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European Contract Law—the way forward?

Report with Evidence

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(p) refers to a page of the Report or Appendices or to a page of evidence

ABSTRACT

The Commission's recent Communication "European Contract Law and the revision of the *acquis*: the way forward" takes forward the Commission's plans for European Contract Law.

The Commission has embarked on an ambitious programme of work. Its most important element is the preparation of a Common Frame of Reference (the CFR), which will set out "legal terms, fundamental principles and coherent model rules of contract law".

The CFR is primarily intended to be used as a "toolbox" to improve existing Community contract law (the *acquis*—mainly consumer protection Directives) and the drafting of future measures.

The Commission is also promoting European-wide standard terms and conditions (STCs) to assist business throughout the EU.

In this Report we examine the Commission's proposals in detail. In particular we consider the claims made for the CFR and the implications of the CFR for the revision of the *acquis* and for better regulation in the future.

The Report concludes that the CFR is to be welcomed in principle.

Preparation of the CFR must not delay much needed reforms of the *acquis*.

A large sum of public money is to be spent on preparing the CFR and the Commission must ensure that the exercise produces value for money.

The CFR must be usable and therefore industry, commerce, legal practitioners and consumers must be closely involved in the preparatory work.

European Contract Law—the way forward?

CHAPTER 1: SUMMARY

The 2004 Communication

1. In October 2004, the Commission published its Communication, “European Contract Law and the revision of the *acquis*: the way forward”.¹ The Communication takes forward the Commission’s plans for contract law which we first examined in the autumn of 2001.² The options on which the Commission were then seeking views have been reduced and refined. This next step is a major one that will involve a substantial commitment of resources over a number of years. The Government have given the Communication a “cautious welcome”.³

The *acquis*

2. There is already a substantial body of Community law affecting contracts. For the most part the existing measures are instruments of consumer protection. Some (such as the Doorstep-selling Directive⁴ and the Timeshare Directive⁵) are targeted at particular mischiefs. Others (especially the Directive on Unfair Terms⁶) have wider application. A few, such as the Commercial Agents and the Late Payments Directives, directly affect business relationships.

Problems with the *acquis*

3. Responses to the Commission’s consultation exercise in 2001 confirmed, and the Commission accepts, that there are problems with the *acquis*.⁷ There are uncertainties—terms are not defined or are defined in some Directives but not in others. There are inconsistencies—for example, there are divergent durations and methods of calculation of the periods within which consumers may withdraw from contracts (withdrawal periods). In some cases several Community measures which produce conflicting results can be applicable. Further difficulties are created by differences in national implementation.

¹ COM(2004) 651 final.

² *European Contract Law* (12th Report, 2001-02, HL 72).

³ Q 188.

⁴ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

⁵ European Parliament and Council Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁷ The problems are described in detail in the Commission’s Communication entitled “A More Coherent European contract law—An action plan” (the Action Plan), published in March 2003. [2003] OJ C 63/1. The Action Plan is described in Chapter 2 below.

The Communication—the main elements

4. The Commission's proposals for future work on European contract law have three key elements:
- (i) the creation of a Common Frame of Reference, which is aimed, in the first instance, at improving the existing European legislation (the *acquis*) and the drafting of better legislation in the future;
 - (ii) the promotion of European-wide standard contract terms and conditions;
 - (iii) the possible development of a so-called “optional instrument”, a set of rules on contract law which would apply unless its application had been excluded by the parties (opt out) or which would only apply if chosen by the parties (opt in).

Political mandate—The Hague Programme

5. The Commission has a clear political mandate for a large part of what is now being proposed. Paragraph 3.4.4 of the Hague Programme⁸ states:

“In matters of contract law, the quality of existing and future Community law should be improved by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a common frame of reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union”.

Thus Member States have at the highest level endorsed the first two of the key elements in the Commission's Communication.

Purpose of report

6. The primary purpose of this Report is to draw the House's attention to the issues raised by the Communication. In so doing we will describe the developments that have taken place since we last reported to the House on this subject and set out the Committee's reactions to the substance of the Commission's proposals and to the process by which work on the first, and most important of the key elements, the Common Frame of Reference, is being taken forward. The Report is made to the House for information.

Conclusions

7. We have reached the following conclusions.
- The Commission has embarked on an ambitious programme of work, the most important element of which is the preparation of the Common Frame of Reference (CFR).
 - It is unlikely that the CFR project would have been undertaken in the absence of the existence of a substantial base of academic research. Even

⁸ The Hague Programme on Strengthening Freedom, Security and Justice in the European Union was agreed by Heads of State at the European Council on 5 November 2004. The Hague Programme identifies priorities and lays down a programme for progress in the next five years. Part 3, entitled Strengthening Justice, deals in large part with civil law matters and includes a reference to the European contract law. For more information on the Hague Programme, see our Report, *The Hague Programme: a five year agenda for EU justice and home affairs* (10th Report, 2004-05, HL 84).

so there is to be a lengthy and costly programme of further research and drafting before the CFR is completed.

- The main argument in favour of the CFR is that it should assist in improving the current *acquis* and in allowing future items of European Union legislation to be clearer in their intent. This must be welcomed in principle.
- But the time taken to produce the CFR could delay much needed remedial work on the *acquis*. Any reforms which are not dependent on the CFR should be taken forward without unnecessary delay.
- A CFR would facilitate the preparation of the so-called “optional instrument” which would supplement, and could even displace, national contract law. The optional instrument would be capable of evolving in time into a European Civil Code on Contract.
- A large sum of public money is to be spent in preparing the CFR. There needs to be proper control over its use. Further, if the CFR is not to become merely an expensive academic exercise the interests of “stakeholders” (industry, commerce, consumers, and legal practitioners) must not be neglected.
- There will be an important political dimension in agreeing the content and future use of the CFR.
- When the CFR is in place the Commission may be expected to be an advocate for opportunities for its use and for the need to maximise the “benefits” of such a large investment.

Our more detailed recommendations are set out in Chapters 3–6 below and listed in Chapter 7.

UK Presidency

8. On 7-8 July 2005, as part of its six-month Presidency of the Union, the United Kingdom will be hosting, jointly with the Commission, a conference on European Contract Law. It is envisaged that there will be some 200 participants from across Europe.⁹ The conference will be the first meeting of the European Discussion Forum, which will provide the opportunity for “stakeholders” (industry, commerce, consumers and legal practitioners) and “Member State experts” (civil servants) to come together in order to discuss the issues. The Government believe that the conference will provide an opportunity to take stock of the work to date in order to put “our particular tone and flavour on the work”.¹⁰

Conduct of inquiry

9. The inquiry was undertaken by Sub-Committee E (Law and Institutions) under the chairmanship of Lord Scott of Foscote. We sought the views of a number of interested organisations and individuals, including Professor Hugh Beale, Law Commissioner. The Directorate-General for Health and Consumer Protection has published on the Europa website the submissions

⁹ All CFR-net members (see Chapter 4) will be invited, as well as representatives from the academic research groups (p 56).

¹⁰ Q 188.

made in response to its consultation exercises together with summaries of meetings with Member State experts and with stakeholders. The evidence, written and oral, supplied directly to the Committee is published with this Report. We are grateful to all those who have assisted us.

CHAPTER 2: BACKGROUND

(i) The 2001 Communication

10. In July 2001, the Commission published its Communication on European Contract Law. The Commission's objective was to obtain information on any practical problems arising from the existence and application of different systems of national contract law across the European Union. The Commission perceived that such problems could hinder both business and consumers in exploiting the potential of the Internal Market.

11. The 2001 Communication set out four options for discussion:

I—no EC action;

II—promote the development of common contract principles leading to more convergence of national laws;

III—improve the quality of existing Community legislation;

IV—adopt new comprehensive legislation at EC level.

The Communication formed the basis for a broad consultation of business interests, legal practitioners, consumer groups and academics. That consultation was formally concluded in October 2001.

12. We undertook a brief inquiry into the issues raised by the 2001 Communication. In our Report, *European Contract Law*, we reached the following conclusions.

—There appeared to be no consensus on the overall scale of the problems and the extent of additional costs attributable to differences in national contract laws. Problems might be greater in some areas, such as financial services, than in others. Some problems had been created by Community legislation.

—Inaction at Community level was not realistic. While the market is, and should be, free to respond to problems, there might be problems for which only the Community could provide satisfactory solutions. Option I was therefore not a real option.

—There were, in essence, only two options. One was to have compulsory EU legislation codifying European-wide the law of contract, either as a whole or in relation to particular areas. The second was to allow the consensual approach to harmonisation to continue, assisted by the work of such bodies as the Commission on European Contract Law and the Study Group on a European Civil Code. At the same time defects in existing Community legislation and its implementation should be identified and remedied.

—In so far as there should be action at Community level the way forward was encompassed by Options II and III.

—The Commission should give priority to dealing with problems arising under existing Directives.

(ii) The 2003 Action Plan

13. The next step in the development of Union policy on contract law was a further Communication from the Commission entitled "A More Coherent

European contract law—An action plan” (the Action Plan), published in March 2003.¹¹ The Action Plan set out the results of the 2001 consultation and put forward, for further consultation, certain proposals for action.

14. The results of the 2001 Consultation showed that only a small minority favoured Option I (*No EC action*) and that there was considerable support for Option II (*Promote the development of common contract law principles leading to more convergence of national laws*). An overwhelming majority supported Option III (*improve the quality of existing Community legislation*). A majority was against Option IV (*adopting new comprehensive legislation at EC level*). However, a significant number of consultees suggested that further thought might be given to this option in the light of any developments under Options II and III.
15. In what the Action Plan termed a “mix of non-regulatory and regulatory measures” the Commission proposed the following:
- drawing up a common frame of reference, including standard definitions of terms such as “contract” and “damage”. Such a common frame of reference could be used when reviewing existing EU law or preparing new proposals;
 - increasing the coherence of existing Community legislation affecting contracts (the Commission gave examples of problems arising from inconsistencies in the present legislation);
 - proposing a study into the feasibility of creating a body of Contract Law at EU level.

Again the Commission sought views on these proposals

16. The Action Plan was considered by Sub-Committee E in April 2003. The Committee noted that the Commission had not given up of the notion of some contract code or regulation and we urged the Government to use their influence to keep the Commission focussed on, and its resources directed towards, the problems arising under existing Directives. The Committee observed that the development of a “common frame of reference” might assist in ensuring greater coherence of existing and future *acquis* in the area of European contract law but expressed concern lest there be unnecessary delay in taking remedial action on a number of the practical problems described in the Action Plan.

(iii) *The acquis*

17. As mentioned above, there is already a substantial body of Community law affecting contracts. In its 2004 Communication the Commission has identified eight consumer directives which it proposed to review. These are listed in the box below.

Review of the consumer *acquis*

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (Doorstep-selling Directive);

¹¹ [2003] OJ C 63/1.

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (Package Travel Directive);¹²

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contract Terms Directive);¹³

European Parliament and Council Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (Timeshare Directive);

European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts;¹⁴

European Parliament and Council Directive 98/6/EC of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers;

European Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests (the Injunctions Directive);

European Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Consumer Guarantees Directive)¹⁵.

(iv) International research work

18. The harmonisation/unification of contract rules has been the subject of much international research and discussion. The aim of such work has varied from the establishment of a binding code to principles that can be used to provide reliable comparative information. A number of major pieces of academic work have been undertaken, in particular by UNIDROIT, the Commission on European Contract Law and the Academy of European Private Lawyers. Some have a long history. The UNIDROIT Principles of International Commercial Contracts 1994 (the UNIDROIT Principles) are the result of years of intensive comparative research and deliberations begun in 1971.

The UNIDROIT Principles

The UNIDROIT Principles are the product of a Working Group composed of representatives of the major legal systems of the world and chaired by Professor Michael Joachim Bonell. The Principles are not a binding instrument in international law. Their Preamble identifies a number ways in which they may have practical application.

“Preamble - Purpose of the Principles

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

¹² *Package Travel* (20th Report, 1987-88, HL 107).

¹³ *Unfair Contract Terms* (6th Report, 1991-92, HL 28).

¹⁴ *Distance Selling* (16th Report, 1992-93, HL 51).

¹⁵ *Consumer Guarantees* (10th Report, 1996-97, HL 57).

They may be applied when the parties have agreed that their contracts be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of applicable law.

They may be used to interpret or supplement international uniform law instruments

They may serve as a model for national and international legislators”.

The UNIDROIT Principles are set out in 119 Articles grouped in Chapters:

Chapter 1—General Provisions

Chapter 2—Formation

Chapter 3—Validity

Chapter 4—Interpretation

Chapter 5—Content

Chapter 6—Performance

Chapter 7—Non-Performance

Each article is accompanied by comments and, where appropriate, by factual illustrations intended to explain the reasons for the rule and the different ways in which it may operate in practice.

19. The origins of the Principles of European Contract Law, prepared by the Commission on European Contract Law (the Lando Principles), can be traced back to a conversation in the Tivoli Gardens in 1974, between Professor Lando and Dr Hauschild, then Head of Division in the Commission’s Directorate General for the Internal Market, when the latter said “We need a European Code of Obligations”. The product of these two exercises is two statements of contractual principles which, though they diverge in both legal policy and technical detail, demonstrate how much uniformity can be achieved.¹⁶

The Lando Principles¹⁷

The Principles of European Contract Law are the result of work carried out by the Commission on European Contract Law, a body of lawyers drawn from all EU Member States, under the chairmanship of Professor Ole Lando. The Principles embody, in 131 Articles, a set of general principles and rules for use in the Member States of the Union. The 131 Articles are divided into nine chapters:

Chapter 1—General Provisions

Chapter 2—Formation

Chapter 3—Authority of Agents

¹⁶ For a comparison of the two sets of rules see Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?* 26 *Uniform Law Review* (1996) 229-246.

¹⁷ *Principles of European Contract Law, Parts I and II* (ed O. Lando and H. Beale) (2000) and *Part III* (ed O. Lando, E. Clive, A. Prum and R. Zimmermann) (2003).

Chapter 4—Validity

Chapter 5—Interpretation

Chapter 6—Contents and Effects

Chapter 7—Performance

Chapter 8—Non-performance and Remedies in General

Chapter 9—Particular remedies for Non-performance

Each Article is followed by a Comment giving the reasons for the rule, and its purpose, operation and relationship to other rules. The operation of the rule is further explained by the use of Illustrations. A concluding Note to the rule identifies the principal sources utilised and describes briefly the manner in which the issue is dealt with in the various in the various legal systems of EU Member States.

20. The Academy of European Private Lawyers has also published a “European Contract Code—Preliminary draft”.¹⁸ This code also contains a set of rules dealing with the formation, validity and interpretation of contracts, together with rules on performance and remedies. The work of the Pavia Group is ongoing. So too is that of the Study Group on a European Civil Code. The Study Group, led by Professor von Bar of Osnabrück and made up of experts from all Member States and from candidate countries, has a wide remit not limited to contract law. The Study Group has teams working on various special contracts (sales, services, franchise and agency, personal security, insurance and financial services, as well as security over moveable property, tort, *negotiorum gestio*¹⁹ and unjust enrichment).
21. In addition there are a burgeoning number of other academic groups addressing a variety of subjects and issues relating to contract law. These include the European Research Group on Existing EC Private Law (principally concerned with the *acquis*), the Common Core of European Private Law (or Trento) Project, the Leuven Centre for a Common law of Europe, The Society of European Contract Law, the Research Group on the Economic Assessment of Contract Law Rules, and the Study Group on Social Justice in European Law.

¹⁸ Universita Di Pavia, 2001.

¹⁹ A quasi-contractual obligation, of Roman law origin, arising from the uninvited intervention (with the intention of being reimbursed) by one party into the affairs of another for the latter’s benefit. Leage gives the examples of the repair of a neighbour’s house during his absence to prevent the property falling down or the taking up of the defence of an action brought against an absent defendant. *Leage’s Roman Private Law*. 3rd edition 1964. p.383.

CHAPTER 3: THE COMMON FRAME OF REFERENCE

Introduction

22. The production of the Common Frame of Reference (CFR) is the most resource intensive element in the current package of measures being developed by the Commission. The Communication states: “The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the *acquis* and on best solutions found in Member States’ legal orders”. It is intended to be used as a “toolbox” when proposals to improve the quality and coherence of the existing *acquis* are presented and when future instruments in the area of contract law are drafted.²⁰ The CFR will be a publicly accessible document.²¹
23. The proposal for a CFR raises a number of issues. In this Chapter we examine those concerning the nature and content of the CFR. In the next chapter we consider the process by which the CFR is to be produced.

The political context

24. The Commission have great expectations, believing that the CFR will allow the Commission to achieve better regulation, to stimulate competition, and to improve the functioning of the internal market.²² The CFR has thus been linked with achieving better regulation and simplification of legislation as stated in the Laeken Declaration (European Council 2001) and with the pursuit of the Lisbon Strategy designed to make the Union’s economy the most competitive and dynamic knowledge based economy in the world.

Problems to be addressed by the CFR

25. The Communication identifies a number of particular problems that the CFR might address:
- clarification of abstract legal terms (*eg* “damage”) used but not defined in Directives;
 - failures of Directives to solve practical problems;
 - differences between national implementing laws resulting from a minimum harmonisation policy;
 - inconsistencies in EC contract law legislation.²³

The CFR—content

26. It is clear that the CFR will not simply be a dictionary of legal terms and phrases. This can be seen from the detailed description of the likely content of the CFR set out in Annex I to the Commission’s Communication. It is

²⁰ Communication, para 2.1.1.

²¹ Action Plan, para 59.

²² Speech by Robert Madelin, Director General, DG Health and Consumer Protection, Meeting of Member State Experts on Common Frame of Reference, Brussels 3 December, 2004. However, in his speech to the CFR-net, Brussels 15 December 2005, Mr Madelin brings in the consumer protection *acquis* revision as an additional factor. The CFR together and the revision “will help us to pursue these important goals”.

²³ Communication, para 2.1.1.

envisaged that the CFR will contain Principles, Definitions, and Model rules. The principles would include the freedom to conclude a contract and decide upon its terms (party autonomy) and the principle of good faith.²⁴ Terms such as “contract” and “damage” would be defined. There would be rules which, for example, would determine when a contract was concluded.

27. Professor Beale, University of Warwick, believed that it was inevitable that the CFR would include rules and not just definitions: “I do not know any way of defining how a contract is concluded other than by setting out a series of rules about what is an acceptance, or whatever you want to call it” (Q 8). However, as Clifford Chance noted, the list of model rules reads like an index to a contract code (pre-contractual obligations, conclusion of a contract, form, validity, interpretation, contents and effects, performance, remedies for non-performance, plurality of parties, assignment, transfer and prescription) (p 53). As Professor Beale said, “you will see that the possible contents are almost *verbatim* the chapter headings from the [Lando] Principles of European Contract Law” (Q 8).

Sale and insurance

28. That part of Annex I dealing with model rules, Chapter III, includes two sections, VIII and IX, providing for specific rules for contracts of sale and specific rules for insurance contracts. Mr Clark, for the CBI, noted the similarity between the contents of Annex I and the contents of a standard French textbook on the law of obligations. It would include concepts with which English lawyers might not be familiar, such as the “notion of contract” and the “plurality of parties”. There would also be chapters devoted to special contracts, basically derived from the four types of old Roman law special contracts. Sale and hire are examples. Mr Clark believed that the Annex thus reflected the civil law approach to classifying types of contract. In his experience many modern business contracts defied categorization. He said: “If I were a Continental lawyer I would say it is perfectly feasible to have specific rules but from a common lawyer’s perspective I think it is an undesirable development” (Q 154).
29. We queried whether the inclusion in the CFR of special rules for sales and insurance contracts was feasible. Professor Beale thought that it was, because there were already groups working on these subjects. His understanding was that the CFR would not include a complete code of insurance law but simply an agreed set of terminology and model rules for the purpose of helping draft future European legislation (QQ 31–33).
30. **It is clear that the CFR is not intended to be limited to general contract law but will also contain detailed rules on specific types of contract.** In addition to the references to sale and insurance contracts the 2003 Action Plan referred to “service contracts”. First meetings with stakeholders will be concerned with proposed rules for commercial agency, for franchise and for distribution contracts.

The CFR—its sources

31. The Commission envisages that the CFR will draw on national contract laws, the EC *acquis*, international conventions such the UN Convention on

²⁴ The latter would arguably be novel as a general principle in English contract law.

Contracts for the International Sale of Goods 1980 (the Vienna Sales Convention),²⁵ and non-binding texts such as the UNIDROIT Principles and the Lando Principles.²⁶

32. The value of all this material must be acknowledged but, as the Law Society noted, “the task of producing terminology and standard terms that will adequately satisfy legal requirements drawing on the traditions of 25 legal systems²⁷ is a truly ambitious one”. The Law Society also expressed concern that the civil law would dominate to the possible detriment of the common law: “There is a need for the UK to lobby for due recognition of common law principles in the CFR” (p 59).
33. Concern was expressed that the common law might not be adequately represented in the CFR. Common law Member States (Cyprus, Ireland, Malta and the United Kingdom) were in a minority. The Law Society mentioned the need for the CFR to take into account “terminology and concepts derived from common law, particularly where these have been used effectively in an international trade context” (p 62). The Minister agreed that that seemed to be a very sensible and practical point (Q 206).
34. **The CFR is bound to contain some differences from the common law.** The latter is not, of course, set in stone and our legal history shows its flexibility and how it has been adapted, by statute and by the judges, to reflect social and technological change and to respond to contemporary needs. But it has not been subject to pressure for change from any general political or ideological standpoint. We share the concerns of witnesses about the possible sidelining of the common law in the preparation of the CFR. The issue would become especially important if the CFR or any derivative, such as the “optional instrument”, were to be made mandatory.

Commission’s claims for the CFR

35. The Communication claims that the CFR would improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law and that national legislators would use the CFR when implementing directives etc. We queried whether these claims made by the Commission were realistic.

(i) Better regulation

36. Witnesses recognised the potential of the CFR, particularly to improve the quality of EU legislation and especially the contract *acquis*. The CBI noted that this fitted in with current simplification and better regulation initiatives (Q 141-2). The Law Society said: “The use of consistent language and coherent concepts in EU legislation could make a substantial contribution to reducing the burdens on business and increasing its value to consumers”.

²⁵ The Convention entered into force on 1 January 1988 and some 60 States are party to it. The Government have announced the intention for the United Kingdom to ratify the Convention and to consult soon on the available options. Hansard, House of Lords, 7 February 2005. Written Answer, Col 87.

²⁶ Brief descriptions of the international conventions can be found in Part 2 of our earlier Report, *European Contract Law* (12th Report, 2001-02, HL 72). The UNIDROIT Principles and the Lando Principles are described in Chapter 2 above.

²⁷ There are in fact more than 25 if regard is paid to the separate and different law districts in the United Kingdom. The possibility of other States joining the Union before the work is completed cannot be dismissed.

The Law Society also recognised that consistent terminology could spill over into the drafting of national implementing legislation and of private contracts (p 58).

37. Professor Beale explained how the CFR might assist in the implementation of, for example, directives. He said: “it is quite difficult for the representatives of Member States who are dealing with the draft directive to work out what the impact will be on their own law and how they might need to adapt their own law to implement it. It seems to me that the Common Frame of Reference could act as a very useful translation tool in that sense, if we can get a more or less agreed set of terms and concepts so that we know what we mean when we say ‘damages’ and we know what we mean when we say ‘guarantee’” (Q 10).
38. The Law Society doubted the utility of including best principles in the CFR: “it is doubtful that including basic codified contract principles in the CFR would be any help to a legislative drafter, since those principles will not be those of the existing legal systems within which the legislation will operate, but will be principles intended eventually to replace the existing ones” (p 59).
39. The Government acknowledged that the potential for the CFR as a toolkit, thesaurus, or whatever, was great. But quite how valuable the CFR would be to different legislators remained to be seen. In the Minister’s view, it was too early to predict (Q 193). **We agree.**

(ii) Review of consumer *acquis*

40. Witnesses confirmed that there were problems in the *acquis* that needed to be addressed. Professor Howells, University of Lancaster, gave examples of inconsistency and obscurity in existing Directives (Q 105). Dr Christian Twigg-Flesner, University of Hull, said that improvements were needed both as regards technical matters such as definitions of key concepts (*eg*, ‘consumer’, ‘seller’ and the somewhat elusive concept of ‘durable medium’), but also in relation to substantive matters such as cancellation periods and information requirements (p 62). Clifford Chance drew attention to problems with the Commercial Agents Directive²⁸ and the Late Payments Directive²⁹ (p 53), though it is noteworthy that neither appears in the list of eight directives earmarked by the Commission for examination.
41. The *acquis* review is targeted at identifying problems in the area of existing EC consumer law. Work on this has already begun. The Commission has commissioned a first study which will examine the problems in the transposition and application of EC Directives in the Member States. But the review of the consumer protection Directives and their implementation is closely related to the CFR. The two exercises will interact. The review will “feed into the broader work of developing” the CFR. The first findings on the CFR “will in turn be tested in the field of consumer protection, in the context of the review of the consumer *acquis*”.³⁰

²⁸ Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents.

²⁹ European Parliament and Council Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions.

³⁰ Speech by Robert Madelin, Director General, DG Health and Consumer Protection, Meeting of Member State Experts on Common Frame of Reference, Brussels 3 December 2004.

42. The Commission has said that the CFR would be primarily used as a “toolkit” to review the existing *acquis* on contract law.³¹ Mr Patel (Which?) believed that the CFR could play a valuable role in improving the *acquis* and assist in its implementation by Member States (Q 92). It seems, however, that the nature and content of the CFR will be important here. Professor Howells took the view that to improve the *acquis*, the CFR had “to be more than simply producing a handbook for draftsmen” (Q 78).
43. Legal practitioners, however, doubted whether the CFR was needed in order to improve the *acquis*. Clifford Chance did not believe that the CFR, even if in the form divined by the Commission, would solve current problems. They favoured an approach whereby solutions for problems would be tailor-made to fit the circumstances of the particular directive. This would be preferable to searching “for an abstract, all encompassing solution” (p 54). We queried whether the Union should be reaching for an ideal, in the form of a CFR designed to be applicable to the law of contract generally, when the Commission in practice was most likely to use the CFR in relation to consumer protection measures. Professor Beale responded: “If we were starting from scratch, I think there would be a great deal to be said for [a] more limited and focussed approach, but, given that the work has quite largely been done already, at least stage one of the work, the academic work has been done, it seems to me a shame not to use it” (Q 22).
44. The time factor is particularly important in this context. The Commission estimates that it will take five years to conclude the work on the CFR. This does not seem to be unrealistic having regard to the amount of work envisaged and the number of parties involved (the process is described in Chapter 4). But the question arises as to whether it is acceptable to delay revision of the existing *acquis* on contract law for so long. We received conflicting views.
45. Professor Beale said: “It would seem to me that probably the difficulties are not so urgent that the bulk of the revision could not wait until the Common Frame of Reference is complete. Of course, in the meantime it would be possible for national governments to deal with specific issues which are causing real difficulties; for example, I believe that all the different withdrawal periods are causing real difficulties for consumer advisers” (Q 42). Professor Howells also made the point that because Member States currently had the freedom to act themselves if necessary (because harmonisation was minimal and not total) people were not going to be too worried whether the revision of the *acquis* happened in two or five years (Q 113).
46. On the other hand, the Law Society was sceptical about delaying much needed reforms of aspects of the *acquis*: “In view of the fact that at best, the CFR will not be available until 2009 and in practice it may well be much later, the Law Society is anxious that necessary reform should not be stifled in the interim” (p 60). Dr Christian Twigg-Flesner voiced similar concerns (p 63). The Government also did not believe that it would be satisfactory to wait. Nor did they think that was what the Commission had in mind. The CFR would have to play its part but it should not hold up review and revision of the *acquis* (Q 212).

³¹ *Ibid.*

47. **We are pleased to hear what the Government say. We would be concerned were the CFR to delay the making of much needed improvements to the *acquis*. We urge the Government to make it a priority to ensure that any reforms which are not dependent on the CFR are taken forward without unnecessary delay.**

(iii) Relationship with harmonisation

48. The CBI saw a danger that the reform of the *acquis* might lead to a ratchetting up of obligations. For example, establishing a uniform cooling-off period might result in the current shorter periods being lengthened with potential adverse costs implications, particularly for smaller companies who might not be engaged in cross-border trade. They also queried the need for any more harmonisation. The CBI's research had shown that differences in contract laws was not a problem, or barrier to trade, for their members. Ms Haan said: "knowing what the differences were was more important than necessarily having harmonisation" (QQ 159–161).
49. Professor Howells, on the other hand, thought that there was a danger that the consumer *acquis* might get diluted in the more general reform of contract law. In his view, it was necessary to see the review of the *acquis* against the background of the political debate currently going³² on as to whether EC consumer law should be a maximal basis of protection (*ie* total harmonisation) or whether, as at present, it should be a minimal basis thus permitting Member States to require higher levels of protection under their national laws (Q 74). Professor Howells believed that consumers would benefit more from the creation of a "coherent European consumer law regime" than from trying to modernise contract law in the light of consumer principles (Q 87).
50. Dr Christian Twigg-Flesner expressed similar concerns. Pointing to the fact that the vast majority of contracts were domestic, he argued that the local national law should be paramount. Community harmonisation measures, justified on single market grounds, should not be the tail that wags the dog! Dr Twigg-Flesner believed that Member States should be free to develop their own contract law to suit their needs. Maximal (total) harmonisation was therefore undesirable and even minimum harmonisation rules should permit derogation in prescribed circumstances (p 63).

(iv) Arbitration

51. The Commission has also suggested that the CFR would be useful as an aid to arbitration. The CFR would help arbitrators "to find unbiased and balanced solutions to resolve conflict".³³
52. Professor Beale said: "I am quite convinced that statements of principle like this can be useful for arbitrations. What I am not convinced of is that we

³² Our attention was drawn to the proposed Directive on Unfair Commercial Practices, adopted by the European Commission in June 2003. The Directive includes a general prohibition on business-to-consumer unfair commercial practices and specific rules aimed at combating misleading and aggressive practices. Negotiations on the Directive have concluded. The Council of Ministers reached a common position on 15 November 2004. On 24 February 2005, the European Parliament adopted amendments to the common position. Those amendments were endorsed by the Council on 7 March. It is expected that the Directive will be formally adopted at the Competitiveness Council in June 2005.

³³ Communication, para 2.1.2.

actually need a Common Frame of Reference to do that because I think we have already got principles that will do that.” Professor Beale referred to the existing UNIDROIT principles for international commercial contracts,³⁴ which he believed were already quite widely used by arbitrators as an indicator of “internationally accepted principles”. He understood that arbitrators had also referred occasionally to the Lando Principles³⁵ (Q 26).

53. The CBI, however, said “there has been a deafening silence on the part of our members involved in arbitration on their enthusiasm for this” (Q 151).
54. The Government have yet to consult the arbitrators. That was, the Minister explained, because it was early days. She saw the Presidency conference in July as providing a springboard which might enable the Government to raise the profile of these issues and probably to start discussions (Q 196).
55. **We do not rule out the potential value of the CFR to arbitrators, though the claim made by the Commission seems at this stage a little extravagant. Increasingly arbitrators may be called on to deal with problems affected by Community law or national implementing legislation. We are concerned that the Government appear not to be in touch with the arbitrators. We hope our inquiry has spurred the Government into opening up a channel of communication with the Chartered Institute of Arbitrators and others representing arbitration interests.**

Toolboxes, textbooks and thesauruses

56. A number of words have been used to describe the basic nature of the CFR. What the Commission has deliberately tried to avoid is any reference to the CFR or the optional instrument being part of a European Civil Code.³⁶ As mentioned above, the Communication describes the CFR as a “toolbox”. The Commission has also called it a “better lawmaking toolkit”.³⁷ Robert Madelin, Director General, DG Health and Consumer Protection (DG SANCO), has said: “It will be, if you like, a contract law handbook that will contain best solutions drawn from existing contract laws”.³⁸
57. But Professor Beale believed that the CFR would need to look more like a textbook: “it is essential that it not just have rules and definitions but that it has an explanation of those definitions in the form of a commentary, and preferably that it goes even further and explains how this compares to the different national laws”. He referred to the Lando Principles, which have three elements. “There are the rules, the articles; there is a commentary which explains basically how they fit together and how they interact, rather like explanatory notes in a slightly more elaborate form; but then there are what are called the national notes where the source of this rule is described. If, for example, this rule represents the law in some countries but not in others, then that is explained” (Q 11).
58. But a number of witnesses expressed concerns about the implications if the CFR was more than a dictionary. The Law Society spoke of the considerable

³⁴ The UNIDROIT principles are described in Chapter 2 above.

³⁵ The Lando Principles are described in Chapter 2 above.

³⁶ Communication, para 2.3.

³⁷ Commission Press release 15 December 2004.

³⁸ Speech given at First Conference of the CFR-net, Brussels 15 December 2004.

confusion over the aims of the CFR. The Law Society was circumspect as to the desirability of the CFR including a statement of principles. If the aim were to create the foundation of a European contract code there would be a need to establish a list of best principles. The Law Society did not want the debate on codification to be pre-empted by the creation of the CFR. If the CFR was to be used to support the improvement of the *acquis* what was important was the creation of a lexicon of agreed terms (p 59).

59. Baroness Ashton preferred to describe the CFR as a “thesaurus”. The Minister said: “I prefer that word to ‘dictionary’ because I think there is an issue about how we make sure that people understand the terminology and how the *modus operandi*, if you like, within it makes sense across the European Union” (Q 190).
60. **We doubt whether it is correct to describe the CFR as envisaged in the Communication as a thesaurus. It would be more than a book of synonyms or a book of specialised vocabulary. We hope the Government have not underestimated what the CFR might contain or involve. As we explain below, the CFR would be likely to have the potential to become an “optional instrument” and/or part of a European civil code.**

Not just a technical exercise

61. It is clear that there is a substantial political dimension to the present exercise, first as to the overall purpose and nature of the CFR and, second, as to the detail of the definitions, principles and model rules therein. Member States will be involved throughout, by their involvement in working group of national experts (see Chapter 4) and by the Commission’s regular reporting on progress to the Council. At the end of the exercise, the European Parliament, the Council and the Member States will be invited to examine the researchers’ final report and an evaluation prepared by the Commission.³⁹

(i) A European civil code—the CFR a Trojan Horse?

62. The Communication states that it is not the Commission’s intention to propose a “European civil code” which would harmonise contract laws of Member States.⁴⁰ Nonetheless we sense a concern among our witnesses that the Commission has in the back of its mind the object of moving towards an eventual harmonisation of contract law across the European Union. If that fear has any substance, the present proposals, particularly the CFR and the optional instrument, might be something of a Trojan Horse leading to that outcome.
63. In its Manifesto, the Study Group on Social Justice in European Private Law draw attention to the ambiguous nature of the CFR, which is “merely an aid to the interpretation of existing Directives” and at the same time “necessary to bring coherence to European regulation of markets ... an instrument towards achieving a higher degree of convergence between national contract laws”. The Study Group believes that the Commission has deliberately left it open as to whether the CFR is “little more than a legal dictionary” or

³⁹ Communication, para 3.2.3.

⁴⁰ Communication, para 2.3. This statement is made under the heading of the optional instrument.

“merely another name for a comprehensive code of contract law, which will secure coherence and harmonisation”.⁴¹

64. Clifford Chance believed the CFR to be “synonymous with a code of European contract law” (p 52). The CBI said: “There is an understandable concern that the Common Frame of Reference will appear in a form that can be easily turned into an optional instrument and that it will look uncommonly like the draft European civil code which has already been published. It would be surprising if the result were to bear much influence from the common law. There is also a concern of CBI members with long experience of EU proposals that what initially starts off as optional may later become mandatory.” (p 40).
65. In his introductory comments to the *Principles of European Contract Law* (the “Lando Principles”, which as mentioned above will be likely to form the basis of work on a major part of the CFR) Professor Lando suggested that the Principles might form the basis of a harmonising Code.⁴² Professor Beale (co-editor of the Principles) acknowledged that if a CFR could be agreed, then it would become easier to draft a civil code. But any such development would, in his view, depend very much on whether it were palatable to governments (Q 3).
66. The Government took a robust line. Baroness Ashton said: “I do not accept that [the CFR] is a Trojan Horse, nor would I accept that we would want to move in any way, shape or form to harmonisation”. The Government would not support the establishment of a European contract code (QQ 190–191).
67. **We are pleased to see that the Government are taking such a firm line. The case for harmonisation of contract law across Europe has yet to be made. It is something that would have to be considered on its merits. There remains, however, a concern that when the present work on European contract law, along the lines that have been suggested by the Commission, has been completed, there will be increased pressure for harmonisation of contract law across the Union. The CFR/optional instrument will have been prepared and could be turned into a draft harmonisation measure. When the CFR is in place the Commission may be expected to press the opportunities for its use and advocate the need to maximise the “benefits” of such a large investment.**

(ii) Decisions on the detail

68. There will also be political issues to address at the second level. Professor Beale said: “But very often there are going to be variations and the group is going to have to choose ... which rule to write into their scheme. They will presumably choose what they think is the better rule and the one that produces the most workable system overall because, after all, the Common Frame of Reference has to work as a whole. It is absolutely vital, however, that they do not suppress the differences, that they bring out to the legislator the fact that there are differences, that this does not represent the law of all the Member States. This is, firstly, because if you happen to be a Member

⁴¹ *Social Justice in European Contract Law: a Manifesto*. Published in *European Law Journal*, Vol 10, No 6, p 653, at p 662.

⁴² *Supra*, Preface to Parts I and II, at p xi.

State for whom this is not the rule, you will need to know that so that you can adjust and interpret accordingly, but, secondly, because there is, as it were, a policy choice there. It is absolutely vital that the legislators realise that there is a policy choice being made there. ... I do not think the groups should, as it were, try to seize the political initiative; that should be left to the slightly more democratic institutions of the European Union and not to a group of technocrats” (Q 22).

69. The detailed content of the CFR is thus going to involve political choices and decisions. The CBI acknowledged that where Directives had, because of an oversight, used different definitions then that might be remedied. But it might be that differences in the texts adopted reflected the fact that Member States had been unable to agree a common definition. If fundamental political differences continued, then it might still be difficult to achieve argument on a common definition (Q 158). Experience shows that it can sometimes be very difficult to obtain agreement. Professor Howells referred to the E-commerce Directive, where, he said, there had been a clear practical need for a uniform rule as to when a contract was concluded over the internet. But the Member States had “ducked it” (Q 79).

(iii) Use of CFR

70. Even where the CFR produces a relevant definition or rule there is no certainty that the rule will be followed by Member States or European Union legislators. It is not proposed (at least yet) that the CFR be mandatory but, as mentioned above, that it should be primarily a “toolbox” or “toolkit” to aid draftsmen and legislators. It is reasonable to suppose that the Commission will draw on the CFR when formulating legislative proposals. But it is rare for texts to survive the legislative process in the Council and Parliament without amendment. The Law Society feared that any consistency gained in using the CFR might be lost in the political process of the negotiation of particular legislative instruments. There would need to be a degree of political commitment to using CFR terminology where possible (p 60).
71. **We would emphasise the point made at the outset of this Report, namely there will be an important political dimension in agreeing the content and future usage of the CFR.**

The Commission’s proposals—a fourth element

72. Professor Beale suggested that there might be a fourth, unstated or implicit, element, namely further EU legislation dealing with specific areas of contract law and related matters such as security over personal property (Q 1). We also note that the Communication expressly contemplates the possibility of further harmonisation of consumer law.⁴³ But the Government did not envisage there would be much more legislation. The Minister said: “we will only wish to legislate where that is clearly a need that has been identified and recognised across Member States and to which we are agreeable” (Q 213).
73. **There is a possibility that the CFR and the review of the *acquis* will give rise to proposals for EU legislation. Any proposal would have to**

⁴³ Communication, page 4. The Commission’s draft checklist for the review of the *acquis* asks the question, “Does consumer contract law need to be further harmonised?”.

be considered on its merits. Were there a genuine need which only EU legislation could meet then it would be irrelevant that the proposal had derived from the CFR.

CHAPTER 4: THE COMMON FRAME OF REFERENCE—THE PRODUCTION PROCESS

Production of the CFR

74. In its response to the 2003 Action Plan the Council called on the Commission to “establish appropriate mechanisms both at political and expert level, including a discussion forum, in order to allow Member States, the Council and the European Parliament, as well as researchers, legal practitioners and other stakeholders,⁴⁴ to participate actively in the elaboration of the Common Frame of Reference”.⁴⁵
75. The Commission do not intend to do the work themselves, but to rely on legal academics (in research groups) and the input from legal practitioners and other interested parties. The focus of Commission activity since the publication of the Communication in 2004 has been the establishment of the mechanisms through which preparatory work on the CFR can take place. As we explain below, there are three elements involved in the preparation work: the research groups, the network of Member State experts and the network of stakeholder experts.

The research groups

76. As mentioned already, a large amount of academic research has been and continues to be undertaken in this area. The Commission made clear in the Action Plan that it had no intention to “reinvent the wheel” but intended to exploit existing research activities to the full.⁴⁶
77. Work on the CFR is being taken forward by the Joint Network on European Law, though final approval of the award of funding has yet to be given by the Commission.⁴⁷ The Network was established following an open call for expressions of interest and independent assessment by experts. Three main groups have already been set up: the Study Group,⁴⁸ the *Acquis* Group, and the Insurance Group. The Study Group will focus on national laws, while the *Acquis* Group, as its name suggests, will be concerned with Community law. The third Group will concentrate on insurance law. The researchers will provide papers which will be discussed at meetings with the stakeholders (see below).
78. The work is to be financed under the Sixth Framework Programme. The Law Society expressed concern that the academic research so funded would not necessarily be restricted as to its term of reference and that the CFR when produced in 2007 might not be an appropriate basis for the reform of the *acquis* (p 58). The CBI was also critical of the Commission’s failure to disclose the names and remit of the academics and was not persuaded by the

⁴⁴ *Ie* industry, commerce and consumers.

⁴⁵ Contract Law. Council Resolution. Adopted at Competitiveness Council 22 September 2003.

⁴⁶ Action Plan, para 66.

⁴⁷ For details see ftp://ftp.cordis.lu/pub/citizens/docs/kickoff_p7_p8_2004.pdf

⁴⁸ The Study Group appears in effect to be the well-established Study Group on a European Civil Code, chaired by Professor von Bar from the University of Osnabrück, which produced the Principles of European Contract Law (the Lando Principles). The SGECC’s aim is “to produce a codified set of Principles of European Law for the law of obligations and core aspects of the law of property”. See generally www.sgecc.net

Commission's argument that as this was a research project the Commission was not able to set the terms of reference (p 40).

79. The Commission responded, confirming that the research is to be funded under the Sixth Framework Programme. Because that Programme exists to fund primary research the Commission "cannot determine terms of reference for the researchers or dictate either methodology or results. Neither can we make public the full details of the project until the award process is completed". However, the Commission told us that they would publish the information as soon as they were free to do so (p 56). In the meantime a synopsis of the research and preliminary list of researchers can be found on the internet.⁴⁹
80. **The means of funding the work on the CFR presents the Commission with something of a dilemma.** The research groups are not outside contractors, whose terms of reference, conduct and results the Commission can direct and control. However in the use of its funds the Commission needs to stay within the terms of the Sixth Framework Programme. If they do not they will be answerable to the Court of Auditors.
81. The CBI acknowledged that academics had a significant role but expressed concern that the exercise was being undertaken by academics. Ms Haan said: "I think the concern from our members is that if [the academics] are the ones driving it but that business are going to be the ones using it, that there needs to be proper business input into the process along the way (Q 146).
82. **It is clear that the Commission is concerned that the CFR eventually produced should be usable. Preparing a draft CFR is not pure academic research and the terms of its funding may not give the result that the stakeholders, and possibly the Commission, would desire. The Joint Network is surely conscious of the political context in which, and the brief to which, its constituent groups and members are working. It is reasonable to suppose that the Network will want to produce a CFR which will be widely acceptable and accepted.**
83. **It is also clear that the Joint Network will not have the final say on the content of the CFR.** As the Commission pointed out, "the preparatory work being undertaken by the research network under the Sixth Framework Programme will not bind the Commission as to the content of the final Common Frame of Reference. This is precisely to ensure that the final product is useful in practice and can, if necessary, be adjusted in the light of stakeholder needs. Before publishing a proposal for the Common Frame of Reference in the form of a White Paper, the Commission would carry out an impact assessment. We are starting to plan this now, and will be inviting comments from stakeholders on the appropriate process and methodology for this strand of work" (p 55).

Network of Member States Experts on the CFR

84. Member States will be involved, *inter alia*, by the Network of Member States Experts on the CFR. The first meeting was on 3 December 2004 when the Commission met with representatives of the Member States to begin the work of the Network. The CBI noted that the information on the workings of the Member States' group was not publicly available (p 39). The United

⁴⁹ See ftp://ftp.cordis.lu/pub/citizens/docs/kickoff_p7_p8_2004.pdf

Kingdom was represented at that meeting by an official from the Department for Constitutional Affairs. The meeting was also attended by observers from applicant States and from the EEA.

85. The objective of the meeting was to inform Member States of the developments of the European contract law project and the preparation of the CFR, to obtain their views on the possible content of the CFR and the problems that the CFR might solve. The Commission have most helpfully published papers prepared for that meeting and a summary of the discussions and conclusions of the meeting.⁵⁰
86. It is envisaged that there will be meetings of the Network two to four times a year. At least two meetings have already been planned for 2005.

The stakeholder experts

87. The Commission wishes to ensure that the work is “grounded in the day-to-day experience of businesses, consumer and legal practitioners”.⁵¹ The Commission has established a network of stakeholder experts, to be known as the “CFR-net”. This will include those with practical legal expertise. The CFR-net is intended to bring together business, professional and consumer interests (representatives from industry, commerce, and services, including financial services, as well as legal practitioners and representatives of consumer organisations⁵²). The involvement of consumer groups was, in the view of Which?, absolutely necessary, though they acknowledged that in a Union of 25 co-ordination of the various consumer groups might be difficult. But a structure was there in BEUC (*Bureau Européen des Unions de Consommateurs*) (QQ 98-100).
88. It is envisaged that the CFR-net will follow closely the work of the researchers and provide input to the researchers. There will be workshops where the experts and researchers can meet. They will have access to a restricted access website (the CIRCA website) where they will be able to comment on research drafts, but not edit documents directly. (The CBI were critical of this on the ground that free and open discussion would be precluded—p 40). There will be a paper which is published by the academic researchers, probably about a month before the workshop is due to take place. Stakeholders will have to study the paper and consult within their various organisations and with the other organisations, and to find out who will be attending the relevant workshop. There will be an opportunity to make representations at the workshop. The academic research teams will not be bound to accept the views of stakeholders but where they depart from them they should give their reasons (p 40).

⁵⁰ The papers are to be found on the Commission’s website at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm

⁵¹ Robert Madelin, Director General, DG Health and Consumer Protection. Speech to the CFR-net, Brussels 15 December 2005.

⁵² The involvement of consumer organisations in the development of EU policies is one of three key objectives of the Commission’s Consumer Policy Strategy for the period 2002-6. The *Bureau Européen des Unions de Consommateurs* (BEUC) is formally/generally recognised by both the Commission and European Parliament as the body that speaks for consumer organisations in the Member States. BEUC membership is open to independent consumer organisations within the European Union, the European Economic Area, and elsewhere in Europe. Both the National Consumer Council (NCC) and Which? are members of BEUC.

89. The first meeting of the CFR-net took place on 15 December 2004. The Commission have published papers relating to that meeting and a summary of the discussions and conclusions.⁵³ The CBI, however, felt that the summary covered the views of the Commission but largely ignored those of the stakeholders (p 39). Two meetings of the CR-net have been planned for March 2005. The CFR-net is expected to be kept busy for three years.

The “lottery”

90. CBI participation in the workshops would, in their view, be something of a lottery (Q 163). The Commission will determine which individuals will participate in which workshop. They only want 20-25 people at each workshop, with only one person per organisation. Individual representatives are not expected to attend more than two in any one year. The CBI feared therefore that the common law would not necessarily be represented in all workshops (p 40).
91. The Minister said that she could appreciate how the CBI felt. It was “part of the shaking down and settling in”. But, she noted, the United Kingdom had 15 per cent of the stakeholders involved (26 people out of 160), which was the second highest to the Germans (Q 198). The Minister said that the Government had put together “for our own stakeholders a network that enables them to come together with us to talk about the work that will be going on in this process” (Q 197). “One of the reasons to bring together these stakeholders in a group is to enable us to think about using people effectively in the different workshops and ensuring there is a broad spread of representation, and also so that they do not feel alone. It is quite important they feel this is a kind of UK effort as well as obviously being completely independent and representing their own views within in it” (Q 198). The object of the network was not, however, to agree a UK line but to enable the UK stakeholders to communicate with each others, be better informed and, for example, co-ordinate representation (QQ 202-3).
92. The Commission has responded positively to the criticisms of the CBI: “We would encourage any stakeholders who have concerns about the practical arrangements so far to contact us directly with constructive suggestions about how the difficulties can be resolved. We do not claim that we have got everything right yet, but we are working on it” (p 56).
93. **We are pleased to see the steps being taken by the Government to encourage the sharing of information among stakeholders in the United Kingdom. We would also encourage stakeholders to take up the Commission’s invitation and put forward proposals as to how the CFR-net consultation process can be improved.**

The work programme

94. The programming of the workshops was also strongly criticised by the CBI. Mr Clark said: “The sequence of the topics does not follow any logical order; it follows the order in which the group of academics, who have been commissioned, have done some work already. You get the notion and functions of the contract coming several sessions after you have already dealt

⁵³ The papers are to be found on the Commission’s website at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm

with things like unjust enrichment, which you might have otherwise dealt with at the end. Things like main obligations under the contract do not come in until the middle of next year. It is going to be very difficult to give serious input to any workshop when you do not know what the basic principles are going to be underlying it all” (Q 163). In the CBI’s view it would be difficult to comment meaningfully when other more general and fundamental topics are to be covered later (p 40). Further, while there would be an opportunity to make representations at the workshop, the academics were not bound to take note of any of the comments made but if they reject them they have to explain why. The CBI complained that there was no plan for follow-up sessions, either as a result of issues raised at a workshop and things or as a result of issues arising out of subsequent workshops which have a consequential effect on matters discussed in an earlier workshop (Q 164).

95. The Minister appeared to be open-minded about the ordering of subject matter for consideration and discussion by stakeholders. “I think there are two ways one could approach it. The positive way is to say: they have done them in the order in which they have academic submissions ready, so we are not waiting. The other way of looking at it is: it is a bit haphazard and one might start at the beginning” (Q 198).

The time factor

96. The Commission envisages that that it will take five years to conclude the CFR. Even though a substantial amount of research and analysis has already been undertaken and texts exist (for example, the UNIDROIT and Lando Principles), there is still much to do. The CFR is an ambitious project involving a large number of parties. Five years does not seem too long. Indeed, if there is to be proper consultation and re-consideration at each stage that time period could easily be exceeded. **As mentioned above, it would not be acceptable to delay for that five year period revision of the *acquis*. Revision of the *acquis* should not be dependent on completion of the CFR** (see para 47 above).

CFR resources/costs

97. The preparation of the CFR will involve a substantial commitment of resources on all sides. **Even though a large amount of preliminary research work has already been done this is still going to be an expensive project.**
98. The Commission is proposing to spend a great deal of money in pursuing the goal of preparing the CFR. 4.4 million euros has been allocated for the researchers. In addition there are the indirect costs of the involvement of the institutions, Member States, stakeholders in each Member State and academic institutions. Professor Beale, University of Warwick, thought that even 4.4 million euros would not cover all the researchers’ costs (Q 13). In the CBI’s view, expenditure of this magnitude requires a significant level of openness and transparency (p 40). **We are pleased to note the positive response of the Commission to criticisms of lack of openness and transparency.**
99. **We detect no political desire or will at the moment to move towards harmonisation of European Contract law. That being so, we cannot avoid the question as to whether it is really a good idea for the**

substantial resources of time and personnel involved in the Commission's programme to be expended on the CFR and the optional instrument, rather than on what is certainly needed, which is improving the *acquis*. We are sceptical as to whether the potential benefits will outweigh the costs. But the reality is that commitments, political and legal, have already been entered into. Work is progressing. Accountability will be important and, subject to the restraints of the Sixth Framework Programme, the Commission must ensure that the exercise produces value for money.

CHAPTER 5: STANDARD TERMS AND CONDITIONS

The proposal

100. The second element in the Commission's proposals is the promotion of Standard Terms and Conditions (STCs) available to assist businesses throughout the EU. It is envisaged that such STCs would be drawn up by the industry concerned and not by the Commission. The Commission's role would be to act as facilitator and "honest broker", bringing parties together without interfering with the substance. The Commission envisages that they would focus on business to business (B2B) and business to government (B2G) transactions. STCs would be posted on a Commission website, which would also provide a platform for the exchange of information and experience. The Communication points out the potential applicability of competition law to STCs and the guidelines already issued by the Commission. Finally, the Communication proposes action to be taken by the Commission to identify potential national legislative obstacles to EU-wide STCs.
101. It is clear that STCs can play an important role in some markets as a starting point for contractual negotiations. Both the Law Society and the CBI gave as an example the wholesale financial markets. Mr Clark, for the CBI, said that STCs "will deal with definitional questions of the subject matter: timing, what happens if this happens or what happens if that happens, they may cover legal issues such as who has the right to terminate, when, and what the level of compensation as liquidated damages might be or whatever". Mr Clark also pointed out the limitations of standard terms: "They do not go so far as to spell out the full legal framework which is to apply to the contract, therefore, I am not quite sure what benefit is to be gained by having a website which has detailed contractual definitions for the supply of grain, oil, financial contracts or whatever they might be drawn up under different legal systems ... I cannot see that you can have some standard terms and conditions which are going to apply under more than one system of law at any one time" (Q 178).

A damp squib?

102. We received little evidence to suggest that STCs were an option that was likely to be greatly used or helpful. Professor Beale, University of Warwick, said: "I may be quite wrong, but I think this particular heading of the Action Plan is probably going to turn out to be a complete damp squib. Certainly I have not seen any sign that the Commission is intending to go out and negotiate standard law or impose standard contract terms" (Q 45). Both Professor Howells, University of Lancaster, and Mr Patel (Which?) also doubted whether the idea of EU wide STCs would come to much (QQ 130-3). Professor Howells said that "business seems to be quite happy to have diversity in its standard terms and to play to the different markets' different expectations" (Q 134).
103. The Law Society sensed that the Commission's own thinking on the subject was tentative (p 60). The Law Society acknowledged that putting STCs on a freely available website might be attractive for business, but they had serious reservations about the Commission's proposal and considered a website for posting STCs to be unnecessary (p 62).

104. The Government were more positive and believed that the Commission's proposal could be a good thing. But the Minister could "see that from an industry point of view they would need to be convinced that this was going to be useful and applicable and not gather dust in a corner". She added: "We recognise that if it is going to be done, it has to be done industry-by-industry. We are waiting to see what comes out of it". The Minister acknowledged that industry would need to be consulted (QQ 222-3, 225 and 228).

Role of the Commission

105. As mentioned above, the Communication envisages that the Commission's role would be limited to acting as facilitator and "honest broker". They would not themselves draw up STCs or interfere with their substance. The resources of the Commission, in this case DG SANCO,⁵⁴ are quite limited and it would appear that they do not intend to become heavily involved (Q 45). Professor Beale thought that the Commission was more likely to be interested in taking forward the work on the optional instrument (Q 50). We queried, however, how "non-interventionist" the Commission could/should be.
106. For the CBI, Mr Clark expressed the concern that if the Commission exercised no quality control that might debase the value of the website (Q 181). The Law Society expressed concern that the Commission might not be able to monitor and vet STCs so as to ensure that they were up to date and appropriate. Yet being on an official website would give STCs credence, which disclaimers might not be able to counter. In the Law Society's view, it was essential not only that any disclaimers were express and explained the nature of and source of the STC but also that it was made clear that standard conditions and terms are only a starting point for parties and that it was for them to agree terms and to verify their suitability (p 60).
107. If, as appears to be the case, the Commission is going to take a passive role, then one wonders whether other legitimate interests concerned, such as consumers, might be under-represented and possibly neglected. Should the Commission not intervene to safeguard the *acquis* and consumer interests? Mr Patel (Which?) did not expect the Commission necessarily to interfere but saw a possible need for them to safeguard consumer interests in the absence of consumer representation in the preparation of STCs (Q 129).
108. **A public authority, such as the Commission, cannot stand back from STCs posted on its website with its encouragement. Formal disclaimers cannot discharge political responsibility, even where they may satisfy the courts. The Commission should exercise control over the quality of such STCs. At the very least the Commission as guardian of the Treaties should ensure compliance by STCs with the competition rules⁵⁵ (Articles 81 and 82 of the EC Treaty) and the *acquis*.**

⁵⁴ The responsible Directorate-General, Health and Consumer Protection, is generally known by its French acronym.

⁵⁵ The Communication draws attention to the relationship between the competition rules and EU-wide STCs. The Commission's present intention is not to publish special guidelines but to organise a survey and consult interested parties. Communication, para 2.2.3.2.

CHAPTER 6: THE OPTIONAL INSTRUMENT

The Action Plan

109. The Communication speaks of it being “appropriate to examine whether non-sector specific-measures such as an optional instrument may be required to solve problems in the area of European contract law”.⁵⁶ The 2003 Action Plan gave a preliminary description of what might be the content and form of an optional instrument.

Extract from the Action Plan

- “90. Some arguments have been made in favour of an optional instrument, which would provide parties to a contract with a modern body of rules particularly adapted to cross-border contracts in the internal market. Consequently, parties would not need to cover every detail in contracts specifically drafted or negotiated for this purpose, but could simply refer to this instrument as the applicable law. It would provide both parties, the economically stronger and weaker, with an acceptable and adequate solution without insisting on the necessity to apply one party’s law, thereby also facilitating negotiations.
92. ... As to its form one could think of EU wide contract law rules in the form of a regulation or a recommendation, which would exist in parallel with, rather than instead of national contract laws. This new instrument would exist in all Community languages. It could either apply to all contracts, which concern cross-border transactions or only those which parties decide to subject to it through a choice of law clause. The latter would give parties the greatest degree of contractual freedom. They would only choose the new instrument if it suited their economic or legal needs better than the national law which would have to be determined by private international law rules as the law applicable to the contract.”

110. The Communication takes the debate a stage further than the Action Plan and sets out (in Annex II) a series of issues for discussion relating to the binding nature, legal form, content, scope and legal base for an optional instrument. On the key question of content, the Commission refers again to the Common Frame of Reference (CFR): “In its Action Plan, the Commission made clear that in reflecting on the content of a non-specific instrument, the future CFR should be taken into account. The content of this CFR would be likely to serve as a basis for the discussions on the optional instrument. On that point, most of the stakeholders agreed with the Commission view even if the question of whether the new instrument should cover the whole scope of the CFR or only parts of it was left open”.⁵⁷

Reactions to the optional instrument

111. As Clifford Chance pointed out, the optional instrument, whether as a legal system to replace or to be an alternative to national laws, raises wider issues than the other elements of the Commission’s contract law package. Those issues include “whether different national laws really do obstruct the

⁵⁶ Communication, para 2.3.

⁵⁷ Communication, Annex II, para 4.

functioning of the internal market, how it would affect the choice of laws between the EU and other States (*eg* New York law), what effect it would have on the financial markets, how it would affect the diversity of traditions within the EU, and whether it would lead to unacceptable uncertainty over a prolonged period” (p 54).

112. The CBI did not see any benefit in the optional instrument. Ms Haan said: “I think our concern is partially the Trojan Horse argument that what starts off as an optional instrument may ultimately become less optional. The other concern is the confusion which exists in some of the discussions between the optional instrument and the CFR and whatever form the CFR is produced in, in 2007, will look extremely like a potential optional instrument” (Q 183).
113. The Government saw no need for the optional instrument and believed that other Member States also held that view (Q 237). There was no reference to the optional instrument in the Hague Programme. Had there been, the Minister was confident that the Government would not have signed up to it (Q 239). But the fact that the optional instrument is not referred to in the Hague Programme, and therefore lacks the political mandate given to the other two elements of the Commission’s package, did not seem to trouble the Government. Though they had serious reservations about the optional instrument, the Government accepted that the Commission should have some leeway to develop ideas and policies (Q 241).
114. What is clear is that, as the Law Society noted, the Commission has not given up its determination to continue the debate on the possibility of an optional instrument. **We believe, and the Commission accepts,⁵⁸ that an extensive impact assessment needs to be undertaken before any further work is undertaken on the optional instrument. As the Law Society said, that assessment should seek to determine whether an optional instrument would have a real effect on reducing cross-border transaction costs (p 62).**

Relationship with the CFR

115. What would be the content of the optional instrument? As mentioned above, the Commission has explicitly acknowledged the relationship between the CFR and the optional instrument. And what seems clear is the CFR is not going to be a mere dictionary. The former, it is proposed, will contain not only Principles and Definitions but also Model rules. Some have said that it is going to be more like a textbook. But it seems far more likely to take on the form of an annotated statement of the law. **Once the CFR has been agreed it would not be a major task to convert or adapt it into an optional instrument. As explained above, the CFR may turn out to be something of a Trojan Horse.**

Opt in or opt out

116. The Commission’s 2001 Communication invited views on whether the optional instrument should be one into which parties contracted (opt in) or one which would apply unless the parties contracted out (opt out). The former approach appears to have won the day, at least for the present. Imposing a perhaps unknown and unfamiliar regime of contract law on

⁵⁸ Communication, Annex II, para 1.

parties would not lead to greater certainty or necessarily lower transaction costs.

117. “Opting-in” had the support of most of our witnesses, provided the scope of application of the optional instrument is limited to business to business (B2B) and business to government (B2G) contracts. Neither Professor Howells, University of Lancaster, nor Mr Patel (Which?) were enthusiastic about a system that would involve consumers opting in or out. Professor Howells said: “That would be a potential pitfall of undermining national consumer protection rules and consumers would not have the ability to judge whether that was in their interests at all” (Q 136). Which? did not think that it was appropriate for consumers to have to make decisions concerning choice of law (p 17). Professor Howells said: “Consumers need clear rules” (p 14).

Vires

118. The Commission accepts that the question of the legal base is closely linked to the legal form of the instrument, its content and its scope. At least three Articles have been mentioned in the discussions to date, Article 65 EC (judicial co-operation on civil matters), Article 95 EC (approximation of laws —internal market) and Article 308 EC (flexibility clause). All three provisions are reproduced, with amendment, in the Constitutional Treaty, as Articles III-172, III-269, and I-18 respectively.

Effect on English law

119. A large number of contracts worldwide provide for English law to be the governing law and for disputes to be settled in accordance with English law. One reason is that English law espouses the principle of certainty to a greater extent than many civil systems, with the result that it is possible to predict with a much greater degree of certainty what the outcome will be in any particular situation. We were therefore concerned to enquire as to what effects the “optional instrument” might have on the use and influence of English law internationally and the “invisibles” which it generated.
120. The issue is one of some concern for the CBI. Mr Clark said: “English law is used not only for trade between England and other parts of the Community and the rest of the world, but between people who have no other connection with the UK whatsoever. Effectively it has become a global commodity and parties to contracts, particularly in the Far East, will as readily choose New York law as English law. The slightest suggestion that English law is becoming less certain in its outcome and they can switch very, very rapidly to using New York law with the consequential loss of economic activity for the UK particularly and that is not just lawyers’ income, it is the associated income of institutions” (Q 160).
121. Professor Beale, University of Warwick, doubted whether large numbers of commercial contracts of an international kind would suddenly migrate to a European optional instrument. However, he could envisage a number of people using the optional instrument rather than one of the national European laws. Professor Beale did not think the optional instrument would really be a threat to the United Kingdom’s invisible earnings (Q 61).

A legislative instrument?

122. **No case for the expenditure of time and money on the optional instrument has been made out. The fact that there is little support from Member States and that reliance for *vires* purposes might need to be placed on Article 308 of the EC Treaty (the flexibility clause) demonstrates that any attempt to produce a binding legislative instrument may give rise to potentially serious political and legal problems.**

CHAPTER 7: DETAILED CONCLUSIONS AND RECOMMENDATIONS

The CFR and reform of the *acquis*

123. It is clear that the CFR is not intended to be limited to general contract law but will also contain detailed rules on specific types of contract (para 30).
124. The CFR is bound to contain some differences from the common law (para 34).
125. It is too early to predict how valuable the CFR would be to Union and national legislators (para 39).
126. We would be concerned were the CFR to delay the making of much needed improvements to the *acquis*. We urge the Government to make it a priority to ensure that any reforms which are not dependent on the CFR are taken forward without unnecessary delay (paras 47 & 96).
127. We do not rule out the potential value of the CFR to arbitrators, though the claim made by the Commission seems at this stage a little extravagant. We are concerned that the Government appear not to be in touch with the arbitrators (para 55).
128. We doubt whether it is correct to describe the CFR as envisaged in the Communication as a thesaurus. It would be more than a book of synonyms or a book of specialised vocabulary. We hope the Government have not underestimated what the CFR might contain or involve (para 60).
129. The case for harmonisation of contract law across Europe has yet to be made. It is something that would have to be considered on its merits. There remains, however, a concern that when the present work on European contract law, along the lines that have been suggested by the Commission, has been completed, there will be increased pressure for harmonisation of contract law across the Union. The CFR/optional instrument will have been prepared and could be turned into a draft harmonisation measure. When the CFR is in place the Commission may be expected to press the opportunities for its use and advocate the need to maximise the “benefits” of such a large investment (para 67).
130. We would emphasise the point made at the outset of this Report, namely there will be an important political dimension in agreeing the content and future usage of the CFR (para 71).
131. There is a possibility that the CFR and the review of the *acquis* will give rise to proposals for EU legislation. Any proposal would have to be considered on its merits. Were there a genuine need which only EU legislation could meet then it would be irrelevant that the proposal had derived from the CFR (para 3).
132. The means of funding the work on the CFR presents the Commission with something of a dilemma (para 80).
133. It is clear that the Commission is concerned that the CFR eventually produced should be usable. Preparing a draft CFR is not pure academic research and the terms of its funding may not give the result that the stakeholders, and possibly the Commission, would desire. The Joint Network is surely conscious of the political context in which, and the brief to which,

its constituent groups and members are working. It is reasonable to suppose that the Network will want to produce a CFR which will be widely acceptable and accepted (para 82).

134. It is also clear that the Joint Network will not have the final say on the content of the CFR (para 83).
135. We are pleased to see the steps being taken by the Government to encourage the sharing of information among stakeholders in the United Kingdom. We would also encourage stakeholders to take up the Commission's invitation and put forward proposals as to how the CFR-net consultation process can be improved (para 93).
136. Even though a large amount of preliminary research work has already been done preparation of the CFR is still going to be an expensive project (para 97).
137. We are pleased to note the positive response of the Commission to criticisms of lack of openness and transparency (para 98).
138. We detect no political desire or will at the moment to move towards harmonisation of European Contract law. That being so, we cannot avoid the question as to whether it is really a good idea for the substantial resources of time and personnel involved in the Commission's programme to be expended on the CFR and the optional instrument, rather than on what is certainly needed, which is improving the *acquis*. We are sceptical as to whether the potential benefits will outweigh the costs. But the reality is that commitments, political and legal, have already been entered into. Work is progressing. Accountability will be important and, subject to the restraints of the Sixth Framework Programme, the Commission must ensure that the exercise produces value for money (para 99).

STCs

139. A public authority, such as the Commission, cannot stand back from STCs posted on its website with its encouragement. Formal disclaimers cannot discharge political responsibility, even where they may satisfy the courts. The Commission should exercise control over the quality of such STCs. At the very least the Commission as guardian of the Treaties should ensure compliance by STCs with the competition rules (Articles 81 and 82 of the EC Treaty) and the *acquis* (para 108).

The optional instrument

140. We believe, and the Commission accepts, that an extensive impact assessment needs to be undertaken before any further work is undertaken on the optional instrument. That assessment should seek to determine whether an optional instrument would have a real effect on reducing cross-border transaction costs (para 114).
141. Once the CFR has been agreed it would not be a major task to convert or adapt it into an optional instrument. The CFR may turn out to be something of a Trojan Horse (para 115).
142. No case for the expenditure of time and money on the optional instrument has been made out. The fact that there is little support from Member States and that reliance for *vires* purposes might need to be placed on Article 308 of the EC Treaty (the flexibility clause) demonstrates that any attempt to

produce a binding legislative instrument may give rise to potentially serious political and legal problems (para 122).

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Borrie

Lord Clinton-Davis

Lord Denham

Lord Grabiner

Lord Henley

Lord Lester of Herne Hill

Lord Mayhew of Twysden

Lord Neill of Bladen

Lord Scott of Foscote (Chairman)

Lord Thomson of Monifieth

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs
- * Professor Hugh Beale, University of Warwick, Law Commissioner
- * Mr Charles Clark, Linklaters
Clifford Chance
Robert Madelin, Director-General of the Health and Consumer Protection Directorate-General, European Commission
- * Ms Susannah Haan, CBI
- * Professor Geraint Howells, University of Lancaster
The Law Society
- * Mr Ajay Patel, Which?
Dr Christian Twigg-Flesner, University of Hull

APPENDIX 3: REPORTS

Recent Reports from the Select Committee

Annual Report 2004 (32nd Report, session 2003-04, HL Paper 186)

Government Responses (26th Report, session 2003-04, HL Paper 164)

Proposed Constitutional Treaty: Outcome of the Irish Presidency and the Subsidiarity Early Warning Mechanism (22nd Report, session 2003-04, HL Paper 137)

Developments in the EU (13th Report, session 2003-04, HL Paper 87)

Correspondence with Ministers (10th Report, session 2003-04, HL Paper 71)

Recent Reports prepared by Sub-Committee E (Law and Institutions)

The Hague Programme: a five year agenda for EU justice and home affairs (10th Report, session 2004-05, HL Paper 84)—*joint Report with Sub-Committee F (Home Affairs)*

Procedural Rights in Criminal Proceedings (1st Report, session 2004-05, HL Paper 28)

Strengthening OLAF, the European Anti-Fraud Office (24th Report, session 2003-04, HL Paper 139)

Security at EU Council Meetings (20th Report, session 2003-03, HL Paper 119)

The Rome II Regulation (8th Report, session 2003-04, HL Paper 66)

The Future Role of the European Court of Justice (6th Report, session 2003-04, HL Paper 47)

Other relevant Reports prepared by Sub-Committee E (Law and Institutions)

European Contract Law (12th Report, session 2001-02, HL Paper 72)

Minutes of Evidence

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE E)

WEDNESDAY 12 JANUARY 2005

Present	Borrie, L	Lester of Herne Hill, L
	Clinton-Davis, L	Mayhew of Twysden, L
	Denham, L	Scott of Foscote, L (Chairman)

Examination of Witness

WITNESS: PROFESSOR HUGH BEALE, examined.

Q1 Chairman: Professor Beale, thank you very much indeed for taking time to come along this afternoon to help us with the current inquiry and proposed report that we are considering. We were last here I think in December 2001 when you gave evidence to us to help us with our European Contract Law Report, which was then under consideration. We are most grateful to you for coming again. The particular reason for inviting you, as I expect you know, is that the Commission has recently published a communication, *European Contract Law and the Acquis: the Way Forward*, which is what this Committee is going to be examining and proposing to write a report about. I understand that you quite recently have given a lecture in Sheffield on the same subject, and you have very kindly provided us with a copy of which, if we may, we will have further copies made and distributed to members of the Committee. None of us have yet read it so we are unable to ask you any questions about it. I am sure it will be of very great assistance to us in any event. Professor, there have been a number of developments over the last three years in the field of contract law and what, if anything, the European Union should do about it. The proposals are to produce a Common Framework of Reference, to have standard contract terms and so forth. What is your general reaction to these proposals, these developments? Are you in favour of them?

Professor Beale: Generally speaking, yes, I am in favour of them. I perhaps should declare an interest. As some members of the Committee may know, for some years now I have been involved in some of the groups which have been working on the subject. I was a member of the Commission on European Contract Law, which produced the so-called Lando Principles of European Contract Law, and I am still a member of the Study Group on the European Civil Code and of the network of groups which will be contributing towards the draft Common Frame of Reference. So that is my declaration of interests, as it were. Broadly speaking, yes, I do welcome the various elements. I think really there are, as you have said, three elements and then a fourth one which is perhaps unstated but

I think implicit from the documents. The first element is the Common Frame of Reference itself, which is aimed, in the first place, at helping the European legislators—and I use that in a broad sense—to improve the existing European legislation, the *acquis*, and to draft better legislation in the future. Then, secondly, as you mentioned, there is the promotion of European-wide standard contract terms. Then, thirdly, there is the possible development of this so-called optional instrument, whatever that means. It is not entirely clear what it will mean, but it is a possibility. I think the fourth and implicit element is that it looks as if there will be further EU legislation in the contract area on specific areas of contract law. When I say “contract law”, I treat that in the very broad sense in which the Commission seem to use the phrase; it is not what we would necessarily find in the contract books. For example, they quite clearly include in the law of contract the law of personal security, or of security over personal property, which I think is property law, but to them it is connected with contracts and falls within the general remit and it is mentioned in some of the documents.

Q2 Chairman: Maybe that is one of the terms that needs to be explained in the Common Framework of Reference?

Professor Beale: That could very well be, yes. I think, provided that the moves at the European level are limited to those four items, then I welcome them. I remain, as I think I explained to the Committee last time I appeared, firmly opposed to any form of unification of private law across the European Union or the replacement of national law by a European civil code, and I am not convinced that there is any need even for general harmonisation, as it were, where all the legal systems are made to conform to a particular pattern, even though they may express it in different ways. I am, of course, in favour of removing any positive barriers that continue to exist to doing trade across borders, and I think in the reactions to the initial communication of 2001, when if you recollect the European Commission asked whether people found that there were barriers to trade, there

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were some reported, particularly in the financial services sector where it was a bit difficult to sell insurance across boundaries, for example, because what was compulsory in one state was forbidden in another and this sort of nonsense. Clearly, those things have to be removed. I think also that there is a need to explore, as I explained last time, to see whether doing business across borders is subject, as it were, to hidden traps in other legal systems, differences which are tucked away and which business people might not realise were causing them considerable risks. There are certain areas where difficulties are caused by differences between the legal systems, or sometimes the impossibility of doing certain things in certain legal systems. Actually the area of security over personal property, which I mentioned a few moments ago, is a good example of that. Whereas we have very general ability to create security over all sorts of assets belonging to companies, for example, in France you still have particular rules about particular kinds of asset and only certain charges can be created over oil, and certain charges can be created over other assets, and it is a very fragmented system. I am told that that does cause quite a lot of difficulty if people are trying to do business across borders. I think these are things which need to be dealt with. As I say, I am firmly opposed to any notion of a European civil code and, to give it its due, I do not think there is anything about that in the Action Plan. In fact, the Action Plan specifically says that it is not intended to create the European civil code. That is the Commission's position. It is perhaps worth mentioning, my Lord Chairman, that the position seems to vary between one institution and another at the European level. I think the Parliament takes a rather different view. The Parliament still seems to be calling for some sort of unification, but the Commission is not, as far as I can see. With those caveats, yes, absolutely, I welcome these developments.

Q3 Chairman: Just pursuing your caveats a little, and I am interrupting myself, I think the UK Government is entirely of the view that you have expressed that harmonisation of contract law is not something which would be acceptable, but the worry perhaps is whether the work that has been done on European contract law, along the lines that have been suggested by the Commission, is somewhat of a Trojan horse, leading towards a state of affairs where the goal of harmonisation of contract law across the Union might become more palatable to those who are now face with it and it might eventually become a proposal in itself. Is there a danger there?

Professor Beale: I suppose, yes, there must be a danger in the sense that if some sort of Common Frame of Reference which everybody agrees on can be created, it becomes easier to draft a civil code, but it seems to

me to depend very much on whether it is palatable to governments. So far I think the Commission has taken the message that certainly our government, and I think many others, are firmly opposed. I gather that it does vary between governments. I was told by my colleague Professor Alpa the other day that the Italian government favours the European civil code. I was rather surprised but apparently they do. I think our position is pretty clear and I do not think the Commission is seriously thinking about it at all now.

Q4 Chairman: I suppose, being parochial, if there were to be a European civil code, it would be bound to be based on a civil law concept of contract rather than the common law concept?

Professor Beale: I would hope that it would be a mixture, rather as the Principles of European Contract Law are a mixture. I would like to say that they combine the best features of both sides, but it may of course be that we combine the head of the carrot with the root of the cabbage.

Q5 Chairman: The fact of the matter is that we have not, even in the United Kingdom, got a unified law of contract. The law of contract for Scotland is quite different from the law of contract for England and Wales. I have never heard of great problems for cross-border trade that were created by these differences.

Professor Beale: That is true, though I think it would be fair to say that in most cases those two systems reach very similar results, so that in practice you probably do not have to worry very much in general contract law whether you are dealing under English law or Scots law. Of course, there are problems in relation to some areas; for example, you cannot create security over receivables in Scotland without notifying the debtor, which apparently means that a lot of it is done under English law because it is impossible to do it under Scots law. So there are differences which of course occasionally cause problems, I am told.

Q6 Chairman: Then there are pragmatic solutions found, as you have just indicated?

Professor Beale: Of course.

Q7 Chairman: Concentrating for the moment on the Commission's proposals for a Common Framework of Reference, the main argument in favour of that seems to be that it will assist in improving the current *acquis* and in allowing future items of European Union legislation to be clearer in their intent. Is that right?

Professor Beale: Yes.

Q8 Chairman: It does not necessarily go any further than that. It is simply a form of dictionary?

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Professor Beale: Yes, I think that is absolutely right, my Lord Chairman, except that the form of the dictionary, I suspect, is going to look rather like a set of rules. What the Commission clearly envisages is a set of definitions, and they then give examples of what they want defined, like what amount of damage or how a contract is concluded. I do not know any way of defining how a contract is concluded other than by setting out a series of rules about what is an offer and what is an acceptance, or whatever you want to call it. I think in practice the Commission acknowledges that we are talking really probably about separate rules. Indeed, if you look at the annex to the latest document, the document that is called *The Way Forward*, which sets out the possible contents of the Common Frame of Reference, you will see that the possible contents are almost verbatim the chapter headings from the Principles of European Contract Law.

Q9 Chairman: To date, has there been any difficulty in individual Member States knowing what was intended and required of them by directives in this field?

Professor Beale: In my experience, there is quite a lot of difficulty. Because we often reach the same results but use different terminology and different concepts and, worse still, sometimes used the same word to mean completely different things, when draft directives are being discussed, there often is a great deal of difficulty in ensuring that everybody is actually talking about the same thing.

Q10 Chairman: Is there an example of a word meaning completely different things in different systems?

Professor Beale: Well, for example, we might well talk about the law of damages but actually what you can recover by way of damages is very different; or we might talk about rescission law, the termination of a contract, and have very different concepts as to whether it means termination simply for the future or whether it means what the French call “resolution”, which is rescission *ab initio* and so on. There really are quite difficult areas sometimes. Equally, I think it is quite difficult for the representatives of Member States who are dealing with the draft directive to work out what the impact will be on their own law and how they might need to adapt their own law to implement it. It seems to me that the Common Frame of Reference could act as a very useful translation tool in that sense, if we can get a more or less agreed set of terms and concepts so that we know what we mean when we say “damages” and we know what we mean when we say “guarantee”.

Q11 Chairman: Is not one of the difficulties that the differences of meaning often derive from translation because there may not be an exact word in one Member State language to produce exactly the same meaning as the relevant word in the other Member State language?

Professor Beale: I think that is absolutely right, if I may say so, but I think that the answer to that is that when the Common Frame of Reference is produced, it is essential that it should have not just rules and definitions but that an explanation of those definitions in the form of a commentary and preferably that it should go even further and explain how this compares to the different national laws. Forgive me if I appear to sell the product which I helped to create, the *Principles of European Contract Law*, but it actually has three elements. There are the rules, the articles; there is a commentary which explains basically how the articles fit together and how they interact, rather like explanatory notes in a slightly more elaborate form; but then there are what are called the national notes where the source of this rule is described. If, for example, this rule represents the law in some countries but not in others, then that is explained. That makes it very much easier to work out what is the equivalent of this particular concept in the *Principles of European Contract Law* in, say, English law or Finnish law or whatever law it is you are interested in.

Q12 Chairman: But you start with some official text in a particular language presumably and then you go on from there?

Professor Beale: I think that if the text were drafted using the language of the Common Frame of Reference, then we would realise that when they refer to a commercial guarantee, for example, that means in England X, in Finland Y and in Latvia Z because that would be set out in the notes, and so it becomes a form of translation.

Q13 Chairman: I must say your explanation, Professor, explains to me what I had been rather wondering about. At page 10 of the Commission’s document, they described, under the heading “First strand: technical input” what is going to have to be done to create the Common Frame of Reference: a network of stakeholder experts to have an ongoing, detailed contribution to the researchers’ preparatory work, regular workshops and so on. It sounds as if it is going to be a very complex and expensive procedure that they will have to put in place. I wonder whether there is any sufficient balance between the cost this is going to involve and the benefit that is going to be expected at the end of the tunnel.

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Professor Beale: That is always a very difficult question, but I think there are two points I would make. The first is that a lot of the work has already been done. The European Commission documents have always made it clear that they do not want to reinvent the wheel; they are going to use the work which has been done by the various groups, including the Lando group and other groups like for example the Academy of European Private Lawyers, which is headed by Professor Gandolfi, and so on. So much of the work has been done. Secondly, the work that remains to be done is being funded by the European Commission through a different directorate, the Research Directorate, under what is called the Sixth Framework Programme. What they have done is to encourage a lot of the existing groups to form themselves into a network to put forward a bid for funds. My understanding is that although the contract has not yet been signed, they are about to award the sum of about €4 million, or something like that. Relatively speaking, of course this is not an enormous amount of money and it will not cover the whole cost of those groups but those groups have other sources of funding. Then there will be the stakeholders' meetings. My understanding is that there are to be something like 30 of those, but they will simply be one-day meetings held in Brussels.

Q14 Chairman: The stakeholders are described as the business entities which may be freely contracting and using the result of this work?

Professor Beale: To be honest, I am not quite sure who they are but my understanding is that people have been invited to put themselves forward for inclusion in this stakeholders' group and about 160, I think somebody told me, have been selected to be the stakeholders, but whether they will be the same people at every meeting, I do not know.

Q15 Chairman: From what sort of areas will they come?

Professor Beale: They come from business, practice, chambers of commerce and I think there are separate groups from the Member States' governments. They are not treated as stakeholders but as something else.

Q16 Chairman: They would have to come from all the different Member States as well?

Professor Beale: Yes.

Q17 Chairman: It is going to be a fairly substantial meeting.

Professor Beale: It will be a fairly substantial meeting, and there we have to present the academic work and answer questions and take comments and learn from what they say, and try not to be too defensive about it as well.

Q18 Chairman: The intent that this will improve the quality and take care of the existing *acquis* and future European Union legislation you think is a realistic one?

Professor Beale: I think it will help. We are having to think quite hard about what the Commission really needs. I do not think the Commission would mind me saying that they are having to work this out as they go along. They have this great idea of a Common Frame of Reference but they are not actually quite sure themselves, I think, what should be in it and how they will use it. For example, it is quite clear that they want to use this to revise the existing *acquis* and, as members of the Committee will be aware, most of the *acquis* relates to consumer law. Presumably, they are interested in the rules of consumer law. If you look at the Principles of European Contract Law, there is nothing about consumer contracts, quite deliberately. The principles were aimed as dealing with, as it were, the general principles of contract law which provide, if you like, the infrastructure on which private law consumer rules are built—the superstructure—and this superstructure was left on one side quite deliberately because it was either dealt with by specific EU legislation or by national legislation and somebody is going to have to do the work of adding in the consumer law. One of the groups that will be involved in this network is a group that I am not involved with myself called the *Acquis Group* who are specifically analysing the existing *acquis communautaire*, and trying to get general principles out of it, not always a terribly easy task but that is what they are trying to do, and then the two will be put together. I will be involved, I think, in a group which has the task of putting the two together into some sort of coherent whole.

Q19 Chairman: In so far as directives from the European Union requiring action by Member States when implementing legislation may have ambiguities deriving from particular expressions which have different meanings in different states, I suppose then questions may arise as to whether there has been a proper implementation in one Member State or the other. These sorts of difficulties, in the end, at the moment would have to be dealt with by the European Court of Justice on a complaint made by the Commission that there has not been proper implementation. Has that been any substantial workload in the ECJ?

Professor Beale: There have been a number of cases but in my experience, which is rather limited I am afraid because I have only dealt in detail with a couple of directives—and I think the Directive on Unfair Contract Terms is the one that I am most familiar with—I think there have been three cases there in the ECJ, one of which was specifically about

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correct implementation; the other two were about interpretation of the directive.

Q20 Chairman: What are the sorts of problems that might have been avoided if there had been in place at an earlier stage the common framework that we are talking about?

Professor Beale: I think that some of the problems could have been avoided. Let me give you an example from another directive, the Package Travel Directive. This is an example which is actually contained in one of the Commission's own papers. The Package Travel Directive provided that in certain circumstances the consumer should be entitled to damages. It was then discovered that whereas in English law a consumer can get damages for a spoilt holiday, under Austrian law, which was the law in question, that sort of compensation was not available. If we had had rules on damages and what the Commission meant when it said "damages", that would have been avoided. It is a rather small instance.

Q21 Chairman: Does one know what the Commission meant when they said "damages"?

Professor Beale: Probably not but if they had had a Common Frame of Reference, perhaps they would have been alert to the question.

Q22 Lord Borrie: In relation to that and in relation to some of the answers Professor Beale has given to the Lord Chairman, the thought goes through my mind that one may be reaching for an ideal in looking at the Common Frame of Reference for the whole of the law of contract when the Commission in practice is most likely to need this sort of assistance in relation to consumer protection measures. If that is so, would not an alternative approach be to consider, when dealing with a package holiday directive or unfair contract terms directive, or whatever it is, to take into account the differences there might be in the different laws in the different Member States what is meant by, eg, damages, and so on and so forth and deal with it, as it were, *ad hoc* rather than this more ideal way, which may be not only expensive—a point that has already been raised—but very general, and there is the risk of course that the more general it is, the less useful it is when you come to try to apply it to some narrower branch of contract law on which the Commission is taking an initiative?

Professor Beale: Certainly that approach could be used. I think I would come back, if I may, to the point that actually a lot of the work has been done already so that a lot of this information is out there. Very often it is the problem that people do not realise that there is a difficulty. I am sure that nobody in the Commission had even thought about the point that "damages" means something different in English law

and Austrian law, so I am not sure, had they taken the approach that you have suggested, that they would have latched on the problem. I think I would defend the rather broad approach which is being taken, particularly as the material is there. If we were starting from scratch, I think there would be a great deal to be said for your more limited and focused approach, but, given that the work has quite largely been done already, at least stage one of the work, the academic work has been done, it seems to me a shame not to use it. It is very important that we expand and deal with the consumer aspect of course. If I may add another point, I think that the Commission needs to think carefully about what they are actually asking for because they talk about asking for general principles and definitions and even model rules, but they are also talking about using this Common Frame of References as a toolbox for the legislator. When the various groups are working and look at a particular area of law and can say, hand on heart, "Yes, actually all the Member States in one form or another have a particular rule", then it is just a question of writing down what the rule is. That is straightforward. But very often there are going to be variations and the group is going to have to choose; they are going to have to choose, as it were, which rule to write into their scheme. They will presumably choose what they think is the better rule and the one that produces the most workable system overall because, after all, the Common Frame of Reference has to work as a whole. It is absolutely vital, however, that they do not suppress the differences, that they bring out to the legislator the fact that there are differences, that this does not represent the law of all the Member States. This is, firstly, because if you happen to be a Member State for whom this is not the rule, you will need to know that so that you can adjust and interpret accordingly, but, secondly, because there is, as it were, a policy choice there. It is absolutely vital that the legislators realise that there is a policy choice being made there. It is a political issue at that stage. I do not think the groups should, as it were, try to seize the political initiative; that should be left to the slightly more democratic institutions of the European Union and not to a group of technocrats.

Q23 Chairman: When you spoke of the legislators, who did you have in mind?

Professor Beale: I think primarily at the moment it would be the Council, I suppose.

Q24 Chairman: And also the Parliament?

Professor Beale: And the Parliament, yes.

Q25 Chairman: But mainly the Council?

Professor Beale: I think the important point is that I hope that the Common Frame of Reference will bring out the fact that there are these differences

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and that there are different policy choices to be made, so that it will say, "We have adopted this rule, for example, because we think this is a more effective way of protecting consumers than the alternative rule", but that will be on the face of the papers, as it were. I think that is rather important.

Q26 Lord Mayhew of Twysden: Just going back a minute or two, if the Commission did not think that there might be different interpretations of damages in different parts of the Community, one wonders what they think they are paid for because that is about the first question you would ask, I imagine. One of the grounds which is put forward for the Common Framework of Reference by the Commission is that it will be a court for arbitration. If that is the case, it is rather a good selling point, it seems to me, because the current frame of opinion is: arbitration, good/litigation in court, bad. I wonder whether you think that that is a justifiable claim on the part of the Commission or not. For example, if one was drawing up a contract with an arbitration clause, would one say "and the Common Frame of Reference is to apply", as it were?

Professor Beale: I am quite convinced that statements of principle like this can be useful for arbitrations. What I am not convinced of is that we actually need a Common Frame of Reference to do that because I think we have already got principles that will do that. For example, the UNIDROIT principles for International Commercial Contracts, which are put out by the UNIDROIT Institute in Rome, I believe are already quite widely used by arbitrators. I am not sure whether that is because of a specific reference in the contract to the principles or whether it is simply that the contract refers to something vague like "internationally accepted principles" and the arbitrator looks around and finds a nice little orange book which sets out what the arbitrator can say are internationally accepted principles. I understand that they are being quite widely used. Even the *Principles of European Contract Law* has been used once in arbitration we discovered because somebody rang up to ask what they were supposed to mean! We have only anecdotal evidence of that. It is perfectly right that the Common Frame of Reference could be used for arbitrations but I am not sure that we need more than we have got already for that particular point.

Q27 Chairman: Professor, you have mentioned a couple of times that a considerable amount of work has already been done and is in place. Of course, that work would have been done before the entry into the Union of the new Member States.

Professor Beale: Yes.

Q28 Chairman: Will the work now to some extent have to be done again because of the law of those Member States which may be different from anything that the persons who have done the work have yet come across?

Professor Beale: That is a very telling point. Certainly some of the work will need to be revised because, if nothing else, the national notes will be out of date; they will not contain references to the 10 new Member States. We are just scratching our heads and wondering how on earth we are going to get that done in the time but it certainly will need to be done. Whether we will need to change the Articles themselves, because as it were of a new body of opinion with the European Union, I am not so sure. We will have to wait and see, but there has been a rather interesting dialogue. Some of the new entrants to the Member States have been revising their civil codes. I have been quite heavily involved with the efforts in Hungary. I know that the Hungarians have actually been looking to the *Principles of European Contract Law* as a source. In a sense, there has been a dialogue going on. It may well be that some of the laws will support the Principles.

Q29 Chairman: That is, as a source for their own domestic law?

Professor Beale: Yes.

Q30 Lord Clinton-Davis: Usually, incoming members are consulted and there has only been a partial consultation in this case. Why is it not more general?

Professor Beale: I am not sure that I am able to answer that. Our group has been trying to involve people from the new entrants for some time now. We have had a Hungarian and a Polish member for quite some years. We operate through a committee which has to meet twice a year and it is difficult suddenly to introduce 10 members. We are doing it in small stages. I think we had five new members at the meeting in December and the other states will be represented at the following meeting as well, so we are trying to get round. It is quite a difficult issue to do that. There has been quite a lot of dialogue in fact. Certainly the *Principles of European Contract Law* seem to be fairly widely known in the new Member States. I am quite surprised at how often we get messages from there, "Can you help us on this particular question", so they are clearly reading these Principles. In fact, there has been quite a flow of information. I agree it would have been better if we had been able to have a dialogue from the moment that it became clear that they wished to join the Union.

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Q31 Chairman: Professor, in the annex to the communication, the Commission has described the content of the Common Framework, which has broadly speaking three parts, I think. The third part, the model rules, Chapter III, has a number of sections which ends up with sections VIII and IX, specific rules for contract of sales and specific rules for insurance contracts. Is that feasible? Is that something that is really practicable?

Professor Beale: Yes, I believe it is practicable to produce rules for those because there are already groups working on that. The Study Group on the European Civil Code, as you may already know, Lord Chairman, has a number of sub-groups which are working on particular aspects of private law apart from basic contract law, which was covered by the Commission on European Contract Law and the *Principles of European Contract Law*. The Study Group deals with matters like tort and restitution and security of personal property but it has also been dealing with sales contracts, services contracts, contracts of guarantee and certain types of long-term contract like commercial agency franchise and distribution. Again, a lot of the work has been done there. Secondly, this new network which is being created to produce the draft Common Frame of Reference for the Commission over the next three years includes three groups which are called, rather curiously, Principle Drafting Groups. I discovered that it is spelt principle “le” at the end deliberately. I thought it was a typing error; it is not because they are the main ones but because they are drafting principles. Those three groups are the study group which I have just mentioned, the Acquis Group I mentioned earlier, which is looking specifically at consumer issues; and a group that was set up originally by the late Professor Reichert-Facilides and is now headed by Professor Heiss, which is dealing specifically with insurance contract law. Because there were a lot of complaints of differences between insurance contracts, the laws are causing difficulties to people trying to sell insurance. This is obviously thought to be an important area by the Commission, but, as I understand it, the group has done quite a lot of work already.

Q32 Chairman: This looks a little like a movement towards what might almost be a law of sales code or an insurance law code?

Professor Beale: It would only be a code if it were adopted as a code. My understanding is that we are still simply talking about an agreed set of terminology and model rules for the purpose of helping draft future European legislation. We are still talking about this legislators’ toolbox. Of course, if I may, there is one other issue. This Common Frame of Reference may sound very well. If it covers all these things and does it well, it should be useful, but

whether it will have any practical impact depends on whether the legislators will use it at the end of the day. We all know that one of the difficulties with European legislation, and I am sure that Lord Borrie has a great deal of experience of this sort of thing, and probably other members of the Committee, is that compromises are made at the last moment by politicians and the beautiful framework that may have been created by some civil servant drafting is upset. That is a real difficulty. If the legislators will not agree to abide by the Common Frame of Reference as a drafting tool, the whole thing will fail from that point of view. I think that is a very real difficulty. The Commission is still wondering how they can tie the hands of the European legislators down to using this Common Frame of Reference.

Q33 Chairman: Is there a difference between the Common Frame of Reference work under sections VIII and IX, specific rules on sales contracts and insurance contracts, on the one hand, and the work done on standard contract terms, which is another aspect of the communication on the other hand? This sounds to me like standard contract terms rather than something which would go into a Common Framework of Reference.

Professor Beale: If I may draw the domestic analogy, I think the difference is between, as it were, the Marine Insurance Act 1906 on the one hand, which is section IV, specific rules for insurance contracts, and the actual contracts of insurance on the other. Of course it is quite right that the Action Plan also envisages some action to produce standard contract terms across Europe. The Commission’s involvement seems to be limited to providing a website where people can put up their models so that people can borrow them, comment on them, and so on. I have to confess that I am deeply sceptical about whether anybody will ever use that website. Most of these contracts are going to be drafted either by companies or by their lawyers, and in my experience lawyers are not very ready to share their wonderful contract terms because they reckon that they have done rather better than their competitors and do not particularly want to lose their advantage by making their terms public. I am very sceptical as to whether that initiative will really get anywhere.

Q34 Chairman: What is in mind so far as sections VIII and IX are concerned, picking up your point about the Marine Insurance Act—

Q35 One is actually looking for the production, I suppose, of something that could become a piece of legislation, not just a reference. Once you go from a dictionary approach to actually a positive formulation of legislation approach, which is what the specific rule sounds like, you are moving into a

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rather different area. That is what I mean by wondering about the Trojan horse.

Professor Beale: It could be. Put it this way: there may be a move to try to harmonise that particular sector in a way which has not been done yet; for example, to harmonise the rules on duty of disclosure. I believe I am right in saying that our rules on the duty to disclose are very different to some of the continental systems in the sense that it is a ground for simply avoiding the contract, whereas many of the continental systems have a scheme where you have to ask what the additional premium would have been, as it were, and then allow the claim proportionately. It may well be that there will be—and I am guessing now—some future legislation on aspects of insurance like that. If that legislation is to be successful, it will need to have the terminology that is agreed between the Member States so that we know what we are talking about when we say “a duty of disclosure” or “good faith”.

Q36 Chairman: It certainly needs to have the terminology but it did not seem to me that sections VIII and IX were really dealing with terminology but much more was proposing to deal with the substantive rules. How else can one read “specific rules”?

Professor Beale: I honestly do not know. I am told that one should not read very much into this annex. I was told that by the Commission officials because it was simply their jotting down of headings, as it were, and certainly you should not read too much into the fact that they describe section VIII as specific rules rather than definitions. It is not a document drafted by parliamentary counsel, as it were.

Q37 Lord Mayhew of Twysden: It might perhaps be a specific tool in the toolbox?

Professor Beale: That would be a very nice change, I think.

Q38 Lord Mayhew of Twysden: The fear, of course, amongst certain opinions is that the next stage is, although it has been for some time the toolbox full of tools, now you shall use the tools, but that is a political decision, a political advance or a treaty, however you like to look at it, which is at all times available to legislators.

Professor Beale: That is correct.

Q39 Lord Mayhew of Twysden: I suppose an advantage could be said to be that at least you will have had some experience of it?

Professor Beale: Yes. I would hope that the toolbox would be in use for a good period of time. It may be that we will need at some point, or will decide at some point, to have fairly close European regulation of insurance contracts, for example, but I suspect that

that is some way off. I hope that in the meantime the toolbox will have been used and people will have become used to it. I think one of the difficulties about the whole process of European legislation is that the actual process is very haphazard. If I may fly a kite, my Lord Chairman, I think sooner or later we will need, at the European level, some equivalent of the Parliamentary Counsel Office so that when somebody puts forward a proposal to the European Council of Ministers or to the Parliament, it has been carefully looked at to make sure that it does work and it does fit with the various Member States’ national systems, rather in the way that Parliamentary Counsel here would take what I ask apart and say, “Do you really mean that? Have you thought this policy through? Be precise”. Then they will draft something and then they will do all the plumbing, as they call it, to make sure that it actually fits and they will make all the necessary consequential amendments. I think that sooner or later we will have to move some sort of system like that at the European level, and it would have to work in the way that I understand it to work in Westminster that when an amendment is proposed on the Floor of the House, if there is time it goes to Parliamentary Counsel to be checked and drafted.

Q40 Chairman: It would have to be done within the Commission, would it not? Under the as yet not final but signed new Constitution, all legislative proposals have to come from the Commission.

Professor Beale: They have to come from the Commission but I would hope that at some point we could have some sort of additional office, not necessarily a big institution—it could be a network of experts who can be called on—to check that this will actually work for the Member States and it does reflect the policy which is needed. I would very much like to see that at the European level.

Q41 Chairman: Moving on to another topic, which I think is also something you have mentioned, the Commission has given an estimate of five years for the conclusion of the Common Framework. One can easily see that that is not necessarily unrealistic, having regard to the amount of work that they are proposing?

Professor Beale: Yes.

Q42 Chairman: If one of the matters of some urgency is a revision of the current *acquis*, it seems rather a long time to wait for that to be done?

Professor Beale: I am afraid I find that a rather difficult question to answer because, as I say, most of the *acquis* affects consumer law and I am not particularly expert in consumer law. I do not know how much day-to-day problem there is with the *acquis*. I think that the Commission does envisage

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that possibly some of the worst aspects that people are familiar with and which might emerge from the review which they are planning to conduct of the eight directives, might be dealt with before the Common Frame of Reference is complete. It would seem to me that probably the difficulties are not so urgent that the bulk of the revision could not wait until the Common Frame of Reference is complete. Of course, in the meantime it would be possible for national governments to deal with specific issues which are causing real difficulties. For example, I believe that all the different withdrawal periods are causing real difficulties for consumer advisers. One of my colleagues went to a training session for consumer advisers the other day and said that, even after a really good training session, these very intelligent but of course not legally qualified people were really struggling with some of this. I think we could sort some of those issues out at the national level by simply giving more generous periods. The minimum harmonisation approach which is adopted, meaning that you can always give the consumer better rights than is required by the directive, can be exploited to get rid of some of the differences on a temporary basis until such time as the Common Frame of Reference is available and the actual directives can be revised. I think we could solve some of these issues at the national level if they are really pressing.

Q43 Chairman: As a matter of interest, are the complexities that you were referring to in the withdrawal period legislation complexities of the European Union legislation or of the implementing legislation domestically?

Professor Beale: They are complexities, I understand, by the fact that the implementing legislation tends to follow very closely the European legislation and the European legislation has different withdrawal periods for different directives. They start on different days; sometimes they include working days, and at other times they include working days and holidays. It is really very confusing. Of course, there is a lot that is confusing in our domestic law as well. It is not all the European Union's fault that our consumer law is sometimes quite difficult to understand, particularly for non-lawyers..

Q44 Chairman: I am not sure that dictionary assistance is what one needs to deal with problems of that sort. One needs a more simplified drafting.

Professor Beale: We may need a dictionary which, as it were, prompts you to ask a question: when you say "days" do you mean all days or only working days? It is at that very basic level that we need some help, I think.

Q45 Chairman: Professor, can I ask you about the proposed standard terms and conditions? The proposal is that the standard terms will be drawn up by the industries concerned with the Commission acting, as they put it, as honest broker. Is it realistic to think of the Commission in this area being non-interventionist as opposed to directing the thinking and discussion along the sort of lines that they, the Commission, think the contract law should be developing?

Professor Beale: I have seen no indication that the Commission wants to get heavily involved, or indeed involved at all, in this particular aspect, other than by putting up the website. As I said, I am very sceptical about the website. I may be quite wrong, but I think this particular heading of the Action Plan is probably going to turn out to be a complete damp squib. Certainly I have not seen any sign that the Commission is intending to go out and negotiate standard law or impose standard contract terms.

Q46 Chairman: If the Commission is not going to be interventionist, then it would only be a damp squib if the industry was not sufficiently interested in the process? That is your impression?

Professor Beale: That is my suspicion, that they will not be sufficiently interested.

Q47 Lord Borrie: In so far as I understand "standard terms and conditions drawn up by the industry concerned", further in the discussion paper there is reference to business-to-business contracts and business-to-consumer contracts. If it is a business-to-business contract, let us say between manufacturers and retailers, there are big manufactures and there are small ones; they have got, in the case of big ones, much more powerful voices and legal advice than perhaps the smaller ones. Retailers come in different shapes and sizes too. Bodies like the British Retail Consortium have a great difficulty in trying to represent everybody when their views are often very different. Then, of course, there are contracts between business and consumer and there is usually a little imbalance there as to the legal skills available to the consumer compared with the businessman. When we talk about standard terms and conditions drawn up by the industry concerned, it seems to leave most questions unanswered as to what does that mean. If the Commission is going to take a very passive role, then one wonders whether at least some of the legitimate interests concerned, be it the consumer or small business, are going to be under-represented?

Professor Beale: That is quite possibly true. On the other hand, it may be that the consumer groups are one of the few groups that are going to have any interest in putting terms up on this website. My fear is that there may be a few consumer groups which say,

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“Well, this is our ideal household insurance policy, for example, and this is what we would like” but unfortunately I do not suppose the insurance companies are going to accept it. That is why I just do not think this is going to get anywhere.

Q48 Lord Clinton-Davis: When I was for one year in charge of consumer affairs in the Commission I found it was very difficult for either industry or the consumers to speak with one voice. In fact, I cannot think of any example now. In relation to this, would this also be true?

Professor Beale: I suspect that is absolutely right, my Lord. I do not know; I have not had the same experience that you have had and I have not been involved in trying to negotiate standard terms at any level. What I have been told is that it is enormously difficult. I have had quite extensive discussions with a colleague who is a consumer lawyer in the Netherlands who is trying to negotiate not standard terms but codes of practice and found it enormously difficult and really quite frustrating. I think this is really a token effort on the part of the Commission. I just do not think it is going anywhere.

Q49 Lord Mayhew of Twysden: Just to go back to the Lord Chairman’s question, one would have to search rather hard, would one not, for any other field of activity in which the Commission had shown itself content to take a passive position? Given the kind of indifference which you anticipate, one can rather readily foresee, can one not, the Commission saying, “Well, let us give it a nudge. Here is our shot at it” as the next stage down the road. I am not saying this is necessarily a bad thing but it seems to be one that I can foresee.

Professor Beale: Quite possibly but, on the other hand, my impression is that although the Commission itself seems very large, the number of parts that are actually involved in this project is very small. I think they have far more than they can handle to deal with already because somehow they have to deal with all these stakeholder meetings, which they are chairing and organising; they have to write up what is said and then, when all that information has been gathered together and fed to the academic groups and the academic groups have produced their draft Common Frame of Reference in three years’ time, somehow the Commission has to turn that into the Common Frame of Reference. There is no indication as to how that is going to happen, other than that they are going to have a White Paper which will allow a certain amount of consultation and that they say they are going to try it out on one or two directives to see if it works, but that is going to be an enormous task. I think we are talking about a handful of people. With luck, they will be distracted from too much intervention.

Q50 Chairman: You would be encouraging them to concentrate on the Common Framework and forget about standard terms and conditions, forget about the optional instrument and opting in and opting out and so on?

Professor Beale: I think the optional instrument, my Lord Chairman, is a bit different because there I think that there may be more interest.

Q51 Chairman: More interest in the Commission, do you mean?

Professor Beale: More interest in the Commission and also more interest among people who comment to the Commission because, as you will know, the reactions to the idea of an optional instrument were very varied. Some were dead against it but others were really rather in favour, providing it was only on an opt-in basis and, at least as far as business-to-business contracts were concerned, providing that it were not prescriptive, so that it would have only minimally mandatory rules. I imagine that most of our European colleagues would, for example, want to have a principle of good faith, which could not be excluded, but, apart from that, I should not imagine that they would want very much by way of mandatory rules for business-to-business contracts.

Q52 Chairman: But if it was on an opt-in basis, presumably then the contracting parties who were putting in could vary the content of the instrument as they chose for their own particular purposes?

Professor Beale: That is a very interesting question. I think it depends on how it is implemented and no decisions I think have been made-and not just decisions; I do not think they have even begun to have a view yet on this.

Q53 Chairman: You could not possibly have a mandatory requirement that if you opt in no changes can be made? That would be interfering with the flexibility of contract and all sorts of basic principles of contractual freedom?

Professor Beale: I think it is conceivable that you could have a system whereby the optional instrument is treated almost as if it were a legal system. You can have your contract governed by English law or you can have it governed by German law but, whichever you choose, you are going to be subject to the mandatory rules of that system. If you choose the optional instrument, if it were set up in the correct way, we can have it that you are bound by the rules of the optional instrument.

Q54 Chairman: Then the optional instrument would become a contract law of the European Union?

Professor Beale: One possible way for it to be implemented, and please do not assume that I am arguing in favour of this, would be that it becomes an

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international convention and so the signatory states, as for example with the Vienna Convention on the International Sale of Goods, simply incorporate this as part of their law, so that if you are in a contracting state, Ruritania, say, and you are involved in an export contract from Ruritania to another contracting state, you are under the Convention. If the Convention had mandatory rules—in fact I do not think it does have any or very few—you would be subject to them because that is simply part of the law. It could be set up in a way that it would be mandatory. Indeed, I think if it were to have any value at all for consumer contracts as opposed to business-to-business contracts, it would only have value if it did contain mandatory rules. Perhaps I should explain a little bit why I think that the optional instrument may have some value? It seems to me that very frequently parties are faced with a choice. They are trying to do business with a foreign partner who is unwilling to adopt the opposite party's law. For example, I am dealing with a Ruritanian company and the Ruritanians say, "Either it is Ruritanian law or no contract". I may be completely ignorant about Ruritanian law. But if they were prepared to do business on the basis of a relatively neutral system in a sale contract, for example on the basis of the International Convention on the Sale of Goods, or on the basis of this new European optional instrument, I might much prefer that to the unknowns of Ruritanian law. It seems to me that there may be advantages. Of course, it is not going to be important for large contracts because with large contracts, first of all, the cost of finding out about Ruritanian law is going to be relatively slight compared to the amount of money at stake and so it is worth employing the City law firms to do their stuff. Secondly, almost certainly it would have been worth drafting the contract which will deal with most of the problems anyway. For smaller contracts, for the smaller businesses, small and medium sized enterprises for example, who are not particularly sophisticated in many cases and are not likely to realise the problems, it seems to me that having a choice of going for the optional instrument might be an interesting alternative if they think that law is important at all. Of course in many cases they really do not think there is any legal risk, so they are not going to worry about which legal system they are under. If they think there is some legal risk, they may prefer to have the optional instrument to govern their contract to the other party's law. That is really the basis on which the Vienna Convention on the Sales of Goods operates, as I understand it. Of course we have never ratified it.

Q55 Chairman: The optional instrument will still have to be interpreted and applied in accordance with some system of law that either party would choose or

which would be chosen for them by the international law rules of the country in question?

Professor Beale: My understanding is that the optional instrument would itself be a system of law. Of course, it will not answer all questions. So, for example, if the question becomes: we have a building contract and the problem is that one of the contractors' employees has run somebody over with a dump truck, that is going to be dealt with by the law of where the accident happened because that is tort law. The contractual aspects, however, would be treated as a complete code. That is my understanding.

Q56 Chairman: It cannot be a system of law. It can be a set of rules but the rules themselves will have to be applied in accordance with some system of law.

Professor Beale: That is true, but if it were adopted in the way that the Vienna Convention is adopted, if you are dealing with an export contract from a contracting state—Ruritania—all the contractual aspects of the thing are governed by the Convention. If there is some topic which is not governed by the Convention, and of course the Convention is incomplete, it does not for example deal with the validity of contracts, then you have to fall back on the national law. I could envisage the same sort of thing being done for an optional instrument. It would, in effect, provide a parallel to the Vienna Convention on the Sale of Goods but not dealing with the sale of goods, dealing with other kinds of contracts and dealing with consumer contracts which are excluded from the International Convention.

Q57 Chairman: Why would it have to be different in status from the Convention in order to produce the desired effect?

Professor Beale: There are other ways of doing it. One possibility has been floated in a Green Paper published by the Commission on reform of the Rome Convention, where it was suggested that one possibility was to modify Article 3 of the Rome Convention to allow the parties to adopt an international system of contract law in place of a national law. At the moment, that cannot be done. At the moment, you have to go for one national law or another, though of course you may end up in the Vienna Convention, but you have to go for a national law. There was a proposal that you should be allowed to adopt an internationally agreed set of principles instead, and the optional instrument could be that set of principles. That would, as it were, replace national law to the extent that it applies.

Q58 Chairman: So it is open to parties to opt out of any national system of law?

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Professor Beale: That was one of the proposals.

Q59 Chairman: It is potentially quite difficult to understand?

Professor Beale: It is quite difficult and I am afraid I am not a conflicts lawyer so I may be rather weak on this.

Q60 Lord Lester of Herne Hill: I apologise that I arrived too late to hear your beginning, Professor. I am thinking of one analogy, which is something I am vaguely familiar with, which is the International Convention on the Settlement of Disputes between States and Investors, the World Bank ICSID Convention, where, unless my memory is wrong, the choice of law, the applicable law, is either left to the parties, they can choose a national system, or the general principles of law which are basically the principles of international law. I cannot see any reason why one cannot have a convention, as you suggest, which sets out basic principles and rules but they are supplemented by general principles of law which are general principles of European law for the poor old judge who has to decide the question. Does that make any sense?

Professor Beale: Absolutely and I wish I could have put it so clearly. I think that is absolutely right. It is also important to remember that the base principles which we are talking about here, the Principles of European Contract Law for example, actually contain what is sometimes called an expansion clause, which says that if an issue is not settled by the rules but is closely analogous to something which is settled, then you simply apply the spirit of the rules, which gives a judge power to deal with and develop the law on issues that are not specifically covered.

Q61 Chairman: The adoption of an optional instrument along the lines that we have been discussing would have some impact, I imagine, on the extent to which English law was the chosen system of law in international contracts. Do you have any view on the extent to which that might happen?

Professor Beale: It is hard for me to say, my Lord Chairman. I suspect that most of the people who currently choose English law when it would not otherwise apply, will continue to do so because they probably do that because they like particular aspects of English law: its claimed certainty, its relatively hands-off approach. I would be rather surprised if large numbers of commercial contracts of an international kind, of the kind that our Commercial Court deals with quite frequently, were suddenly to migrate to a European optional instrument. I think that is most unlikely. What I suspect is that a number of people would use the optional instrument rather than one of the national European laws. So I do not think that it is really a threat to our invisible earnings. Rather, I would actually say that this presents something of an

opportunity because it seems to me that our law firms in particular and our Bar are prized not simply because of English law but for their skill and their knowledge. It seems to me that if those firms and members of the Bar were to become involved in trying to develop a good optional instrument, if we were to have one, and involved in the drafting, and then were to make themselves expert in it, they might actually manage to increase their business rather than lose business because we would become a centre of excellence for dealing with claims under the optional instrument. It is rather disappointing to me that we have not ratified the Vienna Convention yet because I think exactly the same thing could be done with the Vienna Convention. I think that it may even happen that if the UNIDROIT Principles are used for arbitration, we could really become expert in those, not that they are very different from what I think the optional instrument will look like. I think there is actually something that we could do positively there.

Q62 Chairman: We have spoken already about the timeframe within which this work might be completed. It sounds to me as though the work on the optional instrument will be very considerable, very complex and very difficult. The process of formulating and producing a set of contractual rules which could take the place of national rules which could be applicable to contracts generally is a major undertaking. Is it sensible for the Commission to be trying to do that at the same time as pursuing the important goal of producing a Common Framework of Reference, which could be used for the rather more limited purpose that we have been discussing earlier, or should not that have priority?

Professor Beale: I think that is a very good point, if I may say so, but my understanding is that the Commission does have priorities, that these are seen as chronological stages. I think they are quite serious when they say they are continuing the debate about whether there should be an optional instrument while they produce a Common Frame of Reference and that the Common Frame of Reference, once it is produced, might form the basis for an optional instrument. I think that they do envisage the Common Frame of Reference as a toolbox first and any decision on an optional instrument coming only later. It is quite right that that would be very difficult because as soon as we move from a toolbox which is going to be used by a legislator to a set of rules which parties will then opt into, particularly if it is going to be, as it were, opting in and you cannot modify the rules or you can only modify some of them, then of course there are really political (with a small p) choices to be made by the legislator. It is important that it be done on some sort of democratic basis with proper legislative scrutiny rather than simply being a technical output. The nature of the project changes at that stage and it does become very much more difficult. It would take quite a long time to do it.

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I think it is opposed by a number of people. I am not quite convinced by all of the reasons. Some people say quite simply: “We do not see the need for this”. I do not think that is really an answer because they may not see the need for it—City law firms, for example, may not see the need for it because they will always advise their clients to use English law—but if other people want it, why should they not have it? It seems to me that it is a little bit difficult for us to say, “We do not want a European civil code because we like to have different systems and we like people to be able to choose and in particular, of course, we like people to be able to choose English law” and yet say, “But you are not going to be allowed to choose an optional instrument because we do not want an optional instrument”. It seems to me if we are to have freedom of choice, we have to allow people freedom to create and then use an optional instrument if they want to do so.

Q63 Chairman: Do you think that part of the reluctance to support the production of an optional instrument is that people fear that it may in time cease to be this and it may be the Trojan horse which I referred to earlier?

Professor Beale: Absolutely, I think that may well be the fear. I hope that the Commission will be very firm in saying that this is not the intention and the instrument should not become anything more than an optional instrument, because personally I would not wish it to go any further, but there must be the risk to which you refer.

Q64 Chairman: Have you come across any substantial body of opinion in favour of the opt-out alternative?

Professor Beale: I am afraid that I have not gone through all the responses with great care, but I do not recollect there being any. I could check because the Commission produced a summary of the responses to the Action Plan. They may refer to that. The difficulty is that they have split it up in such a way that it is quite hard to work out which is what. My recollection is that certainly the large majority were in favour of an opt-in approach rather than an opt-out approach.

Q65 Chairman: That is my impression as well. I wondered whether there was any particular kernel of support for opt out.

Professor Beale: I am afraid I could not answer that off the cuff but I will certainly check for you if you would like me to do so and let you know.

Chairman: Never mind, but I think if you had known, it would have been helpful.

Q66 Lord Lester of Herne Hill: You mentioned, Professor Beale, that you were disappointed that the Government had not ratified the Vienna Convention on the Sale of Goods. Why have they not done so? I gather we are alone with Portugal and Ireland in not having done so among European states. What is the policy reason why we have not done so?

Professor Beale: I think the answer is quite simply that City law firms, and indeed exporting organisations and importing organisations, have said, “We do not see the need for it” or, “we are positively opposed to it”. I have a feeling that it is because they fear loss of business whereas to me it presents a business opportunity, as I have explained. That is why I am a bit disappointed. I think we perhaps should have done. Of course, it is not a perfect convention. There are problems, particularly for buyers; they have to notify of any problem with goods in a very short period of time. It can constitute a trap. I do not myself see any particular reason for not ratifying it.

Q67 Chairman: If it was to be ratified, it would then have to be implemented, would it not? There would have to be primary legislation?

Professor Beale: I believe so, yes.

Q68 Lord Mayhew of Twysden: Am I right in thinking that our negotiators at the time of the Vienna Convention, assuming we were represented there, were in favour and contributed?

Professor Beale: I presume so. We were certainly represented. I know, for example, that one of the negotiators was the late Professor Barry Nicholas from Oxford. I am not sure who the others were. I think possibly Professor Francis Reynolds was involved, I am not sure, but certainly we were present and contributed a great deal apparently, and so presumably they were in favour.

Q69 Lord Mayhew of Twysden: I am sorry to ask a particularly ignorant question but how long has it been in existence?

Professor Beale: Since 1980.

Q70 Lord Lester of Herne Hill: According to the memorandum, it came into force in 1988.

Professor Beale: That would have been on however many ratifications you have to have, but the text was adopted in 1980.

Q71 Chairman: Professor Beale, thank you very much indeed for a very interesting session, an invaluable one from our point of view. It is very kind of you to have come back again and we will go on inviting you when you give us the wealth of answers that you have given us on this occasion.

Professor Beale: Thank you very much, my Lord Chairman. As always, it is a privilege and a pleasure.

WEDNESDAY 19 JANUARY 2005

Present	Clinton-Davis, L	Neill of Bladen, L
	Denham, L	Scott of Foscote, L (Chairman)
	Lester of Herne Hill, L	Thomson of Monifieth, L

Memorandum by Professor Geraint Howells, Lancaster University

1. I am pleased to be invited to give evidence to the sub-committee. By way of background I have been an academic lawyer for 18 years focusing on consumer law and additionally have recently joined Gough Square Chambers. I am a member of the European Consumer Law Group. Regarding the European Contract Law debate, I participated in the Leuven SECOLA (European Contract Law Society) conference which led to the book, *An Academic Green Paper on European Contract Law* (Kluwer, 2002) that included my paper on “European Consumer Law—the Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence.” I am also involved in two *Acquis* projects to ascertain what elements of a European law could form the basis for a European Restatement of contract and tort law respectively. I have also been asked to act as an adviser on the EC funded study of eight consumer contract law directives. I am part of a team developing a casebook on European Consumer Law in the van Gerven casebook series. For the most part my evidence will focus on the impact on consumer law.

COMMON FRAME OF REFERENCE

2. The 2004 Communication focuses on three topics: the Common Frame of Reference (CFR), promoting EU-wide standard form contracts and the development of an optional instrument. In fact the three are interlinked as it is sensibly foreseen that the CFR should inform the other two. However, this raises the issue of what exactly is the CFR? The Commission had some difficulty in explaining the concept. Now it seems to have settled on the notion of a “tool box”—a sort of lexicon to allow legal systems to communicate with a common terminology and to assist the drafting of European and national laws.

3. Indeed there is a lot of tidying up and ordering that could usefully be done to the Community *acquis*. Common meanings to certain key terms, such as damage, are being developed by the European Court but these could be completed and better organised. In passing it should be noted that European laws frequently deal with topics, but leave it uncertain as to whether a European approach is required to all aspects. For example, the Product Liability Directive makes a producer liable for damage caused by a defective product. If at a stroke the EU had intended to harmonise European causation laws that would be remarkable. This underlines the difficulties of finding limits to the scope of harmonisation.

4. A CFR “tool box” sounds rather innocuous. However, there is every possibility that this could be a Trojan horse for the development of a Civil Code. Indeed the Commission itself foresees the CFR serving as a basis for discussions on the optional instrument.

EU-WIDE STANDARD TERMS AND CONDITIONS

5. The development of EU-wide standard terms and conditions is clearly something that should be welcomed. I do not have personal experience, but in practice I understand that initiatives of this kind have not been very successful, both generally and in relation to consumer contracts. Indeed it seems that even individual traders modify their own terms between states, for instance offering different levels of guarantees. This is something that should have been addressed in the Consumer Sales Directive.

OPTIONAL INSTRUMENT

6. For B-2-B transactions I would favour a non-binding optional instrument. However, for consumers such instruments are inappropriate as individuals cannot assess whether they should opt-in to a particular regime. Consumers need clear rules.

7. In some respects existing EU law fails consumers. It is too complicated. For instance, there are numerous often overlapping information obligations and different cancellation periods. There are also significant gaps. European law avoids the issue of where and when a contract has been concluded. As many obligations

imposed by European law, such as the duty to provide information or the right to cancel, bite at the moment a contract is concluded it is important to be able to identify this in a consistent manner.

8. The approach to a Consumer Code would most likely differ from a general Contract Code. Although the Commission notes the different needs of consumers should to be taken into account, there is a danger that the two projects will become intertwined. This would be unfortunate for whilst consumer principles might inform a modern law of contract, commercial law does have different needs and there must be a temptation to water down consumer provision for the sake of having a harmonised approach. In other words I fear that the project to assess and modernise the existing Community consumer law *acquis* will simply become part of the CFR project. I would prefer the CFR to inform a restatement of EU Consumer law (simplifying, co-ordinating and filling the gaps in the existing *acquis*) and a separate contract code. Indeed as the existing *acquis* is largely based on consumer law directives one might question how much it can inform a CFR directed at general contract law. There is a degree of confusion as to whether one is seeking a CFR/optional instrument which covers most circumstances, with special rules for consumers being in very limited areas or whether general contract law and consumer law should be kept separate. I clearly favour the latter approach, but I note that all the focus is on the general contract law and little mention is made of the mechanisms for updating consumer law.

9. Directives were intended to set objectives with states having the freedom choose the means of implementation. However, both the attitude and practice of the Commission and Court of Justice have drastically reduced the freedom of member states and it would be more honest to introduce a regulation in the consumer contracts field. I could foresee that a Regulation bringing together in a harmonised and complete manner consumer laws after the CFR process is complete. However, as the EU still lacks a clear basis to legislate on consumer law, my fear is that these laws will remain incomplete and dominated by the internal market philosophy. This brings me on to my final point, which is a warning against anything in this process leading to more maximal harmonisation in the consumer contract field.

10. Maximal harmonisation is the flavour of the month in EU consumer law. Whereas once there were doubts as to whether the internal market gave jurisdiction to the EU in consumer matters, now it seems to demand that the EU totally harmonise consumer law leaving no room for national initiatives. This may be needed in the area of product safety and technical harmonisation, but in other areas it is more debateable.

11. It seems that the Unfair Commercial Practices Directive will adopt the maximal harmonisation approach, causing potentially significant upheavals to UK trade practices law (I am currently part of a team organised by the Consumer Law Academic Network (CLAN) advising DTI on this issue). That Directive will already have an impact on UK contract law, despite the Directive stating that it will not affect contract law. The UK would indeed be free to continue with existing contract law rules, such as requiring a cancellation form be provided to assist consumers. However, if this rule is backed up by public law criminal sanctions it would have to be assessed under the Directive and may be deemed to be too protective.

12. Maximal harmonisation is also being proposed in the consumer contract law field. The latest draft of the Consumer Credit Directive adopts this approach and well illustrates the clash of two models of consumer protection. The Commission argues that the consumer will only truly benefit from the internal market if trading across borders is made so simple that traders will have no fears of falling foul of national laws or having to invest in discovering what those rules are. This is a very appealing argument, but perhaps underestimates national traditions both of consumption and consumer protection. It also underplays the value to industry in the market confidence consumers gain as a result of consumer protection. A more cautious approach favours Europe introducing minimum rules, but wants national freedom to improve of this base level of protection. Advocates of this approach also suspect the Commission underplays the continued need for national based legal advice even when rules are formally harmonised. Rules will continue to be applied differently in their national contexts, not least because they fit into national legal contexts as illustrated by *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481 and as confirmed by the European Court of Justice in *Freiburger Kommunalbauten v Hofstetter C-237/02*, [2004] 2 CMLR 13.

13. Moreover the rules generated by Europe are beguilingly brief and simple. The DTI in its latest Consumer Policy Strategy *Extending Competitive Markets: Empowered Consumers, Successful Business* also favours simplifying legislation—indeed it floats the idea of relying on just three general principles, dealing with consumer information, consumer transactions and minimum standards for goods and services. Unfortunately consumer matters can often not be so easily simplified. It would be nice to think that all trade practices law could be replaced by a general clause or our mass of consumer credit law exchanged for a handful of provisions. However, countries that rely on general clauses tend to have detailed case law and commentaries expanding on the rules, which would make them even less transparent from an internal market perspective. Moreover, the UK should be cautious about abandoning its detailed approach for the new European regimes proposed, whilst they are untested and without the benefit of safeguard clauses. Any restatement of consumer

contract law should not be on the basis of the maximal harmonisation approach; at least not without a more thorough root and branch review of the quality of EU consumer law than that which seems to be intended.

January 2005

Memorandum by Which?

1. Which? is an independent, not-for-profit consumer organisation with around 700,000 members and is the largest consumer organisation in Europe. At EU level we are members of BEUC. At international level we are members of Consumers International. Entirely independent of government and industry, we are funded through the sale of our Which? range of consumer magazines and books. Which? was formerly known as Consumers' Association.
2. The European Commission's Communication: "European Contract Law and the Revision of the Acquis: the Way Forward" (COM (2004) 651 final) sets out three proposals: the creation of a common frame of reference (CFR); promoting an EU wide set of terms and conditions and an optional contract law instrument.
3. The creation of a CFR forms part of the study into the approximation of civil law for a better functioning of the internal market. The CFR represents the key element on European Contract Law. It is envisaged that the CFR will set out principles, definitions and model rules of contract law which will have been absorbed from some of the best elements of the various member states' law.
4. As a result of the review of the application of consumer laws in the member states, consumer protection will form the "test ground" for the CFR. The objects of creating certainty, transparency to reduce legal obstacles to trade and to promote competition are incontrovertible. Our concern is that in doing so, some of the important consumer protections which also promote trade and benefit consumers may be lost.
5. The creation of a CFR and its application to consumer protection must be seen in the context of the current proposal concerning unfair business-to-consumer practices, the draft unfair commercial practices directive (UCPD). The UCPD represents the cornerstone of the EC consumer policy. The directive introduces a general prohibition on unfair commercial practices that distort consumers' economic behaviour. The directive is a maximum harmonization measure.
6. This means that member states may not exceed the level of protection provided in the directive, and as such it represents the ceiling of permissible consumer protection. Therefore implementation of the directive will involve a review of all current consumer protection legislation to ensure that it does not exceed the maximum permitted under the directive.
7. The areas which the directive will affect the most are advertising and marketing to consumers. Article 3(1) provides for an exclusion for contract law. The directive is therefore primarily concerned with public law as opposed to private law. However compliance with regulation and private contract law are not always entirely distinct and their interaction can affect one another.
8. For example, failure by a trader to comply with information requirements under the distance selling directive will extend consumers' rights to cancel the contract for a fixed period until such notice is given. Similarly, not providing the required information in writing under the consumer credit act 1974 will give the consumer the right to cancel the agreement. Crucially where such provisions are backed up by criminal sanctions, those will need to be reviewed to ensure that they do not exceed the maximal permitted requirements.
9. We have broadly supported the UCPD but we have advocated a minimal rather than a maximum approach. Until it can be shown that the proposals would not weaken existing consumer protection, and that can only be demonstrated after implementation and, after the directive has been shown to be operating effectively throughout the EU, we would encourage a more cautious approach in the pursuit of harmonization of European Contract Law.
10. A minimalist approach to consumer protection that is aimed at harmonization may at first sight appear very attractive. However the general approach adopted under the UCPD coupled with its maximal stance will put at risk the hard won consumer protections which have aimed to enable consumers to make informed choices and to make markets work.
11. The assumption behind the proposed legislation is that business will be happy to trade across borders only where they can be certain of the legal environment. That argument appears to ignore the "demand" side that consumers will lack the confidence to take advantage of the internal market unless they are certain that they are reassured that the goods or services they are buying are regulated to ensure that they are safe and of satisfactory quality.

12. It is envisaged that the CFR will be used as a toolbox to improve the quality and coherence of current and future directives. The proposed review of the eight consumer directives to see whether they achieve the goals of consumer protection and elimination of internal market barriers with a particular eye on the minimum harmonization clauses they contain, is of great concern to us.

13. In the light of the proposed UCPD and the CFR, we feel that pressure to simplify and ensure consistency across rules may put consumers at risk. For example the proposal to standardize the length of withdrawal periods may mean that the shortest time periods are adopted across the piece, whatever the sector. But consumers need a longer cancellation period if they have entered into an expensive lifetime timeshare contract while on holiday than they do if they have ordered some wine online. A further example is the package travel directive which contains very specific rules governing tour operator liability for the holiday and solvency. These sector specific rules provide certainty and consistency for business and consumers.

14. It seems that harmonization has two aspects; harmonization across the member states and across sectors. While it is clear to see how harmonization across nations may promote trade, it is not so apparent how this is achieved by adopting similar standards across sectors. We would favour a more precautionary approach whereby we wait to see what the impact of the UCPD is before reforming the current consumer protection infrastructure.

15. One of the appeals of the CFR is that it might replace current complicated rules with a more simple and transparent regime. However jurisdictions that have broad general clauses tend to provide for the detail in case law. Therefore the effect may be to replace current legislation with case law which may in fact be less transparent than the current legislation. Certainly it would thrust decision making into the judicial rather than the executive sphere and it would become less political.

16. We should however be clear about what it is that we expect from the CFR. It will need to come clean as to its scope and ambition. If it is ultimately about creating a European civil code, it must represent itself as such. We need also to be clear about what the possible obstacles might be. For example in the creation and application of the use of "good faith" EC legislation has had very different results as studies in comparative law have shown.

17. The optional instrument will provide the parties in different member states the opportunity to contract using an alternative recognized form of transacting business or code. The parties would voluntarily adopt it if they felt it suited them more than the rules under the applicable law. We do not feel that it would be appropriate for consumers to have to make decisions concerning choice of law. Consumers will not be equipped to be able to conduct the exercise in comparative law to enable them to make such a decision. Notwithstanding the principle of freedom of contract consumer protection laws should be mandatory and consumers should not be faced with the option to opt out of such protection.

18. The development of standard terms of contract, which may be applied across Europe, should facilitate cross-border transactions for the same reasons as the CFR and optional instrument, that is, by removing national rules which represent a barrier to trade. We would envisage a vertical or sectoral approach in developing such terms led by trade bodies in consultation with other stakeholders.

19. Naturally any such terms must take account of the mandatory protections provided by EC consumer protection laws. It should be possible to draw from the body of work that currently exists, for example, in the development of online guidelines, for example, as produced by the OECD. Trade bodies and professional associations will be best placed to promote the use of such terms among their members rather than EC or government bodies. No doubt standard terms or something close to them have already evolved across some sectors and any reform should take account of these market driven solutions.

20. The idea of a European contract law is not new. In fact it has been around for many years. We think that there is some scope for the adoption of a CFR and use of an optional instrument to be merged into the development of a single code. The current set up lacks clarity of purpose and it would be better to be upfront about the way forward.

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Examination of Witnesses

Witnesses: PROFESSOR GERAINT HOWELLS, Professor of Law, University of Lancaster and MR AJAY PATEL, consultant to Which?, examined.

Q72 Chairman: Professor Howells and Mr Patel, thank you very much for coming here this evening to help us with our inquiry into these contractual proposals made by the Commission. You may take it we have read your written evidence and you have had copies of the questions that have been prepared, which we propose to invite your help in answering. I think probably the most convenient way of proceeding is simply for me or other members of the Committee to ask questions, and whichever of you feels like answering answer, although I suspect that on most of the questions both of you will have things to say and so one can speak and then the other can follow, it does not really matter which order we get. Is that satisfactory?

Mr Patel: That is fine.

Q73 Chairman: Thank you. First of all, can you help us with your general reactions to the Commission's communication about European contract law and the *acquis*? Do you regard it as a welcome development in Commission thinking in this particular area?

Mr Patel: I certainly welcome the objectives of the project to remove barriers to trade and to promote competition because there are obvious benefits to both consumers and to industry. I would however question the assumption that businesses do not trade, simply because of the legal risks involved, and that removal of those risks will therefore lead to greater business being done. Certainly for large concerns who are able to have access to good quality albeit expensive advice that may be a factor that they work into their costs, but I suspect that legal risk is less of a concern for SMEs and that there are more fundamental commercial issues at stake for not doing business in other Member States. If the objectives are to be achieved—and it is those wide objectives I think which are important, rather than harmonisation or some sort of simplification for its own sake—then European contract law reforms need to be part of a wider strategy.

Q74 Chairman: Yes. Professor Howells, do you want to add anything to that?

Professor Howells: Yes, but first of all to support that. There is some sense in the idea of Thomas Wilhelmsson who wrote about the concept of the abuse of the competent consumer model by the Commission; the Commission are using the idea that consumers need to have greater harmonisation and full harmonisation of these laws in order to be competent to shop across borders, and I think it is plain to many people that actually consumers do not

shop across borders for reasons other than substantively the rules—for example, redress is the most obvious point. As regards my own general impressions, I should first of all say that I had some involvement in these discussions on the part of two *acquis* groups—the *acquis* groups are groups of academics looking at the existing Community law to try to find out what principles are in that to possibly inform the CFR (Common Framework Reference) document. I am also tangentially involved as an adviser to the project on eight Consumer Directives that is going on in parallel with the Commission at the moment. At one level I have to say that I have been very impressed with the seriousness with which the Commission has gone about this work. They seem to have given proper resources to the research behind it, they seem to be taking stakeholder involvement seriously in the process both from industry groups and from the Member States, so there is a lot of structure that has been put in place to make sure that this is not just an ivory tower exercise. I suppose my slight concerns about the process side are that it is to a large extent dominated by northern European countries. The Dutch and the Germans have both recently reformed their civil codes and I think when you go to conferences and you hear academics from southern Europe and possibly now the new Member States, they may feel virtually excluded from some of these discussions. Substantively, I suppose, my concerns are that there is a danger that the consumer *acquis*—which is what consumer contract law is largely at the moment—may get diluted in the more general reform of contract law. Tied up with that is this political debate that we have going on now about whether Community law should be a maximal basis of protection or whether it should just be a minimal basis and Member States could have the right to go beyond that. Those political questions are in the back of my mind.

Q75 Chairman: Mr Patel, in his comments just now, referred to the objectives of the Commission and I think referred to them in terms which welcomed them as objectives. There are three objectives, are there not, one relates to a dictionary CFA for improving the *acquis*, then there is a proposal to have model rules and then there is a proposal to produce some optional instrument that people can opt into or opt out of when making a contract. Those are quite separate objectives and I think everybody would perhaps agree that the first objective is a good one because it might produce better European instruments in this field, but what is the need to

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expend time and resources in pursuing the other two objectives? Is it self-evident that they are desirable objectives?

Mr Patel: My Lord Chairman, I was thinking about the objectives that lay behind even those three ideas when I was talking about liberation of trade and removal of barriers, and as you say those are objectives to which I think everybody would subscribe. As for the optional instrument and the standard terms, it is not by any means self-evident that they will necessarily promote those things and provide for them to be used to the extent that they might make a difference and help in achieving those wider objectives.

Q76 Chairman: Would either of you support the devotion of a considerable amount of Commission funds and a considerable amount of Community resources in terms of the number of people involved and a great deal of time expended in pursuing those last two objectives by pursuit of the first objective but combining it, as it were, with the other two?

Professor Howells: I think that is part of the issue, in the Commission's mind the three are interlinked; in other words, if you are going to expend resources on doing the first objective, the CFR, and produce something which they describe as a "toolkit" but often talk about as more than that because they see it as the basis for the standard contract terms and for the optional instrument—they feel if they spend so much money on the first objective they are just making good use of that money by putting it to two extra purposes. I am trying to work out just how ambitious is the first project? Is the first project just a matter of trying to get common terminology across a range of directives, or is it more ambitious and trying to create a structure which can then be adapted in context?

Q77 Chairman: What is your view on that question?

Professor Howells: I think it has been presented as the former, as a toolkit for legislators.

Q78 Chairman: So for improving the existing *acquis*.

Professor Howells: For improving the existing *acquis*. I think Hugh Beale last week said that the structure is very similar to the principle of European contract law; it is clearly going to try to get a structure of law and I think there must be ambitions that it can form at least a coherent system, so it has got to be more than simply producing a handbook for draftsmen.

Q79 Chairman: If it is assumed to be desirable to produce a coherent system of contract law for the European Union, that brings one into the harmonisation question which is a separate issue altogether. On the footing that it is accepted that it is desirable that there should be improvements to the existing *acquis* and that there should be some sort of

toolkit or terms of references to improve the content of subsequent instruments in this area, that could all be done relatively quickly and without the working groups and the discussion groups that the Commission plainly has in mind for its overall pursuit of the three objectives.

Professor Howells: I think there are some things which need to be clarified at European level. To give you one example, it would make sense, particularly in the internet context, to have a common understanding of when a contract is concluded around Europe. If lots of the obligations kick in—for example, information rights, cancellation periods—once a contract is concluded, it makes sense to have a common understanding of when that moment was. What makes me interested is that actually this very concrete example of the internet context was ducked in the E-Commerce Directive; in the draft of the E-Commerce Directive they had actually included European rules on offer and acceptance in the internet context, but that was dropped because the Member States could not agree to it, they would not give up their own exiting rules. So I find it rather strange that they have once had a real practical need to get a common rule across Europe and they ducked it, yet they feel it would be easier or possible to create a whole structure around that. That, to me, seems a bit paradoxical as when they came across it in the past they were not able to get political agreement on that fairly precise, defined point.

Q80 Chairman: Both of you have been involved in different ways in some of the discussions that there have already been in the pursuit of these objectives. There may be a worry that the Commission has in the back of its mind, albeit not clearly or very vocally expressed, an object of moving towards eventually a harmonisation of contract law across the European Union, in which case one might regard the present proposals, particularly the combination of all three objectives in one project, as something of a Trojan horse that might lead to that outcome.

Mr Patel: It certainly gets further down that track. I perhaps had not understood fully the objections to the civil code and one needs to have, perhaps, some clearer picture of what they actually are, but it seems that most of them are raised by those who want to preserve their own ways of doing things and a sense of their own national legal tradition. I do not necessarily share that view, I do not have an objection to the principle of it.

Q81 Chairman: Is the CFR a Trojan horse?

Mr Patel: You would need to know about the real intentions of those behind it, for instance the Council and Parliament, and that they were being less than open about those intentions, presumably for political reasons. I have not come across anything that

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indicates that that might be the case, but it is an important question.

Q82 Chairman: You spoke of lawyers but the point about harmonisation is that it does not just affect lawyers, contracts are being made between individuals all the time without involving lawyers. People who make these contracts reckon that they know something of how contracts ought to work in the country in which they live and operate, has one not got to take them into account as well before one goes down the road producing a legal code which will bind them and with which they are not familiar?

Mr Patel: Certainly on familiarity with rules amongst consumers it is obviously a problem when they enter into contracts at that level.

Q83 Chairman: Has there ever been any empirical evidential inquiry as to the impediment to the operation of the internal market which is produced by different legal or contractual systems?

Professor Howells: I have seen people try to propose models of how you might make such an inquiry, but even that is quite a difficult task in itself, to actually try to pin down what the costs are with different legal systems. At the back of my mind I am often concerned by the idea that simply harmonisation would reduce costs because, particularly the way harmonisation tends to run at the European level, you have broad general principles, but of course you then need to know how those principles are implemented in practice and that will vary from one country to another. Even if we get a high level of harmonisation or even complete and total harmonisation, we still would not be very competent advising a company about how it actually applied in a foreign country without some local expertise on the day to day working. You might even say that things become less transparent when you get to formal harmonisation and all the really difficult issues are dealt with in different ways at a practical level in Member States.

Mr Patel: The experience of Which? has been that often consumers and sometimes small businesses do not know the rules of their own systems and therefore certainly do not know or understand the rules of other systems. That then does beg the question of what is actually lost by bringing in a less harmonious system.

Q84 Lord Neill of Bladen: Could I just ask Professor Howells about his example where he says the desirable thing would be if we had a clear rule across the European Union as to when a contract can be taken to be concluded and become a binding contract? I have been a practising lawyer for quite a long time and problems do arise on offer and acceptance where there is a contract but they are in

fact incredibly rare. Millions of contracts are made every day by people buying washing machines, washing-up machines, and there are no problems. How much does it matter in the consumer world that there should be a standard rule across the Union of when a contract is concluded? That is a practical example of what our Lord Chairman was putting to you.

Professor Howells: Of course, we may just be looking into a crystal ball but an example at the moment is different cancellation periods of two Member States. For example, one Member States may allow seven days for cancellation, another 14 days, so it may matter where the contract is concluded which country's regime applies. You may say the instances where it actually turns are very few indeed, and I agree that you are talking about only rare instances where it has happened, but if you have an obligation as a business to give information, for example, at the time of or within so many days of the conclusion of a contract, it does seem sensible to try to come to a common understanding of when that moment is.

Q85 Lord Thomson of Monifieth: Lord Chairman, I just want to return to your reference to a Trojan horse because it reminded me of a famous remark of Ernest Bevin in a different context when he was Foreign Secretary. He said: "If you open that bloody Pandora's box you will find a field of Trojan horses." There is more of a danger, is there not, in the early stage of major enlargement of the Community, in trying to promote harmonisation in these rather technical matters over a very wide area with a lot of very new members and inexperienced Members. Is it going to be practical to go very far down the harmonisation route?

Professor Howells: Indeed, that is one of my concerns with some of the proposals at the moment, particularly unfair commercial practices and consumer credit; as a European legislator you may put in place what you think is a sensible regime, but if that then becomes the only rules that Member States can have you do not quite know what there is in the Member States' laws which you are affecting and what you have to change. For example, we have a very strong tradition of using the Trade Descriptions Act in this country, will that survive the Unfair Commercial Practices, will people be surprised that the Trade Descriptions Act may have to be repealed because of the introduction of the general unfairness test? In the consumer credit sphere, we all know how long our statute is, let alone our regulations, and now they may have to be slimmed down to a directive that is only 40 articles long. The danger is that you do not quite know how these European rules will interact with the national rules, and you see that for example in the *First National* case and unfair contract terms, how the unfairness of a credit contract term could

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only be analysed when you actually understood how that fitted into our own consumer credit law and indeed our own rules of charging interest on default judgments in court. So changing one layer has lots of knock-on effects within Member States, and that is why I think some of the more ambitious proposals for total harmonisation—people have not really seen all the potential pitfalls down the line.

Q86 Chairman: You have been speaking of consumer contracts where the contract is between a business on the one hand and a consumer on the other, but there are thousands and thousands of contracts made all the time, as Lord Neill said, which do not involve contracts that could be caught by that consumer regime at all, they are just between one individual and another—somebody advertises his second-hand car for sale, advertises a horse for sale, and it is nothing to do with consumer law. The individuals who enter into these contracts think they have some idea of how they should proceed in the transaction that they are proposing to engage in.

Professor Howells: The answer to that I suppose would be that actually if you read the provisions we have like the Principles of European Contract Law—I was reading them on the train down this morning and I think some of the terminology and the ideas are fairly familiar to English lawyers. There are not too many differences, though there are a few points that would catch me because it is not in my contract textbook, but on the whole they are fundamental values and the results are often very similar anyway. So you might not find the resultant changes too dramatic in practice and at least the man in the street would not find his contract regime was turned upside down by this.

Q87 Chairman: I think it is fair to say that there is no political will at the moment to move towards harmonisation and, that being so, I wonder whether it is really a good idea for the substantial resources of time and personnel involved in the Commission's programme to be expended on the model rules and the optional instruments, rather than confining themselves to what is certainly needed, which is a means of improving the *acquis*.

Professor Howells: From a consumer protection point of view I would prefer that people created a coherent European consumer law regime, which may be going beyond even contract law and taking in other aspects of consumer protection law as well. I would say that consumers would benefit far more from doing that than from doing a broader regime where you try to modernise contract law in the light of the consumer principles, which may be what is happening. As an academic, of course, I think there is a lot of fascinating research going on and we should not under-estimate that the way in which we teach them

law has been influenced by this, and that will probably affect future generations of lawyers who are now far more familiar with concepts and able to handle those. From a consumer protection point of view I think, yes, the focus should be on the consumer as a result of that.

Mr Patel: It seems that there is an assumption that the optional instrument and the standard terms are going to involve more resources perhaps than they necessarily justify and more than the Common Framework Reference. I have not seen anything that necessarily indicates that I may have missed them. I understood from what I had seen in the communication that the optional instrument and standard terms almost followed on and therefore could be integrated without additional or greater additional costs, and that they represented the practical manifestations of the work because the CFR will primarily be of use to drafters.

Q88 Chairman: My understanding of what is involved I have taken from page 10 of the Commission's document under the heading "First Strand Technical Input", if you have that. "A network of stakeholder experts to make an ongoing detailed contribution to the researchers with regular workshops on all themes of the research, supported by a dedicated internet site accessible to researchers . . ." and so on. That sounds fairly intensive to me.

Professor Howells: You could have a proposition which said "Well let us just get a common definition of what a consumer is, what a day is, what common cancellation fees are" and that could be done, probably, fairly speedily.

Q89 Chairman: Yes.

Professor Howells: That is why I think the Common Framework Reference must be looking beyond purely reforming the consumer *acquis*.

Q90 Chairman: That is the point, and I think with respect that you must be right, but the question which we need to address is whether it should be, or whether it would not actually be better to deal with that on a much narrower basis so as to get a more speedy answer to the issues, which could be put into effect for the purpose of improving the *acquis* readily, and then leave the other more substantial issues for pursuit over a longer time scale, depending on whether the end result is thought desirable anyway.

Professor Howells: There are certainly a lot of resources going into this, and from the academic point of view I have got to say it is very welcome because it is creating a great deal of crossover knowledge between the different systems and what Hugh Beale talks about, the ability to have a common conversation with other countries is increasing.

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Q91 Chairman: Is that what the Commission is there for?

Professor Howells: I do not know; I think to some extent that can be very useful in improving the efficiency of the Community. There are some very useful products like the case books of van Gerven and so forth which clearly enable lawyers to better understand how the people work. As I said, I am a participant in those processes and I am benefiting greatly from them, so I have to declare that interest, but I can also say that actually there are two projects at the moment that I am involved in, the *acquis* project, which is the bigger, grander project, and the revision of the eight Consumer Directives. That is a distinct project, the review of the eight Consumer Directives, being short term and with the specific objective of improving consumer law, and it may be that in the future that could roll out into better general contract law, but I think in the Commission's mind there is a certain confluence between those two proposals. In a way that worries me because I think there should be water between them, because one is very focused and the other has, I think, longer term ambitions.

Q92 Chairman: Thank you. Can I move on to invite your comments on the function that the CFR will play, once it has been put into place as a result of the work the Commission has been doing? It is both, as I understand it, in order to allow the existing *acquis* to be improved and some defects to be dealt with, but also to provide a means of enabling national legislators to have recourse to and use when implementing European Union Directives. Is the anticipation that that may be achieved realistic, do you think? Will the CFR play a valuable part in allowing those goals to be attained?

Mr Patel: I think so. Professor Howells has alluded to the fact that it should not be such a difficult and grand job to establish a Common Framework Reference and have an agreed glossary of terms and expressions, and that would be very helpful; better drafting and guidance on implementation to make law-making of a higher quality is obviously desirable and a rulebook to ensure consistency in interpretation of drafting would of course be of great assistance. However, I think in doing so we need to be aware of where differences exist for reasons; for instance, cooling-off periods for doorstep sales are shorter than, say, cooling-off periods for timeshare, and that is clearly because it takes longer and one is, of course, of greater significance and requires a lot more—

Q93 Chairman: More deliberation.

Mr Patel: Thought and deliberation and getting advice. So where that kind of thing can be changed without any loss of consumer protection we would be

supportive. It may be in other instances confusing and unnecessary to have different ways of calculating the dates and that kind of thing.

Q94 Chairman: Whether that includes public holidays and things like that.

Mr Patel: Exactly, also working days. For instance, the Selling Directive uses “working days” and for cancellation of bookings uses just “days”; that kind of difference could be ironed out. Where those changes would involve opting for longer periods and better consumer protection we would obviously have no objection.

Q95 Chairman: In the preparation of the CFR, with that in mind, is it your view that consumer interests are adequately represented in the discussions that are taking place?

Mr Patel: I have to say that I am not sure what consumer representation there has been to date, I would feel that it has been largely an academic input rather than consumer representation.

Q96 Lord Clinton-Davis: In which way has it been achieved?

Mr Patel: From the meetings and the delegates—

Q97 Lord Clinton-Davis: Who are they?

Mr Patel: I do not know their individual names, but they appear to be European academic lawyers.

Professor Howells: Just to explain, I am a member of a body called the European Consumer Law Group which has been around for several years, but I have only been a member for the last year. That comprises, in principle, from each Member State one lawyer from the Consumer Association and one academic who get together twice a year to try to comment on Commission proposals. Unfortunately, the funding for that body is in jeopardy at the moment, and I was intrigued when I was at the Consumer Assembly in Brussels in the Autumn that when the Consumer Consultative Committee of the Commission presented their report to the plenary assembly, they thanked the Commission officials for all the advice they had given them on draft proposals that went through. There was a lacuna about that, in that if the Consumer Consultative Committee is getting legal advice from the officials it is hard for them to be properly independent; so it seems a shame that this body, the European Consumer Law Group, which has been around for a number of years is now in jeopardy, because it is an independent body. I think the answer is that the Commission are trying to encourage people to become involved in the CFRnet and it does cite consumer groups as potential user groups within that network. I do not know how many consumer groups have often taken this up.

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Q98 Lord Clinton-Davis: As a former Commissioner for Consumer Affairs, one of the things that I found objectionable was that there was no coherence between the consumer groups. Do you detect the same thing here?

Professor Howells: I know at the Commission level there is some concern about, in some countries, the proliferation of lots of small consumer groups and the Commission are trying to encourage, I think, a more coherent consumer body that would come together. Of course, the problem is that the consumer image can be very adverse because consumers in different countries also have different objectives and missions. I think BEUC, potentially, is a good funnel to bring those views together, but often of course the problem is resourcing and the Commission often provide for consumer groups to participate in meetings, but if there is no funding there to pay the travel expenses for people to come from Brussels and Europe, it is very difficult for them to do it. So the Commission often complain about lack of the consumer voice and the consumer groups complain because they have not got the funds to participate, so it is a bit of a chicken and egg situation. We then tend to find that, in a strange way, academics can sometimes find the funding to go to meetings and they, in a sense, act as the consumer voice, which perhaps is not ideal.

Q99 Lord Clinton-Davis: Are there any particular risks for consumer interests in that state of affairs?

Professor Howells: Certainly, given the trend within Europe at the moment, which is perhaps more slanted towards internal market policy than consumer protection, because there has been a largely successful inclusion of consumer protection within internal market policy, you have only got to see things like the country of origin principle and the E-Commerce Directive and so forth—there are a lot of big issues there to be decided today and it would be a shame if the consumer voice was not properly heard in those fora.

Mr Patel: I think within both there exists the structure to provide a unified voice, but their task is to find a common voice amongst the previously 15 and now potentially 25 instead and I think that is always going to be difficult.

Lord Clinton-Davis: They could not do it when there were six.

Q100 Chairman: To what extent do you think it is necessary for the Commission to solve these problems and consult with consumer groups before reaching conclusions on the content of the CFR?

Mr Patel: I would say that it is absolutely necessary.

Q101 Chairman: On the footing that they will not have a satisfactory result unless they do?

Professor Howells: I would think that in the interests of balance they would want to seek the representations from consumer groups; I do not see that there would be another way of providing the kind of counterweight to the business voice and the industry voice.

Q102 Chairman: Speaking personally now I am familiar with some of the consumer groups that operate in this country; are there similar consumer groups in each of the other Member States?

Professor Howells: Yes. The models differ; in some countries, like in Germany, there is a lot of state subsidy of consumer groups which actually play quite a regulatory role, taking injunction actions before the court for unfair trade practices; in France there are also consumer groups supported by the state. In other countries there can be literally hundreds of consumer groups; for example, in Italy there are very localised consumer groups based around each town or each product area, so there is quite a different array of consumer groups around Europe. To come back to your point about should they be involved in this debate, I think there is actually a very central debate going on within Europe on consumer law at the moment as to which is the best way forward for consumers. Is the best way forward to open markets, allowing competition to deliver returns to the consumer by getting rid of impediments to trade across borders, or at least get rid of national differences so as to have a common European base, or do you consider we still need to have traditional models of national legislation to protect that? I think that is a very central debate now; we see it consumer credit where the Commission see that the only way you are going to get people offering credit across borders is to get rid of all the complexities of national traditions, of national ways of doing it, to allow business the real possibility to act with one common set of rules—that is their model of promoting consumer interest—while more traditional consumer interests who say we actually still need to have more detailed national consumer protection laws which may actually, in some instances, be a barrier to trade but are needed to protect consumers.

Q103 Chairman: That is an aspect of the maximum rules as opposed to the minimum, is it not?

Professor Howells: I think so, yes.

Q104 Chairman: Individual countries think that their citizens need particular protection which other countries do not think that their citizens need.

Professor Howells: Or in some countries consumers have become used to certain forms of protection and the removal may endanger them.

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Q105 Chairman: What are the main problems with the present EC *acquis* on contract law that need to be addressed, speaking in general terms?

Professor Howells: I have listed seven; some of them may overlap slightly. I think one is inconsistency—for example, different cooling-off periods for no apparent reason in different directives—the other one is gaps where the law just does not cover, for example, contract conclusion points. In other areas it is obscurity as to what the terms really mean—for example, what is damage? Is that in terms of national law or European law? I think more complex is causation; the example I like is in product liability where the directive says there is liability if a product causes damage. Is causation now a European concept? We know in the House of Lords how much we have got to discuss causation just now; should we have a similar basis all across Europe or should we get a common idea of that, because that is very important in many cases, causation? I think in some ways European law is becoming too general, I believe that general clauses can cover topics—

Q106 Chairman: What do you mean by “too general”? I am not sure I follow you.

Professor Howells: For example—and I am sorry to go back to the Unfair Commercial Practices Directive—the move under the Unfair Commercial Practices Directive is to say that instead of having lots of specific rules governing specific trade practices it is sufficient to have a general principle that unfair trade practices will be banned, and that allows you to get rid of lots of specific—

Q107 Chairman: Leaving it to Member States to decide what is going to constitute unfair trade practices.

Professor Howells: Or probably leaving it to the court in most cases because the national legislation will simply be that you are not allowed to have unfair trade practices, that certain rules are misleading and vetting practices, but then not a lot of detail will be legislated.

Q108 Chairman: What part would you envisage the European Court of Justice having in harmonising the national litigation?

Professor Howells: The point of the European Court of Justice is that it is tending to shy away from being very specific. If you look at the recent *Freiberg* case to do with the sale of a parking lot in Freiberg, in that case the European Court said “We are willing to tell you what the test is, but the application of it has got to be a local matter” and I think they are going to say a similar thing here, we cannot judge every unfair practice, the directive will give you guidance and we may give you some more guidance, but we cannot in

every instance go into the European Court, I think they are going to try to really filter things out.

Q109 Chairman: Is that not a satisfactory solution to the problem?

Professor Howells: Is it satisfactory?

Q110 Chairman: Yes.

Professor Howells: It depends; again, it is to do with the transparency of harmonisation. You will then have a harmonised law for trade practice across Europe but you may well as a business be faced with very conflicting practices by different courts, different Member States. I would not have thought that is in anybody’s interest.

Q111 Chairman: Listening to what you and Mr Patel have been saying, is it possible to have a sensible view on the proposals being put forward by the Commission without having a view on the desirability or otherwise of harmonisation?

Professor Howells: You can say that at a technical level we can all agree that it is useful to have certain terms clarified, but the way you talk about the more ambitious side of the project, I think you have to take a view on harmonisation as well and whether you think that is necessary immediately. The irony of European consumer law nowadays to my view is that whereas at one time we were debating whether there was any justification at all for having consumer law, did it really affect the internal market, that has now been turned over and everyone is saying the justification is you have to have total harmonisation. My view would be that you have a duty to have a certain degree of harmonisation but the internal market does not require total harmonisation. Certainly in the contracts field we can survive with a certain amount of national differences.

Q112 Chairman: I think, if I may say so, that I agree with what you are saying, but does that not make it a little bit unreal to consider these Commission proposals without considering them in the context of protocols and harmonisation?

Professor Howells: I agree.

Mr Patel: I think that you can achieve the ostensible aims while dodging, if you like, the question of harmonisation which appears to be what is happening, but if you are talking perhaps more transparently about this idea of still having a civil code then, yes, you need to grasp the nettle and talk about harmonisation.

Q113 Chairman: Thank you. The Commission has estimated five years for the conclusion of the CFR which may be realistic if they are pursuing all three objectives together, at the same time, but do you think it is acceptable to delay the revision of the

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acquis for that period, or have they got their priorities a little bit wrong?

Professor Howells: In one sense it is a difficult question to answer because some of the problems with the *acquis* are policy or political questions, yes, which probably will not be resolved in the CFR. In practice, although we need to tidy up certain aspects of these directives like what does a day mean, is it a day or a working day, those are not really issues which people are going to be talking about in the consumer policy debates, we are talking more about can you extend rights to services, can you really improve access to justice through the courts of the Member State, can you really create internal market protection for the consumers by, for example, introducing producer liability in the Sale of Goods Directive and can you sharpen up the information rules so that they are actually more effective for consumers? In a sense those debates may be delayed because of the CFR, people may say “We do not want to radically revise the Sale of Goods Directive until we can do it in the context of this more wide-ranging overhaul of the CFR”, so that is the danger. At the moment Member States do have the freedom to act themselves if they need to in these areas, people are not going to be too worried whether it happens in two or five years.

Q114 Chairman: You have referred already to the tendency in some areas to move to a maximum scheme of recognition as opposed to a minimum scheme of recognition; do you think the revision of the CFR is likely to thrust the development of the *acquis* in a maximal direction?

Professor Howells: Yes, I think the Commission even highlight that as one of the ambitions themselves. In every area nowadays you are going to get very serious pressure to get this maximal harmonisation.

Q115 Chairman: Is that desirable or is that not somewhat inconsistent with the notion of subsidiarity?

Professor Howells: I feel very old-fashioned when I look back to the old days; I remember the Commission saying “We want to have minimal harmonisation because that will allow experimentation” and indeed if you look over to the United States you actually see there that in their federal system they leave a lot of scope for States to innovate, and particularly when you are dealing with innovative rogues it is quite good to have that ability.

Q116 Chairman: Innovative what?

Professor Howells: Rogues, innovative rogue traders. It is quite good to have the freedom for different States to try to work out different techniques of addressing problems. Indeed, I remember the review of the Consumer Credit Directive where they were praising certain Member States who had gone

beyond the minimum rules so that other States could learn from that experience. I am afraid I take quite a strong view of this.

Q117 Chairman: A strong view against.

Professor Howells: A strong view again maximal harmonisation. Although I can see how it is appealing from the internal market point of view there are some very serious myths attached to it.

Q118 Lord Neill of Bladen: Given your experience, Professor Howells, of the various groups that are working in this field of consumer law I wonder if you would like to comment on the position in the United Kingdom. My memory goes back to the work of the Law Commission and the Scottish Law Commission in the early days of those two Commissions to produce some code of contract which was common to the whole of the United Kingdom, and you will probably know very well that that came totally to grief after years of work and the project was abandoned. Professor T B Smith from Scotland was a doughty fighter on behalf of the law of Scotland, and I think probably single-handedly managed to stop it, but it does show that people value their own system and there is a reluctance to be pushed into a new one. Do you think that currently could be of any significance in the UK, or is that all dead?

Professor Howells: I think so. I think that document was actually published by an Italian professor in the end, was it not, to try to encourage debate within the United Kingdom about harmonisation of contract law? I am very much of the view that actually the mentalities of lawyers across Europe are not that dissimilar, but I think it will take a long time for people in this country to come to accept a code as the starting point for their contract law, and I do not really see why we need to go through that anguish if you can actually achieve harmonisation in a more gradual process. I almost feel that harmonisation of that type should be something that is so obvious to do that it becomes non-contentious. I think at the moment it would be contentious and I think there would be a lot of anguish perhaps for not a lot of gain.

Q119 Lord Neill of Bladen: The easier road you have in mind is the CFR, is that what you are thinking of?

Professor Howells: I think people who are in favour of a code would see it as a development of the CFR which may become adopted as some model rules in some standard form contracts, which then becomes an optional instrument which may start out as an opt-in instrument, then becomes an opt-out instrument and then, before you know where you are, you are all used to playing by the same rules. It may just be the timescale we are debating, it may be that in 100 years we will see that this was just a natural

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thing, that we were making contracts across borders so often, we were introduced to principles like good faith and so this was not an issue for us. At the moment I think it probably is and I think a lot of people will be caught up on the form issue; I think it is the substance which is more important and I would not like to have a long time spent on those formalities.

Q120 Lord Neill of Bladen: You are rather suspicious of this term “toolbox” as possibly being a little misleading, and I have wondered whether terms like that conceal a wider agenda. I was particularly surprised by your paragraph 11 on the Unfair Commercial Practices Directive; you say in that at about line 5: “That Directive will already have an impact on UK contract law, despite the Directive stating that it will not affect contract law.” It seems to me inconceivable that anyone who drafts such a Directive cannot but be aware of the fact that it is going to impact the contract law in all the countries where it is adopted, ie across the face of the Union.

Professor Howells: Yes. There are lots of examples of this; very often directives say that it does not affect private international law, but the directive will actually in some way affect private international law, there are lots of slippages between different types of law which happen almost without you wanting them to happen or being able to prevent it. The way I think the Unfair Commercial Practice Directive might affect contract law, to give an example, is at the moment if we wanted to have a longer cooling-off period than the directives allow, we would be allowed to do so and our freedom to do that under contract law would not be affected. But at the moment those rules are backed by criminal sanctions, in other words there is a criminal penalty if you do that as well as a contractual penalty, and that criminal sanction would now come under scrutiny under the Unfair Commercial Practices Directive and so *de facto* it might well affect your freedom.

Q121 Chairman: A criminal sanction for not allowing a cooling-off period, do you say?

Professor Howells: Yes, for example, there may be an offence of not providing a cancellation notice in a contract so if you made a doorstep contract without providing a cancellation notice it may be a criminal offence and that would therefore be under the scheme of the Trade Practices Directive.

Q122 Chairman: Mr Patel, do you want to add something?

Mr Patel: Yes, sorry, just to go back to your point about national systems, would different Member States wish to hold onto their national systems? Of course, in any debate which is designed to find agreement between so many different Member States

there are bound to be issues of clinging onto your own ways of doing things, and the fact that English law and Scottish law were not able to merge the two into a common framework is indicative of how difficult that is going to be. I do not think that is insurmountable, however, because already there are several examples in the European context which previously have been completely unknown in English law—for instance good faith—in the Unfair Contract Terms Regulations. They have been adopted and they are used and certainly the Office of Fair Trading has built a lot of its work around the examination of the test of good faith.

Q123 Lord Thomson of Monifieth: The fact that the English law system and the Scottish law system are historically different and have existed differently alongside each other for centuries, while at the same time the United Kingdom has moved forward in all sorts of ways, does rather support your proposition on this. One thing I know from my days in the Fabian Society is the inevitability of pragmatism, do you agree?

Professor Howells: I can certainly see that happening, yes. I would imagine that the commercial pressures would be just as important in this kind of context, where there would be lawyers wishing to take advantage of being able to practise in other jurisdictions in order to do business there, and that certainly happens with Scottish firms wishing to establish in London to take advantage of the opportunities afforded.

Q124 Chairman: If one is looking at rules for consumer protections in various types of contracts, what is needed for consumer protection must vary depending on what social conditions there are in the countries concerned, and that may differ widely between different Member States. It seems to me that it is almost impossible to say that there could be maximal rules in that area, because what would be the criterion for deciding what they were to be? There is no real homogeneity between the populations in all Member States, is there, that would allow that to be even sensibly suggested?

Mr Patel: As Professor Howells has alluded it is a very good argument for having a minimal approach rather than a maximal approach.

Professor Howells: I think it is very clear—and I have heard people say this—that European consumer policy is not about consumer protection, it is about an internal market. They have said to us that sometimes you have got to understand that this directive is not a consumer directive, it is an internal market directive and from that perspective there is every reason to have the same rules throughout Europe and simply to make sure that the minimum level of protection is something that each Member

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State can live with. It is two different mentalities: are you into consumer protection, in which case of course you want to keep your own national rules unless they become so over-burdened that they weaken the economy, or is your main objective really to promote inter-state trade? Getting that balance right is the issue.

Q125 Chairman: I value the comments of both you on this, what is your impression of the Commission's approach, does it strike the right sort of balance?

Professor Howells: I think it uses maximal harmonisation as a new mantra in a sense, that every directive has wherever possible to be maximal, without really thinking do we need it to be maximal.

Q126 Chairman: That sounds as though it is over-influenced by the requirements of free inter-state trade.

Professor Howells: I think so. If you look at the consumer protection rules there are certain rules about product quality which clearly have to be harmonised to a fairly high degree, you could not have different national rules about how products were put together, constructed and so forth, they have to be harmonised. As you move towards trade practices there is a certain argument that advertising campaigns should be able to be cross-border as far as possible, but when you come to contract law rules I do not really see the contract rules differing—in the marginal way they will in a harmonisation regime—as having a significant influence on the ability to—

Q127 Chairman: The cooling-off period point is different though, you might need different cooling-off periods depending on what sort of society you are talking about. Availability of advice and all sorts of things might come into that.

Professor Howells: I do not think it would stop businesses doing business because there was a different period in each country.

Mr Patel: I think it is as much about timing as anything else, and the current flavour or fashion is to have maximal directives and, therefore, if the reform takes place within that period of the promotion of maximal approaches then that is okay.

Q128 Chairman: Once you have the maximum regulations then you remove, presumably forever, the ability of Member States to adjust according to their own internal requirements; any adjustment would then have to be made by the Commission, by new legislation.

Mr Patel: Yes, it sets that cap.

Professor Howells: There is another problem, for example in the Distance Selling Financial Services Directive. They tried to get maximum harmonisation on information provisions so the Commission

officials gathered together what every Member State wanted and created an enormously long list of requirements and yet still, at the end of the day, they could not get complete agreement so they had to be derogative on maximum harmonisation for information requirements. You now get a requirement that there be about 20 or 30 pieces of information but still the derogation to allow Member States to go further if they can justify it.

Q129 Chairman: Can I ask your assistance on the standard terms and conditions part of the proposals. The Commission is speaking of promoting the use of EU-wide standard terms and conditions and it proposes that these should be drawn up by the industries concerned with the Commission acting as an honest broker, bringing the parties together without having any particular input into the substance. Is this realistic with this non-interventionist Commission just acting as an honest broker?

Mr Patel: I do not anticipate the Commission will seek to interfere necessarily, in fact there may be a greater role for it in safeguarding consumer interests in the absence of stakeholder representation. I think for the sake of balance there may be scope there. Industry, no doubt, will seek to influence the standard terms and conditions and will be well placed to do so but there is not necessarily an equivalent for the consumer voice as we have discussed.

Q130 Chairman: How do you view this proposal for there to be produced the standard terms and conditions? Is this going to be of assistance?

Mr Patel: I think it would require a great deal of input which I am not sure necessarily will happen. I am trying to think of specific projects of the European Commission where the uptake has been less than what it might have been or what had been hoped for. There is the possibility that this will start off with some flourish and then run into the sand.

Q131 Chairman: It is quite difficult to see business to consumer contracts using these standard terms. Businesses more generally have their own standard terms.

Mr Patel: Yes, businesses will have their own standard terms.

Q132 Chairman: Where you have business to business contracts, the businesses are going to negotiate the contracts and contract accordingly. What is the practical utility of spending a great deal of time and money in working these things out?

Professor Howells: It should be something that comes from the industry anyway because there should be benefits to the industry in doing it. As I understand it—I do not know too much about this—the

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experience to date has been that even when the Commission has tried to prompt the drafting of the European code of practice it has not materialised or not been very satisfactory. I do not see that the European trade associations are pushing to develop these things.

Q133 Chairman: Where does the impetus come from then to produce these things? There must be some impetus which has led the Commission to include this particular objective in their proposals and to be prepared apparently to spend a great deal of time and resources on pursuing the objective?

Professor Howells: I think it is more in the business to business sector that they see this as being fruitful, I should imagine.

Mr Patel: I think one of the possible attractions of having standard terms is that they may provide a neutral non-national, non-domiciled system for doing business. Where you have two parties based in different Member States they may avail themselves of a system which they think has no allegiance to either.

Q134 Chairman: By way of an analogy, when I was a junior at the Chancery Bar I used to have to spend—as all juniors did at the Chancery Bar—a good deal of time drafting instruments of various sorts: leases, mortgages, commercial agreements. One used to go to the books of precedents and find models of these agreements and pick up what you wanted and draft accordingly. Is it anything more than that?

Professor Howells: From the consumer's perspective I always find it interesting that even on the same piece of paper of a consumer guarantee you find that the business has gone to the trouble to draft different terms for each Member State, so business seems to be quite happy to have diversity in its standard terms and to play to the different markets' different expectations. It would be quite useful, of course, to bring all those standards up to a higher level but, as you say, I cannot foresee it happening because you need quite a big input from the consumers' associations to try to demand certain minimum terms in these. I do not see where the resources will come from to be able to make that work.

Q135 Chairman: As to the opt-in or opt-out option, do you have a view on the relative desirability of the two options?

Professor Howells: I think from the consumer perspective you would say that it should not be an option.

Q136 Chairman: It should not?

Professor Howells: It should not be for a consumer to opt-out of its national system with its own mandatory laws and to sign up to some non-binding, non-mandatory set of rules. That would be a potential pitfall of undermining national consumer protection rules and consumers would not have the ability to judge whether that was in their interests at all. For consumers, I think the option code probably should not be an option but for business to business I think probably it would be more sensible to be an opt-in solution, at least in the first instance.

Mr Patel: I think the argument in favour of an opt-in is very much genuine in terms of freedom of the parties to contract as they wish. I think maybe having an opt-out would save them potential time for negotiations so they find themselves in an established framework but, apart from the consumer aspect where you ought not to have consumers being able to or attempting to opt out of mandatory protections, it is very much up to business. Certainly in terms of the uptake and being obliged to use standard terms by default it would help promotion.

Q137 Chairman: Personally, I find it very difficult to understand how the standard terms and conditions objective, whether it is opt-in or opt-out, could lead to the establishing of a separate system of contract law which has been suggested, European Union contract law, because there is not such a thing as European Union contract law, there are national systems of law, and given the freedom of contract, subject to public policy or statutory prohibitions, bodies can put into their contracts what they want. If they want to say damages for the purpose of the contract will mean this, that is what they can say. It will be subject to the national law which governs the contract.

Professor Howells: I find it a little bit confusing how they seem to favour regulation for this particularly if it is a non-binding document because the idea of regulation is that it becomes part of the Member State's law without having to be implemented of course. It strikes me that if it is a non-binding set of rules which you choose to opt into, a recommendation would be a far easier way forward. I do not see why the Commission are talking about it being regulation if it is really such a voluntary matter.

Chairman: Do any Members of the Committee want to ask anything further? Professor Howells and Mr Patel, thank you very much indeed for the patience you have shown in helping us with some of the difficult questions which arise in considering this issue. We are most grateful to you for coming and giving us your valuable time. Thank you.

WEDNESDAY 2 FEBRUARY 2005

Present	Borrie, L Clinton-Davies, L Mayhew of Twysden, L	Neill of Bladen, L Scott of Foscote, L (Chairman) Thomson of Monifieth, L
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Examination of Witnesses

Witnesses: MR CHARLES CLARK, Partner, Linklaters, and Ms SUSANNAH HAAN CBI, examined.

Q138 Chairman: Mr Clark, Ms Haan, thank you both very much indeed for coming here this evening to assist us with the inquiry that we are carrying out into the Commission's proposals in relation to European contract law. We are grateful for the written submissions which have been reproduced for us but which were originally made by the CBI about two years ago for the purposes of our earlier inquiry into the Commission's proposals at that time for European contract law. Mr Clark is here I think on behalf of the CBI?

Mr Clark: That is right.

Q139 Chairman: As a matter of coincidence, we received today—and I have not yet read it—the Law Society's submission to us on that particular matter and I think you are associated with the Law Society panel that produced that evidence. I do not know whether you are briefed to answer questions on behalf of the Law Society as well as on behalf of the CBI?

Mr Clark: I am not briefed on behalf of the Law Society. My name is in a footnote and I congratulate you on having remembered the detail. I should have known that you would! What happened is that when the EU Commission was asking for experts to come forward I was already in contact both with the Law Society and the CBI in relation to all of this so I put my name forward to both organisations. We then agreed that I would act for the CBI but my name stayed on the Law Society's distribution list so that I am able to co-ordinate between the two, but I have not had any input into the Law Society paper.

Q140 Chairman: I do not know whether either or both of you would like to make any sort of preliminary statement to the Committee before we ask the questions of which you will have received notice. It struck me reading the CBI's May 2003 submission that it reflects, as of then, a very marked lack of enthusiasm for the Common Frame of Reference proposal of the Commission. There has been generally some expression of approval as to the possible value of a Common Frame of Reference, the CFR, for the purpose of improving the *acquis*. One of the Law Society's conclusions is that that would be a good idea and should be got on with as soon as possible. I just wondered whether over the two years

between the 2003 paper and now the CBI's views about the potential value of having a Common Frame of Reference which might be used for the purpose of improving the current *acquis* and for the purpose of improving the quality of future European instruments have changed?

Ms Haan: My Lord, the reason that you received the 2003 paper is we felt we had said it all then and our views had not really changed much in the meantime and therefore we would purely be repeating ourselves. The question of the *acquis* is the one area where I think we could see some benefit if it leads to simplification and is evidence based. Our concern and the reason for our more negative approach, if you like, is that we see the whole thrust of the Commission's communication and of the contract law Action Plan as being very ambitious in scope, being driven by academics, with the probability of regulatory creep and whatever outcome we end up with unlikely to be based on whatever our members would consider to be commercially most acceptable.

Q141 Chairman: Mr Clark, have you anything to add on that?

Mr Clark: I think it is certainly fair to say that improvement of the existing *acquis*, particularly in the consumer area, clearly is to be welcomed. If I was doing it I would not go about it by spending all this time and money on the Common Frame of Reference, which I think risks setting up yet another legal system and I fear it may end up being a bit like Esperanto.

Q142 Chairman: The particular focus of our inquiry this time is the Action Plan as it now appears. Do you have any general view on that? Is this something which in your view the Commission is right to be engaging itself in, or is it a waste of time, or is there some intermediate point you might prefer to support?

Ms Haan: I think the Action Plan seems confused in that you have all these different elements of it. You have the reform of the *acquis*, you have the Common Frame of Reference, you have the possibility of an optional instrument and standard terms and conditions, and they all seem to inter-mingle and the policy aims seem to be somewhat confused. The reform of the *acquis* has more widespread support, again on the simplification and better regulation

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agenda. We have been far more sceptical of the benefit of the other elements. I think the concern with the Action Plan is that it is going to take an awful lot of time and money and effort to produce some form of Common Frame of Reference which is going to be driven by the academic community, with general stakeholders' input but, nevertheless, it comes across to us as a very academic-driven exercise rather than one based on commercial need. Therefore the question is what are we going to end up with at the end of it? We would welcome work on the terminology so that you would have, for example, similar definitions across Directives and also the simplification agenda. Our concern is around the work based on principles because one can see the production of a Common Frame of Reference at the end of this process in 2007 as being in essence a draft code, even though the Commission says that is not what they want, but they are not the ones producing the work; the academics are. So I think we have concerns about the direction in which this is all going. Then after all this process, in 2007, if they are only going to start at that stage looking at what simplification may be possible, we are probably talking about eight to 10 years before we actually see anything in terms of what is generally useful to businesses, that being simplification.

Q143 Lord Borrie: I had one question for Mr Clark. I now have one for Ms Haan as well. Mr Clark, you were very damning in your reference to Esperanto. I suppose Esperanto would not have been too bad if people had opted for it and it had appealed to people, and this may not be too bad in terms of principle or in terms of detailed definition of terms and so on which everybody can agree, providing that the work is well done. If it is an optional system of law in which businessmen and their lawyers see advantages and clarity and all the rest of it perhaps they would opt for it in a way they did not opt for Esperanto. Obviously I have latched on to what was a neat analogy, but I am wondering if I could question it. Would you like to answer that and then I will put my other question to Ms Haan?

Mr Clark: Yes, indeed. Just as everyone grows up with a mother tongue and then learning Esperanto would be a deliberate decision, people grow up, albeit in a slightly different way, with their own national legal system. The business community in each country is familiar with its own national system and businesses may end up being either relatively or, in some cases, very familiar with other legal systems. When it comes to negotiating a contract with another party, if the choice of one party's own national systems is not immediately attractive, or even if it is, people may amend their contract to provide for specific things but it is much more likely that they will opt for, say, English law or New York law or Swiss

law, depending on which part of the world they are in, as a commonly accepted system. The advantage of opting for an existing system is that it has its own jurisprudence. We are very lucky that English law and indeed New York law are systems that endorse the principle of certainty perhaps to a greater extent than many civil systems. You therefore can predict with a much greater degree of certainty what the outcome will be to any particular contractual position. There are decades, indeed centuries, of jurisprudence as contract law has built up. If one then goes to what is effectively going to be a new system which will take elements from 25 existing systems (no doubt with greater input from some systems than others) you are going to find yourself in a situation where there will be years of uncertainty as to the precise meaning. Does it have the meaning that the Germans would have given it or the French would have given it? Between the Germans and Austrians there might well be differences of interpretation and approach. I know one of the Lord Justices in the Court of Appeal said that if one opted for this, one might well find oneself with 50 years of litigation as people would want to test the precise boundaries of all the various concepts. That is what I had in mind.

Lord Borrie: Thank you very much indeed.

Q144 Lord Thomson of Monifieth: I could not resist following on just for a moment on this because I think I can probably uniquely claim in the present company that I was once a student of Esperanto as a very young man.

Mr Clark: I should have known better than to make frivolous comments before your Lordships!

Q145 Lord Thomson of Monifieth: Then I later became a member of the European Commission where I sometimes pined for Esperanto as a common language! I was totally taken with your surprising metaphor. I think it is absolutely accurate. That is a personal view.

Mr Clark: Thank you very much.

Q146 Lord Borrie: Ms Haan, I have to admit that I was an academic lawyer for many years and therefore my hackles rose a little at your comment. You would agree, would you not, that sometimes academics are very good at dealing with general principles and synthesis and if you look at, shall we say (and not by chance I pick on *Chitty on Contracts*, edited by one of our witnesses Professor Hugh Beale and others) it is often academics who are very good at bringing together judgments and principles and so on and setting them forth in an intelligent way. Practitioners are more used to dealing with case law and building up from something narrower to something larger but I am not surprised, are you, that in this field, as in many other fields of endeavour in Brussels, a lot of

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reliance is placed on academics and they can be useful for this kind of activity? That is not to go to perhaps the burden of your point which is is it all worthwhile activity, but I cannot see that anybody else would do it any better.

Ms Haan: My Lord, I do not deny that academics have their purpose nor that they are extremely good at writing textbooks. I accept that in this case it is obviously sensible for academics to be involved. I think the concern from our members is that if they are the ones driving it but that business are going to be the ones using it, that there needs to be proper business input into the process along the way. The impression so far from meetings, discussions and contacts we have had is that the academics put more emphasis on getting principles beautifully agreed on paper rather than looking at how real life operates and whether something is genuinely worthwhile and whether this is a real problem, and that the balance is wrong.

Q147 Chairman: Can I take up your reference to the Action Plan being driven by academics. I would have expected the content of any end result of the work to be produced largely by academic lawyers. However, as for being driven by academics, I am not quite sure in what sense you used the verb. My impression up to now—and it may very well be a wrong one—is that it is being driven by the European Commission. They are funding it and putting quite a lot of money into it. If one looks to see what they have in mind—and speaking entirely for myself a fear I have had is that the end product may be regarded as something of a Trojan Horse for some sort of harmonisation of European contract law—I would not have thought that was something the academics would care about particularly one way or the other, although they were doing the work on the end product. In what sense did you mean that the Action Plan is being driven by academics?

Ms Haan: Perhaps I should have said “one” of the driving forces. What I meant was that the CFR which is to be produced is to be the result of independent research by the stakeholders and most of the work, it would seem, is going to be led by the academic community, and the Commission has said that it will allow the academics the freedom to come up with their own result and at that point will apply its policy decision as to whether whatever they produce is useful and something that the Commission wishes to take forward. I suppose the issue for us is that we do not want to be in a process whereby the decisions which are taken from now until 2007 are overly dominated by academic thinking and not by genuine problems. If there are genuine business problems then by all means let us look for solutions, but I think what we have seen so far in the documents coming from the Commission and from general discussions is

that the whole process has been incredibly light on evidence of real problems and a kind of better regulation approach to delivering what the people who are actually going to use this at the end of the day, if it comes out with anything useful, really want.

Q148 Chairman: Just staying with the real problems point, the perception I have had is that there are perceived to be real problems with lack of legal certainty to some extent in the current *acquis* in relation to some of the terms meaning different things in different countries.

Ms Haan: I do not think that is a question of legal certainty, if I may say so. I think it is a question of different legal cultural traditions and to some extent what you have already is harmonisation where you have the same words being used in different countries. What you have at the implementation stage however is a different understanding.

Q149 Chairman: You have a lack of legal certainty in that the implementation in individual countries gets questioned because it has been producing a result that is perhaps different from that which the drafters of the Directive which is being implemented originally intended?

Ms Haan: Yes, and I think our view on that would be that the best way to avoid that is not then to try and harmonise all the interpretations (although if there is some work being done on working out what the differences in interpretations are and smoothing some of those out, then that is fine) but the way to avoid that is actually to do research properly before bringing out legislative proposals, to consult so that these issues come up, and then to draft the legislation in such a way that it is clear what is meant as opposed to a lot of these issues which can come through in fudged language or as a result of political compromise.

Q150 Chairman: It has been suggested that the CFR might turn into some sort of dictionary for particular expressions when used in EU instruments of one sort or another so as to provide uniformity of understanding as to what is meant across the Union. I suppose a dictionary itself sometimes needs a dictionary to be understood?

Ms Haan: That is certainly possible, yes.

Q151 Chairman: It has also been suggested that the CFR would be useful for the purpose of arbitrations. What is your reaction to the proposition that what the project has in mind in the production of CFR would assist our arbitrators?

Ms Haan: I have to say that there has been a deafening silence on the part of our members involved in arbitration on their enthusiasm for this.

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Mr Clark: I am not an arbitrator or litigator at all, but I would have thought an arbitrator does not go out shuttling between the parties to see if there is some convenient common ground they can agree about. They try to establish the facts and then apply whatever is the legal system that governs the particular contract to the facts, taking advice and evidence if need be on the legal system in question. The idea that you go out and try to come up with an arbitral award on the basis of what you think is a nice synthesis of various European contractual laws, I find slightly strange.

Q152 Lord Neill of Bladen: Can I have a follow-up comment on this. It might be said that Community law has rather changed that approach. If you have got a legal problem that is in any way affected by, say, legislation implementing a Directive, as it used to be called (it is now Framework Decision) the law is that all the languages in which that document is originally produced are of equal authenticity. It is quite common now to get into a situation where you have to look certainly at the French and German and maybe for a wider interpretation to up to six or eight other languages to construe a term derived from a Directive. Has that changed the approach that one might have to the dictionary aspect of this?

Mr Clark: Certainly I agree with your Lordship that one does refer to other national texts in Directives and Regulations. As I say, I am not an arbitrator and I cannot really comment on that.

Ms Haan: Surely one would also look to what in the interpretation the purpose of the legislation was and perhaps to some of the debates in the Parliament to see which of the words, if there is confusion between them, might best serve that effect.

Q153 Lord Neill of Bladen: A sprinkling of *Pepper v Hart*?

Mr Clark: You certainly would not want to have recourse to the CFR if there was an established meaning under the national law that was already governing the contract.

Lord Neill of Bladen: Thank you.

Q154 Chairman: The Action Plan in its Annex I sets out a possible structure for the CFR and it has three chapters and chapter three has a heading “Model Rules”. There are a number of sections. Does this document in your view identify the relevant subject matter? Is it desirable to have such things as specific rules for contracts of sales (I am looking at section VII) or specific rules for insurance contract (section IX)?

Mr Clark: If one were to look at the standard French textbook on law of obligations you would find headings that are more or less the exact translation of much of this and of a fairly similar order and you

would have concepts which to us as English lawyers seem rather unfamiliar, like the notion of contract and plurality of parties and so on which are the subject of a number of their existing workshops. You would then get on to special contracts such as sale and hire, basically derived from the four types of old Roman special contract. You could have a separate text book on those and the danger with ending up with a system that has different rules for different types of contract is the existing position where you have a lot of civil systems whereby before you can start advising on what the contract means you have to classify it, which works very well when you have clearly got a contract for sale or clearly got a contract for hire, but so many of the contracts in modern business defy categorisation. They will include a bit of this, a bit of that. They may well involve the sale of something here as well as an obligation to do something else. It is not a new problem. You probably recall from your own Roman studies the problem of classification of hire of gladiators. As to whether it is sale or hire depends on whether they survived or are killed. I cannot remember the result in the end. You can get into terrible discussions—and I am from a financial securities background—on major transactions when the first question the Continental lawyers may often have to ask is what type of contract is it so they can determine the incidents that apply to it. That is completely alien to our way of thinking in most areas of contract law. Is it feasible? If I were a Continental lawyer I would say it is perfectly feasible to have specific rules but from a common lawyer’s perspective I think it is an undesirable development. You also asked whether they have identified all the relevant subject matters. It is very difficult to tell quite what they have covered because the headings are very laconic and even when looking at a French textbook you cannot always guess quite what the topic’s detail is going to be. One of the things that I am aware is not covered is the question of abuse of contractual right, which again we would not normally have as a concept where it might be held to be unreasonable or inflicting unlawful damage for people to exercise the rights of a contract in accordance with its strict terms and conditions. That may seem like an abstruse point but it is fundamental to the question of certainty, particularly in the areas of derivatives where if there is a credit derivative transaction, for example, on a certain specific event the contract may be terminated with nothing being payable to the other party at all. It may seem harsh but that has been factored into the pricing of the contract and the idea that someone may say it was awfully unfair of you to exercise that right on that particular occasion has some appeal in terms of “is it fair and reasonable” but it creates havoc with financial institutions’ hedging arrangements and consequently on the regulator’s

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ability to allow them the appropriate regulatory capital treatment. Getting away from the certainties would be a serious problem, but I digress from the question you asked.

Q155 Chairman: Is that a problem that has arisen in derivative contracts subject to the law of some of the Continental Member States?

Mr Clark: Certainly I can think of two examples of that. One was when there was the last South American debt crisis a few years ago and concerned a credit-linked note which was linked to a variety of South American states' debt. I think it was Ecuador in that case which declared a moratorium, I seem to recall, and that allowed the party to the contract to trigger a credit event. As a matter of English law there was no dispute to it. The Continental investor to whom the notes had been sold ended up in litigation with the institution that had sold them the notes, again another Continental institution, on the basis that they had not properly described the terms of the transaction and they found it difficult to believe as a matter of English law that the contract meant what it said. They said, "It is very unfair. Our contract only had another two days to run. Another two days and you would not have been able to declare the event." To which the answer is, "I am awfully sorry, but that is what it says." If they been able to get out of it on the basis it was a bit unfair in the circumstances, instead of that note being neatly hedged in terms of its exposure to Ecuador, the bank in the middle would have found itself facing a large pay-out to the Continental investor with nothing on the other side which would, if repeated often enough, lead to potential systemic risks to the banking system. From a regulator's point of view being able to say "this nets off against that and you can reduce the amount of capital that is required" is a vital tool to their everyday work.

Q156 Chairman: That takes me into the next question I wanted to ask you. Again this is somewhat derived from the CBI 2003 paper which was criticising the then proposals, really as I read it, on the footing that however desirable some might think from the point of view of consumers they really had nothing to offer to business contracts. To what extent is that still a feature in the CBI approach to these proposals, now the Action Plan?

Ms Haan: I think it is still very much a feature because some people will say for consumers and SMEs they do not understand all of this and therefore it is necessary to harmonise everything so that you have the same law everywhere. Certainly from the SME point selling cross border there is concern as to—

Q157 Chairman: SME?

Ms Haan: Small to medium sized enterprises, very small companies. There may be concern on the part of the smaller companies if they are selling cross border as to what the rules are. Are the rules different? Am I going to get into trouble without knowing it because I do not understand what the rules are? However, what we would say is the answer to that is not to have harmonisation of all the rules but to have information. For most SMEs if they knew what the differences were then in many cases they would be able to take a judgment on whether to proceed with the contract under a different law, if that were the bargaining position of the parties, if they knew what their exposure was. I think to assume that smaller companies are incapable of running a business on the basis of information if it was provided is wrong.

Q158 Chairman: Coming back to the question of the *acquis* and to what extent it needs to be reformed, is that something that in your view could be done relatively quickly and much more quickly than the time envisaged for the completion of the Action Plan?

Ms Haan: Certainly, I think if there is anything we would welcome in this, where we would say work should proceed, it is precisely the reform of the *acquis*. It is looking at where there are problems and where there are, for example, different definitions which are unnecessary. In some cases there are different definitions which are there for political reasons because the Member States could not agree among themselves. To be honest, in this research exercise you may be able to identify those, but if the fundamental political differences between the Member States continue, then I doubt you will achieve agreement on the different definitions. On some of the definitions it may be the case that they exist in different forms, in different directives, purely because nobody remembered they had done something in a different way in another directive.

Mr Clark: It came from other parts of the Commission.

Ms Haan: Yes, exactly.

Q159 Chairman: Certainly in the time I have been involved in this Committee there have been a number of incidents, which have been subjected to scrutiny, where there has been a lack, as this Committee thought, of clarity and certainty, which then we made representations about to the appropriate minister. It has been left unaltered because the fudge was unnecessary as a political solution to disagreements as to substance. One is never going to cure that.

Ms Haan: Certainly not. You may have recommendations in the CFR in 2007 but at that point the political process kicks off with the Commission making recommendations which will be

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based on what it thinks the Member States and the Parliament will accept. The other point I would make, on the question of the *acquis* and the definitions, is the danger from the business point of view of ratcheting up. For example, if you have a sort of cooling-off period which is 14 days somewhere, 21 days somewhere else and 36 days somewhere else and somebody says: "Would it not be nice to have one single period for simplification?", obviously those which have the 36-day period are unlikely to be willing to be reduced to 14 or to 21 to take a sort of middle ground, therefore, the danger is that everything ratchets up and the cost to companies having to change all of their contracts is quite considerable. The danger here is that for the benefit of companies which wish to sell cross-border, there may be costs brought in on all companies including those, for example, which have very small companies based somewhere in the Yorkshire Dales, say, which only sell within England, and the same cost would be imposed upon that company as upon the multinational which does sell across the 25 Member States.

Q160 Chairman: Certainly it seemed to me, considering the justifications for the Action Plan which was given by the Commission and, also, listening to some of the witnesses we have had who approved at least some part of what has been proposed, that there is a feeling that the differences between the legal systems, in so far as a contract is concerned, operate to some extent as a barrier to inter-state trade and some degree of harmonisation in some areas of contract law is desirable in order to smooth out those difficulties in inter-state trade. What is your opinion, on behalf of the CBI, as to the desirability of harmonisation for that purpose?

Mr Clark: Harmonisation is harder to achieve across the entire community because common law is so different from the rest of Europe's law. It will be hard on the continent between the Germanic style systems and the French style Systems, but I imagine between some of the systems, which share the same family origins, there will be aspects which are relatively easy to sort out. There will be the very big political question there as to who wins on which bit. There will be this question of ratcheting. It depends who is driving it. At the moment it is being driven by the consumer affairs side of things rather than the business side. To some extent one can understand that they regard it therefore as being an advantage if something is changed which results in it being in the interest of consumers in the short term. Obviously any change to business which is favourable to consumers may well have an extra hidden cost for industry which therefore puts up the cost for consumers, but that is an old debate. I was slightly alarmed on reading the draft European Civil Code

which, of course, is not the stated endgame of the Commission. When you get to the bit which talks about obligations of good faith, fairness and reasonableness, I think there is a footnote which says England is about the only country that does not have that concept enshrined in its legal system. It makes the point—I cannot remember the precise phrase—that, this is a shortcoming in English law which ignores the desirability of certainty which has resulted in English law being used on a worldwide basis. I do think the question of looking at intra-community trade risks ignoring the fact that English law is used not only for trade between England and other parts of the Community and the rest of the world, but between people who have no other connection with the UK whatsoever. Effectively it has become a global commodity and parties to contracts, particularly in the Far East, will as readily choose New York law as English law. The slightest suggestion that English law is becoming less certain in its outcome and they can switch very, very rapidly to using New York law with the consequential loss of economic activity for the UK particularly and that is not just lawyers' income, it is the associated income of institutions.

Ms Haan: There are two things I would like to say. I think the International Financial Services London have some statistics on the percentage of GDP which legal services bring to the UK which in 2001 was about 1.4 per cent. On the question of cross border barriers, the reason for our scepticism about these proposals is precisely that we went to our members and said: "Are the contractual differences between Member States causing barriers for you?" "Is this a problem for you?" and the answer came back: "No". There are other things which are far more of a problem. You can say: "Goodness me, doing business with France, well they all speak French and we do not have a common language, therefore we should have that, this is a barrier". It is not the answer.

Q161 Chairman: Was that an entirely uniform answer or was it a predominant answer?

Ms Haan: It was almost universal and of those who said: "Oh yes, this might be quite a good idea", when we spoke to them what we found was—and this was from the smaller company section—what they were concerned about, as I mentioned earlier, was the fact that different systems may exist and, therefore, knowing what the differences were was more important than necessarily having harmonisation.

Q162 Chairman: If different Member States have different consumer protection provisions and different withdrawal dates for various types of contracts, for example, is that regarded as a hindrance which needs harmonisation to overcome?

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Ms Haan: We would say no if you had a basic country of origin principle applying to all contracts because then you would know that, for example, as an English company if you were selling to a German consumer and English law applied, you would know that English law existed for the purposes of that contract, so for you as the company there would be no problem. Obviously that does not happen in all circumstances. I think in most cases knowing there was a difference would be sufficient rather than saying that it should be exactly the same. In some cases you might say it should be exactly the same but I think you would only want to say that on the basis of evidence of having asked people whether there was a problem, what the problem was, what the costs were, what the kind of additional bureaucratic requirements, if you like, might be, for example, if you could not allow title to pass until so many days had gone in order for the cooling-off period to finish or something like that. What are the real problems and where is the evidence? That is the basis on which we would like to see this done.

Q163 Chairman: The Commission's proposals involve various working groups, consultation exercises and so on. Is it your impression that there will be sufficient representation of business and industry interests in that process? Is the CBI going to be involved in it?

Ms Haan: We will be involved.

Mr Clark: It is a bit of a lottery. There will be a series of workshops and the Commission has published a list of workshops to take place over the forthcoming couple of years or so. We were asked, as the nominated experts for the various bodies, to tick boxes against which sessions we would like to attend. You got a long list of various short headings: personal security rights, unjust enrichment, authority of agents, and so on. The sequence of the topics does not follow any logical order, it follows the order in which the group of academics, who have been commissioned, have done some work already. You get the notion and functions of the contract coming several sessions after you have already dealt with things like unjust enrichment, which you might have otherwise dealt with at the end. Things like main obligations under the contract do not come in until the middle of next year. It is going to be very difficult to give serious input to any workshop when you do not know what the basic principles are going to be underlying it all. Worse than that, we have been told that the Commission will decide which of the panel of experts is allowed to attend which session. It is not as if you can say: "Right, the following four topics have some coherence or interdependency amongst themselves, I want to attend all four of those", they will decide which ones you can go to. I think you are not expected to attend more than two in any one year,

very nice in terms of disruption to one's professional life.

Q164 Chairman: Is that for each individual?

Mr Clark: Yes. I found myself having ticked most of the boxes—because you miss very many of them at your peril and then have gone through, putting asterisks against the ones I think are even more important, I will see what I am given, but it will be a complete lottery. Then there will be a paper which is published by the academic researchers, probably about a month before the workshop is due to take place. At that point we will then have to study that and consult with our various organisations and with the other organisations, the Law Society and so on, to find out who is attending on this occasion. There will be an opportunity to make representations at that workshop. The academics are not bound to take note of any of the comments made but if they reject them they have to explain why. There is no plan for there being follow-up sessions, either as a result of the workshop and things which come out of that workshop or as a result of things which come out of subsequent workshops which have a consequential effect on what has been discussed already. Each topic is being discussed as a separate workshop in isolation. At the end of the process, in 2007, something will be produced by this committee of academics—please excuse me, Lord Borrie, I have great respect for your Lordship's academic credentials, indeed I have read many of your books—but the input of business and practising lawyers into the process is limited to this one snapshot of each separate workshop which does not seem a particularly fruitful way of proceeding.

Q165 Chairman: Is this procedure, as you have outlined it to us, set out in any written form? Have there been letters to the CBI to say this is how it is going to be done?

Ms Haan: I think there was a hearing in December and papers were sent out for that and there was some indication of that. Then there was a follow-up letter with this list of topics. There is no one place in which all of this is set out.

Q166 Chairman: I think the Committee would find it extremely helpful if we could have copies of whatever you have received from the Commission, which has been the provenance of the description of the procedure which Mr Clark has just given.

Mr Clark: To some extent I may be relying on the note which was taken by a representative of the Law Society at the meeting which was held in December, where the representative from the Commission outlined the process. A lot of people were asking: "How many of these things can we come to and what

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is the procedure going to be?”. We will see if we can find something.

Chairman: That would be helpful. Thank you very much.

Lord Thomson of Monifieth: Perhaps we can pursue it with the Law Society next week?

Chairman: I am not sure they are giving evidence next week. The Minister is coming next week, we can put it to him. Yes, let us do that.

Q167 Lord Thomson of Monifieth: In the hierarchy of the Commission who is behind this wheeze and what ultimate good does he or she think is going to result?

Ms Haan: As to the hierarchy of the Commission, this is being driven by DG Sanco, which is the consumer directorate of the Commission. As to what good they think will come out of that, I am afraid your Lordships would be better asking the Commission.

Mr Clark: I am reminded of Maria Theresa who—when the first draft of the Austrian Civil code was presented to her by their learned committee—sent it back saying it was not fair and reasonable enough and it was not properly balanced in terms of the different interests. My fear is when you look at the work which has already been done on the draft civil code—not that that is anything to do with this—it is going to be heavily influenced by that. I cannot see common law principles coming through.

Q168 Chairman: My own impression is the Commission believes in harmonisation as a removal of an impediment to enter into Member State trade.

Ms Haan: As a matter of ideology that is true. Our concern is this is not evidence based.

Mr Clark: To that extent, I do not believe any regulatory impact assessment has been done at this stage.

Q169 Chairman: Certainly there has been no cost benefit assessment done.

Ms Haan: No.

Mr Clark: The cost analysis is 4.4 million being paid to the researchers in euro. There is also the hidden cost of the CBI and Law Society representatives. You multiply that across all the different jurisdictions—your Lordships’ time, Government time—it is going to be a costly exercise.

Ms Haan: It is extremely ambitious.

Q170 Lord Thomson of Monifieth: On that point, can I ask, the origins of this proposal go back a year or two, do they not?

Ms Haan: Yes, they do.

Q171 Lord Thomson of Monifieth: They go back to a Commission of a European Union of X number of members. I have forgotten the numbers now.

Ms Haan: Fifteen.

Q172 Lord Thomson of Monifieth: Has any account been given of the implications of all the enlargement countries? This is a complicated enough affair for those who have been members of the Union for some time. Is it going to be remotely practicable in a European Union of 25?

Ms Haan: I am not aware that that point has been raised, except that those who are in favour of greater harmonisation would say that having a Union of 25 makes it all the more important that we have one single system for everyone whereas, some of the new Member States might say: “We are trying to cope with the *acquis* which we have just acquired upon entry and a lot of additional new regulation is going to be very difficult for us”.

Q173 Chairman: There are other applicant Member States as well who are involved I imagine in the discussions?

Ms Haan: I would not imagine so.

Mr Clark: I imagine they will not be seeking to take elements of their legal systems to add to the mixture.

Q174 Chairman: I wonder what the contractual legal system of Turkey is?

Ms Haan: Again, I believe it is the civil code.

Mr Clark: I think it is based on a translation of Swiss civil code.

Q175 Lord Neill of Bladen: My Lord Chairman, can I make a comment on what was said about good faith. The notion seems to be around with some financial lawyers that we do not have a notion of good faith here. First of all, in my opinion it is inaccurate as a state of law and, secondly, it has no understanding of the way in which law is administered in this country. If you try to exercise rights under a contract in bad faith on a continuing basis, you do not win your action. It does not call on the court to make a judgment that the clause does not apply and cannot be interpreted in this way. In other words, good faith is an ever present factor in the administration of contract law in this country. Would you like to comment as to whether you agree or disagree with that?

Mr Clark: I would agree, clean hands and equity, and no doubt there are ways for the courts to come to the right answer.

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Q176 Chairman: The flexible use of implied terms.

Mr Clark: Implied terms is a classic example of how you can get there. As a general principle, I think it is true to say that English law achieves far greater certainty. Certainly, I would agree with your Lordship that a determination which is made in bad faith, an exercise of a discretion in bad faith, will be susceptible to challenge. However, if the contract is clear and there is no scope for an implied term, the contract,—taking the earlier example I gave—which says, “If Ecuador declares a moratorium on its public debt, the amount which is payable should not be 100, but should be 20 or zero”, there is no real scope for saying the exercise of that contract you freely entered into should be subject to some test as to whether or not it is, perhaps not one of good faith, but fair and reasonable. The debate about good faith tends loosely to encompass the questions of reasonableness and fairness also. To that extent maybe it is be an infelicitous shorthand. One of the problems we come up against when dealing with contracts under Dutch law is that the Dutch lawyers inevitably have to have a qualification in their opinions which says the validity and the enforceability of the obligation is dependent on it being reasonable both at the time of contracting and enforcement which causes, as you can imagine, a lot of investment banks serious difficulties. I failed to give you the second example on the choice of law earlier. Another example I was going to give you was one where, again, a credit derivative was going to be done under German law, but the German counter-party requested for it to be under English law to the extent possible so that the precise triggers for when things were and were not payable would be determined under English law and not be subject to various tests of, not good faith but, reasonableness and so on and other related concepts which would apply under German law. As a result, it was a slightly tricky structuring issue. It is an interesting example of where the parties deliberately chose to use English law rather than the more obvious choice, in that particular case of German law.

Q177 Chairman: You get the same sort of concepts involved with the performance or non-performance of conditions to which contracts are subject. If you have a condition in a contract when on the happening of a certain event the contract comes to an end, and one party then deliberately brings about the occurrence of that condition, different legal systems have different solutions to the problem. I think civil systems go in for a fictional non-fulfillment proposition if the party deliberately brings it about themselves, whereas in English law we go by implied terms.

Ms Haan: I think that is precisely one of the issues. Again, looking at the question of harmonisation, you can have the same words and even an explanation of what you think they mean behind them but at the end of the day, in practical terms, whatever the legislation says has to be enforced by someone, a judge has to rule. The cultural legal traditions across the Member States are extremely different. Even if you have a common frame of reference the expectation of the Commission that this is going to lead to harmonisation across Europe for businesses, consumers, et cetera, being delivered through the courts is mistaken, I think.

Lord Neill of Bladen: The examples we are taking are of very, very high levels of sophisticated contracting parties. Your Ecuadorian debt was one example. Another is where the parties pick German law to apply to certain parts of the contract and English law to another, assuming the legal team working for each side know what they are talking about, with a very high level of sophistication. People of that character do not need some CFR being produced from the dictionary and they do not need to be harmonised into anything, they know precisely the contract they want to make. I wonder whether it is a guide to us, you do not really need this at the higher levels because at the lower levels we are never going to get agreement between the 25 Member States because of what their consumers have to put up with.

Q178 Chairman: Can I move on and ask you a question or two about the proposed standard terms and conditions, which is another part of the action plan. The plan has in mind EU-wide standard terms and conditions drawn up by the industry or the sector of business in question, then to be given publicity on a website perhaps. What is your attitude to this sort of proposal? Is it likely to be of any value? Are individual firms who have their own cherished standard terms and conditions likely to be pleased with the notion that these will probably be put on a website?

Mr Clark: I think you have answered the question, your Lordship, no. Most of these organisations, if you want to get hold of their standard terms, will sell them to you as a publication; that is minor income for them. I think the main problem is there is a misunderstanding at the Commission as to the purpose which standard terms can serve. Obviously there are lots of industry standard terms in various industries. I imagine each of them presupposes they are operating within an existing national legal system. They will deal with definitional questions of the subject matter: timing, what happens if this happens or what happens if that happens, they may cover legal issues such as who has the right to terminate, when, and what the level of compensation as liquidated damages might be or whatever. They do

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not go so far as to spell out the full legal framework which is to apply to the contract, therefore, I am not quite sure what benefit is to be gained by having a website which has detailed contractual definitions for the supply of grain, oil, financial contracts or whatever they might be, drawn up under different legal systems. The ones I am familiar with are ISDA definitions in the derivatives world and the International Primary Market Association's standard documentation for Euromarket primary market activity. ISDA has produced masses and masses, you would fill several ring binders with publications of definitions and provisions which operate under either English law or New York law. If you want to try and adapt those for German law, you cannot just change the governing law clause at the end. You would have to go off and do a certain amount of work. Probably 80 per cent will work, but there will be that 20 per cent around the edge which will need changing. The International Primary Market Association's documents have been drafted with English law and New York law. Then, as a separate exercise, they have gone off and done the same exercise under French and German law because there was a demand from their members for that. I cannot see that you can have some standard terms and conditions which are going to apply under more than one system of law at any one time. I do not see quite what purpose it will serve.

Q179 Chairman: It sounds to me as though the view you are expressing is an indication that you think the work of standard terms and conditions will be simply a waste of time and money? I do not want to put words into your mouth.

Ms Haan: It seems difficult to see who will want to put their terms and conditions on the Commission's website. What do they gain thereby? Why would someone like the CBI, for example, want to put those on the Commission's website? If we have standard terms and conditions we would rather have them on our website so that people come to us.

Q180 Chairman: I think the proposal is that the various industries, CBI or ICI or whoever, will cooperate in producing standard terms and conditions which can be adapted EU-wide and will then go onto the Commission's website, so they will make them available to the sector of business and industry at large. Then, persons carrying out business in that sector will log on and have a print-out of the standard terms and conditions which they will then use. That seems to be the idea.

Mr Clark: If ICI have their standard terms for the supply of whatever ICI makes these days on their website, the only other people who are really going to be interested will be their competitors or their customers. Their customers will be in contact with

them anyway and their competitors might find it jolly interesting. I cannot see that consumers, particularly, who are at the heart of the Commission's concerns on this, will be particularly benefited by it. The standard terms will not provide helpful clauses as to how to avoid frustration of contracts in particular circumstances or interesting little notices clauses.

Q181 Chairman: To your knowledge has the CBI or any of its members been approached by the Commission to assist in the preparation of these standard terms and conditions?

Ms Haan: No. It is still very much a bright idea, but I do not think it has been developed very far. It has not been thought through very far.

Mr Clark: There is also the problem that if the Commission is preparing to act as an honest broker without interfering with the substance, it will be like a lot of websites: there will be no quality control over what is there and that will thereby debase the value of what is there.

Q182 Chairman: There has been some suggestion to us that some consumer bodies might want to post STCs on the Commission's website, but of course putting them on the website does not get them into use, you would have to have the other party to the consumer contract wanting to use them.

Ms Haan: Of course that is an essential part of contracts, yes.

Mr Clark: What may happen is the Commission and some other bodies may start insisting that either some of these standard terms or, more likely, as and when it exists, the common frame of reference be applied to contracts entered into by parties dealing with, for example, the Commission. When you are dealing or contracting with the Commission you are in a different world anyway.

Q183 Chairman: Finally, I wonder if you can help us with the proposed "optional instrument". I suppose it is a variation of the STC idea, you have this optional instrument where you can either opt-in or opt-out to adopting it as your contractual instrument. What is your attitude to the optional instrument proposal? Is there any benefit for industry or business?

Ms Haan: We have not seen a benefit. I think our concern is partially the Trojan Horse argument that what starts off as an optional instrument may ultimately become less optional. The other concern is the confusion which exists in some of the discussions between the optional instrument and the CFR and whatever form the CFR is produced in, in 2007, will look extremely like a potential optional instrument. It would be like Blue Peter: "Here is one I made earlier".

2 February 2005

Mr Charles Clark and Ms Susannah Haan

Q184 Chairman: I think I know what your answer will be as between the opt-in and opt-out option.

Ms Haan: I am afraid we are terribly predictable, my Lord, we do like certainty, therefore I think we would certainly prefer the opt-in approach.

Q185 Chairman: The optional instrument would still have to be, whether it was an opt-in or an opt-out system, within the context of some national system of law. The Commission seem to be suggesting that they would be moving towards some sort of European Union system of contract law.

Ms Haan: Yes.

Q186 Chairman: Which conceptually I find quite difficult to understand. Do you have an understanding of what is in mind in that respect?

Ms Haan: I think this comes back to the point I was making about confusion in the minds of those of us dealing with the Commission, itself and the stakeholder groups. What exactly are they trying to achieve? Where do they think they are going to end up? On the one hand, they are saying they have not made up their minds about the optional instruments and, on the other hand, they are saying precisely that they will have some sort of EU system of law. The two are not compatible.

Mr Clark: You can only do it if you abrogate by regulation the existing national contract laws and replace them with a fully formed system of law.

Q187 Chairman: If you abrogate it, it would be neither opt-in nor opt-out.

Mr Clark: Indeed. You have the problem of having to overcome the formalities for the formation of the contract in the first place, consideration or “causa” or whatever, to get the contract into existence and you have got to deal with whatever the existing national systems and procedures are for ending contracts: illegality, frustration and so on. It is all very well adopting these provisions but if you have not got a contract in the first place under your own system, it is not going to get you very far.

Ms Haan: There are probably analogies with the European Company Statute which took 30 years to agree where you have something which is supposed to be a European company but, nevertheless, is linked into national law, because it has to be, and it is not really a Pan-European company at all, although it has that title.

Mr Clark: I would go back to my earlier comment that if you are thinking of not using either your system or the system of your contracting party, you would probably settle upon an existing third country’s legal system and there are relatively few in the world which are generally chosen: English, American or Swiss, that is about it.

Chairman: Are there any other questions? Ms Haan, Mr Clark, thank you very, very much indeed for the great assistance you have given us. It is always easier to listen to answers from sponsors which one agrees with, I am speaking for myself. We are most grateful to you for coming and helping. Thank you very much.

Supplementary Memorandum by the CBI

The Commission Communication outlines an ambitious project on EU contract law with a wide remit to create a common frame of reference. We believe that it is essential in carrying out this work that it should be an open and transparent process, allowing full consultation of all relevant stakeholders through nominated experts.

SECRECY/LACK OF INFORMATION

The Commission has so far failed to disclose (even to the DCA) the names of the academics who are to undertake the research, initially citing data protection reasons, yet the first workshop is planned for next month.

The Commission has also failed to disclose the remit of the academics, stating that, as this is a research project, the Commission is not able to set the terms of reference. Since this is a research project, there is no requirement for a regulatory impact assessment at this stage.

The member states’ expert groups will work separately from those of the stakeholders. Information on the workings of the member states’ group is not publicly available.

It has been observed that the process compares unfavourably with the more open, honest and transparent process that led to the creation of the Unidroit principles.

The summary of meetings so far provided by the Commission was felt to cover the views of the Commission but largely to ignore those of the stakeholders.

LACK OF CLARITY OF OBJECTIVES

It is unclear what the principles of contract law are intended to achieve. Principles would seem to be directed towards the creation of an optional instrument (whereas a lexicon and work on simplification of the *acquis* could be more useful). To say that things are in the hands of the researchers and that it is for them to decide where to go is unhelpful. To be this far into a major project with considerable sums of taxpayers' money committed (apart from the time and money required to be committed by member states and stakeholders) and still to have great confusion as to the objectives does not augur well for future success. We understand that €4.4 million is being committed to the project. Expenditure of this magnitude requires a significant level of accountability, which has so far been lacking.

PROCEDURAL FLAWS

The stakeholders (including the nominated experts) are still unable to access the Commission's CFR-Net website.

The order of the workshops has no logic. The initial workshops relate to topics on which the academics have already done significant work but it is difficult to contribute meaningfully when other more general and fundamental topics are to be covered later.

The Commission will decide which experts may attend which workshops. They stated at the initial stakeholder meeting in December that they only want 20–25 people at each workshop, with only one person per stakeholder organisation. It is therefore not even clear that common law practitioners will necessarily be involved in all workshops. The papers for each workshop are to be made available only a month before each workshop (giving little time for reflection, consultation and discussion, particularly for representative organisations, which need to consult their own members). This short time is made worse by the limits on who may attend the workshops and makes the need for such consultation among stakeholders before the workshops even more important. Since nothing has so far been made available and no indication has been given of who is allowed to attend the first workshop, we would conclude that the timetable is starting to slip already.

It is unclear who will have access to the papers. Access is likely to be restricted to those stakeholder representatives who have expressed an interest in the relevant workshop but comments may only be submitted by those attending the relevant workshop. Free and open discussion is thus precluded.

It is not possible to anticipate with any certainty what the subject and scope will be of the workshops as the headings are, in many cases, unclear. It is true that many derive from the headings you would expect in a civil law textbook on obligations but even the Commission admits that they are unclear and they may well mean different things to different people. The Commission says that it is for the academics and not the Commission to decide on the subject matter and scope and so has refused to give any clarification to those asking for more detail before deciding for which workshops they wish to put their name down.

Once a workshop has taken place, it is unlikely that there will be opportunities for follow-up sessions either to deal with points raised at the workshop or to go back and deal with consequential points that arise out of discussions on other related topics at subsequent workshops. The subjects are (so far as the stakeholders can contribute) to be compartmentalised and treated in isolation even though many are intrinsically linked (particularly as different legal systems often use different legal concepts to deal with the same practical issues). Some of the fundamental concepts (such as good faith) are not scheduled to be considered until a much later stage. This is bound to debase the value and effectiveness of the contributions of the stakeholders.

The academics will then publish their conclusions. They are not bound to give effect to the comments of the stakeholders but, if they ignore them, they must explain why. The Commission may then in turn do what it wishes with what will be no more than the fruits of a research project. It is entirely possible that the end results may be of no practical use whatsoever, but the concern is that if the Commission has spent €4.4 million it will feel obliged to follow the end recommendations or stand accused of wasting taxpayers' money.

There is an understandable concern that the Common Frame of Reference will appear in a form that can be easily turned into an optional instrument and that it will look uncommonly like the draft European civil code which has already been published. It would be surprising if the result were to bear much influence from the common law. There is also a concern of CBI members with long experience of EU proposals that what initially starts off as optional may later become mandatory.

All this leads to a fundamental concern that the involvement of the stakeholders (and particularly those from common law jurisdictions) is an empty exercise to serve as a figleaf to claim wider endorsement of the project without allowing for real involvement.

WEDNESDAY 9 FEBRUARY 2005

Present	Clinton-Davis, L	Neill of Bladen, L
	Denham, L	Scott of Foscote, L (Chairman)
	Lester of Herne Hill, L	Thomson of Monifieth, L

**Memorandum by Baroness Ashton of Upholland MP, Parliamentary Under Secretary of State,
Department for Constitutional Affairs**

INTRODUCTION

The purpose of this written evidence is to aid the Select Committee's Inquiry by setting out the key elements of the Government's position in relation to the European Commission's work on European contract law. These issues reflect those set out in the Explanatory Memorandum, submitted to the Committee on 9 November.

That Memorandum set out the background to the Commission's work in this area to date. To summarise, the Government first submitted an Explanatory Memorandum (10996/01) on 8 October 2001 following the publication of the Commission's first consultative communication on European contract law, to which the Government responded. A second Memorandum (24340/03) followed in March 2003 in response to the Commission's publication of its Action Plan. Again, the Government issued a response to this. The Explanatory Memorandum of 9 November followed the publication of the Commission's most recent Communication, "*European Contract Law and the revision of the acquis: the way forward*" (COM (2004) 651 final).

The Government cautiously welcomes the Commission's work in the area of European Contract law, particularly Measures 1 and 2 as set out in the Action Plan and the development of the Common Frame of Reference (CFR) which will underpin each of the proposals. Measures 1 and 2 relate to the review of the current and future contract law *acquis* and the elaboration of EU-wide standard contract terms respectively. We see each of these projects, particularly the review of the *acquis*, as an opportunity to ascertain whether there are obstacles, in the contract law field, that hinder the efficient operation of the internal market. If this is the case, then this is also a chance to identify practical and proportionate ways of removing those obstacles.

The Committee will note the use of the term "cautiously" however. The Government has previously stated, in response to the Commission's communications, that it is opposed to a general harmonisation of contract law across Europe. We have also made clear that we see no case for Measure 3 of the Commission's Action Plan, the creation of an optional, non-sector specific, instrument in European Contract law.

For the future, the Government is committed to remaining fully involved in this project as it goes forward. It is also clear that there is sufficient momentum behind this work, both from the Commission, the European Parliament and other member states, to ensure that it would happen whether or not the UK was involved. On this basis, it seems that our active involvement can only be beneficial in terms of protecting and representing UK interests.

COMMON FRAME OF REFERENCE AND THE REVIEW OF THE ACQUIS

The Government welcomes both the planned review of the current and future contract law *acquis* and the development of the Common Frame of Reference (CFR) as a "toolkit" for improving this *acquis*. We have expressed concern, particularly in the Government response to the Commission's Action Plan, that work on the CFR should not delay work on improving the *acquis*. We understand that this is also a concern amongst certain stakeholders.

Unfortunately, it appears that the principal review of the *acquis* will not commence until the CFR has been fully approved in 2009. However, we are encouraged that the Commission has decided to carry out academic research into the implementation of the eight consumer directives and the problems that have arisen. The Government is currently considering how we can assist the Commission, possibly by conducting research at domestic level, in what is undoubtedly a substantial undertaking.

OPTIONAL INSTRUMENT IN EUROPEAN CONTRACT LAW

The Government has consistently made clear our opposition to the creation of a European code of contract law to replace existing national laws.

We have noted, and agree with, the point raised by Professor Beale in his evidence that the Commission have not, in their most recent Communication—*The Way Forward*, made any mention of a proposed harmonisation of contract law. However, there is still the possibility that an optional instrument will flow from the development of the CFR.

The Government sees no case for the creation of an optional instrument to be used alongside existing member state laws. The Government is committed to safeguarding the contract law of England and Wales and the corresponding laws in Scotland and Northern Ireland.

The Government believes that the common law is a good legal system in which to do business, as it gives particular value to the freedom of parties to contract and to the importance of legal certainty. It is also flexible enough to develop without requiring legislative intervention. For these reasons, the common law system greatly contributes to the UK's position as an international centre for business and commerce. It also makes the UK the natural gateway for Europe into, and from, the United States of America.

INVOLVEMENT OF UK STAKEHOLDERS

The Government believes that it is crucial that there is significant UK stakeholder involvement in the development of the CFR. This will ensure that the reasoning behind the proposal is rigorously tested and that appropriate solutions are developed to clearly defined, practical problems facing both business and consumers.

We are therefore pleased that, firstly, the Commission has established the CFR-Net, which brings together interested stakeholders from across member states and secondly, that the UK is the best represented country on this network after Germany. UK stakeholder involvement should also ensure that the principles of our diverse legal traditions are properly considered.

Although the CFR-Net is still in its early stages, the Government is keen to take a structured approach, in terms of engaging with UK members of the group, in order to ensure that all UK interests are effectively represented as the Commission's work develops. Officials intend to hold regular meetings with these stakeholders over the coming months to ensure that contact is maintained.

UK PRESIDENCY CONFERENCE

I should also mention the forthcoming conference "*Better Lawmaking through the Common Frame of Reference*" in London on 7–8 July. The conference will be jointly hosted by the UK, as part of its Presidency of the Council of Ministers, and the Commission, and will bring together stakeholders, representatives from member states and academics to take stock of work done so far and discuss future priorities.

February 2005

Examination of Witness

Witness: BARONESS ASHTON OF UPHOLLAND, a Member of the House, Parliamentary Under Secretary of State, Department for Constitutional Affairs, examined.

Q188 Chairman: The European Contact Law paper, is the subject of questions we would like your help with. I think it is intended that this country will host the conference on the proposed Common Frame of Reference, the CFR, during its presidency. What is the significance of the hosting of that conference and how does it stand with the rather cautious welcome that the Government has given to the Commission's work in this area?

Baroness Ashton of Upholland: We are, as you say, cautiously welcoming. We are joint hosts with the Commission of the conference which will take place

in July as part of our presidency. We are anticipating about 200 from right across Europe. It will be the first meeting of what we call the European Discussion Forum, which is the opportunity for stakeholders to come together in order to discuss the issues that are being raised alongside what is called "Member State experts", which I think means government, but I do like the terminology. It is our opportunity to do two things. One is to take stock of the work to date, and the other is also to put, if I might say, our particular tone and flavour on the work that is going forward to be clear about what we expect this to be doing.

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Baroness Ashton of Upholland MP

Q189 Chairman: What are we to read into the expression “cautious welcome”? It sounds as though the Government sees dangers in the proposals, although there may be some advantages in them. Is that a fair analysis of what is meant?

Baroness Ashton of Upholland: In terms of the proposals, we can broadly welcome them. I think there is a concern to see where this will go. Again, across other Member States, I think we have a lot of support for the way it has been approached with only the German ministers who are very keen to have contract law much higher up the agenda. I do not think you should be cautioned to be deeply suspicious. I think it is more that this is an interesting area but only on the basis that we have established, as you say.

Q190 Chairman: The Commission is proposing to spend a great deal of money in pursuing the goal of preparing a common frame of reference. One only has to look at page 10 of the paper where there is a reference to what the Commission has in mind: establishing a network of stakeholder experts, regular workshops on all themes of the research, on each topic there will be workshops, a dedicated internet site accessible to researchers, experts and the Commission, and so on. Then, at the end of the day, it is intended that there will be a common frame of reference covering a wide variety of areas. There will be principles, definitions, model rules, specific rules of contracts of sales, specific rules for insurance contracts, and so on. There is a suspicion, which some have, that this is being constructed and may take the form of a sort of Trojan horse leading to a harmonisation proposal on the lines of: we have done all this work, here it is; would it not be sensible if that were applied across the Union?

Baroness Ashton of Upholland: In the evidence you have received, people have called the work being proposed a dictionary. I call it a thesaurus as I prefer that word to dictionary because I think there is an issue about how we make sure that people understand the terminology and how the *modus operandi*, if you like, within it makes sense across the European Union. I have no difficulty with that at all. There is a huge amount of work to be done in that. I would not underestimate that for one second. When you look at the programme that has been suggested, the workshops and the academics who have been involved and the stakeholders and so on, and I have been shown the number of workshops that have already been proposed thus far, then it is a huge challenge and task, but I do not accept that it is a Trojan horse, nor would I accept that we would want to move in any way, shape or form to harmonisation.

Q191 Chairman: It was question 9 on the previous paper which asked whether the Government would support the establishment of a European contract code. I think, from you said, the answer to that is a straightforward “no”.

Baroness Ashton of Upholland: That is right.

Q192 Lord Lester of Herne Hill: I shall declare an interest because I have advised the Cyprus Government quite a lot. When I mention Cyprus and Malta, I had in mind that both those countries are very keen to protect the common law traditions against excessive civilian interference. Would the Government think about, in that cautious welcome, maximising not only the Irish supporters—the other common law jurisdiction—but the other two because if two Mediterranean common law jurisdictions are also concerned that seems to me to be an important matter to bring to the conference when it happens.

Baroness Ashton of Upholland: I agree completely. I was hoping to meet with my colleagues from Malta when I was in Luxembourg, but it did not happen, unfortunately, because of the timetabling. I agree with that but again from talking to some colleagues in my most recent visit, there was no suggestion that people are looking in this direction, with the exception, as I say, when we were around the table, that the German representative did suggest that to the presidency currently under Luxembourg. It was roundly sat upon by the Minister of Justice of Luxembourg, who was chairing proceedings, and that was supported round the table. It is not something that I feel any real desire to move towards and certainly not something on which we would be supportive.

Q193 Chairman: The Commission takes the view that the CFR when produced will improve the quality and coherence of the existing *acquis* and also will assist in producing future instruments in a more satisfactory form for consistent implementation across all Member States. I think they have in mind that national legislators produce the CFR as well for the purpose of implementing measures which the individual Member States may need to put in place. Are these realistic ambitions?

Baroness Ashton of Upholland: I think we will have to wait and see, to be frank with you. We are at a very early stage in this. The potential for the toolkit, thesaurus, whatever, is great. I think it could have a real opportunity within it to help the legal structures work better across Europe with individual nation states, and so on, but quite how valuable they will be to different legislators or others, I think really does remain to be seen because we have not got the workshops yet, never mind what might come out of those.

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Baroness Ashton of Upholland MP

Q194 Chairman: Are you able to say whether our parliamentary draughtsmen are eager in anticipation of the help they are going to get?

Baroness Ashton of Upholland: I confess I have not asked them. I have been much in contact with them of recent days with various bills but I have not asked them that question. If you would like me to do so, I would be more than happy to pass it on, but they are rather busy at the moment. I may not get a response, or any repeatable response!

Q195 Chairman: Paragraph 3.4.4. of The Hague Programme, and this is another question which is coming out of the first paper which relates more to contract law, says that measures should be taken to enable the Council to effect a more systematic scrutiny of the quality and coherence of community law instruments relating to co-operation in civil law matters. What sort of measures are envisaged and how do those relate to the production of the CFR?

Baroness Ashton of Upholland: Again, I do not know the detail of this yet. Our ambition is that we will have measures that support our drive on what we have described as better regulation, making sure that by using the CFR one can identify if there are issues where you need greater clarity, being able to make sure that nation states understand the concepts that work across in different nations and so on. I do not yet have any straightforward “this is what we mean, this is what we are going to do”, to be honest, and I do not anticipate that quite yet.

Q196 Chairman: It has also been suggested that the CFR would be very useful to arbitrators. I wondered about that. Has the Government had any consultation with the Institute of Arbitrators or any like body about this?

Baroness Ashton of Upholland: No, we have not. That is purely because it is early days yet. The conference will give us a sort of springboard, in a sense, to raise the profile of these issues and probably to start discussions with the groups. The DTI of course will play a part in discussions too because many of their stakeholders have a great interest in all of this area.

Q197 Chairman: I know that the United Kingdom’s presidency does not start until July. In the meantime, are there any steps which the UK Government is taking in relation to the work that the Commission is doing in this area—production of CFR and so forth? Are you just leaving it to them until our presidency begins?

Baroness Ashton of Upholland: No. We are involved through the stakeholder groups and we put together for our own stakeholders a network that enables them to come together with us to talk about the work that will be going on in this process. That will include how the workshops are organised and how they liaise

with the academics and so on. Our officials are in touch with the Commission, so we are definitely not leaving it. What I am really pointing to is that the conference is the first big occasion, in a sense, where we have the opportunity to set the tone and the framework of what we think with our colleagues across Europe.

Q198 Chairman: Apropos of the workshops and discussion groups that are being set up, we had some evidence from the CBI about this, which I expect you have had an opportunity to see. The CBI witness that was helping us was expressing a good deal of dissatisfaction and said it was a complete lottery who got to go to any particular workshop. They were asked to express interest in the workshops they wanted to go to, so they lined up all sorts of experts and ticked all the subjects and then the Commission selects the numbers who are going to attend any particular workshop, which makes it, from the point of view of the stakeholders who want to take part, a complete lottery as to what they can assist on.

Baroness Ashton of Upholland: I appreciate how the CBI feels, and I think this is part of the shaking down and settling in. I think we have 15 per cent of the stakeholders involved in total, which is the second highest to the Germans; we have 26 people out of 160 involved in it. One of the reasons to bring together these stakeholders in a group is to enable us to think about using people effectively in the different workshops and ensuring there is a broad spread of representation, and also so that they do not feel alone. It is quite important they feel this is a kind of UK effort as well as obviously being completely independent and representing their own views within in it. There are some issues, I think, that we are in discussion with about being a little bit more transparent and clear about the process. For example, I have been shown the list of workshops. I think there is an issue about the logic, if I can put it that way, of the way in which these are framed. I had not seen them before, but from our brief discussion outside, I think there are two ways one could approach it. The positive way is to say: they have done them in the order in which they have academic submissions ready, so we are not waiting. The other way of looking at it is: it is a bit haphazard and one might start at the beginning. I was hoping to see one on an invitation to treat, which is about all I remember about my contract law days, and whether a yellow cab’s light was an invitation to treat or not! That is what I remember.

Q199 Lord Lester of Herne Hill: There is something called “offer and acceptance”.

Baroness Ashton of Upholland: There is, but it does not have invitation to treat. That was the bit I was looking for. There are different ways of looking at it.

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Baroness Ashton of Upholland MP

We have work to do. I would not want you to underestimate this. We recognise we need to do more. I think, from our point of view, we want to play an active and clear role with our stakeholder groups to make sure that they feel supported by us to enable them to participate properly and fully.

Q200 Chairman: I have always been unclear what is meant in this context by “stakeholder groups”. Who are the stakeholder groups?

Baroness Ashton of Upholland: They are organisations like the Law Society, the CBI, Which and others that have accepted the invitation (possibly to treat) that was put on the website by the Commission to say, “We are looking for people who would be interested in participating”. I am told that the 26 who are going to take part in this process in a sense need to come together, not just themselves but also with others perhaps who are not participating. I do not have the full list but I am very happy to supply it.

Q201 Chairman: They are all representative organisations of one sort or another?

Baroness Ashton of Upholland: That is right. They will have a big role to play. I am conscious that there are other organisations that perhaps feel they cannot, for one reason or another, and we should not lose sight of that. We need to work with colleagues in the Department of Trade and Industry to make sure we have a real and coherent view on how we inject ourselves into that and participate fully, and then come together, so there is also the UK stakeholders’ view about what is happening, too. That is so that we in our deliberations in our discussions with the Commission and with the Council are clear about what information they are getting. We are not working in a vacuum apart from each other. Rather, there is a sense of working together on this. There are real benefits if this is done properly.

Q202 Chairman: You have meetings with the UK stakeholders to decide on the UK line, do you?

Baroness Ashton of Upholland: I would not go that far because I think organisations like the CBI are quite right when they say they have a CBI line and not a government line. It is not that. I think so far we have met with them once, because this is very new. What I was really saying is here is an opportunity for those organisations participating to work out who is going to which workshops, how we feed that information back, to get a sense of the overall picture, rather than people working in isolation, and for them to feed to us within the Department and across Government and across the relevant departments, their views of how it is going, what they think is happening, where they have concerns, where they are comfortable with the way it is happening, and so on, so that we are better informed as ministers.

Q203 Chairman: Having become better informed in the way you indicated, does the Government have any means of intervening if it does not like the way things are going?

Baroness Ashton of Upholland: I think partly that will come out of what happens as a consequence of this conference to get the tone right, and then, through the regular Justice and Home Affairs ministerial meetings, to be informed and so on, to be able to raise these issues. Certainly, during our presidency, this will be beginning to take shape, and then we will want to inject our views on that.

Q204 Lord Thomson of Monifieth: Is there a danger that from the Commission end, so to speak, as seen through British eyes and no doubt the eyes of other Member States, that the Commission engages with researchers who have an academic report approach to these questions rather than a pragmatic and practical approach?

Baroness Ashton of Upholland: Certainly the way that the Commission has approached it is to work through academics and to approach academics right across the European Union who have a track record in this. I am consciously not accusing researchers of not being practical. There are many who would have a lot to offer. That is really, in a sense, to set the backdrop for the workshops, that you start with an academic approach but then, through the stakeholders, one is really into the practicalities of how it works across. If the common framework is going to be of use, it has to be able to take both an academic and a practical stance because it will be about my thesaurus, I hope, of saying, “What does this mean in different countries? How do we interpret this in different countries” and so on.

Q205 Lord Thomson of Monifieth: I notice the Law Society in their evidence to us drew attention to that aspect of things.

Baroness Ashton of Upholland: Yes, indeed.

Q206 Lord Lester of Herne Hill: I also noticed that the Law Society mentioned the need for the CFR to take into account “terminology and concepts derived from common law, particularly where these have been used effectively in an international trade context”. That seemed to me to be a very sensible and practical point.

Baroness Ashton of Upholland: Indeed, I agree with that.

Q207 Lord Lester of Herne Hill: Whilst we are on terminology, could you look in your thesaurus, Minister, to find another word for “stakeholder”? Speaking for myself, every time I hear the word, I wish I could think of a better one.

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Baroness Ashton of Upholland: If I might return the challenge, as I have said twice in the House in the last 24 hours, if anyone can think of a better word, I am very happy to use it, but I am a very limited person.

Q208 Lord Lester of Herne Hill: There may be a French word we can use.

Baroness Ashton of Upholland: Yes. If the noble Lord can find one for me, I would be more than happy to consider it.

Q209 Lord Neill of Bladen: It is not only stakeholders, but there is a bit of an intelligibility gap here. If you said to the man I the street outside, “What we have been talking about today is a new plan for a CFR to improve the quality and coherence of the existing *acquis*”, it would be wrapped in mystery. At some stage it has got to be made intelligible. It is about contract law and it might affect the deep freeze you buy next month.

Baroness Ashton of Upholland: I write it “akee”. I have been corrected on it many times.

Q210 Chairman: The bulk of the current *acquis* relates to consumer measures but the CFR is not designed with consumer measures particularly in mind but with contract law more generally in mind. Is there not somewhat of a problem in devising a common frame of reference which is going to be perfectly applicable across the board to contract measures generally but where the main focus in their preparation will be the interests of consumers?

Baroness Ashton of Upholland: I do not see that as a problem. There is quite a lot of work that has already been done around consumer protection and consumer issues, as we said earlier. I was interested in the question and I do not have a clear answer to it because I was not really quite sure what you felt the problem would be.

Q211 Chairman: I think the problem in relation to consumers is that some states, for example, have longer compulsory cooling off periods for consumers than others. Where business to business contracts are concerned those considerations become irrelevant because they will negotiate what they want and so one has the risk perhaps of getting the CFR out of balance if one is looking at contract law generally because they can be more concerned with the requirements of consumer measures.

Baroness Ashton of Upholland: I think it depends how we approach it. Again, this goes back to how the workshops operate and how they would feed into the work the Commission does and also to how much we work together within the Council and also within the work that goes on in the Commission and that we are able to push to make sure that we do not get it skewed. That is the way I would describe it. It

is important to recognise the differences and the relevance of consumer law. This is meant to be for me the thesaurus that covers all aspects that people can use, and particularly can use effectively, when you are looking across different states. Again, I am hoping the conference will be quite helpful in this way. Because it is a joint conference, the Commission will be explaining how it is going to approach it, how it is going to come forward with its ideas, the work of the academics, the work of the stakeholders, the groups, and so on, to make sure we do not get that skewing.

Q212 Chairman: There seems to be pretty well broad agreement that the present *acquis* stands in need of revision and amendment and the CFR may be a useful tool for achieving that. If there is a serious need for amendment, is it satisfactory to wait until the CFR is completed, and I think 2007 is being aimed at as the time for that to happen?

Baroness Ashton of Upholland: No, I do not think it is satisfactory to wait at all. I do not think that that is what the Commission have in mind. There is no doubt that the CFR will play its part in whether or not we need to tweak, change, alter and so on, but I am hoping—and some of the directives already have their own built-in timetables in any event for when they need to be reviewed—it does not hold that up.

Q213 Chairman: Does the Government envisage much more EU legislation, or national legislation for that matter, arising or becoming desirable after the CFR has been prepared?

Baroness Ashton of Upholland: I do not envisage lots of legislation. We do not yet know what the CFR will tell us because a lot of it is about how you work across different systems and how you understand what different things mean. If you do not have a cooling off period is a very good example of what that means in different nation states and how you apply it. I am hoping it will be more of a practical tool and that we will only wish to legislate where that is clearly a need that has been identified and recognised across Member States and to which we are agreeable.

Q214 Chairman: So whatever degree of harmonisation the CFR may lead to, in the Government’s view, it should be kept to a minimum?

Baroness Ashton of Upholland: I am not suggesting the CFR is going to lead to any form of harmonisation in that sense. The only harmonisation I think I have spoken of today has been in a sense a harmonisation of the bureaucracies that lie underneath the legislative frameworks and the tweaking that might exist thereafter. That is my view of where we might be. I do not envisage that we are going to have serious harmonisation work on this, nor would I wish it.

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Q215 Chairman: For example, not necessarily any harmonisation of cooling off periods?

Baroness Ashton of Upholland: I do not think we were suggesting harmonisation necessarily but more recognition that it will be different. It may be that in the course of looking at the kind of bureaucratic elements of it, the papers that people get, how things are done and so on, you have a best practice framework that develops, or Member States feel it would be sensible to make things work more efficiently by having them fit together more effectively, but that is not the same as harmonisation. It is not saying "a cooling off period equals X" in every state; it is quite different. I do not really think we will be there. I think we will be much more into understanding that it is different and why it is different and what that means for citizens.

Q216 Lord Lester of Herne Hill: I apologise for asking this question because it is so technical. I suppose that there are elements of European competition law which might have, if you like, a harmonising effect? In other words, take cooling off periods, I suppose it is just conceivable that a state which did not have a cooling off period and another one that did might find itself up for comparison in deciding whether there was an impediment to free movement of goods and services caused by that. I do apologise for asking the question and, as I say, it is technical, but it seems to me it is possible that competition law can have that kind of harmonising effect in the area of contract law.

Baroness Ashton of Upholland: I apologise for giving you a non-technical answer, but it does seem to me that if a nation state discovers that within its own legislative framework there is a gap, it is quite capable of adopting by taking off the shelf something that it likes and exists either in another Member State or in the European Union and filling that gap. I do not think that is harmonisation.

Q217 Lord Lester of Herne Hill: I meant harmonisation in the sense that the principles will be harmonised by the Luxembourg court to ensure fair competition on a level playing field. I did not mean harmonisation through legislation. I meant that contract law itself, nothing new. National contract law is not a new or a European principle; it is based on the four freedoms.

Baroness Ashton of Upholland: I am not going even to try to give you a technical answer to that. I will write to you, if I may.

Q218 Lord Lester of Herne Hill: Do not waste too much time on it.

Baroness Ashton of Upholland: It is an important point but it is not one that has come anywhere near my radar as being an issue that might lead to a kind of

creeping harmonisation. I am not sure you were suggesting that.

Q219 Lord Lester of Herne Hill: I am saying it is a good thing that if you have anti-competitive differences in contract law which impede the free movement of goods and services to the detriment of the consumer, that anti-competitive aspect should and would be harmonised, not in the sense of legislation but by virtue of the four freedoms. That is what I mean.

Baroness Ashton of Upholland: You are probably right because you usually are. I will find out and then tell you.

Q220 Lord Thomson of Monifieth: Is there not in fact a real dilemma that, from the point of view of the European consumer, national consumer law can be a disguised form of protectionism for the industry concerned, and therefore against the overall consumer interest? I seem to remember a case of trying to harmonise motor lawnmowers and there was a question of the level of noise. It was discovered that the level that the Germans were insisting on, which was much higher than anybody else's, was in fact a very effective method of preventing German motor lawnmower manufacturers having to face competition in their own marketplace.

Baroness Ashton of Upholland: I think I am straying into becoming a DTI minister. I am going to manage not to answer that question!

Q221 Lord Thomson of Monifieth: There is a problem or a dilemma that has to be advanced, it seems to me.

Baroness Ashton of Upholland: I am sure the DTI are fully engaged with any issues that arise from that.

Q222 Chairman: Can I move on to standard terms and conditions which the Commission's communication speaks of promoting the use of, and then they envisage that these standard terms and conditions will be drawn up industry-by-industry by the industries concerned. In the evidence we have taken, we have not found any enthusiasm for this at all. The view expressed by the CBI witnesses was that these things, if they were prepared, would just gather dust in a corner. Does the Government think this is worth expending time and money on?

Baroness Ashton of Upholland: The phraseology I would use is that there is a kind of broad support because what is being sought is not a bad thing at all. I recognise, having read the evidence, that I can see that from an industry point of view they would need to be convinced that this was going to be useful and applicable and not gather dust in a corner. It is a bit of wait and see really because I do not think we know yet at all quite how this is proposed to evolve, nor

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indeed quite how it can develop industry-by-industry. Anything, from my own experience, where you involve an industry-by-industry approach needs quite a lot of galvanising of people into believing that it is going to be in their best interest to do it.

Q223 Chairman: I quite follow what you say. You say that you are not sure it is a bad thing. Does it not have to be a little bit more positive? Does it not have to be a good thing, just by the expenditure of time and money on it?

Baroness Ashton of Upholland: I am saying it could be a good thing. I am not being neutral about it. I am saying it is a good thing. What you have described is a reaction that means there is a lot to do if one is going to get industry-by-industry this to be something that people want to take up and do. Specifically because it is being approached from that direction, then lots of stakeholders have to buy into that because there are lots of different parts of industry that need to be involved in it. All I am saying is that I think we support it. I yet have to see how it is going to work in practice, what the proposals are, and so on, but we have no difficulty with what is being proposed.

Q224 Chairman: Is this not putting the cart before the horse? Does there not have to be some sort of perceived need before time and expense is incurred in preparing the product?

Baroness Ashton of Upholland: Of course, and I am not suggesting there is not a perceived need, but the solution to that need requires a lot of people to become engaged and involved in solving it, designing it, and so on, and that is a very good thing. I am not putting the cart before the horse. What I am saying is I think it is important. What I have not yet seen is quite how we are going to do it. There are lots of needs I have identified as a minister and as a person.

Q225 Chairman: The evidence we have had has indicated that there simply is not a perceived need on the part of industry for these standard terms and conditions. Does the Government have a different view and, if so, based on what?

Baroness Ashton of Upholland: The Government has a view that we should look carefully at whether there should be standard terms and conditions. We recognise that if it is going to be done, it has to be done industry-by-industry. We are waiting to see what comes out of it. The way the Government approaches lots of these issues is to look at them and say, "Yes, this could be a good thing to do". We do not yet know how it is going to be done. We are not rejecting it but a lot of the issues that will arise will depend on how it is going to be taken forward. That is really all I am saying. It is fine, but let us see how it

is going to be done. I appreciate that industry has not warmed up to that yet, and may not.

Q226 Lord Lester of Herne Hill: I am just trying to think of an example to answer the Lord Chairman's question. Suppose I want to buy a digital camera anywhere outside the UK, would there not be a case for standard terms and conditions that would ensure that my guarantee or the insurance contract that covers my credit card or all of the other aspects of that purchase of a digital camera did not depend upon the country in which I happened to buy it. I am just putting this forward and it is entirely hypothetical, you understand. Would that not be the kind of consumer directive example that one would think about to see whether standardisation would benefit consumers? There might be squeals from industry that did not want that at all because they wanted to be able to muck about with different terms and conditions within each state. From the consumer's point of view, some standardisation might be beneficial?

Baroness Ashton of Upholland: Indeed, and you eloquently state why it could be of value but because the proposal talks about the certain costs, this being done industry-by-industry, I am merely saying that one would have to look at how we made sure that it could happen properly. There is nothing wrong with the proposal. There is an issue about how it would be done, which I do not have the answers to yet because I have not yet seen the proposals on how you take this forward. You are right to bring it back to where I began, which is: does this benefit the consumer? Well, it could. Would we be able to do it? That is the question.

Q227 Chairman: For give me, Minister, but I think that is a misconception. Nobody, as I understand it, from the Commission is proposing that the standard terms and conditions should be imposed so that they will have to be used for particular types of contract. It is up to the industry whether they are going to want to use them or not.

Baroness Ashton of Upholland: That is right.

Lord Lester of Herne Hill: I see in paragraph 13 of our questions there is a reference to the applicability of EC competition rules. That brings me back to my earlier point. They would be imposed.

Chairman: If EC competition law requires them, yes, but EC competition law is moving in the opposite direction I would suppose, exactly in the opposite direction. If somebody to buy a camera at a cheaper price and no guarantee, then they should be able to. The standard terms and conditions are not being put forward as something which is going to be required as consumer protection to form part of the contract with the consumer.

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Lord Lester of Herne Hill: I stand corrected.

Q228 Chairman: It is simply being put forward as something available to be used by industry if industry wants, and, so far as I know, nobody in any industry has expressed any desire for this.

Baroness Ashton of Upholland: All I would say is that I do not think we have actually trawled across the whole of British industry yet to find out what they think. I am not sure yet whether it has validity. My view is that the proposal as it stands is a proposal that we do not have strong objection to. We now need to move beyond that. What I am really trying to say is that I do not have any knowledge yet of how the Commission is proposing to take it forward. The horse is that there is nothing wrong with the proposition. I do not yet know what the cart is that is coming behind that horse.

Q229 Lord Clinton-Davis: That presupposes something which is wholly unreal? How are you going to form a view about the attitude of British industry? It is not possible. There are so many different interests there.

Baroness Ashton of Upholland: Indeed, but Lord Scott was suggesting that no-one in British industry wanted this. I was merely saying I do not think we yet know if there are issues for British industry where there might be parts of British industry which would very much welcome this. I am simply saying we are at a stage where our view is that this is a proposal and there is nothing to stop us welcoming it broadly, which is what we done. We wait to see how the proposal is taken forward, the reaction of industry, working with our colleagues in DTI, seeing what happens in other European nations, and so on. It is very early days really.

Q230 Chairman: Minister, it is of course a profound truth that nobody knows what they do not know. The question is not whether the Government knows that there is an interest. We are looking at the Commission. The Commission is embarking on a project. So far as I can see, it is embarking on a project without any evidence that the project is necessary. Does the Government not have a view on the propriety of the Commission spending EU money on such a project?

Baroness Ashton of Upholland: All I am trying to say to you, Lord Chairman, is that I do not have the information with me or to hand about why the Commission has put forward this proposal and based on what evidence. I am simply saying that in our response as to whether there are the things we would be interested in, we think that this is something that might have merit. We wait with interest to see on what basis and with which parts of industry they think this would carry greatest weight. For our part,

it is our job to look at our industry and ask what they think. We are in that very early stage of saying, "Yes, this is an issue that we could look at". We are not signing up to say: therefore, let us spend lots of money on this. We are simply saying, "Let us see what the next set of proposals say?" I do not think that either you or I are in a different place at all. I think we are merely looking at what we mean when we said "We have no difficulty with this, we have full support for this". Let us have a look at it.

Q231 Chairman: The Government does not mind the Commission spending money on this project?

Baroness Ashton of Upholland: I do not think I ever said that. What I said was that what we need to look at is why the Commission believes that this is an important part of it and to identify with our own British industry what they think would be most appropriate.

Q232 Lord Clinton-Davis: So far, the Commission has not satisfied you in any way at all?

Baroness Ashton of Upholland: I do not have the information to hand, Lord Clinton-Davis, that would give you or I complete satisfaction on that. As I understand it, we are in the early stages of proposals. We will become clear about that very soon.

Q233 Chairman: As I understand it, and correct me if I am wrong, the Prime Minister has signed up to The Hague Programme?

Baroness Ashton of Upholland: Indeed.

Q234 Chairman: So he must be satisfied that this is a project which deserves support?

Baroness Ashton of Upholland: I think in the context of the way that it has been put, yes. I do not think I have said anything that is contradictory to that.

Q235 Chairman: I am probing to discover on what basis that view has been formed.

Baroness Ashton of Upholland: On the basis of the information that I do not have to give you at this point about precisely what the Commission is looking to do because, as far as we are concerned, the issues around standard terms and conditions seem to be ones in which we can have broad support. I fully accept that on the basis in which it has been written the critical factor would be: how does industry work with this? You have had evidence from industry that suggests this is not something that thinks is particularly relevant. I do not have the countervailing evidence to give you as to why the Commission can do that. I will find it and send it to you.

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Q236 Chairman: The Commission has said that they will regard their role as honest broker in bringing parties together so that they all know about these standard terms. There have been questions raised as to whether this rather non-interventionist role of the Commission is a credible one and whether in fact the Commission, having spent a lot of money producing standard terms and conditions, is simply going to be honest broker bringing parties together rather than promoting its product. Should the Commission have some responsibility for the content, particularly with a view to protection of consumer interests that may be involved, and if it does have a view about consumer interests, then presumably it will not be just an honest broker; it will be promoting the product.

Baroness Ashton of Upholland: I think the way that the Commission has described its role we must take as being the role that it wants to play. I think honest broker is about right as a term. We could probably spend a long time trying to define precisely what we mean by that. I do not think, as the proposal stands, that the Commission plans to go beyond that. I think they see themselves as the provider of information, the facilitator, if I can put it like that, of that role. Again, in a sense we are having a conversation I probably need to have in about six months when I know a lot more about precisely how it is going to work out. I do accept that that is a role they envisage and that feels right to me.

Q237 Chairman: The third leg of the Commission's proposals relates to the so-called optional instrument which parties will either opt in to or opt out of. I think there is unanimity, so far as the evidence before this Committee is concerned, that an arrangement under which contracted parties have to opt out of the optional instrument would be unacceptable, that if they wanted to opt in, then let them opt in. I think it was Professor Beale who contemplated the development of the optional instrument leading to the creation of something almost like a system of contract law for the EU. Does the Government have any view on the utility of the optional instrument or the opting in or opting out process or where this development might lead in terms of an EU law of contract?

Baroness Ashton of Upholland: It is quite straightforward: we see no need for it. As we have just had a long discussion about resources, I think I would say that I see no need for resources to be invested in that. We think that the CFR is the right approach; the toolkit, the thesaurus, whatever, is a way that we should go forward; and we do not see any view across our colleagues that suggests where they want to be either. I do not know enough to give you other than a lay person's view, but I think it will

always tend to be deeply confusing if we have that. That is where we stand on this.

Q238 Chairman: I think I am right in saying that there is no reference in The Hague Programme to the proposals regarding the optional instrument?

Baroness Ashton of Upholland: None that I have seen.

Q239 Chairman: Is that significant? I have said already that the Prime Minister has signed up to The Hague Programme.

Baroness Ashton of Upholland: We do not agree with this proposal, so we would not have signed up to it.

Q240 Chairman: Was there ever any suggestion of its inclusion, so far as you know?

Baroness Ashton of Upholland: I have no idea. I honestly have no idea, having only been Minister in this department for a short time, which rather shows. There may be colleagues I could extract that from, or perhaps a freedom of information request would give you the information you need?

Q241 Chairman: Help me with this, Minister. Here we have this optional instrument which is not in the Hague Programme, which the Government obviously have grave reservations about, which our European Union partners appear not to be enthusiastic about either, and here is the Commission proposing to spend money on it. Is there any way in which that can be stopped?

Baroness Ashton of Upholland: I see a theme emerging from some of the questions. In defence of the Commission, I think the Commission's job in part, as I have said, is to look very differently at the approach to Member States and that they do often either do the tidying up we talked about earlier or look to see where they think there could be new and innovative ideas. Not all of them, by any means, find favour. That does not mean they should not do it. In this particular context, our view is very clear: we do not think there is a need for it. In their discussions with other Member States, they may find states who think this is of value and who want to explore it further. That is right and proper in a 25 Member State union that people should have the right to say, "I am quite interested. Can we look at this? Can we do that?" and equally for us to say, "No, we do not think that has merit". It is always a compromise of the best kind, and using that word properly, to say that it is right that they should be thinking about new ideas. It is not always that it is a waste of money to do something. From my perspective, I do not think we should do this. I do not think we should invest resources in it, and I think we carry weight in that, but I am not the only voice in that, and I think that is right and proper.

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Q242 Chairman: Could the Council control the Commission in this regard?

Baroness Ashton of Upholland: I think the Commission, as I see it, and again I am new to this, is very mindful of where the Council's views are and listens with great care. Some very interesting debates take place around the proposals that come forward. I think there are different mechanisms as well as the Council for the Commission to hear our views, as you will know very well. I do not think the Commission ignores the Council by any means. I am really trying to say that I think there is nothing wrong with the Commission trying to put forward ideas, even if we do not agree with them.

Q243 Lord Thomson of Monifieth: The basic constitutional formula of the European Union is that the Commission proposes and the Council disposes.

Baroness Ashton of Upholland: That is very well put.

Lord Thomson of Monifieth: I understand that is the situation, is it not? The Commission has a duty to propose things and equally the final word lies in the disposing of them with the ministers?

Q244 Lord Lester of Herne Hill: Would you agree, Minister, that it would be a very bad thing if the role of the Commission as the initiator of ideas were in any way to be stifled or chilled by suggestions from

the beginning from any one Member State that it is going to be a waste of money?

Baroness Ashton of Upholland: I think if it is any one, then perhaps the nub of what you say lies in that. I do think the Commission has to be, and as far as I can see is, sensitive to when ideas do not find favour and looks and explores why, but there is an inevitability that their role is very different, as I have said. They need to be able to explore ideas, which may have no currency, have currency at a different time and in a different way. Again, I am very mindful that we are 25 nations now. The Commission's role will change and develop in many ways, just as the Council is a different being than it was a few months ago, and Member States are finding their feet, which is also interesting, as they move from almost observer like to fully participating within that and finding with whom they agree on what. Certainly, having some of the bilaterals I have had with newer members has been very interesting as they search for the issues of great concern and look for who else shares their view.

Chairman: Minister, that brings to an end the questions we wanted to ask you. I must thank you very much indeed for the time and care that you have devoted to answering the questions we put to you. The answers will be a great help to us in preparing our report. We are grateful to you for giving us your time so willingly.

Written Evidence

TAKEN BEFORE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE E)

Memorandum by Clifford Chance

1. This paper sets out the comments of Clifford Chance LLP (on the European Commission's Communication to the European Parliament and the Council entitled *European Contract Law and the Revision of the Acquis; the Way forward* (COM (2004) 651 final) and on the further information provided by the Commission at a meeting on 15 December 2004.

SUMMARY

2. The Commission states that its aim is to improve its contractual acquis but, to do this, it considers that it must first create a "common frame of reference" (CFR), which appears to be synonymous with a code of European contract law. We do not consider that a CFR in this form is necessary to improve the acquis and, further, we are concerned that its creation will delay needlessly that improvement.

3. We are also concerned that the Commission's approach risks obscuring the need for proper debate on a European contract law, whether in addition to or instead of national laws. The starting point for this debate should be genuine evidence of the needs of those who use contract law for their commercial and other ends, not just the anecdotes gathered so far. For that reason, we have commissioned a survey of our clients and others across Europe in order to find out whether they regard different national contract laws as an obstacle to cross-border trade and are of the view that a European contract law would be of value to them.

BACKGROUND

4. The European Parliament has called for the harmonisation of civil law across Europe on a number of occasions since at least 1989 (eg 1989 OJ C158/400 and 1994 OJ C205/518) on the basis that it is necessary to meet the objectives of the single market. The Commission responded in July 2001 with a paper (OJ C255/1) seeking information as to whether different national contract laws really did obstruct the working of the internal market. In particular, it asked whether ignorance of foreign legal systems was a disincentive to consumers or small businesses which might otherwise engage in cross-border transactions and, for larger organisations, whether different legal systems led to higher costs or gave a competitive advantage to suppliers in the home state.

5. Having considered responses to its paper, in February 2003 the Commission produced its reply, entitled *A More Coherent European Contract Law—An Action Plan* (COM (2003) 68). The Commission recorded anecdotal evidence of problems caused by differing national laws, and set out the responses it had received to the four remedies identified in its 2001 paper. The first remedy, do nothing, met with little support. This is unsurprising since the Commission also reported considerable dissatisfaction with the current state of EU contractual legislation. The overwhelming majority supported the Commission's third remedy, to improve that legislation. There was also "considerable support" for the Commission's second remedy, the development of common principles of European contract law, but a majority was against the fourth, a comprehensive European contract law.

6. The Commission accepted the need to improve existing EU legislation, but insisted that in order to do this it needed first to create a "common frame of reference, establishing common principles and terminology in the area of European contract law". The *Action Plan* was ambiguous as to what the CFR would contain. There were suggestions that it could be merely a glossary of definitions, but also suggestions that it would differ little from a code of contract law.

THE COMMISSION'S COMMUNICATION OF OCTOBER 2004

7. The Commission's communication of October 2004 puts more flesh on its plans and on the nature of its proposed CFR. It describes the CFR as a "toolbox" to improve the quality and coherence of the existing contract acquis and future legal instruments in the area. It also identifies other possible aims for the CFR, including assisting national legislators in transposing directives into national law, offering unbiased and balanced solutions in arbitrations, developing into standard terms, integration into the Commission's

contracts with its contractors, and as the basis for development of common principles of European contract law and for further deliberation on an optional instrument.

8. Annex I to the communication contains details of what the CFR might contain. These include common fundamental principles (eg contractual freedom and the principle of good faith), definitions (eg contract and damages), and model rules for contract. The model rules appear to be by far the largest part, and their description reads like the index to a contract code (eg pre-contractual obligations, conclusion of a contract, validity, interpretation, performance, remedies for non-performance, assignment and prescription).

9. The Commission further expanded on its plans at a meeting in Brussels on 15 December 2004 of “stakeholder experts”, ie groups and individuals who have expressed an interest in this project, including a member of this firm. The Commission said that it was in the process of arranging to finance three academic research teams which are to prepare the CFR. These teams are: the Study Group on a European Civil Code, which will look at national laws; the Acquis Group, which will look at EU law; and a group devoted to insurance law. The Commission stressed that it is financing independent research by these groups rather than commissioning them to produce a particular product. The Commission is not bound by the work of the researchers, and will consider it independently. It will publish a white paper setting out its views, and hopes to adopt a CFR by the end of the current Commission, in October 2009.

10. The researchers are to deliver the results of their work to the Commission by the end of 2007. As part of this work, the researchers propose to hold some 32 workshops for stakeholders on topics such as service contracts, unjust enrichment law, notion/functions of contract, pre-contractual obligations, offer and acceptance, validity, unfair terms, good faith, performance, breach/remedies, loan agreements and other financial services, insurance law, and security rights in movables. The list of workshops reinforces the impression that the researchers will produce a draft code of European contract law. Indeed, the Study Group is effectively the successor to the group which produced *Principles of European Contract Law* (Lando and Beale (Eds), Kluwer Law International, 2000), and its web site (www.sgecc.net) states that its aim is “is to produce a codified set of Principles of European Law for the law of obligations and core aspects of the law of property. The published principles will be complete with commentary and annotations.”

11. The researchers are to produce drafts at least a month before the workshops. The drafts will then be discussed by stakeholders at the workshops. The Study Group appears already to have undertaken some of this work. Its web site includes, for example, drafts on the notions of consumer and the professional, negotiorum gestio (benevolent intervention), personal securities, services, sales, and e-commerce, all of which are to be the subject of workshops.

12. The Commission is also financing a study into its consumer acquis, with a view to assessing, for example, whether legislation is achieving its aims, how directives have been implemented in different member states, and whether different levels of implementation affect the internal market. This study is due to report before the other researchers, but the Commission intends to assess the effectiveness of the CFR produced by the researchers by seeking to use it to improve one consumer directive.

WILL THE DEVELOPMENT OF THE CFR HELP TO IMPROVE THE ACQUIS?

13. No one could oppose the aim of improving the EU’s acquis in the area of contract law. The Commission’s *Action Plan* of February 2003 recorded well-known problems in the acquis, particularly in the area of consumer law but problems exist across the board. For example, the lack of clarity in the EC Council Directive 86/653 relating to self-employed commercial agents has caused difficulties for the English courts, and it is clearly questionable whether the European Parliament and EC Council Directive 2000/35 on combating late payment in commercial transactions has achieved its aims.

14. The Commission is adamant that it wants a tool to improve the current acquis and to assist in drafting future community instruments rather than a civil code for Europe. The fundamental question, therefore, is whether the production of a CFR in the form now manifested by the Commission is an essential step in the improvement of the acquis and, indeed, whether it is likely to help at all. We do not consider that the preparation of a CFR in the form put forward by the Commission is the best approach to improving the acquis.

15. It is hard to see how a CFR offering what it considers to be the “best” solution on, for example, a party’s ability to withdraw from a contract by reason of a fundamental mistake will help to improve the acquis. If the acquis does not currently have any provisions affected by this, then its production will only delay other improvements. Contracts will continue to be governed by domestic laws, which have their own solutions to this issue. If, however, the acquis does include provisions affected by this, the better course is to consider the

law in the context of the particular directive or regulation in order to achieve the best solution in those particular circumstances rather than to search for an abstract, all-encompassing, solution.

16. Similarly with the “notion of the consumer and professional”. A more coherent approach to defining a “consumer” may help, but the best approach is to consider how it is defined and used in existing legislation, to identify differences, to consider whether the differences are justified by the aims of the legislation, and then to seek to provide a better, unified, definition where that is appropriate.

17. Accordingly, we consider that the appropriate course is to undertake a study of the *acquis* to identify where the problems lie and then to improve the legislation by addressing those problems. For that reason, we welcome the Commission’s financing of research on the consumer *acquis*. If the research shows that tools are necessary to bring about an improvement, they can then be developed rather than preparing a contract code in the questionable hope that it will assist. The Commission argues that it cannot concentrate solely on the current *acquis* because it also wants a tool to assist it in drafting the future *acquis*. Even if it had been proved that the CFR will provide the toolbox the Commission wants, creating a perfect tool applicable in all present and future circumstances before any improvement can be made will only delay improvements that could be made in a shorter timescale by focusing on current problems.

18. Indeed, the delay before there will be any consideration of improvements to the current *acquis* is a matter of serious concern. The Commission’s timetable indicates that nothing will be done until 2009 at the earliest. By concentrating on more limited aims, the Commission could, with the assistance of member states, bring about improvements in the *acquis*, reducing the regulatory burden and costs to business, in a far shorter period.

19. In his speech at the meeting in Brussels on 15 December 2004, Robert Madelin, the Director General for Health and Consumer Protection at the European Commission, identified a number of goals for the CFR. These included, of course, improving the current *acquis* and providing a “high quality toolkit for lawmaking by the Commission”, but went on to include achieving better regulation, boosting competitiveness, improving the functioning of the internal market, creating a legal framework that is as simple, coherent and adapted as possible, and serving as a source of reference and interpretation for national legislators, judges, arbitrators and legal practitioners. These aims, along with those mentioned in paragraph 7 above, may well be proper aspirations for the Commission, but they impose too heavy a burden on a CFR the primary purpose of which is to improve the current *acquis*, and are not necessarily consistent with that purpose. As a result, they will certainly delay, and quite possibly obstruct, effective measures to improve the *acquis*.

AN OPTIONAL INSTRUMENT?

20. The Commission’s *Action Plan* and its more recent paper state that it is continuing to deliberate on the “opportuneness” of an optional instrument on contract law. The Commission denies that it has any intention to produce a “European Civil Code”, but the form the CFR is to take and the wide-ranging ambitions the Commission has for it have to a large extent merged the debate on the CFR with that on the optional instrument. The meeting in Brussels on 15 December 2004 was unsurprisingly (if, perhaps, to the apparent frustration of the Commission) devoted largely to the need for an optional instrument, which was treated by most present as being synonymous with the CFR.

21. We consider that it is legitimate for the Commission to explore whether there should be a European contract law, either as a 26th legal system within the EU or as a replacement for existing national laws. However, this raises far wider issues than does the improvement of the *acquis*, and it would be unfortunate if the CFR obscured these issues. They include, for example, whether different national laws really do obstruct the functioning of the internal market, how it would affect the choice of laws between the EU and other states (eg New York law), what effect it would have on the financial markets, how it would reflect the diversity of traditions within the EU, and whether it would lead to unacceptable uncertainty over a prolonged period. The content of any optional instrument itself also raises very difficult issues, not least because of the different legal traditions within Europe.

22. A, if not the, key matter in any deliberation on an EU contract law is the needs of the users of contract law, ie the businesses and consumers who use contract law every day to pursue their commercial and other ends. If they consider that a single European contract law, whether optional or compulsory, would assist them, then that is perhaps the most powerful reason for going ahead. If, however, they do not consider that a European contract law would be beneficial, that is an equally powerful reason for the Commission to concentrate its efforts on the current *acquis*.

23. In order to find out what the users of contract law really do want, Clifford Chance has commissioned a survey amongst its clients and others across Europe to find out their views on this matter. Do they consider that the different national laws within Europe obstruct cross-border trade or are other factors involved? If different laws are an impediment, would the position be improved by a single law, whether in addition to, or as a replacement for, existing national laws? The results of the survey will be presented at a conference organised by the Institute of European and Comparative Law at the University of Oxford on 18 and 19 March 2005.

STANDARD TERMS

24. The Commission's paper of October 2004 says that the Commission will promote the use of standard terms, acting as an "honest broker" to bring interested parties together. Where market participants cooperate to produce standard terms (as, for example, in areas of the financial markets), it can reduce transaction costs and raise market standards. The success of this will, however, depend upon the willingness of businesses to participate. If the Commission can promote this, then so much the better but, as the Commission recognises, it can be a facilitator only.

14 January 2005

**Letter from Robert Madelin, Director-General of the Health and Consumer Protection
Directorate-General, European Commission, to Lord Scott of Foscote, Chairman of
Sub-Committee E of the European Union Committee**

Thank you for drawing our attention to the feedback you have received from the CBI in the course of your inquiry into European Contract Law, and for giving us the opportunity to comment. To summarise what follows, I would see no evidence anywhere to justify the CBI's fear that common law traditions may lack the opportunity to influence this process. Nor do we feel that the real efforts underway to engage all interested parties merit scepticism: we indeed share the CBI's commitment to an open and transparent process. I sympathise with anyone's impatience to learn all the details of the Research project, but would point out that any confidentiality here is imposed on the process by the financial rules of the Union (not just of the Commission) and all will be revealed once the grant allocation has been formally made.

I will not repeat here the rationale behind this project, which has been set out in three Commission communications so far.¹ However, I will just note that the 2003 Action Plan and the most recent Communication explain very clearly that the primary role of the Common Frame of Reference (CFR) will be to improve the quality and coherence of legislation. The Communication states explicitly that the Commission has no intention of developing a European Civil Code.

The Communication also makes clear that the preparatory work being undertaken by the research network under the Sixth Framework Programme will not bind the Commission as to the content of the final Common Frame of Reference. This is precisely to ensure that the final product is useful in practice and can, if necessary, be adjusted in the light of stakeholder needs. In fact, the work of CFR-net is the first of three levels of consultation which will precede the final version of the CFR. We have said that after the preparatory phase we will consult Member States, the European Parliament and stakeholders on the full draft prepared in this first phase, and that we would then publish a White Paper for further consultation. Before doing so, the Commission would carry out an impact assessment. Only then would the Common Frame of Reference be finalised.

This exercise has been carried out since the beginning with very extensive consultation and stakeholder involvement, and we are committed to ensuring that this continues. A full list of our activities is attached. I would add that we have always published details of the process and stakeholder contributions to it on our website. The Action Plan and the 2004 Communication have clearly reflected the comments received from stakeholders in the previous rounds of consultation. For example, the proposals for stakeholder involvement outlined in the 2004 Communication were developed in the light of a conference jointly hosted by the European Parliament and European Commission for stakeholders in April 2004 and written contributions received in response to the Action Plan.

¹ COM (2001) 398 final, COM (2003) 68 final and COM (2004) 651 final, all available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

I will also take this opportunity to address some of the concerns which have been raised with you by the CBI about the practicalities of the process we have set in train for involving stakeholders systematically in the development of the CFR.

The main area of activity since the publication of the last Communication in 2004 has been the establishment of the mechanisms through which preparatory work on the Common Frame of Reference will take place.

These mechanisms include establishing a stakeholder network which currently has over 160 members and is likely to grow as we receive further suitable applications from Member States which are currently under-represented. I should add that the UK is currently the Member State with the second highest number of participants, which reflects the quantity and quality of applications received.

At the first meeting of this group in December, stakeholders made many practical suggestions about how the network should go about its tasks. These included comments on the sequence and timing of the workshops, and whether a single workshop on each topic would be sufficient. We are acting on these. For example, after the first few workshops which are already planned, we will lengthen the time available for stakeholders to see the drafts before the workshops from one to two months. We have also announced that we may organise follow-up workshops if there is a need to do so.

Some of the concerns expressed by the CBI are issues of timing; for example the list of CFR-net members is now available on the CIRCA website, as was always our intention. We would encourage any stakeholders who have concerns about the practical arrangements so far to contact us directly with constructive suggestions about how the difficulties can be resolved.

We will in any case be providing an opportunity for a review of the practical arrangements at the conference in July which the Commission is jointly hosting with the UK Presidency in London. The afternoon session will be used to review practical and substantive issues arising from the experience of the first few workshops. All CFR-net members will be invited to participate, as well as representatives from the academic network. One input to this process will be the feedback we receive from stakeholders through questionnaires on the workshops which all participants will be asked to complete. These will be analysed before the conference and the results will form part of a non-paper which will be discussed at the conference. The session also provides an opportunity to address horizontal issues which may be relevant for several different workshops.

The first two workshops will take place in March, and the participants have been selected and invited. In selecting the workshop participants we are trying as far as possible to ensure a balance of legal traditions and sectoral interests. However, all CFR net members will be able to read all the documents on the CIRCA-website. All CFR-net members will be able to comment on the drafts to be posted on the CIRCA-website.

The CBI memorandum states that the Commission has been secretive in the explanations it has given to stakeholders so far, in particular about the academic research. The objectives for the research in question were published in the annual work programme 2003. This research is funded under the Sixth Framework Programme which exists to fund primary research, so that detailed terms of reference for the researchers would be contrary to the purpose of the Programme. We will make public the full details of the project as soon as the award process is completed. In the meantime a synopsis of the research and preliminary list of researchers (which may be subject to change) can be found on the internet at <ftp://ftp.cordis.lu/pub/citizens/docs/kickoff-p7-p8-2004.pdf> (see p154).

As the CBI note, a parallel process for consulting the Member States has also been established. The preparatory papers for the first meeting of the group, held in December are available at <http://europa.eu.int/comm/consumers/cons-int/safe-shop/fair-bus-pract/cont-law/wshop122004-en.htm> along with a summary of the meeting which was added in January. We intend to put information about all subsequent meetings of this group on our website too, in line with the transparent approach to this project which we have taken since its inception.

As a further contribution to transparency we will be publishing an annual progress report on the project. The first such report will be published this summer.

In short, I would like to emphasise that this project has put transparency at its core. We have devoted significant resources to enabling stakeholders to contribute effectively and will continue to seek this input. Clearly, the success of our efforts also depends on the willingness of stakeholders to work constructively with us to make use of the opportunities to contribute that we have provided.

I should be happy to provide any further clarifications the Committee might require.

I am copying this, as a matter of courtesy, to the Director General of the CBI.

4 March 2005

Annex

July 2001—*Publication of the Commission Communication on European Contract Law*, launching a public debate on the issue. Publication of the responses to the consultation and summary thereof on the DG Health and Consumer Protection website.

February 2003—*Publication of the Action Plan on a more coherent European Contract Law*, launching a public consultation on the issue. Publication of the responses to the consultation and summary thereof on the DG Health and Consumer Protection website.

June 2003—*Organisation of two workshops on the European Contract Law Action Plan* (Measures I and III). The first targeted at stakeholders and the second at researchers wishing to conduct research under the 6th Framework Programme. Publication on the website of DG Health and Consumer Protection of the summary of the workshop.

January 2004—*Organisation of a workshop on Measure II of the European Contract Law Action Plan*. Publication on the website of DG Internal Market of the summary of the workshop (link from the website of DG Health and Consumer Protection).

28 April 2004—*Joint European Commission/European Parliament Conference on European Contract Law*. Publication on the DG Health and Consumer Protection website of the relevant speeches and summary.

31 July 2004—*Publication of the Call for expression of interest aimed at establishing a stakeholder expert network on the Common Frame of Reference (CFR-net)*: publication in Official Journal and on DG Health and Consumer Protection website—dissemination to stakeholders and Member States—registration of ca 300 expressions of interest—selection of stakeholders.

11 October 2004—*Publication of the Follow-up Communication*, setting out the process for the preparation of the Common Frame of Reference on European Contract Law (publication on EUR-Lex and DG Health and Consumer Protection website; electronic dissemination to stakeholders and Member States—presentation to the Council in November 2004).

3 December 2004—*Kick-off of the Member States experts network* on the Common Frame of Reference.

15 December 2004—*Kick-off of the CFR-net*.

2005 (FIRST SEMESTER):

- Establishment of the CIRCA website where all the documents concerning the CFR-process will be posted during the CFR process. Grant of reading access to all parties concerned in the process, and grant of writing access to the CFR-net members according to their expression of interest in each specific topic (January/February 2005);
- Publication on the website of DG Health and Consumer Protection of the summaries of the first workshop with Member States experts and of the first conference with CFR-net experts and publication of other relevant documents (speeches, non paper, etc) (January 2005);
- Organisation of the CFR-net workshops to be carried out from 2005 to 2007;
- Inclusion in CIRCA of the weblink to the texts of the Unidroit and PECL principles (February);
- Publication of the list of the CFR-net members (beginning of March 2005);
- Publication of a paper explaining the researchers' approach in the preparation of the CFR (March 2005);
- Publication of the full list of researchers taking part in the preparation of the CFR (as soon as the grant agreement with them is signed). Summary information on the researchers is currently available, at p 154 of the document published at the following internet address: <ftp://ftp.cordis.lu/pub/citizens/docs/kickoff-p7-p8-2004.pdf>
- Increase from one to two months of the time available for CFR-net members to examine the research drafts before each workshops (for workshops to take place from second semester 2005 onwards);
- In view of further improvement of the process, distribution to the participants of questionnaires for feedback after each workshop. We are intending to discuss the possible improvements to the CFR process at the Conference organised jointly by the UK Presidency and the Commission in July. The results of the questionnaires will be fed into a non-paper, which will serve as a basis for the discussion in July;
- Possible increase of the number of workshops on the same topic during the whole CFR process and establishment of drafting groups, if necessary, following feedback from stakeholders;

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- Organisation of the first European Discussion Forum on European Contract Law to be held in July 2005 under the auspices of the UK Presidency. Each year a European Discussion forum, bringing together the CFR-net experts, the Member States experts and the researchers, will be organised under one of the Council Presidencies.
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Memorandum by The Law Society

INTRODUCTION

1. The Law Society of England and Wales (“the Law Society”) is the professional body representing the interests of its 116,000 solicitor members. It is responsible for regulating the legal profession and also carries out law reform and representational work. It is very active in the sphere of law reform, including EU matters.
2. The Law Society has taken an active role in relation to the programme of reform of European contract law proposed by the European Commission (“the Commission”). Following the publication of the Commission’s 2003 Action Plan on Contract Law, the Law Society’s EU committee undertook a widespread consultation on the issues at stake and presented substantial submissions to the Commission. The Law Society also took an active part in the Commission’s workshops for stakeholders in April and December 2004. In order to provide on-going representation on issues relating to the modernisation programme, a working group of legal experts in the field of contract law (“the Experts’ Group”²) was established and is chaired and co-ordinated by the Law Society’s EU committee.
3. The Law Society welcomes the opportunity to address the issues raised by the House of Lords in response to the Commission’s 2004 Communication on European Contract Law and the revision of the *acquis* (“the Communication”).

RESPONSE TO THE COMMUNICATION

*Improving the present and future *acquis* in the area of contract law*

4. The Communication suggests that the Common Frame of Reference (“CFR”) will “provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”. Its primary use will be to improve the quality of existing and future *acquis*. The Law Society has the following comments to make on this issue.

In general, the Law Society is of the view that improvement to the consistency of the *acquis* is a highly desirable aim. It is further recognised that a set of agreed terminology could be of considerable assistance to that process. The use of consistent language and coherent concepts in EU legislation could make a substantial contribution to reducing its burdens on business and increasing its value to consumers. “Consumer”, “good faith” and “indemnity” are examples of terms where usage and understanding are currently divergent between legal systems and within the *acquis*, and where convergence could be useful. Consistent terminology in the *acquis* may even come to be matched by the use of the same terminology in private contract law, with the benefit of having a growing common understanding of relevant concepts throughout the Community. It may also result in a more consistent transposition of EU law in different Member States. Therefore, the Law Society is generally in favour of the creation of the CFR. However, there are a number of points of concern as outlined below.

5. In the Communication, the Commission has identified the “possible structure and content” of the CFR. The preparatory work for the creation of the CFR is being launched as part of a research programme under the Sixth Framework Programme for research and technological development. The deadline for a draft CFR is 2007. After that time, there will be a further stage to develop the final product.
6. The Law Society recognises the need for academic involvement to produce a draft CFR since the Commission does not itself have the necessary expertise or resources. However, because the CFR study research is funded as part of a general Framework Programme for research, the applicable funding rules do not require the researchers to be bound to detailed terms of reference. Therefore there appears to be an inherent difficulty in ensuring that the study will necessarily meet the intended purpose. Without wishing to reflect adversely in any way on the credentials and experience of the researchers in the area of international

² Members of the Law Society Working Group: Rachel Bickler (Chair), Karen Battersby, Jonathan Berkson, Nicholas Bohm, John Chave, Marc Dewar, Peter Farthing, Nicholas Mallett, Charles Clark, Simon James, Stephanie Sharp, Georgina Squire and Nicholas Yule.

contract law, there appears to be a potential problem with the ability of the Commission to control and provide incentives to ensure that the outcome matches the aims expressed in the Communication. There is therefore a danger that in 2007, when the draft CFR is due to be produced, it may not be an appropriate basis for the reform of the *acquis*.

7. As a general point, the Law Society notes that concurrent with the Commission's work on the CFR, there is ongoing debate on Rome I (dealing with principles of private contract law) and the proposed Services Directive. It is imperative that there is consistency of approach between these measures. We note that the Law Society is involved in making submissions on both these measures.

8. The task of producing terminology and standard terms which will adequately satisfy legal requirements drawing on the traditions of 25 legal systems is a truly ambitious one notwithstanding the fact that researchers will be able to build on earlier work in the area (Llando principles, Gadolfi, Unidroit, the Vienna Convention etc). In this context, the Law Society welcomes the recognition in the Communication of the role of stakeholders in the creation of the CFR. In order to be effective, the CFR should reflect the practical realities of legal transactions and not be based purely on academic solutions. The involvement of legal practitioners in the drafting process is therefore clearly essential. Eight members of the Experts Group³ requested the opportunity (and were accepted by the Commission) to participate in the forthcoming stakeholders' workshops on the Common Frame of Reference ("CFR") over the next few years.

9. There is a need for the UK to lobby for due recognition of common law principles in the CFR. Although the civil law tradition is dominant within the EU (except in the UK and Ireland and to a lesser extent Malta), the importance and influence of the common law should not be overlooked in the area of contract law. The common law is very widely used and recognised internationally when it comes to cross-border contracts. Many non-English parties choose English law as the applicable contract law at present because:

- (a) much international business is carried out in the UK and in other parts of the world, such as Hong Kong, where English law is often chosen; and
- (b) it has gained a high reputation within the international business Community. Moreover, the common law system has formed the basis of a number of legal systems worldwide including those of major trading partners such as the US, Canada and Australia.

10. There is considerable confusion over the aims of the CFR, as is apparent from the submissions made to the Commission and comments made during workshops with both stakeholders and Member States. We appreciate that if the aim of the CFR is to form the foundation of a European contract code there would be a need to establish a list of best principles. Indeed the appointment of Professor von Bar's study group as researchers, in the light of their work to date, would imply that this was the aim. However, the Commission have so far denied that there is a presumption that a codified contract law is the ultimate outcome of this exercise. We set out below our views regarding codification in the form of an optional instrument. In any event, we would not wish to see the debate over codification in essence pre-empted by the creation of the CFR. Equally, it would be regrettable if the opportunity of reform of the *acquis* on the basis of agreed terminology were lost owing to controversy over codification of contract law.

11. With regard to the creation of a CFR to support the improvement of the *acquis*, we support the creation of a lexicon of agreed terms. There is however some scepticism about the utility of the extension of the project to agreed basic principles in this context. The difficulty we see is that even assuming that a set of "best" principles were agreed for use in drafting directives, once these directives were implemented into national law they would apply to contracts governed by national law and interpreted by national courts. In this context there could be a danger that the intention of conformity may be dissipated owing to a mismatch between those concepts introduced by EC law and those which continue to apply by virtue of national law and the manner in which they are interpreted by national courts. More simply, it is doubtful that including basic codified contract principles in the CFR would be any help to a legislative drafter, since those principles will not be those of the existing legal systems within which the legislation will operate, but will be principles intended eventually to replace the existing ones.

12. Assuming that the outcome of the study is nevertheless successful and the Commission is able to produce from it an appropriate CFR to use as a "tool box" for amendment and drafting of the CFR, the question that arises is to what extent consistency will thereafter remain in the legislative process. The Commission can propose changes and can draft EU legislation based on the agreed terminology. However, through the legislative process amendments made by the European Parliament and Council are likely to deviate from the proposed text and this could include changes to terminology derived from the CFR. This issue obviously goes to the question of the legal nature of the instrument as raised in paragraph 2.1.3 of the Communication. The

³ Experts group on the Commission's stakeholders panel: Jonathan Berkson, Nicholas Bohm, Marc Dewar, Nicholas Mallett, Simon James, Stephanie Sharp, Georgina Squire and Nicholas Yule.

Law Society in no way wishes to suggest imposing restrictions upon the right of the Legislators to engage in legislative negotiation, nor should it be supposed that we advocate that the CFR become a legally binding instrument; but it is necessary to point out that any consistency gained in using the CFR may be lost in the political process. There may be very good grounds for deviation, but where there are not, then if consistency is still regarded as a valuable aim there will need to be a degree of political commitment to using CFR terminology where possible.

13. A further issue arises in relation to the proposed time frame for revision of the acquis. The Communication suggests that there should be a delay in the revision of acquis until after the creation and acceptance of the CFR. It clearly makes sense that those aspects of the acquis which require revision for the sake of ensuring consistency (and, perhaps, common principles) should be revised after the CFR has been created (assuming that it has been a success both in formation and during the proposed testing period). For instance, the Commission is financing a study on the consumer acquis and its implementation, which appears to be a sensible step. However, the Law Society is sceptical about delaying much needed reforms of aspects of the acquis in general, in cases where the reform of the CFR is not fundamental to revision. In view of the fact that at best, the CFR will not be available until 2009 and in practice it may well be much later, the Law Society is anxious that necessary reform should not be stifled in the interim.

14. Finally, it should be emphasised that the acquis only governs a small proportion of contract law within the EU and that even where there is EU legislation governing a particular subject (eg unfair contract terms, misleading advertising, distance selling etc), the provisions of the legislation generally only affect some provisions of any relevant contract. Therefore, the vast majority of contracts (including most cross-border contracts) will remain unaffected by changes brought about by the CFR and will remain governed by national law.

Promoting the use of EU-wide standard terms and conditions

15. The Commission has raised the possibility of promoting EU-wide standard terms and conditions ("STC"). It is suggested that a Commission web-site be used to host an exchange of ideas about this. It is difficult for the Law Society to comment at length on this proposal since the Commission's own thinking on this appears somewhat tentative. As we understand it, the Commission does not itself intend to promulgate standard terms and conditions but merely to act as a facilitator.

16. Standard terms and conditions currently do play an important role in some markets (eg the common use of "Incoterms" in commercial law) and in the wholesale financial markets, the ISDA's work on contract terms has played a significant part in the huge growth of derivatives by reducing transaction costs and setting market standards. This has been successful because market participants have created and directed the process. While standard terms and conditions cannot provide an all-encompassing solution to contractual problems, they can often reduce costs by providing a starting point for contractual negotiations. The Law Society therefore appreciates that access to standard terms and conditions via a freely available website may be a very attractive option for businesses. As a matter of principle the Law Society supports open access to such information. We do however have some reservations about the proposed scheme.

17. While the Commission has the resources to host such a website it is unlikely it is in a position, or would be willing, to monitor or vet the information which is posted there from a technical legal perspective. This means that it is not in a position to ensure that the information provided and used is necessarily up to date or appropriate for use by those who access it. The risk is that the mere fact that the standard terms and conditions appear on an official EU website may unwittingly give greater credence to the standard terms and conditions than the Commission intends, and any disclaimers may be inadequate to counter that impression. If such a website is established, it is essential to ensure not only that any disclaimers are express and explain the nature of and source of the STC but also that it is made clear that standard conditions and terms are only a starting point for parties and that it is for them (and their legal advisors where appropriate) to agree terms and to verify their suitability.

An optional contract law instrument

18. The Communication signals the Commission's determination to continue the debate on the possibility of an optional instrument in the field of European law but otherwise has left the matter open. The Communication does not elaborate on what has already been set out in the Action Plan. As we understand it, what is intended by the "optional instrument" is the notion of some form of model contract or system of rules which would apply to cross border private contractual relations. The suggestion is that it would apply automatically but parties would have the right to "opt out" or alternatively, it would be entirely voluntary and

parties could “opt in” if they considered it useful and suitable to the transaction. The intention appears to be that it would largely replace the national law that would otherwise apply to the contractual relations between the parties.

19. The notion of the optional instrument is entirely separate from that of the CFR except in so far as the CFR might form the basis for drafting such an instrument. However, the confusion between the two has continually dogged the debate on European contract law and has caused considerable confusion even amongst Member States and experts. It is regrettable that this confusion is detracting from the debate over the CFR and the improvement of the *acquis* which are much more immediate concerns.

20. It is perhaps therefore premature to discuss the question of the optional instrument in too much detail given that the thinking on the issue from the Commission is still at an embryonic stage. The Law Society did however address a number of points on the issue to the Commission in response to the Action Plan following a period of consultation. The principal points were as follows:

- Generally speaking those who were consulted considered that the difficulties arising from different applicable laws across border are not of such a magnitude that automatic application of an EU instrument (albeit with the ability of parties to opt out) could be justified. Moreover, many cross border transactions occur without parties formally seeking advice. Imposing on such parties a contract law which is not necessarily familiar to either party and about which they might know very little did not of itself appear to respondents to produce greater certainty or lower transaction costs. There was therefore very little support for an “opt out” instrument.
- Respondents were more open to considering the possibility of “opt in” instrument available to parties through a choice of law clause. However, it became clear that the needs and the issues to be considered varied according to the nature of the contract and the parties. Three different types of contract and the possible issues relating to the use of an “opt in” instrument were discussed namely: (i) sector specific rules (ii) business to consumer (“B2C”) contracts (iii) business to business (“B2B”) contracts.
 - *Sector specific contracts*: there are sectors (particularly in the financial sector) where differences in applicable contract laws do raise specific types of problems. An optional instrument which is drafted in such a way as to be commercially attractive throughout the EU, and which would ultimately become the industry standard, might be an attractive option. However, there would be serious issues to be considered in relation to whether the appropriate solution to these problems would be an optional (“opt in”) instrument.
 - *B2C contracts*: Firstly, the vast majority of B2C transactions are not carried out on the basis of formal written contracts, no express choice of law is ever made (or is likely to be made in practice) and therefore an optional instrument is unlikely to resolve the identified problems. Secondly, there exist at the national level mandatory provisions governing consumer contracts. These mandatory provisions would not be automatically superseded by an optional instrument. There may be solutions to the problem in including minimal mandatory provisions in the optional instrument which are deemed to supersede national provisions. Thirdly, as we see it, the main benefit of an optional instrument for B2C contracts is where they are adopted as a standard for companies operating wide-spread cross border transactions (including those concluded at a distance and on the Internet). This in itself could be useful but consideration should be given as to whether the efforts involved in achieving an optional instrument for B2C contracts will be justified if in practice it will only be used in a narrow category of cases.
 - *B2B Contracts*: As noted above, the response in relation to the difficulties experienced by parties in B2B contracts operating cross border were mixed. Many small and medium-sized enterprises (and even some larger companies) do not currently formalise their contracts so as to even make a choice of law in favour of national law therefore the likelihood of their making an informed choice in favour of an EU optional instrument is not very high. Nevertheless, in the light of enlargement and the continued growth of cross-border trade, it is recognised that an optional instrument could provide a useful and cost saving solution for certain categories of standard form agreements (eg setting up a network of distributorships) or multi-national sales contracts. The problem of mandatory national laws can arise with B2B contracts (eg Belgian law on termination of exclusive distributorships) and would need to be resolved for an optional instrument to be commercially attractive. However, such mandatory rules are less prevalent in respect of B2B contracts compared to B2C contracts and therefore a solution which permitted the supremacy of the optional instrument over such mandatory provisions is less likely to raise the same level of controversy as is likely to arise in respect of mandatory national provisions in B2C contracts.

- From discussions to date, it is apparent that there needs to be considerable further work on whether there are any real benefits to be gained through the adoption of an optional instrument. Through consultations to date, the evidence gleaned by the Commission is largely anecdotal and we consider that a proper impact assessment would be needed to justify a proposal for an optional instrument.

21. In summary, the Law Society's position to date on the optional instrument is that if the CFR proves successful, it may itself be used as an instrument by parties in drafting ("the soft law" approach) which may reduce the need for any other measures such as an optional instrument. However, the Law Society broadly supports the further debate on the future of an optional instrument subject to the conditions that (i) any instrument under consideration should be optional for the parties (ie the "opt in" approach), (ii) any mandatory provisions should be kept to the minimum necessary and that all other provisions should be modifiable by the parties. It should be further noted that for such a choice of law to be made, it would be necessary to amend Article 3 of the Rome Convention. Finally, it should be emphasised that there would not be support for an opt out instrument or any other mandatory code of contract law.

CONCLUSIONS

22. In summary, the Law Society position is as follows:

- Our priority is revision of the *acquis* to ensure consistency and effectiveness. In this context, we support and are prepared to participate in work towards the creation of a CFR consisting of a workable set of agreed terminology and standard clauses suitable to form the basis of reform of the *acquis* and drafting of further legislation.
- We seek support to ensure that the CFR takes into account terminology and concepts derived from common law, particularly where these have been used effectively in an international trade context.
- We do not support unnecessary delay in revision of *acquis* where not dependent on the outcome of the CFR.
- We oppose further consideration of an "opt out" instrument or any other instrument which effectively imposes a mandatory model form of contract or set of principles for cross-border transactions.
- We support further consideration of an "opt in" instrument on the basis that an impact assessment is carried out and indicates that such an instrument would have a real effect on reducing cross-border transaction costs; but we do not consider this to be of high priority.
- We consider that a web-site for posting standard terms and conditions is unnecessary but if contemplated, consider that it must be accompanied by necessary safeguards and disclaimers.

January 2005

Memorandum by Dr Christian Twigg-Flesner, University of Hull

1. I am a Lecturer in Law at the University of Hull. I am also convenor of the Consumer Law Section of the Society of Legal Scholars, a member of the *Acquis Group* working on identifying principles of existing European private law, a member of the co-ordinating team working on the compendium/database to be developed as part of the review of the consumer *acquis*,⁴ and co-ordinator of a research team⁵ preparing a report for the Department of Trade and Industry on the potential impact of the forthcoming Directive on Unfair Commercial Practices ("UCPD"). This note is submitted on an individual basis and represents my personal views only.

2. In *The Way Forward* (COM (2004) 651 final), the European Commission has identified three key proposals. The first, improvements to the *acquis*, is to be welcomed. After two decades of legislating in the field of contract law (predominantly, but not exclusively with an eye on consumer protection), there is now an urgent need to ensure consistency between measures. Such improvements need to be made to technical matters such as definitions of key concepts across the various measures (eg, "consumer", "seller" and the somewhat elusive concept of "durable medium"), but also to substantive matters such as cancellation periods and information requirements.

⁴ Lead by Professor Dr Hans Schulte-Noelke at the University of Bielefeld, Germany.

⁵ Members: Dr Christian Twigg-Flesner and Deborah Parry (Hull), Professor Geraint Howells (Lancaster) and Annette Nordhausen (Sheffield).

3. However, tying this into the development of the “Common Frame of Reference” (“CFR”) may be problematic. My immediate concern is the time-scale. The CFR is due for completion in 2009, some four years from now. Assuming that the work is completed on time, there would have to be revisions of the various existing directives, followed by modification through the rather slow legislative process, and then the inevitable delays caused by late implementation in some Member States. At best, we might see improvements to the *acquis* by 2010. Although such improvements would benefit greatly from the CFR, I do wonder if there is not a need to address some of the shortcomings in the *acquis* before the CFR has been completed.

4. On page 3 of *The Way Forward*, the Commission lists the main problems with the existing *acquis*. I have already referred to the difficulties with definitions. However, it may be that some of these problems are more apparent than real in the sense that these could well be the result of mistakes made in translation rather than intentional inconsistencies between the various measures. For example, it seems that sometimes, English lawyers point out variations in the definition of “consumer”, whereas this debate does not arise elsewhere because there are no variations between the various directives in other languages.

5. There is then reference to a failure of the *acquis* to solve problems in practice. It seems to me that part of the problem here may be the lack of focused empirical evidence identifying the problems. As the European Community has to legislate with reference to the internal market to justify use of Article 95 EC as a legal basis, available empirical evidence tends to focus on cross-border implications, but the vast majority of contractual dealings will remain domestic.⁶ To some extent, this may be a case of the tail wagging the dog—surely, there should be a better understanding of what is needed before legislation is adopted, or amended.

6. There are clear differences between Member States as a result of minimum harmonisation; the database project on 8 specific consumer law directives currently in progress will provide important data on this. However, part of the problem may be due to misunderstanding of the nature of minimum harmonisation—often, there are derogations from the standards set in specific directives on the basis that this provides a higher standard of consumer protection and are covered by the minimum harmonisation clause when, in fact, the different approach adopted at national level may fall outside the scope of the directive concerned.

It may be asked whether such variations are problematic. In the sense that there remain variations between jurisdictions and that this causes serious problems for trade in the internal market, perhaps; however, as the vast majority of transactions will remain domestic, it is the concerns within the particular jurisdiction that should be paramount, and if derogations are necessary, then Member States should have some scope to adopt these.

7. It is to be welcomed that the CFR will be a non-binding instrument, although there is a hint that this may change in the future (p 5—“at this stage”). My preference would be to retain the CFR’s non-binding nature. This is especially so because of the earlier reference that the CFR could be used by Member States as a reference point “when enacting legislation on areas of contract law which are not regulated at Community level”. Although it would certainly be useful for Member States to have regard to the *acquis* and to the relevant domestic laws of other jurisdictions, Member States should be free to develop their contract law to suit their own needs (unless there are existing binding European requirements). The Sub-Committee may wish to note the very important observations made by the *Study Group on Social Justice in European Private Law*.⁷ Although the CFR will be a high-quality measure, it may not offer a solution for particular problems in a Member State, and the ability to take a different approach should be retained.

8. I have no specific comments to make on the development of EU-wide standard contract terms, other than to note that, whilst this may reduce instances of the “battle of the forms”, it may also have an impact of regional variations which may be desirable. Evidence from affected business representatives may provide more detail on this point.

9. There is then the idea of a “non-sector specific optional instrument” to respond to problems in the area of European Contract law. It is reassuring to read that the Commission does not propose a “European civil code”. It seems to me that what is proposed here is a more complete optional instrument which could be used by parties instead of a specific domestic law, going beyond the CFR. Although Member States may be concerned that this could have an adverse impact on their domestic laws, it could offer an opportunity to return some freedom of action to the Member States. However, this would involve a fundamental change to regulating the internal market, and I express no opinion on the desirability of this possibility.

10. I will, however, expand on this briefly: Put in very broad terms, the present approach has been to adopt directives to modify domestic law in order to encourage participation in the internal market. However, the effect of these measures has tended to be on domestic transactions, where there may not even have been a

⁶ Incidentally, the need for sound empirical research to inform policy developments has been noted by the Department of Trade and Industry in its recent consultation on developing a domestic consumer policy strategy.

⁷ “Social Justice in European Contract Law: a Manifesto” (2004) 10 *European Law Journal* 653-674.

perceived need for change. If there were to be an optional instrument, it would operate as a free-standing measure and not require implementation. In effect, we would see the development of a contract law system for internal market transactions only. Anybody involved in transactions within the internal market would be using one set of rules, but those involved in purely domestic transactions would use the contract law rules of their particular jurisdiction. This could result in greater fragmentation at domestic level, and may re-start the regulatory “race to the bottom”. The latter may be avoided if the “optional instrument” were to cease to be optional and become binding for all internal market transactions, but that would deprive the parties of the possibility to exercise the right to choose the law applicable to the contract. The former, on the other hand, may be beneficial in that it may promote the development of solutions to new problems at domestic level—with the possibility to update the CFR/“optional” instrument to take the “best” approaches into account.

11. To summarise: I welcome plans to improve the existing *acquis*, although I would prefer developments in the short term. This does not preclude a more comprehensive review after the CFR has been completed. The CFR itself is a welcome development, although some clarification about its precise function would be useful. The development of an “optional contract law” instrument is awaited with interest, although this will be a longer term project.

12. I would like to make a few observations on a development which is not contained in *The Way Forward*, but is already in progress and nearing adoption: the Unfair Commercial Practices Directive. This will be a maximum harmonisation measure, and I endorse the comments made by Professor Geraint Howells on this in his submission to the Committee.⁸ I am also concerned that, to some extent, the UCPD may have an impact on domestic contract law, notwithstanding the express provision that it is to have no such effect. The UCPD will outlaw certain behaviour which, in domestic contract law, will not give rise to remedies for a consumer, in particular with regard to rules on disclosure which are more strict in the UCPD than under the rules on misrepresentation. It is perfectly possible that a trader may be found to have infringed the UCPD and yet the consumer will have no contractual remedy. I would not at all be surprised if the courts felt that this situation would demand a development of the common law to provide a consumer with a remedy. There are instances in the area of unfair terms where the courts have indicated their willingness to develop the law to fill gaps left by measures such as the Unfair Contract Terms Act 1977.

13. It would, therefore, be desirable to take account of the UCPD as part of the European Contract Law process. I accept that the intention is that the UCPD will have no impact on the law of contract, but I remain unconvinced that a simple statement to that effect in what is currently Article 3(2) of the present draft UCPD will suffice. As a result, we may see some “back-door” harmonisation of contract law. I do not wish to be understood as saying that the substantive development of domestic contract law, particularly with regard to disclosure, in line with the UCPD would be undesirable (a more detailed analysis of the possible development is needed in any event);⁹ but I would prefer acknowledgement of this possibility as part of the overall process in examining European contract law.

14. My comments have been brief and may, perhaps, simplistic in places, but I hope that these will provide the Committee with some useful evidence.

10 January 2005

⁸ I have seen a copy of his written submission.

⁹ It may, for example, produce a different outcome on the facts of *Sykes v Rose* [2004] EWCA Civ 299.

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