



EUROPEAN COMMISSION CONSULTATION ON CONTRACT LAW

GREEN PAPER FROM THE COMMISSION

**on policy options for progress towards a European Contract Law for
consumers and businesses**

COM(2010)348 final

EUROPEAN COMMISSION CONSULTATION ON CONTRACT LAW

Question 1

What should be the legal nature of the instrument of European Contract Law?

As the FSB sees it, the 'optional instrument' (Option 4) is the only viable option. Pan-European legislative reform is unlikely to obtain the support of most member states and therefore should be discouraged.

The European Small Business Alliance (ESBA) considers that the Toolbox lacks the substance to deliver real benefits to businesses engaged in transactions across the wider European market. A '28th regime' would appear to be effective in the long term, although ESBA acknowledges that it would involve an initial cost to member states as well as businesses in adapting procedures and changing practice. However, this cost is acceptable when compared to continuing potentially high transaction costs.

Recent research by ESBA's UK member the Federation of Small Businesses shows that in terms of future plans for exporting, the vast majority of small businesses will be targeting the EU and EEA countries.¹ Given the lower percentage of members engaging in eCommerce there is clearly a potential for growth in the future here. The same research also indicates that members cite 'red tape/bureaucracy' and 'legal uncertainty/fear of litigation' as issues that act as key challenges when exporting, suggesting there are some issues with the current legal framework.

A major disadvantage to the toolbox is that there will still be 27 'sets' of contract law, defeating the purpose of a European Contract Law.

For this reason, ESBA is supportive of the idea of an 'optional instrument' or '28th regime' but would like to see more details on the instrument. ESBA considers the 28th regime would be able to break down internal market barriers. If designed in a simple and straightforward manner, it will help small businesses engaging in cross-border activities to have the option of national law and a European-wide regime for their contracts, sitting side by side.

Furthermore, ESBA believes that problems caused for small businesses by article 6 of Rome I (business to consumer) must be resolved. Article 6 of the Rome I regulation states that contracts are subject to the rules in the country where the consumer lives. If a business wants to engage in e-Commerce, it has no freedom of choice over which law is applied in cross-border B2C contracts. Businesses have to comply with another member state's contract law, and they will need to translate the contract and put it online. When the Rome I Regulation came into force, ESBA was of the opinion that it contradicted the single market as online sellers were obliged to comply with 27 sets of consumer law; there is no single model contract, and it takes away the freedom of choice over which law is applied to cross-border transactions. On this basis, there is room for improvement from the current arrangements. The Green Paper implies that a 28th regime would solve this issue.

¹ *Made in the UK. Small Businesses and an export led recovery* FSB, December 2010.

Potential issues

The FSB is well aware that none of the options presented is a cost-free option as far as small businesses are concerned. There would certainly be familiarisation costs attached to any option, particularly in the initial stages. The following points are of concern:

Costs

Businesses engaged in cross-border trade would need two versions of their terms and conditions, and they would need to train their staff to deal with the new European contract form. Other businesses would need to do the same if the choice of using the 28th regime or the national law were extended to domestic transactions. If this became the case, it would be a burden for businesses that trade only domestically. For exporting businesses, the question is whether it is more expensive complying with the law of the country of the customer they are selling to, or adapting their terms and conditions to a European wide contract law.

Uncertainty

The 28th regime may be interpreted in different ways in the courts of the member states, leading to legal uncertainty. Although a European contract law should be interpreted in the same way in every court, national differences, legal traditions and different degrees of implementation could mean different outcomes in similar cases. National courts supposedly have jurisdiction over the 28th regime and a business would be able to go to the court nearest to where he or she lives. The question is whether the potential legal uncertainty that could accompany the 28th regime is worse for a business than the legal uncertainty of a foreign law or of being involved in a court case in another country.

Question 2

What should be the scope of application of the instrument?

Small businesses are involved in business-to-business contracts (B2B), business-to-consumer contracts (B2C) and online transactions.

In B2B situations, it tends to be the size and dominance of the business that determines how a contract is drawn up and which national laws govern it. The issue of jurisdiction is often overlooked by small businesses until a dispute arises and they discover that proceedings need to be pursued under legal systems outside their own Member State. Therefore, it is important that any future contract law option makes it easier for businesses to resolve a dispute should one arise.

There is little substantive detail attached to the consultation around how business-to-business contracts would practically be handled and what the status of the consumer would be. If B2B contracts were to be covered by an optional instrument, we would prefer separate instruments for B2B and B2C contracts, due to the different nature of the former relationship. We would also like to ensure that further consultation is carried out with

stakeholders as the proposals develop. In addition, creating a more level playing field between large and small businesses is advisable.

With regard to online and distance selling, ESBA believes separating online transactions from other transactions is realistic given that it might be possible to purchase the same product from a company offline. It would not make sense to have two different regimes in operation for online and offline sales.

Question 3

What should be the material scope of the instrument?

ESBA advises for any instrument to be simple and straightforward to use. It must be easily digestible and workable for any EU small business.

Patrick Gibbels
Brussels Representative
European Small Business Alliance

For further information

Patrick Gibbels
patrickgibbels@esba-europe.org
European Small Business Alliance
Rue d'Idalie 9-13, 1050 Brussels