 ranging from 2 years to 30 years are too long. They place a too high burden on companies and do not favour legal certainty.