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REPORT FROM THE COMMISSION

First Annual Progress Report on European Contract Law and the Acquis Review

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(Text with EEA relevance)

1. INTRODUCTION

This report summarises the progress of the European Contract Law (ECL) initiative and the review of the acquis since the Commission's Communication on European Contract Law and the revision of the acquis of 2004 ("the 2004 Communication")¹, and outlines main policy issues.

This report, the first of a series of yearly reports, fulfils the Commission's commitment to the Council² and the European Parliament (EP)³ in the 2004 Communication.

Support for the project was also given by the European Council which adopted in its conclusions of 5 November 2004⁴, as a follow-up to the European Council of Tampere, the so-called The Hague Programme⁵ which also includes the Common Frame of Reference (CFR). Subsequently, the Commission incorporated the CFR in its Action Plan of 10 May 2005⁶ which was also endorsed by the Council.⁷ Furthermore, the EP, in its resolution on the Commission's legislative and work programme for 2005⁸, calls on the Commission to further the ECL project, and emphasises its wish to be fully associated to the project.

2. PREPARATION OF THE CFR

2.1. Research Network

The evaluation of proposals received following a call for proposals in December 2002 led to the selection of a research network that widely covers European legal traditions⁹. The research is organised in work packages proposed by the researchers that will feed in the draft CFR due by end 2007.

¹ COM(2004) 651 final, OJ C 14, 20.1.2005, p. 6.

² OJ C 246, 14.10.2003, p. 1.

³ P5_TA(2003)0355.

⁴ Council Doc. 14292/04, 5.11.2004.

⁵ Annex I to Council Doc. 14292/04.

⁶ COM(2005) 184 final.

⁷ Council Doc. 9778/2/05 REV 2, 10.6.2005.

⁸ P6_TA-PROV (2005) 0053.

⁹ See further: ftp://ftp.cordis.lu/pub/citizens/docs/kickoff_p7_p8_2004.pdf

2.2. CFR-net

2.2.1. Establishment of CFR-net

Following a call for expression of interest¹⁰, the network of stakeholder experts on the CFR (“CFR-net”) was established. Its participation ensures that the research takes into account the practical context in which the rules are to be applied and the needs of users.

The selection of experts was based on 4 criteria: variety of legal traditions, balance of economic interests, expertise and commitment. It was carried out in 2 evaluation rounds, the second of which was targeted at remedying initial shortcomings as regards professional and geographical representation. The network now comprises 177 members, with a broad representation from Member States and professions¹¹. A list of members is publicly available¹².

2.2.2. Work of CFR-net

The CFR-net started its work with a conference on 15 December 2004. Throughout the research process, it will provide input through comments on the research papers, to be discussed in workshops and via a dedicated website.

At this stage, 32 topics have been identified for discussion before the end of 2007. CFR-net members have registered, on the basis of their specialisation, their interest in specific research areas. As the workshops should allow substantial discussions, the size of groups has to be limited. The participants in workshops are selected according to the same criteria as overall stakeholder participation. Those CFR-net members who cannot be admitted to participate in workshops are invited to submit their comments in writing.

Involvement of CFR-net members in the research work is currently organised as follows:

- Before workshops, the research drafts are posted on the dedicated website. Those CFR-net members who have registered an interest in the specific topic are invited to examine the drafts and comment.
- After workshops, CFR-net experts are invited to summarise their contribution to the discussion in writing. The Commission prepares a report which reflects the comments raised by CFR-net members in the workshop, their written contributions and the reactions of researchers. The reports specifically identify policy issues, in particular those relevant to the consumer contract law acquis, as well as horizontal questions.
- The researchers have 6 months to react to the CFR-net comments summarized in the Commission report, by taking them on board in their revised drafts, or, in case of disagreement, by explaining the reasons.

Since March 2005, the following workshops have been held: Services contracts (11 March); Franchise, Agency, Distribution (16 March); Personal Security Rights (19 April); Benevolent

¹⁰ OJ S 148, 31.7.2004.

¹¹ See Annex.

¹² http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/common_frame_ref_en.htm

Intervention (29 April); Unjust Enrichment (20 May); Notion and Functions of Contract (7 June) and Notion of Consumer and Professional (21 June).

2.3. Member states expert network

The network of Member States experts on the CFR has been established following nominations from Member States. A list of members is publicly available¹³. The network has taken up its work with a first workshop on 3 December 2004¹⁴. The second workshop on 31 May 2005 was dedicated to a review of procedural and substantive issues that had arisen from work on the CFR¹⁵.

2.4. Website

The Commission established a dedicated website to which CFR-net members, Member States experts and the EP have access. All relevant documents, e.g. researchers' drafts, CFR-net comments, Commission workshop reports, will be posted on it throughout the CFR-process.

2.5. European Discussion Forum

The first European Discussion Forum, a forum which, according to the 2004 Communication, was aimed at bringing together periodically all those contributing at political and technical level to the development of the CFR, in particular members of the CFR-net and Member State experts, was scheduled on 7/8 July 2005 in London, co-hosted with the UK presidency. This conference had to be cancelled due to the terrorist attacks in London. It is now scheduled for 26 September 2005. The next European Discussion Forum, co-hosted with the Austrian Presidency, is foreseen for 25/26 May 2006 in Vienna.

2.6. Issues arising from the first phase of CFR preparation

2.6.1. CFR-net and review of the acquis

As indicated in the 2004 Communication, the relevant findings (e.g. definitions, model rules) in the CFR preparation will be tested in the field of consumer protection, in the context of the review of the consumer acquis. The acquis review will in turn feed into the development of the broader CFR. The Commission emphasises the need for a clear focus of the CFR preparation on policy aspects to guarantee the process is more operational and efficient. The Commission therefore will clearly prioritise issues that are relevant to the consumer contract law acquis, and other contract law related acquis.

2.6.2. Procedural issues

Efficiency of cooperation within the CFR process is essential. The Commission therefore wants to improve work within the CFR-net, in particular enhance the effectiveness of the CFR-net input. As decided early on, the Commission will extend from 1 to 2 months the time that CFR-net members will have to examine the researchers' drafts from the second half of 2005.

¹³ See footnote 12.

¹⁴ See footnote 12.

¹⁵ See footnote 12.

The evaluation of questionnaires the Commission had distributed at CFR-net workshops as well as discussions with the Member States experts have proved very useful. Against this background, in order to improve the CFR process, the Commission will:

- Prioritise those topics/workshops that are important for the review of the consumer acquis, and possibly enrich the list of topics/workshops by acquis relevant issues.
- Arrange for an indication within the drafts of which parts of the rules are specifically relevant for the main use of the CFR, i.e. the review of the acquis, and which parts provide supplementary details for possible use of Member States when implementing directives.
- Introduce more flexibility regarding workshop formats (e.g. where appropriate, organise “drafting groups” to elaborate drafting recommendations for specific questions; nominate delegates within workshops to ensure horizontal coherence).
- Further investigate possibilities to finalise the discussion where one workshop has already been held.
- Invite researchers to provide a comprehensive outline summarising the key features of the draft in advance of the workshop.
- Organise workshops on the overall structure of the draft CFR.
- Invite representatives from Member States or EP to produce draft reports on CFR workshops. The Commission reserves the right to revise draft reports in order to guarantee neutral and consistent reporting.

2.6.3. *Horizontal substantive issues*

Regarding substance, the Commission wishes to underline the following, in the light of discussions with stakeholders and Member States:

- The Commission will feed issues arising during the diagnostic phase of the consumer acquis review into the CFR process.
- Definitions of abstract legal terms are indispensable for the CFR preparation and need to be included in the drafts. Where sector-specific differentiation is necessary this should be highlighted and explained. Definitions have to be closely coordinated with the elaborated rules.
- The overall coherence of a draft CFR is crucial: The interdependence between general and specific contract law needs to be clarified. For horizontal issues, coherent solutions need to be achieved. The scope of the rules should be clarified.
- Policy decisions should be clearly identified and explained, in particular in the researchers’ outline and in the comments linked to the draft rules.
- The principle of freedom of contract needs to be emphasised as crucial for the process. Should rules be mandatory, this should be clarified and justified in the drafts.
- Appropriate differentiation between B2B and B2C contracts is paramount. Consumer law adjusts structural imbalances between a consumer and a trader; therefore policy decisions

might be taken differently in a B2C and in a B2B context. In order to allow sufficiently differentiated solutions, a case by case approach that identifies where specific consumer rules are necessary and that, for these cases, suggests deviations from the general rules, appears appropriate.

The Commission will invite researchers to consider these issues when preparing future or revised drafts.

3. THE REVIEW OF THE CONSUMER ACQUIS

To better achieve its Better Regulation goals and benefit from synergies with the ECL project, the Commission has launched the review of the acquis to simplify and complete the regulatory framework. The review process is outlined in the 2004 Communication and draws on the example of the consumer acquis because of its relevance to contract law. This report aims at outlining in more detail this process and follows again an example based approach. Progress on the review is described below with an emphasis on process but some preliminary findings on individual consumer directives and possible outcomes are also put forward.

3.1. The Process

The Commission is still in the diagnostic phase which involves an analysis of the transposition and application of the consumer directives by the Member States. This is essential to identify regulatory problems, internal market barriers and consumer protection lacunae and assess whether they stem from problems with the existing directives or from the incorrect implementation or application in one or more Member States.

A comparative law analysis is currently being undertaken by a network of academics and legal practitioners on behalf of the Commission. This analysis will complement the Commission's transposition checks. It will examine the application of the directives in the Member States, including leading national case law and administrative decisions. The researchers will make recommendations as to the rationalisation and simplification of the acquis in order to get rid of possible inconsistencies, overlaps, internal market barriers and distortions of competition. The study will be publicly available in autumn 2006.

The Commission intends to issue a comprehensive document reporting on the review of the consumer acquis. This document is expected for publication in the first half of 2006.

The Commission intends to conduct a wide consultation, the results of which will be made public. The EP will be informed regularly of our findings and work progress. A standing working group of Member States' experts will be set up, as indicated in the 2004 Communication; its first meeting will be in autumn 2005. Regular consultations with stakeholders will formally start with the publication of the report in 2006. However, interested parties can comment and submit information to the Commission beforehand.

Although no final decision has been taken as to the form of the consultation, national experts and interested parties will be asked to consider some directives on an individual basis, while specific workshops could be organised to address 'horizontal' issues, including definitions and remedies.

The consultation process will wrap up the diagnostic phase. The Commission will evaluate the various policy options and consider the need for regulatory measures.

Although it is still too early to draw conclusions on the individual directives, the work undertaken so far on the Unit Pricing¹⁶, Injunctions¹⁷, Timeshare¹⁸ and Distance Selling Directives¹⁹ provides preliminary findings. It is important to note that in considering these directives, the Commission recognises the need to ensure their proper enforcement, including self regulatory measures. The Committee which will be established under the Regulation on Consumer Protection Cooperation²⁰ will provide valuable input for the review.

3.2. Preliminary findings on transposition

3.2.1. Unit Pricing

The Directive leaves a wide discretion as to the implementation of some of its main provisions. This has resulted in rather diverging transposition measures. Firstly, the Directive allows, as an alternative to metric units, the use of units of quantity which are widely and customarily used in the marketing of certain products in Member States. This has led to the use of different units of quantity throughout the territory of the Community in respect of these products. However, it is still unclear to what extent this may hinder price comparisons and the ability of undertakings to establish themselves in other Member States.

Moreover, Member States can introduce exemptions to the general obligation to indicate the unit price, on the ground that such indication would not be useful, or could cause confusion. Member States have made use of this possibility in diverging ways. The Commission is aware that this is a problem, which derives from the fact that only a minority of non-food products can be sold with a unit price (e.g. paint, wood). The possibility of developing a rule that fits all cases appears doubtful.

Finally, the Directive allows, during a transitional period, to derogate from the general obligation to indicate unit prices in favour of small retail businesses. However, since the Directive contains no definition of “small retail business”, Member States have identified the beneficiaries of the derogation with reference to inconsistent criteria. It is unclear whether this is likely to cause a significant problem, considering the local nature of most of the relevant geographic markets.

In any event, since price indications constitute a commercial practice, whether or not contained in an advertisement, the relevant provisions of the Directive will need to be coordinated with the recent Directive on Unfair Commercial Practices²¹.

3.2.2. Injunctions

Most of the bodies or organisations notified by the Member States to the Commission under the Injunctions Directive are consumer organisations. So far, none of these has sought a cross-border injunction. The present work should help identify the main obstacles consumer organisations may face when seeking an injunction in another Member State.

¹⁶ Directive 98/6/EC of 16.2.1998, OJ L 80, 18.3.1998, p. 27.

¹⁷ Directive 98/27/EC of 19.5.1998, OJ L 166, 11.6.1998, p. 51

¹⁸ Directive 94/47/EC of 26.10.1994, OJ L 280, 29.10.1994, p. 83.

¹⁹ Directive 97/7/EC of 20.5.1997, OJ L 144, 4.6.1997, p. 19.

²⁰ Regulation (EC) No 2004/2006 of 27.10.2004, OJ L 364, 9.12.2004, p. 1.

²¹ Directive 2005/29/EC of 11.5.2005, OJ L 149, 11.6.2005, p. 22.

The UK Office of Fair Trading (OFT) brought the only case so far. A Belgium company was sending unsolicited mail order catalogues to UK residents along with notification of a prize win. Consumers were led to believe that they had to make a purchase from the catalogue to secure the alleged win. However, prize winners were pre-selected and the vast majority of recipients were unlikely to receive the prize. The OFT claimed that the prize notifications were misleading consumers and sought an injunction from the Belgium courts. The latter ordered the cessation of the advertising.

The Regulation on Consumer Protection Cooperation establishes a network of public authorities responsible for the protection of consumer economic interests, partially harmonises their investigation powers and provides for mutual assistance. The OFT will therefore be able to ask its Belgian counterpart to adopt enforcement measures.

3.2.3. *Timeshare*

Consumer problems with timeshare constitute a major challenge. The Commission receives a number of complaints, mainly from consumers and the EP, which relate to timeshare in Spain and, to a lesser extent, Portugal and Cyprus. Evidence from the European Consumer Centres seems to confirm that the problem is significant.

The main issues are:

- New products fall outside the timeshare legislation (e.g. holiday clubs, contracts for less than 3 years and contracts related to accommodation in boats);
- Misleading marketing and insufficient information provided to consumers on the product and on the cooling off period;
- Aggressive selling techniques e.g. pressure selling;
- Problems with the return of deposits which are banned under the Directive.

Some of these problems, relating to misleading and aggressive marketing practices, will be dealt with by the recent Directive on Unfair Commercial Practices.

3.2.4. *Distance Selling*

The review of the Distance Selling Directive has so far confirmed the need to clarify certain definitions and to use terms more consistently, both in this Directive and from one directive to another. Good examples are references to “working days” and “days” within the Directive and the different “minimal” cooling off periods in different consumer protection instruments.²²

More substantive definition problems have also emerged. In a recent ruling by the European Court of Justice²³ in which the OFT sought a preliminary ruling on the meaning of “transport services”, the Court applied a broader interpretation than the Commission or the OFT advocated and excluded the application of the Directive to car rental services.

²² The problems associated to different cooling off periods were already recognised when the Directive was adopted, see Declaration of the Council and EP, OJ L 144, 4.6. 1997, p. 28.

²³ C-336/03 *Easycar (UK) Ltd v. Office of Fair Trading*.

Certain of the exemptions to the Directive are also causing problems in practice. For example, auctions are excluded from the Directive, although some Member States have chosen to only exclude certain types of auctions. However, certain websites combine auction houses and shopping at a fixed price. In the latter case, the provisions of the Directive will apply as far as B2C transactions are concerned. This may create confusion for consumers.

Similarly, new technologies and marketing practices require consideration of the adequacy of certain definitions. For instance, written confirmation of information in a “durable medium” is required. Certain Member States have concerns about how to interpret this term in the context of contracts entered into by sms (i.e. short text messages sent via mobile phones). In considering such issues, the Commission will naturally take into account the interpretation of similar concepts in other Community instruments e.g. in the Directive on the Distance Marketing of Financial Services²⁴.

The Commission will also be looking at how easy the Directive is to apply in practice. Have businesses or consumers encountered problems with specific aspects of the Directive? For example, has the fact that the cooling off period potentially runs from different days in case of goods and services created confusion for consumers and obstacles for business where a contract covers both goods and services?

More generally, the review of the Directive requires a careful consideration of its interaction with other Community instruments, both in the field of consumer protection (e.g. interplay with the prior information requirements of the Package Travel²⁵ and Timeshare Directives; do products like hire purchase or leasing amount to a financial service for the purpose of this Directive and/or the Directive on the Distance Marketing of Financial Services) and in others such as Data Protection and E-commerce.

3.3. Possible outcomes

If, during the diagnostic phase, the Commission finds evidence that the *acquis* needs to be revised or completed the Commission could theoretically choose between 2 options:

a) a vertical approach consisting of the individual revision of existing directives (e.g. revision of the Timeshare Directive) or the regulation of specific sectors (e.g. a directive on tourism, including provisions of the Package Travel and Timeshare Directives);

b) a more horizontal approach, adopting one or more framework instruments to regulate common features of the *acquis*. This framework instrument(s) would provide common definitions and regulate the main consumer contractual rights and remedies.

²⁴ Directive 2002/65 of 23.9.2002, OJ L 271, 9.10.2002, p. 16.

²⁵ Directive 90/314/EEC of 13.6.1990, OJ L 158, 23.6.1990, p. 59.

Under the horizontal approach, the Commission could, for example, prepare a directive on B2C contracts of sale of goods. It would regulate consistently the contractual aspects of sale, which are currently scattered in several directives (e.g. Directives on the Sale of Consumer Goods²⁶, Unfair Contract terms²⁷ Distance Selling and Doorstep Selling)²⁸. In accordance with Better Regulation principles, this instrument would rationalise the regulatory framework considerably since all the relevant provisions of the relevant existing directives would be systematised into the new directive. The parts of existing Directives covering marketing techniques (e.g. restrictions on the use of certain means of distance communication) and services would remain in force. These, if possible and necessary, could be regulated by a separate framework instrument(s) in the future. The horizontal approach would not exclude vertical solutions if need be.

Whatever approach is chosen the synergies between the acquis review and the ECL initiative will be exploited.

Any decision to revise the consumer acquis will be subject to an impact assessment. In accordance with the Inter-institutional Agreement on Better Law Making²⁹, its results will be made available to the EP, the Council and the public.

4. OTHER DEVELOPMENTS

4.1. Measure II of the Action Plan

In the 2003 Action Plan, the Commission agreed to examine whether it could promote the development by private parties of EU-wide Standard Terms and Conditions (“STCs”) in particular by hosting a website on which market participants could exchange relevant information.

After careful examination, the Commission considers that it is not appropriate to host such a website for the following reasons:

- If STCs are to be enforceable in all EEA legal systems, they need to comply with the most restrictive national law. The Commission believes that parties that do not operate in all EU jurisdictions, in particular not in those with the most restrictive national regimes, might not be tempted to use such STCs. This would greatly reduce the circle of economic actors that would benefit from such an exercise.
- STCs are typically drafted for a specific sector. It is hard to see how contractual clauses drafted for a specific sector could be of use to other sectors of the economy.
- The increasing speed of legislative change requires STCs to be constantly updated. STCs posted on a Commission website would therefore quickly outlive their usefulness.
- The complexity and need for constant review of STCs means that keeping STCs up to date comes at a great cost in terms of legal fees. The Commission doubts that parties that invest

²⁶ Directive 1999/44/EC of 25.5.1999, OJ L 171, 7.7.1999, p.12.

²⁷ Directive 93/13/EEC of 5.4.1993, OJ L 95, 21.4.1993, p.28.

²⁸ Directive 85/577/EEC of 20.12.1985, OJ L 372, 31.12.1985, p.31.

²⁹ OJ C 321, 31.12.2003, p. 1.

vast amounts to develop and update STCs will be eager to share the final result at no cost with competitors.

- The Commission had already stated in the Action Plan and in the 2004 Communication that STCs will be posted on the website at the sole responsibility of the parties posting them, without the Commission accepting any responsibility as to the legal or commercial validity of the STCs. If, however, STCs posted on the website are not checked as to whether they are valid and enforceable in all EU jurisdictions or compatible with EC law, this would greatly reduce the value of such an exchange.

In view of the high projected cost of hosting a website with the necessary functionalities, abstraction made of translation costs, and in the light of the above, the Commission has decided not to set up a website for the exchange of STCs.

4.2. Opportuneness of an optional instrument in ECL (“26th regime”)

In the area of financial services, the Commission in its Green Paper on Financial Services Policy (2005-2010)³⁰ takes note of the debate on a so-called “26th regime”, leaving the 25 sets of rules untouched. The Commission responds to the call to explore such 26th regimes further by launching a feasibility study, e.g. in the fields of simple (term-life) insurance and savings products. The Commission also proposes to establish Forum groups for specific retail products, consisting of experts representing industry and consumer interests to identify any barriers and examine possible solutions. This work will be supported by extensive research. Furthermore in its Green Paper on Mortgage Credit in the EU³¹ the Commission welcomes views on the merits of the standardisation of mortgage contracts, e.g. via a 26th regime instrument and indicates that such regime could be introduced by a legal instrument sitting alongside, but without replacing, national rules, and be available as an option to the parties to a contract.

³⁰ COM(2005) 177 final.

³¹ COM(2005) 327 final.

Annex: CFR-net members; overview

Country	Business					Legal professions					Consumers' org.	Total
	Industry	Trade	Services	Financial Services	General	Lawyers	Judges	Notaries	Arbitrators	Public registrars		
Austria					2	1						3
Belgium						2					1	3
Cyprus												
Czech Republic	1					1						2
Denmark						1						1
Estonia												
Finland					1	1						2
France		1		3	1	2					1	8
Germany	11		1	6		5	10	2				35
Greece												
Hungary												
Ireland						1						1
Italy		1		1		4	2	1			1	10
Latvia						1						1
Lithuania											1	1
Luxemburg				1	1						1	3
Malta						1			1			2
Netherlands	2					1	1					4
Poland	1					1						2
Portugal						1					2	3

Country	Business					Legal professions					Consumers' org.	Total
	Industry	Trade	Services	Financial Services	General	Lawyers	Judges	Notaries	Arbitrators	Public registrars		
Slovakia												
Slovenia					1				1			2
Spain						4				2	1	7
Sweden	2					2						4
UK	2	1	2	4		12	2		1		1	25
EU org.	8 ³²	5 ³³	1	14	2	4 ³⁴		13 ³⁵			4	51
Non-EU	4											4

³² 1 Belgium, 1 Spain, 1 Germany, 1 Norway, 2 Italy (UNICE).

³³ 1 Spain, 1 France (FEDSA).

³⁴ 1 France, 1 Italy, 1 Slovenia, 1 UK (CCBE).

³⁵ 1 Austria, 1 Belgium, 4 France, 1 Hungary, 3 Germany, 1 Netherlands, 1 Italy, 1 Spain (CNUE).