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# CCBE RESPONSE TO THE EUROPEAN CONTRACT LAW ACTION PLAN
**(COM(2003) 68 final, 12.2.2003)**

## 1. INTRODUCTION

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 500,000 European lawyers through its member bars and law societies. In addition to membership from EU bars, it has also observer representatives from a further 13 European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

Following the Communication by the European Commission on possible harmonisation of European contract law in July 2001, and the ensuing public consultation which took place last year, the Commission issued on 12 February 2003 an Action Plan setting out its proposed next steps in this area.

This paper is the response of the CCBE to the latest proposals, exploring some of the issues raised by the Action Plan.

The CCBE is not yet in a position to address detailed comments on the proposals, because harmonisation of law is a difficult issue for our member bars, given their very different legal systems and (in this case) different national contract laws. Nevertheless, we are beginning to develop our views, and this response represents our initial opinions. We hope that in due course we will be in a position to give a more comprehensive response to the range of harmonisation of law proposals that are emerging at the European level.

Our remarks are divided into two parts. First, we comment generally on the procedure used by the Commission in relation to harmonisation of law and procedure in the EU. Second, we comment on some of the specific questions raised by the Commission in its document regarding the optional instrument.

## 2. PROCEDURE FOR DEALING WITH HARMONISATION PROPOSALS

The CCBE would like to make the following recommendation on the way actions are formulated in general in EC consultations on harmonisation of law and legal procedure,

and in particular within the Action Plan. We believe that there is a need to draw together the different initiatives which contain overlapping areas, e.g. the Green papers on the European payment order, small claims and the Rome Convention, any further harmonisation of consumer protection, as well as this consultation to which we are replying, to ensure consistency in how these issues are dealt with overall. The debate on harmonisation of European contract law generally should be raised to a higher and more political level, including both legal practitioners and business experts, and should not be dealt with in isolation. It should be part of the overall approach to harmonising law and legal procedure within the EU. Otherwise, there is a danger that different proposals will be dealt with according to different, and maybe conflicting, principles.

The CCBE suggests that the Commission set up a high level group of experts, comparable to the one established recently in relation to company law under Jaap Winter, which would develop a global vision of the future of the harmonisation of law and legal procedures across the Member States, of which contract law would form a consistent and appropriate part. We believe that this is the only way to achieve a coherent European Contract Law in the context of an overall policy of harmonisation of law and legal procedures.

## 3. THE OPTIONAL INSTRUMENT

The Commission is seeking views on the opportuneness, content, form and legal basis of non-sector-specific measures, such as an optional instrument.

### a. Opportuneness

Whatever the arguments for and against harmonisation, they are all based on notions of the difficulty of the functioning of the internal market or increased transaction costs. It is clear that there needs to be evidential justification for any changes; in particular the economics of the situation need to be reviewed before any firm views can be formed. However, the Action Plan does not address some of the arguments against taking any action in this area, such as the lack of clear evidence that the current system of choice of national laws impedes cross-border transactions and that other factors, such as language, culture and distance, have a detrimental effect. It also does not propose any economic analysis of the cost-benefit of establishing a new body of rules (including costs in term of judicial infrastructure and legal education for lawyers to apply and interpret the new rules) as against the level of transaction costs caused by the current system of different national laws. In the CCBE's view it is still necessary to carry out an economic assessment of the need for and impact of new rules, even if the instrument is optional.

### b. Competence

Whilst arguments of proportionality and subsidiarity were raised in relation to proposals to introduce a mandatory European contract code, the same arguments could apply in relation to an optional code without clear evidence of problems that can only be remedied by such Community action.

On 25 March 2003, the CCBE President, Helge Jakob Kolrud, in a speech to the Legal Affairs Committee of the European Parliament on two green papers which also suggest a harmonisation of law and legal procedure (Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation and the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation) outlined the challenge facing European lawyers when asked to respond to proposals to harmonise European law, namely balancing the needs of harmonisation and subsidiarity. Whilst he recognised that a degree of harmonisation in law and procedure was required to achieve a single market (and that the absence of such harmonisation could lead to forum shopping and unequal treatment of consumers in different Member States), nevertheless he stated that the law and legal procedure were not such easy candidates for total harmonisation as, say, goods, because the law is part of the tradition and cultural inheritance of a country. Subsidiarity was vital to preserve such traditions. He proposed that the solution to the balancing act between harmonisation and subsidiarity in the law was to regard subsidiarity as the presumption, and to harmonise the law only where subsidiarity would cause injustice. He stated that, by injustice, he meant examples like undue expense or delay in obtaining a remedy in one Member State as compared to another. This statement of principle by the CCBE President is another guideline the CCBE would very much like to see applied in the current process of harmonisation of European contract law.

### c. Form and content of an instrument

Regarding the form the instrument should take, the Action Plan does contain some guidelines, such as the fact that freedom of contract should be a guiding principle of the instrument which should "*apply in parallel with, rather than instead of national contract laws".*

The CCBE agrees with this specific and most important point. Therefore, any optional instrument should be "opt-in" to be consistent with the principles of freedom of contract and subsidiarity.

An area of uncertainty if the instrument were to be opt-out is the inter-relationship with the Vienna Convention on the International Sale of Goods (to which the UK, Ireland and Portugal are not parties, but which has been adopted by most other EU countries and

which applies to international supply contracts between commercial parties on an opt-out basis in those countries already).

The CCBE shares the view of some who question the need to draw up an optional instrument at all because this Convention, which covers the same area, exists, although there is some criticism of the Convention in not covering e.g. rules on contract validity.

How the instrument could apply or be chosen by the parties is an issue in relation to choice of law rules, and therefore relevant to the current consultation on the modernisation and possible conversion of the Rome Convention into a Community instrument. At present, the Convention appears only to allow the choice of a national law to govern a contract, and so it would probably need amendment to allow an optional Community instrument to be chosen as well. That is why such a high level group of experts, as described before, would be most useful to avoid any inconsistency in the overall process of harmonisation.

The CCBE considers that deciding the content of the optional instrument should proceed on the basis of a focus on problems with the existing *acquis*, e.g. common definitions or principles which remedy problems due to incoherence or inconsistency in current EC legislation, rather than a wide-ranging code covering all areas of contract law.

The CCBE believes that execution and enforcement of contracts should also be specifically focused on.

## 4. CONCLUSION

The CCBE will continue to participate in the debate, and is grateful that the Commission has invited European lawyers to join the workshop due to take place on June 16 2003.

While it is difficult to reach detailed conclusions at this stage of the debate, the CCBE would recommend the following:

a) The creation of a unique top level group of experts to ensure a global vision of the whole area of harmonisation of law and procedure in the EU, including contract law, to avoid incoherence and inconsistency in the present and future in relation to the body of European law.

b) Before any decision regarding an optional instrument is made, the undertaking of an economic analysis to assess current cross-border transaction costs, and also the costs in moving to a fully harmonised system.

c) An "opt-in" basis for any optional instrument to be consistent with the principles of freedom of contract and subsidiarity.

d) If an optional instrument is introduced, it should be one which would focus:

- on the one hand, on problems with the existing *acquis,* e.g. common definitions or principles which remedy problems due to incoherence or inconsistency in current EC legislation, rather than a wide-ranging code covering all areas of contract law,

- and on the other hand, also on execution and enforcement of contracts.

16 May 2003.