Wednesday 8 June 2011

Policy options for progress towards a European contract law for consumers and businesses

P7_TA(2011)0262

European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013(INI))

(2012/C 380 E/09)

The European Parliament,

— having regard to the Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)0348),

— having regard to Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law [1],

— having regard to the Communication from the Commission of 11 July 2001 on European Contract Law (COM(2001)0398),

— having regard to the Communication from the Commission of 12 February 2003 entitled 'A more coherent European Contract Law – An Action Plan' (COM(2003)0068),

— having regard to the Communication from the Commission of 11 October 2004 entitled 'European Contract Law and the revision of the *acquis*: the way forward' (COM(2004)0651),

— having regard to the report from the Commission of 23 September 2005 entitled 'First Annual Progress Report on European Contract Law and the Acquis Review' (COM(2005)0456) and to the report from the Commission of 25 July 2007 entitled 'Second Progress Report on the Common Frame of Reference' (COM(2007)0447),

— having regard to the Communication from the Commission of 22 October 2009 on Cross-Border Business to Consumer e-Commerce in the EU (COM(2009)0557),

— having regard to its resolution of 3 September 2008 on the common frame of reference for European contract law [2],

— having regard to its resolution of 12 December 2007 on European contract law [3],

— having regard to its resolution of 7 September 2006 on European contract law [4],

— having regard to its resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward [5],

— having regard to its resolutions of 26 May 1989 [6], 6 May 1994 [7], 15 November 2001 [8] and 2 September 2003 [9] on the issue,

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[1] OJ L 105, 27.4.2010, p. 109.
[2] OJ C 295 E, 4.12.2009, p. 31.
[3] OJ C 323 E, 18.12.2008, p. 364.
[4] OJ C 305 E, 14.12.2006, p. 247.
[5] OJ C 292 E, 1.12.2006, p. 109.
[6] OJ C 158, 26.6.1989, p. 400.
[7] OJ C 205, 25.7.1994, p. 518.
[8] OJ C 140 E, 13.6.2002, p. 538.
[9] OJ C 76 E, 25.3.2004, p. 95.

Wednesday 8 June 2011

— having regard to Rule 48 of its Rules of Procedure,

— having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0164/2011),

A. whereas the initiative on European contract law, which seeks to address Single Market problems created, inter alia, by divergent bodies of contract law, has been under discussion for many years,

B. whereas, in the wake of the global financial crisis, it appears more important than ever to provide a coherent European contract law regime in order to realise the full potential of the internal market, and thus help meet our Europe 2020 goals,

C. whereas the Single Market remains fragmented, owing to many factors, including failure to implement existing Single Market legislation,

D. whereas greater study is needed to further understand why the internal market remains fragmented and how best to address these problems, including how to ensure implementation of existing legislation,

E. whereas in the above-mentioned Green Paper the Commission sets out a range of options for a European Contract Law instrument which could help develop entrepreneurship and strengthen public confidence in the Single Market,

F. whereas the Expert Group set up to assist the Commission in preparing a proposal for a Common Frame of Reference (CFR) has started work, together with a stakeholders' round table,

G. whereas the divergence of contract law at national level does not constitute the only obstacle for SMEs and consumers in respect of cross border activities since they face other problems including language barriers, different taxation systems, the question of the reliability of online traders, limited access to broadband, digital literacy, security problems, demographic composition of the population of individual Member States; privacy concerns; complaint handling, and intellectual property rights etc.,

H. whereas, according to a Commission survey of 2008, three-quarters of retailers sell only domestically, and cross-border selling often takes place in a few Member States only ([1]),

I. whereas it is necessary to distinguish between conventional cross-border transactions and e-commerce, where specific problems exist and the transaction costs are different; whereas it is also necessary for the purposes of future impact assessments, to carefully and precisely define how transaction costs are made up,

J. whereas it is clear that the application of foreign (consumer) law to cross-border transactions under the Rome-I Regulation ([2]) has been seen to entail considerable transaction costs for businesses, in particular for SMEs, which, in the UK alone have been estimated at EUR15 000 per business and per Member State ([3]),

([1]) Eurobarometer 224, 2008, p. 4.
([2]) OJ L 177, 4.7.2008, p. 6.
([3]) UK Federation of Small Businesses, Position paper on Rome I (2007).

K. whereas more information is required concerning the transaction costs resulting from the application of Article 6(2) and Article 4(1), point (a) of the Rome-I Regulation, bearing in mind that Rome I has only been applied since December 2009,

L. whereas such transaction costs are perceived as being one of the important obstacles to cross-border trade, as confirmed by 50 % of European retailers already trading cross-border interviewed in 2011 who stated that harmonisation of the applicable laws in cross border transactions across the EU would increase their level of cross-border sales, and 41 % said that their sales would not increase; whereas, in comparison, among retailers not selling across border, 60 % said that their level of cross-border sales would not increase in a more harmonised regulatory environment, and 25 % said it would increase ([1]),

M. whereas some of the most evident impediments that consumers and SMEs face with regard to the Single Market are complexity in contractual relations, unfair terms and conditions of contracts, inadequate and insufficient information and inefficient and time-consuming procedure,

N. whereas it is of paramount importance that any initiative from the EU will have to answer real needs and concerns of both businesses and consumers; whereas these concerns also extend to legal/linguistic problems (provisions of standard terms and conditions for small businesses in all EU languages) and the difficulties in enforcing contracts across borders (provisions of autonomous EU measures in the field of procedural law),

O. whereas a Commission study estimated that the online market remains fragmented: in a survey, 61 % of 10 964 test cross-border orders failed, and that cross-border shopping appears to increase consumers' chances of finding a cheaper offer ([2]) and of finding products not available domestically online ([3]), whereas the figure of 61 % seems to be very high and to warrant further study, verification and assessment,

P. whereas gradual harmonisation does not effectively overcome obstacles in the internal market resulting from diverging national contract laws, any measures in this field must be based on clear evidence that such an initiative would make a real difference which cannot be achieved through other less intrusive means,

Q. whereas a common European Contract Law would benefit consumers and in particular contribute to more and easily accessible cross-border trade within the internal market,

R. whereas the negotiations on the Consumer Rights Directive ([4]) illustrated just how difficult it is to harmonise consumer law applied to contracts without undermining the common commitment to a high level of consumer protection in Europe and what limits this imposes on the process,

S. whereas any steps taken in the area of European contract law must take into account mandatory national rules, and must be coherent with the expected Consumer Rights Directive, which will have a significant impact on the content and on the level of harmonisation of a possible future instrument in the field of European Contract Law; whereas it would be necessary to constantly and carefully monitor its implementation in the next months in order to define which should be the scope of the optional instrument (OI),

([1]) lash Eurobarometer 300, 2011 http://ec.europa.eu/consumers/strategy/docs/retailers_eurobarometer_2011_en.pdf
([2]) COM(2009)0557, p. 3.
([3]) Ibid, p. 5.
([4]) COM(2008)0614.

Wednesday 8 June 2011

T. whereas any end product in the field of European Contract Law must be realistic, feasible, proportionate and properly thought through prior to being amended, if necessary, and formally adopted by the European co-legislators,

1. Supports action to address the range of barriers faced by those who wish to enter into cross-border transactions in the Internal Market and considers that, along with other measures, the European Contract Law project could be useful for realising the full potential of the internal market, entailing substantial economic and employment benefits;

2. Welcomes the open debate on the Green Paper and urges the relevant Commission departments to carry out a thorough analysis of the outcome of this consultation process;

3. Highlights the economic importance of SMEs and craft manufacturing businesses in the European economy; insists, therefore, on the need to ensure that the 'think small first' principle promoted by the 'Small Business Act' is well implemented and considered as a priority in the debate over EU initiatives related to contract law;

Legal nature of the instrument of European Contract Law

4. Welcomes the recent publication of the results of the feasibility study carried out by the Expert Group on European contract law and the Commission's commitment to continue consultation on the scope and the content of the OI, and in this vein urges the Commission to continue a genuinely open and transparent discussion with all stakeholders as part of its decision-making process as to how the feasibility study should be used;

5. Acknowledges the need for further progress in the area of contract law and favours, amongst other options, the option 4 of setting up an optional instrument (OI) by means of a regulation; after an impact assessment and clarification of the legal basis; believes that such an OI could be complemented by a 'toolbox' that could be endorsed by means of an interinstitutional agreement; calls for the creation of 'European standard contract models', translated into all EU languages, linked to an ADR system carried out online, which would have the advantage of being a cost-effective and simpler solution for both contractual parties and the Commission;

6. Believes that only by using the legal form of a Regulation can the necessary clarity and legal certainty be provided;

7. Stresses that a Regulation setting up an OI of European Contract Law would improve the functioning of the internal market because of the direct effect, with benefits for businesses (reduction in costs as a result of obviating the need for conflict-of-law rules), consumers (legal certainty, confidence, high level of consumer protection) and Member States' judicial systems (no longer necessary to examine foreign laws);

8. Welcomes the fact that the chosen option takes appropriate account of the subsidiarity principle and is without prejudice to the legislative powers of the Member States in the area of contract and civil law;

9. Believes that a 'toolbox' could possibly be put into practice step-by-step, starting as a Commission tool, and being converted, once agreed between the institutions, into a tool for the Union legislator; points out that a 'toolbox' would provide the necessary legal backdrop and underpinning against which an OI and standard terms and conditions could operate and should be based on an assessment of the national mandatory rules of consumer protection within but also outside the existing consumer law acquis;

10. Takes the view that by complementing an OI with a 'toolbox', clearer information will be available on that EU instrument, helping the parties concerned to better understand their rights and to make informed choices when entering into contracts on the basis of that system, and that the legal framework will be more comprehensible and not overburdensome;

11. Believes that all parties, be it in B2B or B2C transactions, should be free to choose or not to choose the OI as an alternative to national or international law (opt-in) and therefore calls on the Commission to clarify the intended relationship of an OI with the Rome -I-Regulation and international conventions including the United Nations Convention on Contracts for the International Sale of Goods (CISG); considers however that further attention is required for ensuring that the OI offers protection to consumers and small businesses given their position as the weaker commercial partner and that any confusion is avoided when making a choice of law; therefore calls on the Commission to complement the OI with the additional information which will explain in a clear, precise and comprehensible language which are the consumer's rights and that they will not be compromised, in order to increase their confidence in the OI and to put them in a position to make an informed choice as to whether they wish to conclude a contract on this alternative basis;

12. Considers that an OI would generate European added value, in particular by ensuring legal certainty through the jurisdiction of the Court of Justice, providing at a stroke the potential to surmount both legal and linguistic barriers, as an OI would naturally be available in all EU languages; emphasises that, in order to create a better understanding of the way in which European institutions function, European citizens should have the opportunity to have all kinds of information connected with the optional instrument translated via accessible, easy-to-use online translation tools, so that they can read the desired information in their own language;

13. Sees a possible practical advantage in the flexible and voluntary nature of an opt-in instrument; however calls on the Commission to clarify the advantages of such an instrument for both consumers and businesses and to better clarify which contracting party will have the choice between the OI and the "normally" applicable law and how the Commission intends to reduce transaction costs; calls on the Commission to include in any proposal for an OI a mechanism for regular monitoring and review, with the close involvement of all parties concerned in order to ensure that the OI keeps up with the existing acquis in contract law, particularly Rome I, with market needs and with legal and economic developments;

Scope of application of the instrument

14. Believes that both business-to-business and business-to-consumer contracts should be covered; emphasises that the OI must offer a very high level of consumer protection, in order to compensate consumers for the protection that they would normally enjoy under their national law; wishes for further explanation on how this could be achieved; believes therefore the level of consumer protection should be higher than the minimum protection provided by the Consumer Acquis and cover national mandatory rules as satisfactory solutions must be found to problems of private international law; considers that this high level of consumer protection is also in the interests of businesses as they will only be able to reap the benefits of the OI if consumers of all Member States are confident that choosing the OI will not deprive them of protection;

15. Points out that the benefits of a uniform European Contract Law must be communicated in a positive way to citizens, if it is to enjoy political legitimacy and support;

16. Notes that the contract law provisions governing B2B and B2C contracts respectively should be framed differently, out of respect for the shared traditions of national legal systems and in order to place special emphasis on the protection of the weaker contractual party, namely consumers;

Wednesday 8 June 2011

17. Points out that essential components of consumer law applied to contracts are already spread across various sets of European rules, and that important parts of the consumer acquis are likely to be consolidated in the Consumer Rights Directive (CRD); points out that the aforementioned Directive would provide a uniform body of law which consumers and businesses can readily identify; therefore, stresses the importance of waiting until the outcome of the CRD negotiations before any final decision is made;

18. Further believes, taking into account the special nature of the different contracts, especially B2C and B2B contracts, leading national and international principles of contract law, and the fundamental principle of a high degree of consumer protection, that existing branch practices and the principle of contractual freedom have to be preserved regarding B2B contracts;

19. Takes the view that an optional common European Contract Law could make the internal market more efficient without affecting Member States' national systems of contract law;

20. Believes that the OI should be available as an opt-in in cross-border situations in the first instance and that guarantees are needed that Member States will be able to prevent any misuse of the OI in non-genuine cross-border scenarios; further considers that the effects of a domestic opt-in on national bodies of contract law merit specific analysis;

21. Acknowledges that e-commerce or distance-selling contracts account for an important share of cross-border transactions; believes, that, whilst an OI should not be limited to these types of transaction, there could be merit in introducing other limits when applying the OI in the first instance, and until sufficient experience of its application has been gathered;

22. Emphasises the particular importance of facilitating e-commerce in the EU, given that this sector is underdeveloped, and considers it necessary to assess whether differences between national contract law systems could represent an obstacle to the development of that sector, which has rightly been identified by businesses and consumers as a potential motor for future growth;

23. Believes that the scope of a 'toolbox' could be quite broad, whereas any OI should be limited to the core contractual law issues; believes that a 'toolbox' should remain coherent with the OI and include among its 'tools' concepts from across the diverse range of legal traditions within the EU, including rules derived from, inter alia, the academic Draft Common Frame of Reference (DCFR) [1] and the 'Principes contractuels communs' and 'Terminologie contractuelle commune' [2]; and that its recommendations on consumer contract law should be based on a genuinely high level of protection;

24. Calls on the Commission and the Expert Group to clarify what is to be considered as 'core contractual law issues';

25. Sees benefits in an OI containing specific provisions for the most frequent types of contract, in particular for the sale of goods and provision of services; reiterates its earlier call to include insurance contracts within the scope of the OI, believing that such an instrument could be particularly useful for small-scale insurance contracts; stresses that, in the field of insurance contract law, preliminary work has already been performed with the Principles of European Insurance Contract Law (PEICL), which should be integrated into a body of European contract law and should be revised and pursued further; however, urges caution with regards to the inclusion of financial services from any contract law instrument proposed at this stage and calls on the Commission to establish a dedicated intra-service expert group for any future

[1] Von Bar, Clive, Schulte-Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), 2008.

[2] B. Fauvarque-Cosson, D. Mazeaud (dir.), collection 'Droit privé comparé et européen', Volumes 6 and 7, 2008.

preparatory work on financial services to ensure that any future instrument takes into account the possible specific characteristics of the financial services sector and any related initiatives led by other parts of the Commission, and to involve the European Parliament at an early stage;

26. Points out that some specific issues in connection with which an OI might be beneficial have been raised, such as digital rights and beneficial ownership; considers that, on the other hand, there might be a need to exclude certain types of complex public law contracts; calls for the Expert Group to explore the possibility to include contracts in the field of authors' rights with the aim of improving the position of authors who are often the weaker party in the contractual relation;

27. Believes that the OI should be coherent with the existing acquis in contract law;

28. Recalls that there are still many questions to be answered and many problems to be resolved regarding a European Contract Law; calls on the Commission to take into account case law, international conventions on sales of good such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the impact of the Consumer Rights Directive; emphasises the importance of harmonising contract law within the EU while taking into account relevant national regulations providing high-level protection in B2C contracts;

Application of a European contract law instrument in practice

29. Considers that the consumers and SMEs must be granted real benefits from an OI, and that it should be drawn up in a simple, clear and balanced manner which makes it simple and attractive to use for all parties;

30. Believes that whilst an OI will have the effect of providing a single body of law, there will still be a need to seek provision of standard terms and conditions of trade which can be produced in a simple and comprehensible form, available off-the-shelf for businesses, and in particular SMEs and with some form of endorsement to ensure consumer confidence; notes that standard contract terms and conditions based upon an OI would offer greater legal certainty than EU-wide standard terms based upon national laws which would increase the possibility for differing national interpretations;

31. Recalls that further work on cross-border alternative dispute resolution (ADR), which is speedy and cost-effective in particular for SMEs and consumers, remains a priority, but emphasises that, if the parties use one body of law provided by an OI, ADR will be further facilitated; calls on the Commission to consider synergies when putting forward a proposal; notes that the UNCITRAL Working Group on Online Dispute Resolution has also shown interest in an OI as a means to facilitate ADR [1] and therefore recommends that the Commission follows developments within the other international bodies;

32. Suggests that improvements to the functioning and effectiveness of cross-border redress systems could be facilitated by a direct linkage between the OI and the European Order for Payment Procedure and the European Small Claims Procedure; takes the view that an electronic letter before action should be created to assist companies in protecting their rights, in particular in the field of intellectual property and the European Small Claims procedure;

[1] United Nations Commission on International Trade Law Report of Working Group III (Online Dispute Resolution)on the work of its twenty-second session (Vienna, 13-17 December 2010), p. 8, 10.

33. Notes concerns that consumers seldom feel they have a choice with regard to contract terms and are confronted with a 'take it or leave it' situation; strongly believes that complementing an OI with a 'toolbox' and a set of standard terms and conditions, translated into all languages, will encourage new entrants to markets across the European Union, thereby strengthening competition, and broadening the overall choice available to consumers;

34. Emphasises that although the supreme test of the effectiveness of any final instrument is the internal market itself, it must be established beforehand that the initiative represents an added value to consumers and will not complicate cross-border transactions for both consumers and businesses; emphasises the need to include rules on the provision of appropriate information concerning its existence and the way it works to all potential interested parties and stakeholders (including national courts);

35. Notes that, in connection with the goal of a European Contract Law, the importance of a functioning European jurisdiction in civil matters must not be overlooked;

36. Urges the Commission to carry out, in collaboration with Member States, quality testing and checks to ascertain whether the proposed instruments of European Contract Law are user-friendly, fully integrating citizens' concerns, providing added value for consumers and business, strengthening the Single Market and facilitating cross-border commerce;

Stakeholder involvement, impact assessment

37. Emphasises the vital importance of involving stakeholders from throughout the Union and from different sectors of activity, including legal practitioners and recalls the Commission to undertake a wide and transparent consultation with all the stakeholders before it takes a decision based on the results of the Expert Group;

38. Appreciates that both expert and stakeholder groups already have a varied geographical and sectoral background; believes that stakeholder contributions will become even more important once the consultation phase is over and if a legislative procedure as such, which would need to be as inclusive and transparent as possible, is launched;

39. Recalls, in accordance with Better Lawmaking principles, the need for a comprehensive and broad impact assessment, analysing different policy options, including that of not taking Union action, and focusing on practical issues,such as the potential consequences for SMEs and consumers, possible effects on unfair competition in the Internal Market and pinpointing the impact of each of those solutions on both the Community acquisand on national legal systems;

40. Considers, pending the completion of such an impact assessment, that, while EU-level harmonisation of contract law practices could be an efficient means of ensuring convergence and a more level playing field, nonetheless, given the challenges of harmonising the legal systems not only of Member States but also of regions with legislative competences on this matter, an OI could be more feasible as long as it is ensured that it implies added value for both consumers and businesses;

41. Insists that Parliament should be fully consulted and involved in the framework of the ordinary legislative procedure with regard to any future OI to be submitted by the European Commission and that any OI proposed be subject to scrutiny and amendment under that procedure;

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42. Instructs its President to forward this resolution to the Council and the Commission.