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EUROPEAN COMMISSION

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**GREEN PAPER FROM THE COMMISSION**

**on policy options for progress towards a European Contract Law for consumers and  
businesses**

## GREEN PAPER FROM THE COMMISSION

### on policy options for progress towards a European Contract Law for consumers and businesses

#### 1. PURPOSE OF THE GREEN PAPER

The internal market is built on a multitude of contracts governed by different national contract laws. Yet, differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market. Divergences in contract law rules may require businesses to adapt their contractual terms. Furthermore, national laws are rarely available in other European languages, which imply that market actors need to take advice from a lawyer who knows the laws of the legal system that they are proposing to choose.

Partly for these reasons, consumers and businesses, in particular small and medium enterprises (SMEs) having limited resources, may be reluctant to engage in cross-border transactions. This reluctance would in turn hinder cross-border competition to the detriment of societal welfare. Consumers and businesses from small Member States might be particularly disadvantaged.

The Commission wants citizens to take full advantage of the internal market. The Union must do more to ease cross-border transactions. The purpose of this Green Paper is to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law, and launch a public consultation on them. Depending on the evaluation of the results of the consultation, the Commission could propose further action by 2012. Any legislative proposal will be accompanied by an appropriate impact assessment.

#### 2. BACKGROUND

With its 2001 Communication on *European Contract Law*<sup>1</sup>, the European Commission launched a process of extensive public consultation on the problems arising from differences between Member States' contract laws and on potential actions in this field. In the light of the responses, the Commission issued an Action Plan in 2003<sup>2</sup>, proposing to improve the quality and coherence of European Contract Law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. It was also proposed to review the Union *acquis* in the area of consumer contract law, to remove inconsistencies and fill regulatory gaps<sup>3</sup>. As a result of the review, in October 2008, the Commission submitted a Proposal for a Directive on consumer rights<sup>4</sup>, a measure designed to boost the retail internal market.

The Commission financed through a grant under the 6th Framework Programme for Research and closely followed the work of an international academic network who carried out the preparatory legal research in view of the adoption of the CFR. The research work was

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<sup>1</sup> COM(2001) 398, 11.7.2001.

<sup>2</sup> COM(2003) 68, 12.2.2003.

<sup>3</sup> See also Commission Communication on "European Contract Law and the revision of the *acquis*: the way forward" - COM(2004) 651, 11.10.2004.

<sup>4</sup> COM(2008) 614, 8.10.2008.

finalised at the end of 2008 and led to the publication of the Draft Common Frame of Reference (DCFR)<sup>5</sup>. The DCFR covers principles, definitions and model rules of civil law<sup>6</sup>, including contract and tort law. It contains provisions for both commercial and consumer contracts.

The DCFR has built on several projects previously undertaken at European and international level. A network of eminent European academics<sup>7</sup> has elaborated the *Principles of European Contract Law* (PECL) with the aim of providing the internal market with a uniform contract law. Various international and regional organisations, recognising that diverging contract law rules create obstacles to international trade, have been working to reduce such obstacles by providing uniform model rules. The United Nations Commission on International Trade Law (UNCITRAL) has created an almost worldwide standard for business-to-business sales of goods – the Vienna Convention on International Sales of Goods<sup>8</sup> - which applies by default whenever the parties have not chosen to apply another law. The International Institute for the Unification of Private Law (UNIDROIT) has developed the Principles of International Commercial Contracts, which represent model rules on sales of goods and provision of services. These instruments have created standards which have served as model rules for legislators around the world<sup>9</sup> and for parties to commercial contracts who may not designate them as the law governing certain aspects of their contracts but can nevertheless incorporate them by reference, as Article 3 in conjunction with Recital 13 of the Rome I Regulation<sup>10</sup> makes clear. However, their scope is limited to business-to-business contracts, and in the case of the Vienna Convention, to sale of goods. Moreover, there is no mechanism to ensure their uniform interpretation in the Member States. Finally, these instruments cannot restrict the application of national mandatory rules.

An instrument of European Contract Law could help the EU to meet its economic goals and recover from the economic crisis. The Stockholm Programme for 2010-2014<sup>11</sup> states that the European judicial area should serve to support the economic activity in the internal market. The Programme invites the Commission to submit a proposal on the CFR and to examine further the issue of contract law. The Commission's Communication "Europe 2020"<sup>12</sup> recognises the need to make it easier and less costly for businesses and consumers to conclude contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional

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<sup>5</sup> Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Munich, Sellier, 2009.

<sup>6</sup> Some of those have been inspired by principles and model rules produced by the Association Henri Capitant and Société de législation comparée ("*European Contract Law. Materials for a Common Frame of Reference : Terminology, Guiding Principles, Model Rules*", Ass. H. Capitant et SLC, 2008, Sellier European law publishers).

<sup>7</sup> The network, entitled 'Commission on European Contract Law', was composed of academics from all the Member States and activated, under the chairmanship of Ole Lando, between 1982 and 2001.

<sup>8</sup> The Vienna Convention has been ratified by 74 countries so far. Notable exceptions, among the EU countries, are the United Kingdom, Portugal and Ireland.

<sup>9</sup> For example, the Organisation for the Harmonisation of Business Law in Africa has been working on developing a Uniform Act on Contracts largely inspired by the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles and PECL have also inspired the Chinese Contract Act of 1999.

<sup>10</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6).

<sup>11</sup> Council act of 2 December 2009, No 17024/09.

<sup>12</sup> COM(2010) 2020, 3.3.2010.

European Contract Law. The Digital Agenda for Europe<sup>13</sup>, the first flagship initiative adopted under the Europe 2020 strategy, aims at delivering sustainable economic and social benefits from a digital internal market by eliminating legal fragmentation. The action it proposes refers to "an optional contract law instrument to overcome the fragmentation of contract law, in particular as regards the on-line environment".

The Union could fill contract law gaps by adopting effective tools for the removal of market barriers relating to diverging contract laws. An instrument of European Contract Law, if sufficiently user-friendly and legally certain, could also serve as a model, in particular to international organisations which have taken the Union as a model for regional integration<sup>14</sup>. The Union could thus play a leading role in setting uniform international standards in this field, which could in turn give the European economy a competitive advantage in the world.

In order to carry out its mandate, the Commission has set up an Expert Group<sup>15</sup> to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty. The Group will assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions. It will also take into consideration other relevant sources in this area, as well as the contributions to the present consultation. The Group gathers the expertise from the Union's different legal traditions and stakeholders' interests. Members were selected from among reputable experts in the area of civil law, in particular contract law, and are acting independently and in the public interest. The results of the public consultation launched by this Green Paper will inform the on-going work of the Expert Group.

### **3. CHALLENGES FOR THE INTERNAL MARKET**

The completion of the internal market faces a number of barriers, which prevent it from delivering on its full potential. Regulatory, linguistic, and other obstacles<sup>16</sup> hinder the smooth functioning of the internal market. Divergences between national contract laws feature amongst these barriers, as has emerged in the course of the consultation launched with the 2001 Communication in European Contract Law, in Eurobarometer surveys<sup>17</sup> and other studies<sup>18</sup>.

#### **3.1. Business-to-consumer contracts**

Divergences exist not only in areas which have not been regulated by EU law (e.g. general contract law), but also in areas which have been partially harmonised at Union level on the basis of minimum harmonisation (e.g. consumer protection law). This has left room for different national approaches to consumer protection legislation.

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<sup>13</sup> See Communication from the Commission, "A Digital Agenda for Europe" - COM(2010) 245, 19.5.2010.

<sup>14</sup> For example, the Association of Southeast Asian Nations (established in 1967), or the recently established Union of South American Nations (2008).

<sup>15</sup> Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (OJ L 105, 27.4.2010, p. 109).

<sup>16</sup> E.g. delivery problems with postal services, problems with payments.

<sup>17</sup> See, for example, Special EUROBAROMETER 292 (2008) and Flash EUROBAROMETER 278 (2009).

<sup>18</sup> See, for example, the Clifford Chance Survey in European Contract Law, (2005).

In business-to-consumer contracts, the Union has put into place uniform conflict-of-law rules which aim to protect consumers when seeking redress with businesses from other Member States with whom they have contracted. More specifically, under Article 6 of the Rome I Regulation, where the business party pursues his commercial activities in or directs this activity to the country of habitual residence of the consumer, the law of this country applies in the absence of choice. If the parties choose a law other than the law of the country of habitual residence of the consumer, the contract cannot deprive the consumer of the protection afforded by his law<sup>19</sup>. As a result of this rule, consumers can be confident that, in the event of dispute, courts will ensure that they will benefit from at least the same level of protection as guaranteed in their country of residence.

For businesses, this rule means that when they sell across borders, the contracts that they conclude with consumers are subject to the different rules in force in the countries in which these consumers are resident, irrespective of whether a choice of law is made or not. Businesses wishing to engage in such cross-border trade may face high legal costs when their contracts are subject to foreign consumer law. In extreme cases, some businesses may even refuse to sell across borders and thus potential consumers of that company may be locked in their national markets and be deprived of the enhanced choice and lower prices offered by the internal market. This may be particularly relevant in e-commerce transactions. Even if the website of a seller could be accessed by consumers from all the Member States, because of the related costs and risks, the seller may refuse to conclude contracts with consumers from other Member States. For example, for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer's country.<sup>20</sup> Thus, the potential of cross-border e-commerce remains partly unfulfilled, to the detriment of both businesses, in particular SMEs, and consumers.

The Commission's Proposal for a Consumer Rights Directive<sup>21</sup> addresses some of these problems by aiming at simplifying and consolidating the existing legislation in the area of consumer contract law, on the basis of a fully harmonised set of key internal market aspects of consumer contract law. However, even if adopted as proposed, it would not render fully compatible the national contract laws of the Member States in the non-harmonised areas. Also in the areas of fully harmonised provisions, there would be a need to apply them in conjunction with other national provisions of general contract law<sup>22</sup>. Moreover, two years of intense negotiations in the European Parliament and Council have highlighted that there are limits to an approach based on full harmonisation. Consequently, differences between the contract laws of the Member States will remain a reality even after the adoption of the Directive and businesses wishing to sell cross-border will have to comply with them.

### **3.2. Business-to-business contracts**

In a business-to-business contract, the parties have the freedom to choose the law governing their contract. They can also incorporate into their contracts existing instruments, such as the Vienna Convention on the International Sale of Goods or the UNIDROIT Principles of

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<sup>19</sup> Similar conflict-of-law rules which aim at protecting the weaker party exist in respect of other types of contracts, such as for example insurance contracts and contracts of carriage, see Article 7 and 5 respectively of the Rome I Regulation.

<sup>20</sup> See Communication from the Commission on Cross-Border Business to Consumer e-Commerce in the EU - COM(2009) 557, 22.10.2009.

<sup>21</sup> COM(2008) 614.

<sup>22</sup> For example, on remedies for breach of information duties.

International Commercial Contracts. However, businesses do not have the option of a common European Contract Law which could be applied and interpreted uniformly in all the Member States.

Large companies with strong bargaining power can ensure that their contracts are subject to a particular national law. This may be more difficult for SMEs and therefore raise obstacles to pursuing a uniform commercial policy across the Union, thus preventing businesses from grasping opportunities in the internal market. Furthermore, ensuring compliance with different systems of contract law or obtaining information about the law applicable in another Member State and in another language might increase legal costs.

Whereas for certain specialised types of contract having a strong international dimension, such as shipping contracts, businesses may already have become familiar with the laws commonly used for governing this type of transaction, this is not necessarily always the case. In addition, for more general commercial transactions, businesses might benefit from an instrument setting out a uniform set of rules of European Contract Law which would be easily accessible in all official languages. This could provide greater reassurance to businesses engaged in cross-border trade, which might quickly familiarise themselves with such a system by using it in all dealings with businesses in other Member States. In such dealings, it could also come to be seen as an alternative to the Member States national contract laws and a neutral modern contract law regime drawing on the common national law traditions in a clear and user-friendly manner. Such an option could be particularly attractive for SMEs venturing into new markets for the first time.

#### **4. CHOOSING THE BEST INSTRUMENT FOR EUROPEAN CONTRACT LAW**

An instrument of European Contract Law should respond to the problems of diverging contract laws identified above, without introducing additional burdens or complications for consumers or businesses. In addition it should ensure a high level of consumer protection. In the area it covers, the instrument should be comprehensive and self-standing, in the sense that references to national laws or international instruments should be as much as possible reduced. Several options have been identified, in respect of the legal nature, the scope of application and the material scope of the future instrument.

##### **4.1. What should be the legal nature of the instrument of European Contract Law?**

An instrument of European Contract Law could range from a non-binding instrument, aiming at improving the consistency and quality of EU legislation, to a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules. As a general observation, a Union instrument would be made available in all official languages. This would benefit all stakeholders involved, legislators seeking guidance, judges applying rules and parties negotiating the terms of their contract.

##### *Option 1: Publication of the results of the Expert Group*

The outcome of the work of the Expert Group could be made easily available, by immediate publication on the website of the Commission, without any endorsement at Union level. If the Expert Group produces a practical and user-friendly text, this could be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions. It could also be used in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. Extensive use of this work could contribute, in the long term, to the voluntary convergence of national contract laws.

However, this solution could not address the internal market barriers. Divergences in contract law would not be significantly reduced by a text which has no formal authority or status for courts and legislators.

*Option 2: An official "toolbox" for the legislator*

a) Commission act on a "toolbox"

Drawing on the results of the Expert Group, the Commission could adopt an act (e.g. a Communication or Commission Decision) on European Contract Law to be used as a reference tool by the Commission to ensure the coherence and quality of legislation. The Commission would use the "toolbox" when drafting proposals for new legislation or when revising existing measures. Such an instrument would be effective immediately upon adoption by the Commission, without the approval of the Parliament and Council. However, in this case, the Parliament and Council would not be required to take its recommendations into consideration when tabling their amendments.

b) Interinstitutional agreement on a "toolbox"

A "toolbox" in European Contract Law could be the object of an interinstitutional agreement between the Commission, Parliament and Council to make consistent reference to its provisions when drafting and negotiating legislative proposals bearing on European Contract Law. A proposal for an interinstitutional agreement would require negotiations between the three lawmakers before it becomes effective, but it would have added value in its implication of the three institutions which will be required to take its recommendations into consideration while preparing and adopting new legislative instruments.

The disadvantage of any "toolbox" is that it would not provide immediate, tangible internal market benefits since it will not remove divergences in law. Furthermore, a "toolbox" for the legislator could not ensure a convergent application and interpretation of Union contract law by the courts.

*Option 3: Commission Recommendation on European Contract Law*

An instrument of European Contract Law could be attached to a Commission Recommendation addressed to the Member States, encouraging them to incorporate the instrument into their national laws. Such a Recommendation would allow the Member States to gradually adopt the instrument into their national laws on a voluntary basis. Furthermore, the Court of Justice of the EU would have jurisdiction to interpret the provisions of the Recommendation.

Two possibilities can be envisaged:

- a) The Recommendation could encourage the Member States to replace national contract laws with the recommended European instrument. Such an approach has been successfully implemented in the United States, where a Uniform Commercial

Code elaborated by experts in commercial law and endorsed by neutral, quasi-public organisations<sup>23</sup> has been adopted by all but one of the 50 states.

- b) The Recommendation could encourage the Member States to incorporate the European Contract Law instrument as an optional regime, offering contractual parties an alternative to national law. In those Member States opting for this method, the European optional instrument would stand beside other alternative instruments which can be chosen as the law applicable to contracts, such as the UNIDROIT Principles.

Such a Recommendation would have no binding effects on the Member States and would allow them discretion in how and when to implement the instrument into their national laws. Therefore, this solution bears the risk of an incoherent and incomplete approach between the Member States, which might enact the Recommendation differently and at different moments in time or not at all.

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

A Regulation could set up an optional instrument, which would be conceived as a "2<sup>nd</sup> Regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law<sup>24</sup>.

It would insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts<sup>25</sup>. It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules<sup>26</sup>. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts (see Section 4.2.2 below).

By its very nature, an optional instrument could only constitute a sensible solution to the problems stemming from regulatory divergences if it is sufficiently clear to the average user and provides legal certainty. These are preconditions for building the confidence of the contracting parties in the instrument so that it would be chosen as the legal basis of the contract in the first place. In particular, consumers should be reassured when entering into a contract on this basis that their rights will not be compromised. To be operational from an internal market perspective, the optional instrument would have to affect the application of the mandatory provisions, including those on consumer protection<sup>27</sup>. Indeed, this would

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<sup>23</sup> The Uniform Commercial Code is frequently revised and approved jointly by the Uniform Law Commission, which has the aim of drafting and promoting the enactment of uniform state laws, where uniformity is practical and desirable, and by the American Law Institute, which produces influential scholarly work to clarify, modernise and improve the law.

<sup>24</sup> See also Opinion of the European Economic and Social Committee, INT/499, 27.5.2010.

<sup>25</sup> This set of contract law rules would form part of each Member State's national law also for the purposes of private international law.

<sup>26</sup> See Mario Monti's Report to the President of the European Commission "A New Strategy for the Single Market", 9 May 2010: "The advantage of the 28<sup>th</sup> regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States". See also the recommendation of the Report to the European Council by the Reflection Group on the Future of the EU 2030, "Project Europe 2030: Challenges and Opportunities", May 2010: "Action should be taken to provide citizens with the option of resorting to a European legal status (the "28<sup>th</sup> regime") which would apply to contractual relations in certain areas of civil or commercial law alongside the current 27 national regimes".

<sup>27</sup> It would be necessary to articulate in the instrument itself the relationship with the provisions of the Rome I Regulation.

constitute the added value compared with the existing optional regimes, such as the Vienna Convention, which cannot restrict the application of national mandatory rules.

The optional instrument would need to offer a manifestly high level of consumer protection<sup>28</sup>.

Consistent reference to a single body of rules would remove the necessity for judges and legal practitioners to investigate in certain cases foreign laws, which is currently the case under conflict-of-law rules. This could not only reduce costs for businesses, but also alleviate the administrative load on the judicial system.

Such an optional instrument could bring about important internal market benefits without necessitating further in-roads into national law. Therefore, in line with the principle of subsidiarity, an optional instrument could constitute an alternative to full harmonisation of national laws, by offering a proportionate solution to internal market barriers stemming from diverging national contract laws.

On the other hand, a European optional instrument might be criticised for complicating the legal environment. By adding a parallel system, the legal environment would continue to be challenging and require clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis.

#### *Option 5: Directive on European Contract Law*

A Directive on European Contract Law could harmonise national contract law on the basis of minimum common standards. Member States would be able to retain more protective rules, subject to compliance with the Treaty. It could also be foreseen that the resulting differences are notified to the Commission and then published to increase transparency for consumers and businesses operating across borders.

In respect of business-to-consumers contracts, the Directive would be based on a high level of consumer protection, as required by the Treaty, and would complement the consumer *acquis*, including the provisions of the future Directive on Consumer Rights.

Such a Directive could decrease legal divergences, by achieving a degree of convergence between national contract laws. This in turn could lead to more confidence, in particular for consumers and SMEs, in venturing to operate across borders. However, harmonisation through directives based on minimum harmonisation would not necessarily lead to uniform implementation and interpretation of the rules<sup>29</sup>. Businesses offering goods and services across borders would still need to abide by the different consumer contractual rules in all those countries. The existing consumer contract *acquis* demonstrates the limitations of minimum harmonisation directives in reducing regulatory divergences. In business-to-business cross-border contracts, the Directive might not be able to deliver the necessary legal certainty and businesses would thus continue to incur compliance costs.

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<sup>28</sup> See Article 12 of the Treaty on the Functioning of the European Union.

<sup>29</sup> For this reason, the Monti Report recommends that harmonisation should be pursued through Regulations, p. 93.

#### *Option 6: Regulation establishing a European Contract Law*

A Regulation establishing a European Contract Law could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party. These rules would apply to contracts not upon a choice by the parties, but as a matter of national law. The Regulation could replace national laws in cross-border transactions only, or it could replace national laws in both cross-border and domestic contracts (see Section 4.2.2 below).

This solution would remove legal fragmentation in the field of contract law and lead to a uniform application and interpretation of the Regulation's provisions. Uniform contract law rules could facilitate the conclusion of cross-border contracts and present an efficient mechanism for settling disputes.

However, this solution could raise sensitive issues of subsidiarity and proportionality. Replacing the plurality of national laws, in particular if domestic contracts are also covered, with a single set of rules might not be a proportionate measure to deal with the obstacles to trade in the internal market.

#### *Option 7: Regulation establishing a European Civil Code*

This solution goes one step further than the Regulation establishing a European Contract Law, in the sense that it would cover not only contract law, but also other types of obligations (e.g. tort law and benevolent intervention). Such an instrument would reduce even further the need to fall back onto national provisions.

Although impediments to the smooth functioning of the internal market exist also in areas of law other than contract law, it is yet to be established to what extent an extensive instrument such as a European Civil Code could be justified on grounds of subsidiarity.

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

An instrument of contract law could cover several areas of application.

#### *4.2.1. Should the instrument cover both business-to-consumer and business-to-business contracts?*

An instrument could be applicable in all types of transactions, whether business-to-business or business-to-consumer. There are certain general contract law provisions which are relevant to all contracts without distinction, but the instrument could also contain specific provisions, the application of which would only be triggered in certain types of contracts, for example, mandatory provisions ensuring a high level of consumer protection. These would come into play when a transaction involves a consumer and a business party<sup>30</sup>.

Separate instruments for business-to-consumer and business-to-business contracts could also be envisaged. In principle, separate instruments could better tackle issues which are specific to these types of contracts and would be easier to elaborate and use. However, the

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<sup>30</sup> For reasons of consistency, the instrument of European Contract Law will have to complement the relevant consumer *acquis*, by integrating its requirements, including progress made on consumer protection in the internal market in the Consumer Rights Directive.

proliferation of instruments bears the inherent risk of overlaps and inconsistencies in the legislation.

#### 4.2.2. *Should the instrument cover both cross-border and domestic contracts?*

The problems of divergences in laws are normally a trademark of cross-border contracts, where several national or international instruments may come into play. An instrument covering cross-border contracts only, capable of resolving the problems of conflict of laws could make an important contribution to the smooth functioning of the internal market. In business-to-consumer contracts, businesses would be able to operate on the basis of two sets of terms – one for cross-border and one for domestic contracts. Consumers would also be subject to two sets of rules. An instrument applicable to both cross-border and domestic consumer contracts would further simplify the regulatory environment, but would impact on consumers who may not wish to venture into the internal market and prefer to preserve national levels of protection.

On the other hand, in business-to-business contracts where the principle of freedom of contract is paramount, it may be unreasonable to deny the parties the possibility of choosing the European instrument in purely domestic transactions. An instrument covering both cross-border and domestic contracts could represent a further incentive for businesses to expand across borders, as they would be able to use one single set of terms and one single economic policy.

The instrument could also focus on contracts concluded in the on-line environment (or, more generally, at a distance), although such an approach would not provide an exhaustive solution to internal market barriers beyond that specific context. These contracts constitute a significant proportion of cross-border transactions in the internal market and have the highest potential for growth. Therefore, an instrument tailor-made for the online world could be developed. This could be applicable in both cross-border and domestic situations, or only in cross-border situations.

### **4.3. What should be the material scope of the instrument?**

The material scope of the instrument of European Contract Law could be interpreted in a narrow or in a broad manner. In any case, the instrument should cover mandatory consumer contract law rules, taking the Union *acquis* as a starting point.

#### 4.3.1. *A narrow interpretation of its scope*

An instrument of European Contract Law could be limited to rules on: definition of contract, pre-contractual duties, formation, right of withdrawal, representation, grounds of invalidity, interpretation, contents and effects of contracts, performance, remedies for non-performance, plurality of debtors and creditors, change of parties, set-off and merger, and prescription<sup>31</sup>. Its scope could also focus on mandatory consumer contract laws giving rise to internal market barriers and practices causing detriment to consumers and SMEs, such as unfair contract terms.

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<sup>31</sup> This terminology taken from the DCFR is indicative only and does not pre-empt either the structure or the terminology of the instrument.

#### 4.3.2. *A broad interpretation of its scope*

An instrument of European Contract Law could cover, in addition to the matters listed in Section 4.3.1 above, related topics, such as restitution, non-contractual liability, acquisition and loss of ownership of goods and proprietary security in movable assets.

#### 4.3.3. *Should specific types of contracts be covered by the instrument?*

In addition to general contract law provisions, the instrument could contain specific provisions for the most prevalent types of contract. The most common and relevant from the internal market perspective is the contract for sale of goods.

Service contracts are also very important. However, given their heterogeneous character, specific provisions will have to be made for specific types of service contracts. For example, the instrument could contain provisions for 'sale-like' service contracts, such as car lease, or for insurance contracts. Furthermore, contracts in the financial services area are of a very specific and technical nature, particularly when concluded between professionals, and need a prudent approach as the legal environment in these areas changes rapidly.

In respect of certain service contracts, model rules have already been proposed by researchers and could serve as inspiration. For example, the DCFR contains model rules for contracts of lease of goods. The Project Group "Restatement of European Insurance Contract Law" elaborated the *Principles of European Insurance Contract Law (PEICL)*<sup>32</sup>. Assessment of the suitability of the principles is necessary for a decision as to whether and how they are to be applied to financial services contracts.

#### 4.3.4. *Scope of a European Civil Code*

A European Civil Code would need to cover not only contract law, including specific types of contracts, but also tort law, unjustified enrichment and the benevolent intervention in another's affairs.

## 5. CONCLUSIONS

The purpose of this Green Paper is to launch a public consultation to gather orientations and views from relevant stakeholders regarding possible policy options in the field of European Contract Law.

This Green Paper will be published on the Commission's website (<http://ec.europa.eu/yourvoice/>). The consultation will run from 1 July 2010 to 31 January 2011 and is open to any interested stakeholder. Individuals, organisations and countries that intend to participate in the consultation process are invited to send their contributions, in the form of answers to some or all the questions presented in the document and/or as general comments on the issues that are raised in the document.

Contributions received will be published, possibly in a summarised form, unless the author objects to publication of their personal data on the grounds that such publication would harm his/her legitimate interests. In this case, the contribution may be published in anonymous

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<sup>32</sup> Principles of European Insurance Contract Law, Munich, Sellier, 2009.

form. Otherwise, the contribution will not be published nor, in principle, will its content be taken into account.

Furthermore, since the launch in June 2008 of the Register for Interest Representatives (lobbyists) as part of the European Transparency Initiative, organisations are invited to use this Register to provide the European Commission and the public at large with information about their objectives, funding and structures. It is Commission policy that submissions from organisations will be considered as individual contributions unless the organisations have registered.

Contributions to the consultation should be sent to: [jls-communication-e5@ec.europa.eu](mailto:jls-communication-e5@ec.europa.eu).

Enquiries about this consultation can be made at the same e-mail address or at:

European Commission, DG Justice, Unit A2, Rue de la Loi 200, B-1049 Brussels, Belgium.