

European Commission
Directorate General Justice

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EUROPEAN CONTRACT LAW

The European Commission has launched a consultation on the Green Paper on policy options for progress towards a European Contract Law for consumers and businesses. Finland Chamber of Commerce submits the following statement.

Obstacles to cross-border transactions

Cross-border transactions have not become as wide-spread as could be hoped for despite the existing technology enabling distance contracts and the European efforts to promote the internal market. European contract law and consumer protection rules are not harmonised which is an obstacle to cross-border transactions.

Many businesses will not engage in cross-border consumer transactions due to the differing legislation in the different Member States. When European consumer legislation is introduced or amended, it is crucial that in the future it will not lead to 27 different laws as has been the case until now. In electronic commerce or when using other means for cross-border consumer purchases, it is only fair to expect that the rules are the same in the whole European Union. This is not the case today and leads to confusion and unfair situations among consumers and businesses alike.

The current obstacles to cross-border transactions can be elaborated using as an example small and medium sized businesses (SME's) operating independently of chains. SME's face serious challenges in applying even national law, due to their small administrative and often virtually non-existent legal resources. Belonging to a chain of businesses may ameliorate the situation.

If a business operates locally, in principle it should have at least some basic knowledge of national contract law and consumer protection. Many small businesses may, however, operate for long periods of time without any legal problems. When a problem finally arises, the awareness of even basic rules may be limited.

If a business has cross-border operations, the challenges multiply. Many businesspeople may believe that consumer protection and contract laws are harmonised in the European Union, thus thinking that the same rules apply in cross-border contracts between parties from two Member States. More knowledgeable businesspeople know that the contrary is true.

Problems of minimum harmonisation of consumer protection

A major obstacle to cross-border B2C transactions is the current state of differing consumer legislation in the different Member States. European consumer law is based on minimum directives. This has led to 27 different regimes. Due to the confusing and unfair situation, many businesses do not operate cross-border. The situation does touch merely small businesses; some larger businesses have also decided not to sell their products cross-border directly to consumers. This leads to a lack of competition and higher prices from consumers' point of view.

A survey on cross-border operations

In June 2010, Finland Chamber of Commerce conducted a survey on cross-border operations among Finnish businesses. The results of the survey have not been published previously.

The survey was answered by 28 companies of different sizes, including 7 with fewer than 50 employees. 12 respondents operated in retail business and 8 in the services sector. Half of the respondents deliver products or services in other EU countries, whereas 24 of the companies deliver their products or services directly to consumers.

Most of the respondents (22) identified different legislation applicable (legal uncertainty, additional costs) among the main difficulties that the company faces in cross-border business-to-consumer trade. Other obstacles mentioned by the respondents included fear of litigation in the consumer's country (9 businesses), languages (5), the need to revise pricing strategy (3), logistics (2) and the need to train staff (2).

According to the results of the survey, 18 of the participating companies (64 %) believe that the harmonisation and simplification of consumer protection laws would allow the company to increase its sales in other EU countries.

The survey was a part of a survey conducted by EUROCHAMBRES over the summer 2010. The survey was answered by 1330 companies of different sizes from 12 EU countries and Croatia. The large majority of respondents were SMEs (91%).

Most of the respondents of the EUROCHAMBRES survey (737 companies) identified different legislation applicable (legal uncertainty, additional costs) among the main difficulties that the company faces in cross-border business-to-consumer trade. Other obstacles mentioned by the respondents included fear of litigation in the consumer's country (419 companies), languages (343 companies), logistics (254 companies), the need to revise pricing strategy (182 companies) and the need to train staff (105 companies).

Option 1: Publication of the results of the Expert Group

We support the publication of the results of the Expert Group. The work is of high quality and is useful for parties outside the preparatory group.

Option 2: An official "toolbox" for the legislator

The results of the Expert Group can and should be used as a toolbox for the legislator. Over time, this would ameliorate the quality of European legislation.

Option 3: Commission Recommendation on European Contract Law

We don't find a Commission Recommendation on European Contract Law very useful as we don't believe that it would lead to significant changes to the current regimes. However, we do not oppose such a recommendation.

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

Fully harmonised European contract law may be an unrealistic target even as a long-term goal. This is due to the different legal traditions in the Member States. However, an optional instrument for European contract law may contribute to cross-border transactions in a positive manner.

Creating an optional instrument for European contract law is an interesting academic exercise. Companies' point of view is different. The question is whether the instrument will prove to be a solution to the problem of different laws and rules in the different Member States. A pragmatic approach is necessary. If companies don't recognize the usefulness and value of an optional instrument, it will remain a purely academic exercise with little practical effect.

Requirements of a successful optional contract law instrument

The aim of the current European project is to create an optional instrument for European contract law that parties to any contract may agree to apply in their contractual relationship. Whether companies will use this option is an important question. The mere existence of an optional instrument does not guarantee its success.

The success of the optional instrument will depend on the reactions of businesses across Europe. It is unlikely that consumers will have the knowledge and interest required for promoting the use of an optional instrument. Furthermore, it may happen that consumer authorities and associations will be hesitant concerning the use of an optional contract law instrument in consumer contracts.

Predictability is a key issue for companies when entering into contracts. Lawyers are very conservative and risk-conscious. When a company enters into a transaction with due care it should be entitled to trust that the transaction is legally valid. This need is so important that companies may be willing to face a little bit of bureaucracy if that ensures the validity of their transactions.

Predictability of rules is based on several factors. First of all, clarity of the text is fundamental. For example, it is important that it comes out clearly which provisions apply only to B2C contracts and which apply also to B2B relationships. Also, using cross-references in the text may be confusing and will reduce the attractiveness of an optional instrument.

Clarity is one part of predictability. Another factor in this case will be the novelty of the instrument. As there are no court rulings based on the optional instrument, companies may be very hesitant in opting to apply it. And there certainly won't be court rulings until companies opt to apply the new instrument.

Knowing that companies and their advisors wish to avoid risks, it may be unrealistic to predict a wide use for an optional instrument. At least it will take a considerable time before any breakthrough can be expected. Companies will be unwilling to opt for an instrument they don't know thoroughly.

It is quite unlikely that all companies have sufficient resources to study the optional instrument and analyse its impact on their contractual relationships compared to national legislation. Law societies and organisations representing European businesses may have a role in determining whether an optional instrument will prove to be a success.

Furthermore, predictability is also based on how complete a set of rules the optional instrument will be. If the proposed legal regime is incomplete, the issue of different applicable laws remains. In that case the usefulness of the instrument will be limited.

The creation of European model contracts for different areas of business based on the optional instrument is probably not a realistic task considering the costs and the uncertainty of wide use and acceptance of such model contracts.

The challenges of creating an optional instrument

One of the questions regarding the optional instrument is how detailed it will be. Very detailed rules may be contrary to the legal tradition of some jurisdictions. In general contract law, the legal systems and traditions of the EU member states differ widely. This is evident in the differences of opinion concerning general clauses in legislation.

General clauses have a strong position in the Nordic legislation. The Nordic courts have interpreted general clauses in a sensible manner giving reasonable rulings. The Nordic lawyers don't appreciate detailed lists, e.g. black lists and grey lists that have become common in EU legislation.

Lawyers representing some other jurisdictions don't share the Nordic trust in their courts for interpreting general clauses in a reasonable manner. This should not be seen as criticism of these courts but as a justified concern for introducing foreign elements to those jurisdictions. We come back to the issue of predictability. If a lawyer cannot analyse the issue and give advice to his or her client, the lawyer won't recommend the use of the optional instrument.

Option 5: Directive on European Contract Law

We don't find it a realistic goal to give a directive on general European Contract Law. This kind of proposal would lead to endless arguments and disagreements about its contents due to the different legal traditions and approaches to contract law in the Member States.

However, we support a fully harmonised European consumer protection law. It must be admitted that some deviations from full harmonisation may be necessary. The deviations should not, however, include e.g. time limits, burden of proof, length of withdrawal period and costs for returning goods when using right of withdrawal.

Option 6: Regulation establishing a European Contract Law

We do not find regulation establishing a European Contract Law a suitable instrument to harmonize European contract law due to the different European jurisdictions and approaches to contract law.

Option 7: Regulation establishing a European Civil Code

We don't find it a realistic goal to establish a European Civil Code due to the different jurisdictions of the Member States.

4.2. What should be the scope of application of the instrument?

A major issue from companies' point of view is if it is feasible to have a general contract law covering both business-to-business, consumer-to-consumer and business-to-consumer relations. Furthermore, businesses are a very heterogenic group, including businesses of all sizes and resources.

B2C and B2B contracts

Consumer protection is a specific area of law and the requirements for clarity are very high if the optional instrument contains both B2C and B2B clauses.

This problem can be elaborated with an example. The Draft Common Frame of Reference (DCFR) contains a section on unsolicited goods or services (Chapter 4, Section 4). According to it, no contract arises from a consumer's failure to respond if a business delivers unsolicited goods to him or her. As such, the section is as it should be. But it raises the question, what is the interpretation if a business delivers unsolicited goods to another business? As the section can be seen as a consumer protection clause, it may be understood to be an exception to the general contract law. Thus the section might lead to an *a contrario* interpretation meaning that a business would be bound to an unsolicited contract. This may not have been the intention of the DCFR.

Companies may not wish to have a general contract law that can be interpreted in this way. Businesses are nowadays experiencing a flood of deceiving and even fraudulent bills for services that they haven't at least knowingly meant to acquire. Such practises should rather be prevented than promoted. This is of course an isolated example but it shows the challenges of including consumer protection clauses in general contract law.

B2B contracts

It is one thing to draft legislation for business-to-consumer relations. Business-to-business relations on the other hand are more heterogenic. When businesses use a standard contract in their transactions, it cannot always be assumed that the party providing the standard contract is stronger than the other party.

For example, a major international company with an extensive legal department may be a client of a small company, while this small service provider produces the contract. It is possible that the client actually understands the legal implications and risks of the contract better than the small service provider. If contract law gave the large company a preferential standing between the parties in disputes concerning the standard contract, the small service-provider would be in a weaker position than without such legislation. Especially in the sector of financing, it can often be questionable which party is stronger, the one providing the contract or the other party, bearing in mind that financial institutions serve also the largest companies in the world.

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