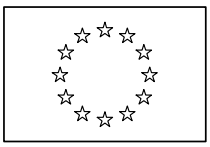

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

European Contract Law and the revision of the *acquis*: the way forward

1. INTRODUCTION

This Communication sets out the Commission's follow-up to the 2003 Action Plan[1], in the light of the reactions from EU institutions, Member States and stakeholders. It outlines how the Common Frame of Reference (CFR) will be developed to improve the coherence of the existing and future *acquis*, and sets out specific plans for the parts of the *acquis* relevant to consumer protection, in line with the Consumer Policy Strategy 2002-2006. It also describes planned activities concerning the promotion of EU-wide standard contract terms and intends to continue the reflection on the opportuneness of an optional instrument.

The European Parliament (EP)[2] and the Council[3] adopted resolutions welcoming the Action Plan in which they underlined the need to involve all interested parties, in particular in the elaboration of the CFR. The EP called for the CFR to be completed by the end of 2006 and speedily introduced. The Council also recognised the usefulness of EU-wide general contract terms developed by contractual parties within the respect of Community and national provisions. Finally, these institutions called on the Commission to pursue further reflection on an optional instrument.

To date, 122 contributions to the consultation were received. The Commission, with the consent of the authors, published their contributions and a summary thereof [4].In order to ensure stakeholders involvement, two workshops on contract law were organised in June 2003[5]. Another workshop on standard terms and conditions was organised in January 2004[6]. In addition a joint Commission and EP conference took place in April 2004[7].

2. THE WAY FORWARD

2.1 Improving the present and future *acquis* (Measure I of the Action Plan)

Contributors to the Action Plan supported the need to improve the quality and consistency of the *acquis* in the area of contract law and emphasised that the CFR could contribute to that goal. In the light of this significant support the Commission will pursue the elaboration of the CFR.

2.1.1 The main role of the CFR

The Action Plan identified different categories of problems of the *acquis.* The main ones were:

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1 All the documents concerning European contract law are available on the Commission's website: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.
2 See footnote 1.
3 See footnote 1.
4 See footnote 1.
5 See footnote 1.
6 http://europa.eu.int/comm/internal_market/contractlaw/2004workshop_en.htm.
7 See footnote 1.

- Use of abstract legal terms in directives which are either not defined or too broadly defined

- Areas where the application of directives does not solve the problems in practice

- Differences between national implementing laws deriving from the use of minimum harmonisation in consumer protection directives

- Inconsistencies in EC contract law legislation

First a policy choice must be made on the need to modify the existing directives in order to address these problems. If so, the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the acquis[8]. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders.

Example: Review of the consumer *acquis*

The Commission's key goals remain to enhance consumer and business confidence in the internal market through a high common level of consumer protection and the elimination of internal market barriers and regulatory simplification[9]. Eight consumer directives[10] will be reviewed to identify whether they achieve these goals, in particular in the light of the 'minimum harmonisation' clauses they contain.

The review will evaluate to what extent the current directives, as a whole and individually, have in practice met the Commission's consumer protection and internal market goals. That implies looking not only at the directives themselves but the way they are applied and the markets within which they operate (i.e. national transposing laws; jurisprudence; self-regulation; enforcement; levels of compliance in practice; and developments in business practice, technology and consumer expectations).

In particular the review will examine the following questions:

- Is the level of consumer protection required by the directives high enough to ensure consumer confidence?

[8] This initiative is included in the scope of the Commission Communication on "Updating and simplifying the Community *acquis*" (COM(2003) 71) and aims at achieving legislative simplification.

[9] OJ C 137, 8.6.2002, p. 2.

[10] Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6; 98/27, 99/44.

- Is the level of harmonisation sufficient to eliminate internal market barriers and distortions of competition for business and consumers?
- Does the level of regulation keep burdens on business to a minimum and facilitate competition?
- Are the directives applied effectively?
- As a whole, are there any significant gaps, inconsistencies or overlaps between the eight directives?
- Which of the directives should be given the highest priority for reform?

Certain specific questions also arise:

- Is the scope of the directives correct? Are the pre-contractual information requirements appropriate?
- Should the duration and modalities of the withdrawal periods in the directives on doorstep selling, timeshare and distance selling be both fully harmonised and standardised between the directives?
- Does consumer contract law need to be further harmonised?
- Is there scope for merging some of the directives to reduce inconsistencies between them?

In order to review the consumer *acquis*, a number of actions are planned:

- Development of a public database of the *acquis*, including national legislation and jurisprudence. This project will also provide a comparative analysis of the implementation of the directives in practice.
- Establishment of a standing working group of Member States' experts to act as a forum for information exchange and debate on the implementation of the *acquis*.
- Implementation reports on the directives on price indication, distance selling, sales of consumer goods and injunctions. The reports will also consult stakeholders and be followed up with appropriate seminars.

In the light of the completion of the project and the reports, the Commission will consider the necessity for proposals to amend the existing directives. This diagnostic phase is expected to be completed by end 2006. Any proposals will take into account work on the draft CFR, as appropriate, and will be accompanied by the appropriate regulatory impact assessments.

It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals. Such use of the CFR would be consistent with the shared goal of achieving high quality EU legislation[11] and the commitment of the European institutions to promote simplicity, clarity and consistency of the EU legislation[12].

2.1.2 Other possible roles of the CFR

National legislators could use the CFR when transposing EU directives in the area of contract law into national legislation. They could also draw on the CFR when enacting legislation on areas of contract law which are not regulated at Community level.

Another role, suggested by the EP, is the possible use of the CFR in arbitration. Arbitrators would have the possibility to refer to the CFR to find unbiased and balanced solutions to resolve conflicts arising between contractual parties.

The CFR can also play a role in developing the other measures identified in the Action Plan. The EP, for example, indicated that the CFR could be developed into a body of standard contract terms to be made available to legal practitioners. The Commission agrees that it would be desirable to use the CFR as extensively as possible in the realisation of Measure II of the Action Plan. Moreover, the CFR would be likely to serve as the basis for the development of a possible optional instrument.

The Commission is also considering the suggestion that it could integrate the CFR in the contracts concluded with its contractors. The CFR could still be used in addition to the applicable national law. The Commission would also encourage other institutions and bodies to use the CFR when concluding contracts with third parties.

Finally the CFR, based on the EC *acquis* and on best solutions identified as common to Member States contract laws, could inspire the European Court of Justice when interpreting the *acquis* on contract law.

2.1.3 Legal nature of the CFR

Several contributors to the Action Plan raised the question of the legal nature of the CFR. The proposed ideas range from a binding legal act adopted by the Council and the EP, to a non-binding instrument adopted by the Commission.

The Commission considers at this stage that the CFR would be a non-binding instrument. However, the Commission will consult extensively all interested parties when elaborating the CFR. In that context this question might be raised again.

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11 Action Plan "Simplifying and improving the regulatory environment" (COM(2002) 278).

12 Interinstitutional Agreement on Better Lawmaking, (OJ 2003/C 321/01).

2.2 Promoting the use of EU-wide standard terms and conditions (Measure II of the Action Plan)

2.2.1 The Commission's suggestions in the Action Plan

The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU-wide use rather than just in a single legal order. Currently parties often think they have to use different sets of STC, due to the existence of differing mandatory requirements in Member states' laws, either in contract laws or in other areas of the law (e.g. tort law differences may appear to require different contract terms on liability issues). However, there are a number of examples of EU-wide STC being used successfully, which cover issues which typically need to be dealt with in other contracts as well.

Acceptable EU-wide solutions are therefore likely to be also available in other cases where single-country STC are currently being used. There appears to be a lack of awareness of the availability of such EU-wide solutions, so the Action Plan suggested a comprehensive initiative to increase awareness of the existing possibilities.

2.2.2 The reactions from stakeholders and others

Some respondents welcomed the suggested approach, but others were sceptical of the Commission's involvement in this area as they thought that the Commission planned to draw up STC itself. This is certainly not the Commission's intention: the content of STC is for market participants to determine and the decision whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an "honest broker", i.e. bringing interested parties together without interfering with the substance.

The issues were further explored at a work-shop on 19 January 2004[13] where the focus was on the use of STC in business to business (B2B) transactions as well as in contracts between the business sector and the government (B2G). Two principal conclusions were reached:

First, there was general agreement that EU-wide STC could be successfully used in a significant number of cases, in spite of the fact that some legal and administrative obstacles remain in certain areas. An inventory of the most egregious obstacles would be drawn up by the Commission with the help of stakeholders.

Second, it was agreed that raising awareness of existing possibilities, in particular by providing structured information about successful examples of EU-wide STC on a Commission-hosted website would be useful.

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[13] See footnote 6.

2.2.3 Actions: a website to promote the development and use of EU-wide STC

In the light of all these contributions, the Commission has concluded that there would be benefits from raising awareness of existing possibilities. The Commission will focus on STC regarding B2B and B2G transactions.

In the light of an assessment of these actions, further measures may be proposed and further consideration may be given to extending this work.

2.2.3.1 A platform for the exchange of information on existing and planned EU-wide STC

The Commission will host a website, on which market participants can exchange information about EU-wide STC which they are currently using or plan to develop. The information will be published at the sole responsibility of the parties posting it. Such publication will not constitute any recognition of the legal or commercial validity of those STC. Before proceeding, the Commission will consult interested stakeholders to obtain information about precisely what information users need and what information organisations will be prepared to post on the website.

The information should allow parties to avoid the mistakes and repeat the positive experiences of those who went before. The Commission does not, therefore, intend to define itself a set of "best practices".

2.2.3.2 Guidelines on the relationship between the competition rules and EU-wide STC

The Commission does not intend at this stage to publish separate guidelines relating to the development and use of STC. It has already pointed out that it generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions[14]. Although agreements on the development or use of EU-wide STC will therefore generally be looked upon positively, in certain cases agreements or concerted practices to use STC may be incompatible with the competition rules.

In this regard the Commission draws attention to its "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements"[15], particularly section 6 which lays down guidelines on standardisation agreements. Although they do not specifically apply to agreements on STC, parties may use them to find guidance for avoiding problems when agreeing to use STC.

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14 Commission Notice Nr. 2001/C 3/02, (OJ C3/2 of 6 January 2001) point 169.

15 Ibid.

2.2.3.3 Identifying legislative obstacles to the use of EU-wide STC

The Commission will examine, together with interested parties, whether and if so what legislative obstacles to EU-wide STC exist in the Member states, with a view to eliminating them where needed and appropriate. This could be done through voluntary action by the Member State concerned, infringement procedures by the Commission where the obstacles violate EU law, or other EU action, such as legislative measures, where they do not.

In the first instance the Commission will organise a survey on this following consultation with stakeholders on its content and structure, to ensure that the survey focuses on aspects relevant to market participants.

2.3 A non-sector specific measure - An optional instrument in European contract law (Measure III of the Action Plan)

The Action Plan concluded, *inter alia*, that at this stage there were no indications that the sectoral approach followed thus far leads to problems or that it should be abandoned. It was nevertheless considered appropriate to examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law.

The Commission intends to continue this process in parallel with the work on developing the CFR and taking into account the comments received so far from stakeholders about their preferences for the parameters of any such instrument, if the need for it were to arise. The process of developing the CFR and in particular the stakeholder consultation may well provide relevant information in this regard.

The Commission will establish specific opportunities for exchange of information on the opportuneness of such an instrument. Although it is premature to speculate about the possible outcome of the reflection, it is important to explain that it is neither the Commission's intention to propose a "European civil code" which would harmonise contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.

A number of parameters for the reflections on the need for an instrument have been determined based on the contributions to the Action Plan and the Commission's own considerations. These include the need to take into account differences between transactions with consumers and those between businesses or with public authorities, the degree to which other solutions, including EU-wide STC already offer satisfactory solutions and the need to respect different legal and administrative cultures in the member states. These parameters will need to be taken into account during the future discussion on the opportuneness of this instrument. Some of these parameters are explained in Annex II.

Moreover, if problems are identified that require solutions at EU level, the Commission would proceed to an extended impact assessment in order to determine the nature and contents of those solutions.

3. PREPARATION AND ELABORATION OF THE COMMON FRAME OF REFERENCE

3.1 Preparation: research and participation of EU institutions, Member States and other stakeholders

3.1.1 Overview

In order to ensure that the CFR is of high quality the Commission will finance three years of research under the Sixth Framework Programme for research and technological development[16]. Proposals for research were evaluated and work is expected to begin soon.

By 2007, the researchers are expected to deliver a final report which will provide all the elements needed for the elaboration of a CFR by the Commission. It shall therefore include a draft CFR which the researchers believe to be fit for the purposes set out in the Action Plan.

3.1.2 Stakeholder participation

Stakeholder participation to the process is essential, as was emphasised by all respondents to the Action Plan.

At the joint EP/Commission conference in April 2004, four key criteria for successful participation were proposed and supported:

- Diversity of legal traditions: account needs to be taken of the range of different legal traditions in the EU;
- Balance of economic interests: account needs to be taken of the interests of a wide range of businesses in diverse economic sectors from SMEs to multi-nationals, as well as consumers and legal practitioners;
- Commitment: stakeholders need to devote real resources to provide ongoing, substantive input;
- Technical expertise: to provide detailed feedback and challenge to the academic researchers.

[16] Decision No 1513/2002/EC (OJ L 232, 29.8.2002, p. 1).

These criteria will be taken into account in establishing the structures outlined below. The structures in the first strand will form part of the agreement between the Commission and the researchers:

First strand: technical input

- The Commission will establish a network of stakeholder experts to make an ongoing, detailed contribution to the researchers' preparatory work.

- Regular workshops on all themes of the research will be organised to enable stakeholders to identify practical issues to be taken into account and give feedback. On each topic, there will be workshops so that stakeholders and the Commission can follow the evolution of the works. Workshops' subjects will be specific and the number of participants to each workshop will be limited in order to ensure efficiency.

- This process will be supported by a dedicated internet site, accessible to researchers, stakeholder experts, the Commission, Member State experts and the EP. Drafts will be updated on this website as the research evolves and in the light of stakeholder comments.

- Once decisions are taken on how to divide the different aspects, it may be helpful to establish guidelines for the operation of the technical strand, to ensure that researchers and stakeholders have a clear and shared understanding of the process. These could include a structure for ensuring overall co-ordination of stakeholder input, such as a steering group involving both members of the academic research and stakeholder experts.

Second strand: political consideration and review

The Commission will:

- Provide regular updates to the EP and to the Council on progress, as they have requested

- Organise regular high level events involving the EP and Member States

- Establish a working group of experts from Member States to ensure that they are informed about progress and have an opportunity for feedback

In addition, the two strands could be brought together periodically into a discussion forum, to allow discussion in a broader context.

3.1.3 Possible structure and content of the CFR

The research preparing the CFR will aim to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980. Other existing material will also be relevant and will be taken into account, while ensuring that the CFR fits the EU's specific requirements.

The structure envisaged for the CFR (an example for a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles could be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR. A distinction between model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged.

Some respondents identified areas which they argued could be included in the CFR. Many of these relate to general concepts, which are not specific to particular types of contract or contracting parties. The primary criterion for determining which areas are covered should be the usefulness in terms of increasing the coherence of the *acquis.*

However, two types of contracts which were mentioned specifically were consumer and insurance contracts. The Commission expects the preparation of the CFR to pay specific attention to these two areas. Other areas mentioned specifically which the CFR could cover were contracts of sale and services and clauses relating to the retention of title and the transfer of title of goods.

The Commission also took into account a study launched, following the requests from the EP and the Council, to examine whether problems arose from differences in the interaction between contract laws and tort laws, and between contract laws and property laws[17]. In the light of this study, the Commission concluded that there are no appreciable problems arising from differences in the interaction between contract law and tort law in the different Member States. More significant problems appear to arise from the different interactions between contract and property law in Member States. The preparation of the CFR will need to consider how to resolve these problems, as far as necessary for improving the present and future *acquis*.

[17] See footnote 1.

3.2 Elaboration by the Commission of the Common Frame of Reference

3.2.1 Suitability for the objectives of the Action Plan

The Commission is not bound by the researchers' final report and will amend it where necessary to achieve the Action Plan's objectives.

3.2.2 Practicability test

In its evaluation of the researchers' final report the Commission will ensure that the draft CFR is subjected to a practicability test on the basis of concrete examples for the anticipated uses of the CFR.

Firstly this will involve checking that the draft CFR is fit for use in improving the *acquis* and preparing legislation. This could mean using the draft CFR in a proposal to modify an existing directive.

This could be done, for instance, within the context of the Commission plans to review the consumer law *acquis* and in any actions arising from the review of Directive 2000/35/EC on combating late payment in commercial transactions[18]

Any lessons learned will be incorporated before adoption of the Commission's final CFR.

Secondly, the draft CFR could be used by other institutions on a trial basis. This phase could also involve asking Member States to examine the transposition of a sample of existing legislation and consider to what extent the draft would have contributed to it. The suitability of the draft CFR for use in Measures II and III, again using practical examples, would also need to be tested. Ways to check the suitability of the draft CFR as a tool in international arbitration or in the Commission's own contractual relationships will also be sought.

3.2.3 Consultation on the Commission's CFR

This elaboration process will result in a Commission CFR that will be submitted for final consultation. The EP, the Council and the Member States will be invited to examine the researchers' final report and the Commission's evaluation. An inter-institutional working group could also be used to discuss the CFR's use throughout the legislative process. Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work.

. Next step will be an open consultation in the form of White Paper, giving stakeholders the opportunity to contribute. For that purpose, the Commission's CFR will be translated into all official EU languages. Stakeholders will have at least six months to comment on the Commission draft. The consultation will allow for detailed consideration

[18] OJ L 200, 8.8.2000, p. 35.

of the CFR's content and provide an opportunity to address differences between the language versions, to ensure that the final version is fully compatible and clearly intelligible in all languages.

3.2.4 Adoption of the CFR by the Commission

The adoption of the CFR by the Commission is foreseen for 2009. The CFR will be widely published, including in the Official Journal of the European Union and reviewed as necessary. Mechanisms for updating the CFR will be identified.

ANNEX I

Possible structure of the CFR

The main goal of the CFR is to serve as a tool box for the Commission when preparing proposals, both for reviewing the existing *acquis* and for new instruments. To that aim, the CFR could be divided into three parts: fundamental principles of contract law; definitions of the main relevant abstract legal terms and model rules of contract law.

CHAPTER I – Principles

The first part of the CFR could provide some common fundamental principles of European contract law and exceptions for some of these principles, applicable in limited circumstances, in particular where a contract is concluded with a weaker party.

Example: Principle of contractual freedom; exception: application of mandatory rules; Principle of the binding force of contract*;* exception: e.g. right of withdrawal; principle of good faith

CHAPTER II – Definitions

The second part of the CFR could provide some definitions of abstract legal terms of European contract law in particular where relevant for the EC *acquis*.

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

CHAPTER III – Model rules

SECTION I – Contract

1. Conclusion of a contract: i.e. notion of offer, acceptance, counteroffer, revocation of an offer, time of conclusion of a contract.

2. Form of a contract: i.e. written contract, oral contract, electronic contract and electronic signature.

3. Authority of agents: direct and indirect representation.

4. Validity: i.e. initial impossibility, incorrect information, fraud, threats.

5. Interpretation: i.e. general rules of interpretation, reference to all relevant circumstances.

6. Contents and effects: i.e. statements giving rise to contractual obligation, implied terms, quality of performance, obligation to deliver the goods / provide the services, conformity of the performance with the contract.

SECTION II – Pre-contractual obligations

1. Nature of pre-contractual obligations (mandatory or not)

2. Pre-contractual information obligations:

   a. General/Form: i.e. written information, by any clear and comprehensible way.

   b. Information to be given before the conclusion of the contract: i.e. information regarding the main characteristics of goods or services, price and additional costs, regarding the rights of the consumer, specific information for e-contracts.

   c. Information to be given at the conclusion of the contract: i.e. information regarding the right to ask for arbitration.

   d. Information to be given after the conclusion of the contract: i.e. obligation to notify any modification of the information.

SECTION III – Performance / Non-Performance:

1. General rules: i.e. place and time of performance, performance by a third party, time of delivery, place of delivery, costs of performance.

2. Non-performance and remedies in general:

   a. Non-performance : notion of breach of contract

   b. Remedies in general: i.e. remedies available, cumulation of remedies, clause excluding or restricting remedies.

3. Particular remedies for non-performance: i.e. right to performance, to terminate the contract (right of rescission), right of cancellation, right for a price reduction, repair, replacement, right to damages and interest.

SECTION IV – Plurality of parties

1. Plurality of debtors

2. Plurality of creditors

SECTION V – Assignment of claims

1. General principles: i.e. contractual claims generally assignable, partial assignment, form of assignment.

2. Effects of assignment as between Assignor and Assignee: i.e. rights transferred to assignee, when assignment takes effects.

3. Effects of assignment as between Assignee and Debtor: i.e. effect on debtor's obligation, protection of debtor.

SECTION VI – Substitution of new debtor - Transfer of contract

1. Substitution of new debtor: i.e. effects of substitution on defences and securities

2. Transfer of contract

SECTION VII – Prescription

1. Periods of prescription and their commencement

2. Extension of period

3. Renewal of periods

4. Effects of prescription

SECTION VIII – Specific rules for contract of sales

SECTION IX – Specific rules for insurance contracts

ANNEX II

Parameters concerning the optional instrument – For further discussion on the opportuneness of this instrument

This annex presents some parameters concerning an optional instrument which should be taken into account during the further discussion on its opportuneness.

1. Concerning the general context of an optional instrument:

The existing legal framework, in particular existing European legislation relating to contract law and the ongoing work regarding the future Regulation on the law applicable to contractual obligations should be taken into account within this reflection process. The results of measure I regarding the improvement of the *acquis* as well as those of measure II will have to be considered.

Moreover, an extended impact assessment will have to be carried out regarding this measure. Such an exercise implies that, among others, the following questions are considered before any decision on the adoption of an optional instrument:

- What problem(s) are being addressed?
- What is the overall policy objective, in terms of the desired impacts?
- What would happen under a 'no change' scenario?
- What other options are available to meet the objectives? (eg different types of action, more or less ambitious options)
- How are subsidiarity and proportionality taken into account?
- What are types and the scale of positive and negative impacts associated with each option – whether economic, social, environmental – and are there tensions/trade offs between them?
- How can the positive impacts be maximised and negative impacts minimised? Are any associated measures needed to achieve this?
- Who is affected? Are any specific groups particularly affected?
- Are there impacts outside the EU?
- How will the instrument be implemented and the impact in practice monitored and evaluated?
- What were the views of stakeholders?

2. Concerning the binding nature of an optional instrument

In the Action Plan, the Commission presented different possible approaches concerning the binding nature of an optional instrument. This instrument could either be a set of rules on contract law which would apply unless its application is excluded

by the contract of the parties ("*opt out*") or a purely optional model which would have to be chosen by the parties through a choice of law clause ("*opt in*"). The latter would give parties the greatest degree of contractual freedom.

Respondents' positions on this issue were clear, with most favouring an "*opt in*" model. The governments which expressed an opinion on this point, supported the "*opt in*" model which they consider being of great importance in preserving the principle of contractual freedom. Businesses also supported such a voluntary scheme and again stressed the importance of the general principle of contractual freedom. Further, almost all legal practitioners called for an "*opt in*" solution. Finally, a majority of academics seemed also to prefer this solution.

The Commission shares stakeholders' view of the importance of the principle of contractual freedom and had already underlined in the Action Plan that the principle of "*contractual freedom should be one of the guiding principles of such a contract law instrument"* and that consequently *" it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs*". A limit to contractual freedom would only be acceptable in relation to some mandatory provisions contained in the optional instrument, particularly provisions aiming to protect consumers (see point 4 below).

In that context, and as suggested by contributors, the Commission considers that future consultations and debates should follow this direction and should take into account the coherence of such an optional instrument with the Rome Convention of 1980 on the law applicable to the contractual obligations and the subsequent Green Paper of January 2003 on the conversion of the Rome Convention into a Community instrument and its modernisation. This latter point was underlined by all respondents.

Contributors to the Action Plan mentioned different approaches which could be used as a basis for further reflection on the question of the articulation of an optional instrument and the successor of the Rome Convention ("Rome I"). The first suggestion, as put forward by some contributors, would be to adopt the optional instrument as international uniform law. The main example of an instrument adopted as international uniform law is the Vienna Convention on the International Sale of Goods (CISG). Within that approach, the optional instrument would contain a provision relating to its scope[19] and Rome I would not then apply to matters regulated by the optional instrument. Moreover, for all the aspects of contract law not provided by the optional instrument, the parties would use the national law applicable according to the provisions of Rome I. The second approach presented by respondents to ensure such coherence would be through Article 20 of the Rome Convention[20]. In this case, the optional instrument would again contain a clause relating to its scope and Rome I would not then apply to matters regulated by the optional instrument. An adaptation of Article 20 could be envisaged. Finally, the

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19 The scope clause could provide that the optional instrument is applicable to contracts where at least one of the parties is established in a Member State.

20 Article 20 of the Rome Convention: "This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts".

third possibility suggested by stakeholders would be to adopt the optional instrument as a Community instrument, which would not benefit from any priority over Rome I and that the parties could choose as applicable law to their contract on the base of Article 3[21] of the Rome Convention. In this case, the optional instrument would not contain any scope clause but only provisions of substantive law. As suggested by stakeholders, Article 3, paragraph 1 could be interpreted in a way to leave the possibility for the parties to choose the optional instrument as applicable law to their contract. The possibility of such interpretation could be clarified in Rome I.

It is clear from the approaches suggested by respondents that the works undertaken on the conversion of the Rome Convention into a Community instrument and its modernisation and those on European Contract Law need to be coherent. Even if it is too premature to take any decision on the opportuneness and adoption of the optional instrument, it is important to ensure that the future Community instrument "Rome I" takes into account the possibility of a coherent articulation of its provisions with a possible future optional instrument.

3. Concerning the legal form of an optional instrument

In the Action Plan, the Commission suggested that an optional instrument could take the legal form of a regulation or a recommendation which would exist in parallel with, rather than instead of, national contract laws.

As we have seen above, a great majority of respondents expressed its preference for an "*opt in*" instrument. If this approach is followed, there is significant support for a regulation. However, among the academics' contributions, some are in favour of a non-binding instrument, for example a recommendation.

For an "opt-out" instrument a regulation would be more appropriate as, unlike a recommendation, it is directly applicable. For an "opt-in" instrument, the choice of its legal form will depend on the approach chosen for the articulation of this instrument with the successor of the Rome Convention (see point 1 above). In this context, in the light of the three approaches suggested by stakeholders, the form of a Regulation may seem more appropriate.

4. Concerning the content of an optional instrument

In its Action Plan, the Commission made clear that in reflecting on the content of a non-sector-specific instrument, the future CFR should be taken into account. The content of this CFR would be likely to serve as a basis for the discussions on the optional instrument. On that point, most of the stakeholders agreed with the Commission view even if the question of whether the new instrument should cover the whole scope of the CFR or only parts of it was left open.

The question of whether this optional instrument should contain only some general contract law components or also components for specific contracts which are of a

[21] Article 3.1 of the Rome Convention: "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

great economic importance in the internal market, i.e. contract of sale or services, was also left open in the Action Plan. Many stakeholders agreed on the fact that an optional instrument should contain some provisions of general contract law as well as provisions relating to specific contracts which have significant importance for cross-border transactions. Concerning provisions of general contract law, stakeholders suggested that the optional instrument could contain, for instance, provisions relating to the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies. Concerning specific contracts, several suggestions were made: the optional instrument should contain rules relating to contract of sale, exchange, donation, lease, cross-border financial transactions and contracts of insurance. Some stakeholders also expressed the view that the optional instrument should cover areas of law linked to contract law, i.e. security law, unjust enrichment as well as rules on credit securities on movable goods.

Thus, according to these contributions, an optional instrument could have different components, i.e. parts relating to general contract law and/or certain specific contracts. However, the exact content of an optional instrument and which sectors should receive special attention will need to be further discussed. An optional instrument should only contain those areas of contract law, whether general or specific to certain contracts, which clearly contribute to addressing identified problems, such as barriers to the smooth functioning of the internal market.

5. Concerning the scope of an optional instrument

Concerning the scope of an optional instrument, two main issues can be identified which would need to be addressed through further reflection.

Firstly, in the Action Plan, the Commission raised the question of whether an optional instrument should cover solely business-to-business transactions or also business-to-consumer contracts. In the latter case, the new instrument would contain mandatory provisions concerning consumer protection. The Commission underlined the importance of the principle of contractual freedom that allows parties, once they have decided to apply the optional instrument to their contract, to adapt this instrument according to their needs. However, it also noted that this freedom could be restricted by the mandatory character of some limited provisions of the new instrument, e.g. those relating to consumer protection.

In answering this question, it is important to remember the main goal of the optional instrument, namely the smoother functioning of the internal market. It is clear that including business-to-business transactions would facilitate that goal. However, business-to-consumer transactions are also of great economic importance for the internal market and, to that extent, their inclusion would be justified. In this case, consumers would need to be afforded a sufficiently high level of protection to ensure benefits for the demand-side of the market (consumers) as well as the supply-side (businesses). In that context, most stakeholders considered that a new instrument should apply to business-to-consumer transactions as well and so include mandatory rules to ensure a high level of consumer protection.

Here it should be noted that national mandatory rules, applicable on the basis of Articles 5 and 7 of the Rome Convention, can increase transaction costs and constitute obstacles to cross-border contracts. In that context, the introduction in the

optional instrument of mandatory provisions in the meaning of in Articles 5 and 7 of the Rome Convention could represent a great advantage: the parties, by choosing the optional instrument as applicable law to their contract, would know from the moment of the conclusion of the contract which mandatory rules are applicable to their contractual relationship. That would provide legal certainty in cross border transactions and the relevant providers of services and goods could market their services or products throughout the whole European Union using one single contract. The optional instrument would then become a very useful tool for the parties. However, in such a situation, it would need to be certain that, where the parties have chosen the optional instrument as applicable law, other national mandatory rules would no longer be applicable. That would depend on the solution chosen for the articulation of the optional instrument with Rome I (see point 1 above).

Secondly, the introduction of the business-to-business transactions within the scope of the optional instrument raises another issue. It concerns the articulation of the optional instrument and the Vienna Convention on the International Sale of Goods (CISG). In its Action Plan, the Commission asked for some comments on the scope of the optional instrument in relation to the CISG. Many stakeholders presented their view on this issue. All of them agreed on the necessity to ensure coherence between an optional instrument and the CISG. However, there was less consensus on how to ensure such coherence: while some considered that the optional instrument should only provide for complementary rules to the CISG, others proposed that the CISG should become part of the optional instrument.

The question of the relationship between the optional instrument and the CISG would depend, on the one hand, on the scope of the optional instrument[22], and, on the other hand, on the binding nature of this new instrument, i.e. "*opt in*" or "*opt out*". As noted in point 1, the majority of respondents favoured an "*opt in*" instrument. In a scenario where the optional instrument was an "*opt in*" instrument applicable to business-to-business international sales of goods, by choosing the optional instrument as applicable law to their contract, the parties would have tacitly excluded the application of the CISG on the base of Article 6 of the CISG[23]. However, in the alternative scenario of an "*opt out*" instrument applicable to business-to-business international sales of goods, the problem of determining the appropriate application of the two instruments could be more difficult to solve. That would be an argument in favour of an "*opt in*" instrument, an approach preferred so far by stakeholders.

6. Concerning the legal base of an optional instrument

In its Action Plan, the Commission launched the reflection on the legal base of a new instrument and welcomed comments from stakeholders. However, very few contributors expressed their view on that issue. While one Member State proposed Article 308 of the TEC for an "*opt in*" instrument and Article 95 TEC for an "*opt out*" scheme, a group of academic lawyers preferred Article 65 TEC.

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22 If the optional instrument is not applicable to international sales of goods, there is no problem of competition between this optional instrument and the CISG.

23 Article 6 of the CISG: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

The question of the legal base is closely linked with the questions of the legal form of the optional instrument (see point 2 above), of its content (see point 3 above) and its scope (see point 4 above). More reflections on the important issue of the legal base will be necessary within a larger debate on the parameters of an optional instrument.