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## CCBE SUBMISSION

# GREEN PAPER FROM THE COMMISSION ON POLICY OPTIONS FOR PROGRESS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES

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**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

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## CCBE Submission

### Green paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE has been actively following political and legislative developments in European contract law and has contributed to the debate through various position papers which support initiatives to promote a European contract law. The Draft Common Frame of Reference (DCFR) is one of the most interesting and challenging developments in this area and has been at the centre of the most recent work by the CCBE's European Contract Law working group. The CCBE hereby expresses its continued willingness and readiness to further participate in any debate concerning the shape of European Contract Law.

So far, the following work has been undertaken by the CCBE:

- CCBE Resolution on European Contract Law in November 2006: [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/en\\_contract\\_law\\_ccbe1\\_118371753\\_6.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_contract_law_ccbe1_118371753_6.pdf)
- CCBE Position Paper on certain principles of European Contract Law (Freedom of contract, Standard terms of contract, Notion of professional and consumer and Remedies and damages): [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_Position\\_Pap1\\_1205761\\_121.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1205761_121.pdf)
- CCBE Position paper on the Draft Consumer Rights Directive: [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_position\\_on\\_1\\_1260182\\_031.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_position_on_1_1260182_031.pdf).
- CCBE Position Paper on the Draft Common Frame of Reference: [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_CCBE\\_Position\\_Pap1\\_1265878\\_409.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_Position_Pap1_1265878_409.pdf)
- CCBE position on the services and mandate of the Draft Common Frame of Reference with particular reference to service contracts between lawyers and clients: [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_090910\\_CCBE\\_posit1\\_128496\\_7233.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_090910_CCBE_posit1_128496_7233.pdf).

After careful consideration of the various options put forward by the European Commission in the Green Paper issued on 1 July 2010<sup>1</sup>, the CCBE makes the following recommendations:

#### The legal nature of the instrument of European Contract law

1. As to the options under Question 4.1. (What should be the legal nature of the instrument of European Contract law?), the CCBE would evidently welcome the immediate publication on the Commission's website of the results of the Expert group. The majority of the national delegations<sup>2</sup> is in favour of further steps, namely the following.

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<sup>1</sup> COM(2010) 348 final.

<sup>2</sup> The UK delegation does not support the CCBE position. Due to differences between the substantive contract laws, the scale of opposition varies within the separate UK jurisdictions. Responses of the UK delegation:

- The Bar Council of England and Wales: <http://www.barcouncil.org.uk/aboutthebarcouncil/BrusselsOffice/> and <http://www.barcouncil.org.uk/consultations/>
  - The Law Society of England and Wales: <http://international.lawsociety.org.uk/node/10660>.
  - The Law Society of Scotland: <http://www.lawscot.co.uk/forthepublic/consultation-responses/2011/obligations>.
- The German delegation's response to the Commission's consultation can be seen at:
- Deutscher Anwaltverein: <http://www.anwaltverein.de/downloads/Stellungnahmen-11/SN-3-2011deutsch-und-englisch.pdf>.
  - Bundesrechtsanwaltskammer: <http://brak.de/seiten/11.php>.

2. The appropriate instrument for progress towards a European contract law in the current circumstances is a Regulation setting up an optional instrument of European Contract law ("Option 4"). The CCBE agrees such an optional instrument should (only) be an "opt-in" instrument, requiring a choice of the instrument by all the parties to the contract. It follows from this principle that no offeror can be compelled to offer contracting parties a choice between this instrument and internal law.
3. The instrument as the Green paper envisages it (see 4.1. option 4, 2nd alinea) would not change the conflict of law rules, but be conceived as an optional regime inserted into the national law of each Member State. The CCBE believes this is an appropriate solution, but requiring careful attention to the substantive scope of the instrument, i.e. the matters regulated - as every limitation in this respect will lead to the application of the otherwise applicable and to a large extent unharmonised national law -, and to the way the scope of the rules in the optional instrument is formulated. The purpose of such an instrument will not be achieved if it is not clear which of the otherwise applicable rules of national law are excluded by opting into the instrument.

### The scope of the instrument *ratione personae*

4. As to the scope of the instrument *ratione personae* (Question 4.2.1), given the assumption that it will be an opt-in instrument, the CCBE favours making this option available irrespective of the qualification of the parties as business or consumer or private party. For reasons of coherence and legal certainty, the CCBE prefers a single instrument that would be available for business to business contracts and business to consumer contracts alike. This evidently implies that those rules of contract law that are required for the protection of consumers are part of the instrument. The rules of the instrument should basically be non-mandatory in B2B relations<sup>3</sup>. The protection of consumers will require in the first place rules indicating clearly which of the generally applicable rules are mandatory in B2C, and will further require additional rules specifically for consumer contracts. Well-structured subdivisions of the instrument could help to bring clarity in this respect.

The CCBE equally agrees with the position that for such an instrument, a manifestly high level of consumer protection is appropriate (see 4.1. option 4, 4th alinea).

### The territorial scope of the instrument

5. As to the territorial scope of the instrument (Question 4.2.2.), the CCBE is of the opinion that parties should not be denied the possibility to choose the optional instrument, also in domestic transactions<sup>4</sup>. A discrimination against domestic contracts would be difficult to justify. Moreover, for certain types of transactions, it is becoming increasingly difficult to distinguish domestic transactions from cross-border transactions (especially in e-commerce). Limiting the application

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The further comments by the German delegation contained in the CCBE text below should be read in conjunction with, and without prejudice to, the separate German position papers.

The French delegation's response to the Commission's consultation can be seen at <http://www.dbfbruxelles.eu/pdf/ReponseLivrevert2.pdf>. The further comments by the French delegation contained in the CCBE text below should be read in conjunction with, and without prejudice to, the separate French position paper.

The Belgian delegation's response to the Commission's consultation can be seen at:

- Orde van Vlaamse Balies: <http://www.advocaat.be/UserFiles/Positions/Groenboek%20-%20Standpunt%20OV%20-%202011%2001%2028.pdf>.
- Ordre des barreaux francophones et germanophone : <http://www.avocat.be/communication/communiqués-de-presse.fr.70.html>.

The further comments by the Belgian delegation contained in the CCBE text below should be read in conjunction with, and without prejudice to, the separate Belgian position papers.

<sup>3</sup> The Austrian delegation states that restrictions to the principle of freedom of contract in B2B relations are acceptable only for general terms and conditions which do not comply with the standard of grossly unfairness.

The Greek delegation believes that some restrictions should be applied in favour of small businesses.

<sup>4</sup> The Austrian delegation believes the instrument should only be available for cross-border transactions. Other delegations express the view that where this solution would be chosen, a clear and workable definition of the scope of application (cross-border) is necessary.

to cross-border transactions could lead to artificially adding a foreign element to make the transaction a cross-border transaction.

### The material scope of the instrument

6. As to the material scope of the instrument (Question 4.3), two different questions arise: the transactions covered and the matters regulated.

#### *Types of transactions covered*

- a) An optional instrument only makes sense if it contains the specific provisions required for at least one type of contract<sup>5</sup>. The green paper mentions sale of goods, different types of service contracts, lease of movables, insurance contracts. The CCBE considers it wise not to start immediately with a full range of contracts; it is appropriate to envisage an instrument that for the moment would only be available for a single or a few types of contracts, such as sale of goods and/or insurance contracts. Priority should be given to those contracts which are either already very frequently concluded cross-border or where the absence of a common instrument prevents frequent cross-border transactions.

If sale of goods is chosen, instalment sales should be included and it might thus be appropriate to take into consideration that sales contracts are often associated with credit contracts, lease contracts (hire-purchase) and/or personal suretyship contracts<sup>6</sup>. If an instrument would be available for sale of goods, it would also be appropriate to make it available for contracts for the purchase of digital rights (including software, music etc.) as they are at least sales-like<sup>7</sup>. Some delegations have suggested to include also some other types of contracts.

#### *Matters regulated*

- b) Such an instrument should certainly cover the topics mentioned in the green paper under 4.3.1. (we assume that the topics of conditions and time periods are also covered). More generally, in the light of the purpose of an optional instrument, it is important to have a full set of rules, dealing also with less important aspects of contract law, and this should have priority over broadening the scope of application (to other kinds of contracts or even non-contractual relationships). Therefore, it is totally unrealistic and even damaging to try to limit the number of articles of the optional instrument to 150 articles.
- c) As to the related topics mentioned under 4.3.2., the CCBE is of the opinion that questions of property law (including proprietary security) should not be dealt with in an optional instrument, as property law deals with the existence and/or effectiveness of rights in relation to third parties and even the world at large. A regulation containing uniform conflict of law rules on matters of property law, including proprietary security rights and their effects in insolvency<sup>8</sup>, is probably needed. The further development of the internal market does require harmonisation of matters such as the effect of reservation of title, but this can only be solved by uniform rules and not be done in an optional instrument.
- d) As to the topics of restitution and non-contractual liability (also mentioned under 4.3.2.), the CCBE is of the opinion that they should *not* be covered for the time being and that it is more appropriate to develop an optional instrument limited to contractual relationships, at least in the short term<sup>9</sup>.

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<sup>5</sup> If it contains merely general contract law, the otherwise applicable national law containing rules for specific contracts will be applied and set the rules of the instrument aside in different degrees in different jurisdictions.

<sup>6</sup> The Austrian delegation believes an extension to such contracts is to be considered only in a next step in the future.

<sup>7</sup> Irrespective of whether this is qualified as a sale *sensu stricto* or not.

<sup>8</sup> Some of these rules are already present in the Insolvency Regulation (1346/2000).

<sup>9</sup> The Austrian delegation believes an optional instrument is not fit for restitution and non-contractual liability.

However, some questions on the borderline of contract law on the one hand and restitution or non-contractual liability on the other hand may have to be settled in order to give the optional instrument a sufficiently uniform scope in all Member States' jurisdictions.

First of all, it is appropriate that the instrument covers the rules dealing with the effects of a) withdrawal from a contract and b) termination of the contractual relationship, including the restitution of what has been performed under the contract, and does not leave these questions to the otherwise applicable national law. The same is probably true for the effects of avoidance of a contract, including restitution (unravelling of avoided contracts).

Secondly, the instrument will have very different effects in the various Member States if in some Member States the otherwise applicable national tort law would in addition remain applicable between the parties ("cumul") and in other Member States not ("non-cumul"). Without taking a position on this, the CCBE points out that a solution may e.g. consist of distinguishing, in light of the further applicability of national law as to damage caused by non-performance of contractual obligations, of bodily harm on the one hand and material and economic damage on the other hand.

A further example of a borderline topic is the topic of personal suretyship: disharmony could be caused if the optional instrument would deal with the (external and internal) effects of plurality of debtors in general, but not be applicable where one debtor is merely a subsidiary debtor (personal surety).

7. As to the other options mentioned in the green paper, especially options 5 to 7, the CCBE is of the opinion that it would be wiser to test the optional instrument first.

The optional instrument could, if it contains a sufficient number of topics, also provide the tools for at least part of the "toolbox" for the European legislator (option 2)<sup>10</sup>; this will ensure that the toolbox consists basically of operative model rules and that the terminology (and possibly definitions) used in a toolbox is not self-standing but taken from such rules. If the optional instrument remains restricted to matters of contract law, it would be helpful to develop the toolbox further along the same lines in the domains of non-contractual liability, restitution, and aspects of property law; a lot of the work has already been done in the academic Draft Common Frame of Reference.

As can be deduced from the positions supra, the CCBE prefers an optional instrument introduced by a Regulation over option 3 (Commission recommendation on European Contract Law)<sup>11</sup>. It is not clear which role such a Recommendation could still play where there is such an optional instrument; if the instrument is successful, it will in itself form, to some extent, a recommendation for reform of the law of the Member States in the same direction.

### **The necessity to use the expertise of the legal profession**

8. Finally, it is essential to the success of the project, whatever its future form, that it results in a product that is user-friendly and practical in its application. The CCBE strongly urges the Commission to fully and effectively utilise the expertise of the legal profession, drawing from the various different legal traditions across Europe, in all aspects of this work going forward, including in the process of selecting and refining the parts of the DCFR which may be the basis of any future measure. Business parties will not opt in if the future instrument does not respond to their real needs, and the legal profession may also help to translate these needs.

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<sup>10</sup> The Danish delegation believes a toolbox as the Commission envisages it, would help to improve the content of the legislation, and should therefore be the object of an inter-institutional agreement between the Commission, Parliament and Council, requiring all parties involved to take the content of the "toolbox" into consideration while preparing and adopting new legislative instruments.

<sup>11</sup> The Czech delegation, however, prefers to give priority to such a Recommendation.