



CCBE POSITION PAPER CONCERNING THE FEASIBILITY STUDY CARRIED OUT BY THE EXPERT GROUP ON EUROPEAN CONTRACT LAW

CCBE position paper concerning the feasibility study carried out by the Expert Group on European Contract Law

1. 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.

1.1 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 support¹ 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.

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

- [CCBE Resolution on European Contract Law](#)
- [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)
- [CCBE Position paper on the Draft Consumer Rights Directive](#)
- [CCBE Position Paper on the Draft Common Frame of Reference](#)
- [CCBE position on the services and mandate of the Draft Common Frame of Reference with particular reference to service contracts between lawyers and clients](#)
- [CCBE Submission regarding the Green paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses](#)

2. The majority of the CCBE welcomes the Feasibility Study as being an appropriate basis for an optional instrument, i.e. a 28th regime of Contract Law within the European Community. A minority, however, suggests that further study of the key barriers to cross-border trade would be welcome before any initiative is undertaken.

3. The CCBE also welcomes that the scope of this Study mainly covers sales contracts, as this approach seems to cover the alleged main practical problem areas. This approach is in line with the position papers previously approved by the CCBE. Moreover, the majority of the CCBE believes that the Commission should also consider including all further types of service contracts in the foreseen optional instrument.

4. It is suggested that a positive statement on scope or on how the "optional" mechanism would function, would facilitate any definite answer by the legal professions and would thus enable the CCBE to provide focused comments.

¹ Not unanimous. In particular, the UK delegation has consistently derogated from CCBE positions on this file, with the exception of broad statements that the CCBE is following the EU institutions work in this area, and supports the publication of the work product and its use as a toolbox by the EU legislator.

5. However, the CCBE believes that the time granted by the Commission to submit answers until July 1, 2011 is far too short. There is hardly any reasonable opportunity to properly ascertain all relevant implications of this Study in view of a European Contract Law and to establish a common understanding for a CCBE position. Therefore, the CCBE has decided to restrict this position paper to general observations and appropriate comments only, and to leave it up to its national delegations to comment, if they wish, on the Study independently, especially in view of the 7 questions raised by the Commission.

6. The CCBE sees the following problem areas to be elaborated further in due course in drafting the concept of a European Contract Law:

6.1 The CCBE is of the opinion that the interrelation between the proposed Consumer Rights Directive and the Feasibility Study must fully be taken into account. The possibility that the Consumer Rights Directive may be restricted in scope so as not to cover all four Directives (Sales, Unfair Terms, Doorstep and Distance Selling) does not resolve this issue by itself.

6.2 The CCBE believes that the Feasibility Study is overprotecting the consumer.² However, there are strong arguments pursuant to article 6 Rome-I to increase the level of consumer protection well above the average standards within the EU Member States. Whether this approach also requires that article 81 shall restrict any contract term that has been individually negotiated to the requirements of fairness/unfairness is one of the salient issues to be discussed in detail within the delegations.

6.3 Some CCBE members also consider that the freedom of contract of the business is also too much restricted, thereby referring – among others – to article 87. Other CCBE members, however, argue that the standard of unfairness in article 85 is appropriate. But the question has been left unanswered by the Feasibility Study whether it is appropriate to also apply this (rather rigid standard) to (rather) small business.

6.4 The majority of the CCBE considers that the proposal of the Feasibility Study to establish a no-fault liability (without negligence) for contractual damage claims is a fair approach, as – at first sight – the difference between these two divergent concepts of liability seems to be rather small in practical terms. It is, however, underlined that the main issue in this respect rests with the question, what actually was the standard of care the debtor had promised to fulfil when entering into a contract. In any claims for damages this approach then ties in with the concept of impediment and foreseeability outlined in the Feasibility Study (i.e. article 91), leaving problems of causation aside.

6.5 However, in view of the broad definition of damages including also non-economic loss and future loss, the CCBE is unanimously in favour of a concept of “*split liability*”, under which the extent of compensation depends on the degree of fault; especially non-economic loss should only be compensated if the non-performing party acted gross negligently or intentionally.

6.6 Finally, the CCBE underlines that the envisaged legislative proposal for which the Feasibility Study might be used should be no more than an optional instrument, nor should it lead to more.

² This is not shared by the Greek delegation which finds the level of consumer's protection appropriate.