

Official Journal

of the European Union

ISSN 1725-2423

C 63

Volume 46

15 March 2003

English edition

Information and Notices

<u>Notice No</u>	<u>Contents</u>	<u>Page</u>
	I <i>Information</i>	
	Commission	
2003/C 63/01	Communication from the Commission to the European Parliament and the Council — A more coherent European contract law — An action plan	1

I

(Information)

COMMISSION

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL

A MORE COHERENT EUROPEAN CONTRACT LAW

AN ACTION PLAN

(2003/C 63/01)

Summary

The Commission communication on European contract law of July 2001 launched a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at European level. The present action plan maintains the consultative character of this process and presents the Commission's conclusions. It confirms the outcome of that process, i.e. that there is no need to abandon the current sector-specific approach. It also summarises the problems identified during the consultation process, which concern the need for uniform application of Community contract law as well as the smooth functioning of the internal market.

This action plan suggests a mix of non-regulatory and regulatory measures in order to solve those problems. In addition to appropriate sector-specific interventions, this includes measures:

- to increase the coherence of the Community *acquis* in the area of contract law,
- to promote the elaboration of EU-wide general contract terms, and
- to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument.

In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the Community contract law *acquis*, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like 'contract' or 'damage' and of the rules that apply, for example, in the case of non-performance of contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in Community legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law.

In order to promote the elaboration by interested parties of EU-wide general contract terms, the Commission intends to facilitate the exchange of information on existing and planned initiatives both at a European level and within the Member States. Furthermore, the Commission intends to publish guidelines, which will clarify to interested parties the limits which apply.

Finally, the Commission expects comments as to whether some problems may require non-sector-specific solutions, such as an optional instrument in the area of European contract law. The Commission intends to launch a reflection on the opportuneness, the possible legal form, the contents and the legal basis for possible solutions.

CONTENTS

	<i>Page</i>
1. Introduction	4
2. Description of the present process	4
3. Identified problem areas	5
3.1. Uniform application of Community law	5
3.2. Implications for the internal market	7
4. Suggested approach: a mix of non-regulatory and regulatory measures	10
4.1. To improve the quality of the Community <i>acquis</i> in the area of contract law	10
4.2. To promote the elaboration of EU-wide standard contract terms	14
4.3. Further reflection on the opportuneness of non-sector specific measures such as an optional instrument in the area of European contract law	15
5. Conclusion	16
ANNEX	19

1. INTRODUCTION

1. In July 2001, the Commission published its communication on European contract law⁽¹⁾. The communication was the first consultation document issued by the European Commission that envisaged a more fundamental discussion about the way in which problems resulting from divergences between contract laws in the EU should be dealt with at European level. Its follow-up is the subject of this action plan.
2. The communication launched a process of consultation and discussion. The Commission is aware of its long-term nature and intends to maintain its consultative character. Only through continuous involvement of all Community institutions and all stakeholders can it be ensured that the final outcome of this process will meet the practical needs of all economic operators involved and finally be accepted by all concerned. For this reason, the Commission has decided to submit the present action plan as a basis for further consultation.
3. In particular, this action plan seeks to obtain feedback on a suggested mix of non-regulatory and regulatory measures, i.e. to increase coherence of the Community *acquis* in the area of contract law, to promote the elaboration of EU-wide standard contract terms and 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. As such, it constitutes a further step in the ongoing process of discussion on the developments in European contract law.

2. DESCRIPTION OF THE PRESENT PROCESS

4. The communication on European contract law launched a consultation procedure that yielded numerous contributions from governments and stakeholders, including businesses, legal practitioners, academics and consumer organisations. The flow of incoming mail has continued since the process was started. Up to now, the Commission has received 181 responses to the communication.
5. The communication was intended to broaden the debate on European contract law and to allow the Commission to gather information on the need for more far reaching Community action in the area of contract law. The Commission sought information as to whether problems resulted from divergences in contract law across the Member States. In particular, the communication asked whether the proper functioning of the internal market might be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts. It was also interested in whether different national contract laws discouraged or increased the costs of cross-border transactions and sought views on whether the existing approach of sectoral harmonisation of contract law could lead to possible inconsistencies at Community level, or to problems of non-uniform implementation of Community law and application of national transposition measures.
6. The Commission was also interested in receiving views on what form solutions should take. In order to assist in defining possible solutions, the communication included a non-exhaustive list of possible options, set out in options I to IV.
7. None of the contributions indicated that the sectoral approach as such leads to problems or that it should be abandoned. All contributors nevertheless reacted to the various options. Only a small minority favoured option I which suggested leaving the solution of identified problems to the market. There was considerable support for option II, i.e. to develop, via joint research, common principles of European contract law. An overwhelming majority supported option III, which proposed the improvement of existing Community law in the area of contract law. A majority was, at least at this stage, against option IV, which aimed at a new instrument on European contract law. However, an important number of contributors suggested that further thought might be given to this in the light of future developments in pursuance of options II and III.
8. The Commission has put strong emphasis on transparency at all stages of the consultation procedure. With the consent of the authors, it published their contributions on the Commission's website (Responses to the Commission's communication on European contract law⁽²⁾). The Internet was also used as a forum to publish a summary that analysed these responses (Summary of the responses to the communication on European Contract Law⁽³⁾). This summary attracted a lot of interest⁽⁴⁾ and an updated version is annexed to this action plan. This interest together with the abundance of scholarly publications are evidence that the ideas expressed in the communication fell on fertile ground and provide the Commission with a mandate to pursue its work in this field. The outcome of this consultation provides a basis for this action plan.

9. The European Parliament adopted the 'resolution on the approximation of the civil and commercial law of the Member States' ⁽⁵⁾ on 15 November 2001. The resolution, addressed to the Commission, requests a detailed action plan with short-term, medium-term and long-term measures within a fixed timetable.
10. The Council adopted a report on the need to approximate Member States' legislation in civil matters ⁽⁶⁾ on 16 November 2001 where, in particular, it considered it necessary to ask the Commission to submit, as a follow-up to the consultation exercise, any appropriate observations and recommendations, if necessary in the form of a Green or White Paper, before the end of 2002.
11. In its opinion adopted on 17 July 2002 ⁽⁷⁾, the European Economic and Social Committee emphasised the need to look for solutions in this area on a global scale. However, as long as such solutions were not possible, it considered preferable the creation of a uniform, general European contract law, for example, by means of a regulation. This regulation could, in the medium-term, be chosen by the parties (opt-in solution) and, in the long-term, become a common instrument, which the parties could still waive if they wished to apply a specific national law (opt-out solution).
12. The EU has set itself the objective of developing an area of freedom, security and justice, for example by initiatives in the field of judicial cooperation in civil matters. The suggested measures described in this action plan insert themselves, *inter alia*, within the same objective. In particular, they run in parallel with the Green Paper on the conversion of the Rome Convention of 1980 ⁽⁸⁾ on the law applicable to contractual obligations into a Community instrument and its modernisation ⁽⁹⁾.
13. This Green Paper and the present action plan complement each other. The rules of private international law included in the Rome Convention or any potential future Community instrument are of considerable importance as they determine the applicable law. In particular, they are closely related to one measure suggested in this action plan, i.e. to examine whether non-sector-specific measures such as an optional instrument may be required and feasible. If such instruments were to be implemented, they could be expected to contain substantive law rules for certain contracts. The role of private international law rules remains of great importance to the extent that they will determine the application of such instruments if chosen as the law governing the contract.

3. IDENTIFIED PROBLEM AREAS

14. Many of the contributions to the consultation launched by the Commission communication on European contract law point to concrete and practical problems. Others observe, in a more general manner, that divergences between national contract laws do indeed create problems both for the uniform application of Community law and for the smooth functioning of the internal market. Inconsistency within Community legislation itself was also criticised by many contributors, some of them giving concrete examples. However, none of the contributions indicated that the sectoral approach as such leads to problems or that it should be abandoned.
 15. What follows is a brief typology of the problems identified. It is not intended to reflect every single point that was raised in all of the contributions (for more detailed information, the reader is directed to consult the Annex to this action plan or the individual contributions), nor can it be presumed that the reactions received in response to the Commission's communication give a complete picture of all the problems which may exist. Nevertheless, this brief recital of specific problems may be useful to give the reader a general idea of the challenges that are to be faced and to stimulate debate.
- #### 3.1. Uniform application of Community law
16. Different types of problems have been mentioned. As a category of inconsistencies that is intrinsic to Community legislation in the field of contracts, it was mentioned that similar situations are treated differently without relevant justification for such different treatment. The problem of divergent requirements and consequences in some of the directives applying to the same commercial situation was emphasised. Examples included the different modalities concerning the right of withdrawal in Directives on doorstep selling ⁽¹⁰⁾, timeshare ⁽¹¹⁾, distance selling ⁽¹²⁾ and distance selling of financial services ⁽¹³⁾, in particular, the divergent duration and methods of calculation of the withdrawal periods. Other examples concerned inconsistent approaches regarding information requirements between the Directive on electronic commerce ⁽¹⁴⁾ and the two Directives on distance selling or divergent information requirements in different consumer protection directives as far as contract law is concerned.
 17. Another category of inconsistencies mentioned concerned cases where in specific circumstances several Community acts can be applicable which produce conflicting results. One example mentioned concerns the

limitation of liability in the Package Travel Directive ⁽¹⁵⁾ in connection with the Convention for the Unification of Certain Rules for International Carriage by Air ⁽¹⁶⁾ on the one hand and the Regulation on air carrier liability in the event of accidents ⁽¹⁷⁾ on the other hand ⁽¹⁸⁾. Another example concerns the situation of parallel application of the Doorstep Selling Directive and the Timeshare Directive as confirmed by the European Court of Justice *Travel Vac* case ⁽¹⁹⁾.

18. Another criticism concerned the coexistence of two different legislative approaches in one and the same directive. This could lead to inconsistencies within the system of the directive itself. An example mentioned concerned the differentiation between the approaches to the applicable law on marketing and contracts in the Directive on electronic commerce. The inconsistency within the system of the Directive could also have consequences for the national implementation law. An example, which was mentioned, is the coexistence in the Commercial agents Directive ⁽²⁰⁾ of both the concept of 'indemnity' and the concept of 'compensation', where a Member State in its implementation had not opted for one concept but taken over both. According to the relevant contributions, this leads to a lack of legal certainty in commercial and legal practice. Other criticisms mentioned by many contributors were formulated in the context of the use of abstract legal terms in Directives. These include fundamental terms like 'contract', 'damage' or more specific terms like 'equitable remuneration', 'fraudulent use' or 'durable medium'.

19. One part of this more general problem is that these terms are often either not defined or too broadly defined ⁽²¹⁾. The absence of common definitions or existence of overly broad definitions in directives leave a very large implementation discretion to the national legislators. Whereas it is true that the national implementation laws would still be in conformity with the relevant Directive, they would nevertheless lead to inconsistencies in their application to similar cases.

20. In other cases abstract terms are defined in some Directives, while they are not defined in others. For example the term 'damage' is defined in the Product liability Directive ⁽²²⁾ for the purposes of this Directive, while it is not defined in either the Commercial agents Directive or the Package travel Directive. The term 'durable medium' is defined in the Directive on distance selling of financial services, but not in the general Distance selling Directive.

21. One problem, which was raised in the consultation, is whether in such a case the given definition in one directive can also be used for the interpretation of other

directives, i.e. whether the relevant abstract term can be interpreted in the light of the whole *acquis communautaire* or at least of the part, which is more broadly concerned. This methodological approach was also used by the Advocate-General in *Simone Leitner/TUI Deutschland* ⁽²³⁾. However in this specific case, the European Court of Justice interpreted the general term 'damage' only in the light of the Package travel Directive and did not follow its Advocate General. It is true that this decision cannot necessarily be generalised. However, if the interpretation of an abstract term in the light of the specific directive is the guiding principle, then such an interpretation can lead to fragmentation of national legislation. For example, Member States which have referred to an existing national legal concept with a general definition in their implementation laws might have to adapt this existing definition in order to implement the specific meaning of this abstract term in the light of the relevant directive.

22. A general observation concerning fragmentation of national contract laws, which was made by several contributions, was that the national legislator is faced with a dilemma. Either the implementation of directives with a limited scope entails a much larger adaptation of the national legal system than what is actually foreseen by the Community measure in question, or the implementation is restricted to the pure transposition of the directive in question. In some cases this might create inconsistencies in the national legal system.

23. Another category of problems concerned inconsistencies in the application of national implementations as a consequence of the introduction, by directives, of concepts, which are alien to the existing national legislation ⁽²⁴⁾. It was mentioned that when implementing a directive, some national legislators maintain the existing national legislation in parallel, thereby creating a situation which leads to legal uncertainty, for example the coexistence of two laws on unfair contract terms in one Member State. Some legislators also created uncertainty through their implementation of dispositions in directives that are based on unfamiliar concepts, for example the term 'compensation' in the Commercial agents Directive when it was implemented in one Member State's law.

24. The principle of minimum harmonisation in consumer protection legislation was criticised as not achieving the uniformity of solutions for similar situations that the internal market would require. Examples mentioned concerned the difference, from one Member State to another, in cooling-off periods in the context of Doorstep selling, Timeshare and Distance selling Directives, financial thresholds of implementation laws of the Doorstep

selling Directive or divergent concepts in the implementation of the annex to the Unfair contract terms Directive⁽²⁵⁾. For example, it was criticised that the latter is partly implemented as a binding 'black list' of unfair contract terms and partly implemented as an indicative 'grey list'⁽²⁶⁾.

3.2. Implications for the internal market

25. The barriers described in the present chapter cover obstacles and disincentives to cross-border transactions deriving directly or indirectly from divergent national contract laws or from the legal complexity of these divergences, which are liable to prohibit, impede or otherwise render less advantageous such transactions.
26. Before addressing the specific problems for the functioning of the internal market, it is important to mention the general distinction between problems resulting from mandatory rules and non-mandatory rules. Some contributors stress that the main problems in the contract law area result from provisions which restrict contractual freedom.
27. It has already been pointed out⁽²⁷⁾ that a large number of problems for cross-border contracts could be avoided, at least for one party to the contract, by choosing the appropriate applicable law. Alternatively the parties could also negotiate complex contracts which cover all potential legal questions. However, it has been emphasised that this approach does not help as regards mandatory rules of the law which has not been chosen as applicable, but which nevertheless apply. Indeed, a large number of contributions during the consultation mention the divergence of national mandatory contract law provisions as a particular problem, which is accentuated by the growth of e-commerce.
28. However, it has also been underlined in a number of contributions, especially by export-oriented industries, that the choice of applicable law is not always commercially realistic or desirable.
29. Firstly, it does not help the contracting party, which does not have sufficient economic bargaining power to impose its choice of law in the negotiations. It has also been pointed out that taking advice on the unknown applicable law will involve considerable legal costs and commercial risks for this party to the contract⁽²⁸⁾ without necessarily giving the most economically favourable solution.
30. This is particularly important for SMEs since the legal assistance costs are proportionately higher for them. As a result, SMEs will either be dissuaded from cross-border activities altogether or will be put at a clear competitive disadvantage compared to domestic operators⁽²⁹⁾.
31. Secondly, it has been highlighted in the consultation that this situation is even more dissuasive for consumers. Their national laws are in most cases not the laws applicable to the contract. This may be because the law of the trader is chosen as the applicable law under standard terms or because it is objectively determined as the applicable law under Article 4 of the Rome Convention. Article 5 of the Rome Convention does not help the consumer in a significant way because it does not apply in the case of an active consumer who wants to take advantage of the opportunities offered by the internal market. Given the consumer's typical lack of knowledge of foreign law, the latter will be in greater need of legal advice prior to the conclusion of the cross-border contract.
32. Finally, the distinction between mandatory and non-mandatory provisions might be theoretically clear, but is in practice much less evident. Many contracts in practice do not waive existing suppletive legal provisions by inserting specifically negotiated clauses in the respective contract dealing with the problem in question or some do not even choose the applicable law. The existence of these gaps is not due to the fact that the contractual parties might not have seen the relevant problem or did not want to choose their own law as the applicable law to the contract. It is more due to a balanced decision between the clarity resulting from negotiating new clauses covering these gaps on the one hand and the transaction costs for such a negotiation on the other hand. In such cases, contractual parties might reasonably decide that the negotiation effort is simply not worth the economic advantage or the commercial risk of losing the customer and hope that the potential problem will not appear. As such, the relevant non-mandatory provisions of the applicable law have become de facto 'mandatory'.
33. It was indicated during the consultation that this applies, in particular, to general and very fundamental legal rules on for instance the conclusion of a contract, the assessment of its validity, the notion and consequences of non-performance or partial or incorrect performance of contractual obligations.
34. This leads immediately to the first category of specific problems mentioned in the consultation. Many contri-

butions criticised the divergence of rules on fundamental issues of contract law which create problems and entail higher transaction costs. Examples concern diverging rules on representation of foreign companies and the consequences for the validity/recognition of documents. Contributions indicated that the only way to obtain legal certainty is to take local legal advice to ensure, for example, the validity of documents and the power to bind another, which is seen as being an expensive and inconvenient solution for an everyday management act.

35. Other examples concern divergent requirements for the formation of contracts which create obstacles. This concerns especially requirements of form, such as the requirement for certain contracts to be concluded before a notary or the necessity of authentication of documents which is mandatory for certain contracts and necessitates higher costs for businesses and consumers. This concerns also the requirement for certain contracts to be in writing or in a certain language ⁽³⁰⁾.
36. Another category of problems mentioned by many contributions concerned the divergence of rules on the inclusion and application of standard contract terms. In some jurisdictions, it is sufficient merely to make reference to standard terms, whereas in others they must be attached to the contract or signed separately. In some Member States such as Italy (Article 1341 *codice civile*), certain clauses must be individually initialled to become valid. Such rules may apply independently of the choice of law made by the contracting parties.
37. Between Member States, there are considerable differences as to which contract terms are considered inadmissible (and therefore invalid) by the courts. In some Member States such as Germany or the Nordic countries, courts exert strict control over the fairness of contractual terms even in business-to-business contracts. Other Member States provide for a limited control by way of interpretation or only allow specific contract clauses to be struck down in commercial contracts.
38. This creates uncertainty for businesses that use standard terms; it also hampers the use of ready made standard contracts that were actually created to facilitate cross-border transactions and intended for use in any legal system. It is indeed necessary to use different standard contracts in different Member States, which in turn makes it impossible to use the same business model for the whole European market.
39. This leads to another category of frequently mentioned problems concerning the divergence of national rules as regards clauses excluding or limiting contractual liability in specific contracts or standard contract terms and their recognition by the law courts in another Member State. Examples mention the full responsibility of suppliers for hidden defects (*vices cachés*) under French case-law, and the mandatory impossibility, under Czech law, of restricting contractual liability for future damages. In this context, contributions mention also different national mandatory rules on limitation periods. Export-oriented industries indicated that the resulting unrestricted liability for suppliers could lead to very high commercial risks, which discourage or impede the conclusion of cross-border transactions.
40. In the context of contractual liability, contributions highlighted also that being unaware of the specific requirements of the relevant applicable contract law often leads to unanticipated costs. Examples include the obligation for merchants to serve a prompt notice of default in respect of defective goods under the German Commercial Code (§ 377) in order to preserve their right of redress and the *bref délai* under Article 1648 of the French Civil Code.
41. Numerous contributions concerned problems as regards to the divergent national rules on contract law on the one hand and on the rules on transfer of property and securities concerning movable goods on the other hand ⁽³¹⁾. The national rules on the transition of property differ and therefore the moment of transition of property is different. Furthermore, this can also depend on the nature of the contract which, again, is different in national legal systems. It must be borne in mind that the possibility of a choice of law only concerns contractual rules, and not rules applicable to rights in rem, e.g. transition of property, where the applicable law is the *lex rei sitae*. Many businesses are not aware of this limitation. It has been pointed out that Community law ⁽³²⁾ addresses part of the problem by providing for the validity of retention of title clauses, but it does not go beyond this.
42. Reservation of title is regulated differently from jurisdiction to jurisdiction and the effectiveness of relevant contract clauses varies accordingly. This applies even more to possible extensions where the reservation of title also covers, for example, a claim for the purchase price which arises upon a resale of the sold goods by the buyer ⁽³³⁾ or over products made from the sold goods ⁽³⁴⁾. These extensions can also cover future claims or not only the purchase price of the specific goods delivered under a particular contract of sale, but all the buyer's outstanding indebtedness ⁽³⁵⁾.

43. The divergence of rules often entails that, in the case of the sale of goods with reservation of title, the 'security' foreseen in the contract disappears at the moment when the good in question is brought across the border. It is generally observed that divergence of rules on securities creates a great risk for operators on the market. As a consequence for the supply side, the seller is forced to look to other forms of securities which are, such as bank guarantees, substantially more expensive and realistically speaking, unobtainable from the outset for SMEs. The result for the demand side is that trade credit provided by the seller to the buyer will be higher priced since the seller's risk is to a considerable degree increased or decreased depending upon the availability of proprietary security and its legal effectiveness. This risk can only be partially alleviated by costly legal opinions.
44. Similar problems have been mentioned in the financial services sector for granting trans-border credit, which is only possible if the corresponding securities are guaranteed. It has been pointed out that the analysis of the validity of the cross-border transfer of securities necessitates costly in-depth legal expertise, which discourages from or impedes such cross-border transactions. In addition, it was mentioned that such analysis is rather time-consuming which, in cases of cross-border transactions to provide finance for re-capitalisation in order to prevent insolvency, might be a critical factor which prevents the whole operation.
45. Above all, some security instruments for movable goods are simply not known in other Member States and vanish if the secured goods are transferred across borders. An example given concerns the transfer of movable goods under the contractual agreement of a *Sicherungsübereignung* from Germany to Austria. These differences also adversely affect the possibility of entering into cross-border leasing contracts.
46. Contributions also indicated differences in national contract laws concerning credit assignments. The difference in rules on factoring was mentioned as a problem because the assignment of receivables is an important instrument for the financing of export transactions. In particular, some Member States restrict the assignment of future receivables or the bulk assignment of receivables, while others take a much more liberal stand in these matters. As a consequence, the factoring industry meets serious obstacles in some Member States, but is favoured by laws of others; this could lead to distortions of competition. Similar differences exist with regard to the validity of clauses contained in sales or service contracts that prohibit the assignment of claims arising from those contracts. Contributions emphasise that factoring companies are prevented from offering their services outside the Member State of their establishment by using one and the same type of contract throughout the whole of the Community. In any case, they would have to undertake a very careful analysis of different national laws.
47. In the area of financial services, contributions stated that firms are unable to offer, or are deterred from offering, financial services across borders because products are designed in accordance with local legal requirements, or because the imposition of differing requirements under other jurisdictions would give rise to excessive costs or unacceptable legal uncertainty. If, in spite of this, firms decide to sell across borders, they have to cope with considerable competitive disadvantages compared to local service providers. Choice of law in business-to-business transactions only partially alleviates this problem.
48. The same problems occur particularly with insurance contracts. Contributions indicate that the diversity of national regulations governing life insurance contracts, non-life insurance for mass risks and compulsory insurance constitutes a check to the development of cross-border insurance transactions. The attractiveness of certain contract schemes at national level may disappear in cross-border situations where they have to comply with different regulatory requirements. Choice of law clauses may alleviate the problem in non-life insurance of large risks. However, they are not admissible in the other cases. The wording of a single policy that could be marketed on the same terms in different European markets has proved impossible in practice.
49. In the field of cabotage transport, i.e. road transport services carried out within a Member State by a carrier established in another Member State, it was indicated that some host Member States⁽³⁶⁾ exclude the choice of law and insist upon the application of their national provisions. As a consequence, the resulting divergence of liability regimes not only leads to high insurance costs, which generally increase the cost of cabotage transport, but may also lead to distortions of competition.
50. In the field of consumer protection, many businesses complain about the great diversity in national regimes, which creates obstacles for cross-border business to consumer transactions. This is mainly imputed to the fact that Community directives in that field are based on the principle of minimum harmonisation, so as to allow Member States to maintain rules that are more favourable

to consumers than those foreseen in Community law. While Community law has led to some degree of convergence, it is still difficult for businesses to develop distribution strategies that can be applied throughout the internal market, because the rules adopted by Member States going beyond the minimum harmonisation prescribed by Community law are necessarily divergent. In addition to this, consumer protection rules, even if they go beyond the minimum harmonisation level are often mandatory and sometimes even extended to business to business relationships.

51. The abovementioned problems have been identified by the stakeholders and interested parties who participated in the consultation following the communication on European contract law. The Commission sets out, in the following section, suggestions for a mix of non-regulatory and regulatory approaches in order to tackle some of these problems. These suggestions have to be seen in the light of the limited contributions received during the consultation.

4. SUGGESTED APPROACH: A MIX OF NON-REGULATORY AND REGULATORY MEASURES

52. In some cases, the Community Treaty may already provide the legal base to solve the problems identified, although the present action plan does not take a position on the compatibility of the barriers identified with Community law. For other cases, non-regulatory as well as regulatory solutions may be required. As the Commission recalled in its recent action plan 'Simplifying and improving the regulatory environment', there are, in addition to regulatory instruments (regulations, directives, recommendations) other tools available, which, in specific circumstances, can be used to achieve the objectives of the Treaty while simplifying lawmaking activities and legislation itself (coregulation, self-regulation, voluntary sectoral agreements, open coordination method, financial interventions, information campaign)⁽³⁷⁾. The Commission is aware that this mix of non-regulatory and regulatory measures will not solve all problems described. However, they will provide a solution to a number of problems.

53. The solutions suggested cannot all be implemented within the same time frame. In a number of sectors initiatives have already or will soon be taken to update current directives or propose new ones. The measures to promote standard contract terms can be launched within a year. The creation of a common frame of reference is an

intermediate step towards improving the quality of the Community *acquis* in the area of contract law. It will require research as well as extensive input from all interested parties. The former will be done within the context of the Sixth Framework Programme for research and technological development and will therefore depend on the timing of the respective call for proposals. In any case, it is envisaged to obtain the results of the research within three years of its launch.

54. The improvement of the existing and future *acquis* is a key action. The Commission will continue its efforts to improve the existing *acquis*⁽³⁸⁾ and expects that the common frame of reference, when available and as far as relevant, will be instrumental in this respect. Reflection on an optional instrument will start with the present action plan and be carried out in parallel to the whole process. The results of the Commission's examination could only be expected some time after the finalisation of the common frame of reference.

4.1. To improve the quality of the Community *acquis* in the area of contract law

55. As indicated above, one of the conclusions drawn from the consultation thus far is that it is possible for the EU to continue a sector-specific approach. However, the consultations have also emphasised the need to increase coherence of the existing *acquis* in the contract law area and avoid unnecessary inconsistencies in new *acquis*. This is why the Commission intends to take a number of measures aimed at increasing coherence of the Community *acquis* in the contract law area, notably by improving the quality of the legislation.

56. The objective is to achieve an European contract law *acquis* which has a high degree of consistency in its drafting as well as implementation and application. However, if differences between provisions in directives can be explained by differences in the problems which those directives seek to solve, intervention is not necessary. Differences in terms and concepts that cannot be explained by differences in the problems being addressed should be eliminated.

57. An improved Community *acquis* should enhance the uniform application of Community law as well as facilitate the smooth functioning of cross-border transactions and, thereby, the completion of the internal market. For example, it should avoid similar situations being treated differently without relevant justification for such different treatment. It should also avoid conflicting results and should define abstract legal terms in a consistent manner allowing the use of the same abstract term with the same meaning for the purposes of several directives. As such, it should indirectly remedy the fragmentation of national contract laws and promote their consistent application. Such an *acquis* would respond to the need for uniform application of Community law, as stated by the European Court of Justice ⁽³⁹⁾.
58. The Commission will seek, where possible, a high degree of consistency in the contract law area. When the common frame of reference is available, the Commission would, wherever possible and adequate, make use of it and include corresponding provisions in its legislative proposals.
62. a) As indicated above, the objectives of the common frame of reference are threefold. First, the Commission may use this common frame of reference in the area of contract law when the existing *acquis* is reviewed and new measures proposed. It should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as 'contract' or 'damage' and of the rules which apply, for example, in the case of the non-performance of contracts. In this context contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons. The intention is to obtain, as far as possible, a coherent *acquis* in the area of European contract law based on common basic rules and terminology. The second objective is that it could become an instrument in achieving a higher degree of convergence between the contract laws of the EU Member States and possibly appropriate third countries. Thirdly, the Commission will base its reflections on whether non-sector-specific measures such as an optional instrument may be required to solve problems in the area of European contract law on the common frame of reference.

4.1.1. A common frame of reference

59. A common frame of reference, establishing common principles and terminology in the area of European contract law is seen by the Commission as an important step towards the improvement of the contract law *acquis*. This common frame of reference will be a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law. This frame of reference should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world's most dynamic economy ⁽⁴⁰⁾.
60. If the common frame of reference is widely accepted as the model in European contract law which best corresponds to the needs of the economic operators, it can be expected also to be taken as a point of reference by national legislatures inside the EU and possibly in appropriate third countries whenever they seek to lay down new contract law rules or amend existing ones. Thus the frame of reference might diminish divergences between contract laws in the EU.
61. The following considerations are intended to give an indication of its objectives, the content areas to be covered and the organisational aspects.
63. b) In order to ensure that the common frame of reference meets the needs of the economic operators and offers a model in regulatory approaches to contract law, the Commission intends to finance extensive research in this area. The areas to be covered by the research activities and their contents follow from these objectives. The research activities should concentrate on the fields covered by the present action plan as well as the communication on European contract law ⁽⁴¹⁾.

Although the details of the common frame of reference will be decided on the basis of the research and input from economic operators, it can be expected to contain the following elements.

- It should deal essentially with contract law, above all the relevant cross-border types of contract such as contracts of sale and service contracts.
- General rules on the conclusion, validity and interpretation of contracts as well as performance, non-performance and remedies should be covered as well as rules on credit securities on movable goods and the law of unjust enrichment.

Several basic sources should principally be considered.

- Advantage should be taken of existing national legal orders in order to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions.
- It is particularly important to take into account the case-law of national courts, especially the highest courts, and established contractual practice.
- The existing Community *acquis* and relevant binding international instruments, above all the UN Convention on the International Sale of Goods (CISG) ⁽⁴²⁾, should be analysed.

64. It is not the task of the present action plan to elaborate the principles or terminology, which will constitute the contents of the common frame of reference. In any case, the objectives of the common frame of reference determine its content. The first objective is to allow the existing *acquis* to be improved and simplified and to ensure the coherence of the future *acquis*. This means that the common frame of reference should provide for common solutions where problems of the *acquis* are identified. This could concern, for instance, problems of consistency or the use of abstract terms in Community law without definition, which may represent a legal concept for which there are different rules in each national body of law. Furthermore, it should allow the identification of common terminology for particular fundamental concepts or best solutions for typical problems in order for the future *acquis* to be proposed. Finally, the common frame of reference should also form the basis for further reflection on an optional instrument in the area of European contract law. In this context, it might constitute an attempt to formulate relevant principles and rules.

65. The research activities should provide for an assessment of the economic implications of the results for the economic operators, i.e. industry, retail business, legal practitioners and consumers. The Commission intends in any case to consult widely with stakeholders and other interested parties on the draft common frame of reference in order to ensure that it meets the needs of economic operators.

66. c) As far as the organisational aspects are concerned, it should be emphasised that it is not the Commission's

intention to 'reinvent the wheel' in terms of research activities. On the contrary, it is remarkable that never before in the area of European contract law has there been such a concentration of ongoing research activities. It is essential that these research activities are continued and exploited to the full. Therefore, the main goal is to combine and coordinate the ongoing research in order to place it within a common framework following several broad approaches.

67. Only where ongoing research does not cover all the areas concerned, would it be desirable that new research activities fill these gaps. Furthermore, the abovementioned areas to be covered do not preclude ongoing research projects from going beyond these areas as they might have necessary links with other areas, like property law or tort law.

68. Research activities in the abovementioned area could be supported by the sixth framework programme for research and technological development (FP6) ⁽⁴³⁾. Within its 'integrating' programme, priority 7 'Citizens and governance in a knowledge-based society' presents the analytical and intellectual context for such an endeavour. It is envisaged that research activities in the domain of European contract law will be part of one of the first calls for proposals to be published within this priority. Given the nature of the issues at stake, the implementation could use one of the new instruments provided in FP6, in order to further structure and integrate the research efforts in this domain.

4.1.2. *High quality and consistency of the Community acquis in the area of contract law*

69. As stated in the Better regulation action plan ⁽⁴⁴⁾, the Commission feels that it is essential to maintain high standards as regards quality and consistency throughout the entire legislative process.

70. This measure therefore fits in the overall EU institutions' strategy, which aims at simplifying the regulatory environment and enhancing the quality of Community legislation. The Lisbon European Council gave a mandate to the Commission ⁽⁴⁵⁾, which was confirmed at the Stockholm, Laeken and Barcelona summits ⁽⁴⁶⁾, to present a coordinated strategy for further action to simplify the regulatory environment. Since 2001, the Commission has been engaged in a wide consultation process with the other institutions and Member States with which it shares

responsibility for the quality of Community legislation, and an important debate was launched, aimed at improving the quality, effectiveness and simplicity of regulatory acts and at better consulting and involving civil society in the EU decision-making process.

71. In this context, the White Paper on Governance adopted in July 2001⁽⁴⁷⁾, together with the Better regulation action plan, represents a dynamic expression of the political will to reform the regulatory environment. The White Paper on Governance stresses the need for the European Union to 'pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts'⁽⁴⁸⁾. The Better regulation plan, aims *inter alia* at improving the quality of legislation proposals. It mentions that 'the aim of simplifying and improving the regulatory environment is to ensure that Community legislation is more attuned to the problems posed, to the challenge of enlargement and to technical and local conditions. By being written in a less complicated style, it should be easier to implement for the Member States and operators concerned and easier for everyone to read and understand. The ultimate goal is to ensure a high level of legal certainty across the EU, even after enlargement, enable economic and social operators to be more dynamic and thus to help strengthen the Community's credibility in the eyes of its citizens'⁽⁴⁹⁾.
72. Already, in its communication on European contract law, the Commission indicated that 'improving the quality of legislation already in place implies first modernising existing instruments. The Commission intends to build on action already undertaken consolidating, codifying and recasting existing instruments centred on transparency and clarity. Quality of drafting could also be reviewed; presentation and terminology could become more coherent. Apart from those changes regarding the presentation of legal texts, efforts should be systematically focused on simplifying and clarifying the content of existing legislation. Finally, the Commission will evaluate the effects of Community legislation and will amend existing acts if necessary'⁽⁵⁰⁾.
73. In its communication on consumer policy strategy for 2002 to 2006⁽⁵¹⁾, the Commission emphasised the need for greater convergence in EU consumer law, which would notably imply a review of existing consumer contract law, in order to remove existing inconsistencies, to fill in gaps and to simplify legislation.
74. In order to ensure coherence in the legislative framework for financial services, the Commission indicated that it will launch a three-strand policy to secure increased levels of convergence in respect of consumer and investor protection rules. Its third strand foresees a review of national rules relating to retail financial services contract⁽⁵²⁾. As it has also been stressed in the consultation, contracts play a crucial role in financial services — particularly banking and insurance. Indeed, in these areas the services consist often of a series of terms and conditions which are expressed in a contract. Over time, Member States have developed rules, which affect the terms and conditions which may or may not be included in an insurance contract or another financial services contract. To the extent that these rules differ they might affect the products which are offered across borders. Further convergence of such measures may be needed in order to balance the need for greater uniformity of national rules with the need to maintain product innovation and choice⁽⁵³⁾. Improving the quality of the *acquis* and making it more coherent⁽⁵⁴⁾ as far as contract law is concerned is therefore a key initiative in this context, and it would constitute a follow-up action to the Better regulation action plan.
75. This measure gathers overall support from other EU institutions as well as civil society. Both the Council and the European Parliament have emphasised the need for coherence, improvement and consolidation of the existing *acquis communautaire*. The consultation launched by the Commission shows that this measure is also almost unanimously supported by all contributors, and particularly by industry and by legal practitioners. The Commission considers therefore that ensuring coherence and consistency of the existing and future *acquis* is a priority that needs to be tackled rapidly.
76. In order to solve this problem, the consistency of Community legislation has to be ensured in the light of identified problem areas. This means notably:
- remedying identified inconsistencies in Community contract law,
 - reviewing the quality of drafting,
 - simplifying and clarifying existing legislation,
 - adapting existing legislation to economic, commercial and other developments which were not foreseen at the time of adoption,

- filling gaps in Community legislation which have led to problems in its application.

77. Consolidation⁽⁵⁵⁾, codification⁽⁵⁶⁾ and recasting⁽⁵⁷⁾ of existing instruments, focused on transparency and clarity, will have to be considered where appropriate.
78. Such action would not go beyond the harmonised areas, but deal with areas already, at least partially, covered by Community legislation. However, it would not only concern the existing *acquis*, but also the future measures in order to ensure the coherence of the *acquis* as a whole.
79. The Commission intends to implement the abovementioned actions and to submit other proposals where a sectoral need for harmonisation arises. It is envisaged for the implementation of these actions that where possible and adequate, the common frame of reference will be used as a tool for greater convergence. So the common frame of reference could, for example, make definitions or fundamental rules available, which could be used to improve the existing *acquis* and be integrated in the future *acquis*.
80. In its Better regulation action plan, the Commission had suggested ensuring that substantial modifications introduced by the European Parliament and the Council to Commission proposals during the first reading do not change the quality of the legislative act itself and that it is essential to maintain high standards as regards quality and consistency throughout the entire legislative process⁽⁵⁸⁾. As a consequence for the area of European contract law, the common frame of reference as a guideline should not only be used by the Commission in the preparation of its proposals, but should also prove useful to the Council and the European Parliament in case they propose amendments.

4.2. To promote the elaboration of EU-wide standard contract terms

81. The principle of contractual freedom, which is the centrepiece of contract law in all Member States, enables contracting parties to conclude the contract which most suits their particular needs. This freedom is restricted by certain compulsory contract law provisions or requirements resulting from other laws. However, compulsory provisions are limited and parties to a contract do enjoy a significant degree of freedom in negotiating the contract

terms and conditions they want. This is particularly important in case the parties want to conclude a contract with special features or which needs to cover a complex situation.

82. Nevertheless, in a large majority of cases, and in particular for fairly straightforward and often repeated transactions, parties often are interested in using standard contract terms. The use of standard contract terms spares the parties the costs of negotiating a contract.
83. Such standard terms are often formulated by one of the contracting parties, in particular, where a single contracting party possesses sufficient bargaining power to impose its contract terms, either as a seller or a service provider or as a purchaser of goods or services. In other cases such standard contract terms are developed by a group of contracting parties, representing either one side in contract negotiations or, more rarely both sides, or they may be developed by a third party.
84. Although standard contract terms and conditions are used very broadly, most of them have been developed by parties from a single Member State. Such contract terms may therefore be less adapted to the particular needs of cross-border transactions. The Commission is aware, however, of initiatives in which standard contract terms have been developed specifically for international transactions⁽⁵⁹⁾. These contract terms are increasingly being used also for contracts concluded inside single Member States.
85. This demonstrates the usefulness of standard terms developed for use in various Member States and, in particular, in cross-border transactions. The Commission believes that if such general terms and conditions were developed more widely, they could solve some of the alleged problems and disincentives reported. This is why the Commission intends to promote the establishment of such terms and conditions in the following ways:

- (a) Facilitating the exchange of information on initiatives.

86. As a first step in promoting the development of EU-wide standard terms and conditions, it is important to establish a list of existing initiatives both at a European level and within the Member States. Once such a list is made available, parties interested in developing standard terms and conditions could obtain information on similar initiatives in other sectors or in the same sectors in other Member States. Thus they could learn from the mistakes

of others and benefit from their successes ('best practices'), while they could also obtain names and addresses of their counterparts in other Member States who could be interested in a joint effort to create EU wide standard terms and conditions.

87. Thus the Commission intends to setup a website, where companies, persons and organisations can, on their own responsibility ⁽⁶⁰⁾, list information on existing or planned initiatives in this area. The Commission will invite all such companies, persons and organisations to post the relevant information on this website. The Commission intends to evaluate the usefulness of the site with users 18 months after its launch, and may take appropriate steps.

(b) Offering guidelines on the use of standard terms and conditions

88. The Commission's general support for the elaboration of standard terms and conditions on an EU-wide scale, rather than on a Member State per Member State basis should not be interpreted as a blanket approval of such terms and conditions, however. Indeed, standard terms and conditions should not violate EU rules, nor run counter to EU policies. This is why the Commission intends to publish guidelines, the purpose of which is to remind interested companies, persons and organisations that certain legal and other limits apply. Thus it is obvious that the standard terms and conditions should be in conformity with the Unfair contract terms Directive, where it applies. The guidelines will also remind parties that limits for such initiatives result from the EU competition rules. Moreover, it is important to ensure that standard contract terms and conditions are jointly elaborated by representatives from all relevant groups including large, small and medium sized industry, traders, consumers and legal professionals.

4.3. Further reflection on the opportuneness of non-sector specific measures such as an optional instrument in the area of European contract law

89. During the consultation, there were calls to continue reflections on the opportuneness of non-sector-specific measures in the area of European contract law.

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 national law, thereby also facilitating negotiations.

91. Over time economic operators would become familiar with these rules in the same way they may be familiar with their national contract laws existing at this moment. This would be important for all parties to a contract, including in particular SMEs and consumers, and in facilitating their active participation in the internal market. Thus such an instrument would facilitate considerably the cross-border exchange of goods and services.

92. The Commission will examine whether non-sector-specific-measures such as an optional instrument may be required to solve problems in the area of European contract law. It intends to launch a reflection on the opportuneness, the possible form, the contents and the legal basis for possible action of such measures. 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 to 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 been determined by private international law rules as the law applicable to the contract.

93. It is the opinion of the Commission that contractual freedom should be one of the guiding principles of such a contract law instrument. Restrictions on this freedom should only be envisaged where this could be justified for good reasons. Therefore it should be possible for the specific rules of such a new instrument, once it has been chosen by the contracting parties as the applicable law to their contract, to be adapted by the parties according to their needs ⁽⁶¹⁾.

94. Only a limited number of rules within this body of rules, for example rules aiming to protect the consumer, should be mandatory, if the new instrument applies to the

contract. The reflection would have to include, *inter alia*, the question whether the optional instrument (if it were a binding instrument) could exclude the application of conflicting mandatory national provisions for areas which are covered thereby. Such an instrument would, accordingly, ensure freedom of contract in two ways: firstly, when the parties choose this instrument as the applicable law and secondly, as they are able, as a matter of principle, to modify the respective rules.

95. It is clear that in reflecting on a non-sector-specific instrument, the Commission will take into account the common frame of reference. The content of the common frame of reference should then normally serve as a basis for the development of the new optional instrument. Whether the new instrument would cover the whole scope of the common frame of reference or only parts thereof, or whether it would cover only general contract law rules or also specific contracts, is at present left open.
96. The Commission would welcome comments on the scope of an optional instrument in relation to the CISG. The optional instrument could be comprehensive, i.e. covering also cross-border contracts of sale between businesses, and thereby include the area covered by the CISG. It could also exclude this area and leave it to the application of the CISG.
97. As with all measures mentioned in this action plan it is the purpose of this action plan to invite comments from Community institutions and stakeholders on the suggestions.
5. CONCLUSION
98. The purpose of this action plan is to receive feedback on the suggested mix of non-regulatory and regulatory measures as well as input for the further reflection on an optional instrument in the area of European contract law. It also intends to continue the open, wide-ranging and detailed debate, launched by the communication on European contract law with the participation of the institutions of the European Community as well as the general public, including businesses, consumer associations, academics and legal practitioners.
99. All parties that wish to contribute to the debate are requested to send their contribution by 16 May 2003. These contributions should be sent, if possible in electronic form, to European-Contract-Law@cec.eu.int, or

otherwise in writing to the European Commission, B-1049 Brussels. Each contribution should be marked 'Action plan on European contract law'. In order to stimulate a real debate on the issue, the Commission has published this action plan on the Commission's Europa website under:

http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

Incoming contributions will be published on the same website, unless senders request confidentiality.

- (1) Communication from the Commission to the European Parliament and the Council on European contract law, (COM(2001) 398 final, 11.7.2001) (OJ C 255, 13.9.2001, p. 1).
- (2) http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html
- (3) See footnote 2.
- (4) According to the statistics, the press release 'Feedback on Commission's European contract law initiative now published' (IP/02/496, 3.4.2002) was in third place out of all April 2002 Commission press releases counting the hits on the Europa homepage.
- (5) COM(2001) 398 final, C5-0471/2001 — 2001/2187(COS) (OJ C 140 E, 13.6.2002, p. 538); see also: www.europarl.eu.int/plenary/default_en.htm
- (6) <http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf>
- (7) Opinion of the European Economic and Social Committee on the communication to the Council and the European Parliament on European contract law, Ecosoc INT/117 European contract law (OJ C 241, 7.10.2002, p. 1).
- (8) Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC (OJ L 266, 9.10.1980, p. 1); consolidated version in OJ C 27, 26.1.1998, p. 34).
- (9) COM(2002) 654 final.
- (10) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).
- (11) Directive 94/47/EC of the European Parliament and of the Council 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 (OJ L 280, 29.10.1994, p. 83).
- (12) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).
- (13) Directive 2002/65/EC of 23 September 2002 on distance marketing of consumer financial services, (OJ L 271, 9.10.2002, p. 16).
- (14) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market — 'Directive on electronic commerce' (OJ L 178, 17.7.2000, p. 1).
- (15) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).
- (16) Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention') (OJ L 194, 18.7.2001, p. 39).
- (17) Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ L 285, 17.10.1997, p. 1).

- ⁽¹⁸⁾ It should be noted that Regulation No 2027/97 has been amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ L 140, 30.5.2002 p.2). One objective of the latter Regulation is, according to its recital 6: 'to amend Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport'. Recital 8 states that, 'In the internal aviation market, the distinction between national and international transport has been eliminated and it is therefore appropriate to have the same level and nature of liability in both international and national transport within the Community'.
- ⁽¹⁹⁾ Case C-423/97 *TravelVac and Manuel José Antelm Sanchis* [1999] ECR I-2195.
- ⁽²⁰⁾ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17).
- ⁽²¹⁾ This was also highlighted as a significant problem by the final report of the High-Level Consultative Group ('Mandelkern Group', set up by the ministers responsible for the civil service in November 2000 report submitted on 13th November 2001) on Better Regulation, p. 70.
- ⁽²²⁾ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29).
- ⁽²³⁾ Case C-168/00 *Simone Leitner v TUI Deutschland*, [2002] ECR I-2631.
- ⁽²⁴⁾ This problem had already been identified by the final report of the Mandelkern Group on Better Regulation, p. 67.
- ⁽²⁵⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).
- ⁽²⁶⁾ Some Member States have not transposed the Annex into national law at all, but included it in their preparatory work; see European Court of Justice judgment of 7 May 2002, *Commission v Sweden* C-478/99 [2002] ECR I-4147.
- ⁽²⁷⁾ See Commission communication on European contract law, point 28.
- ⁽²⁸⁾ This was emphasised for the area of services, in the report from the Commission on the state of the internal market for services, p. 36, 42.
- ⁽²⁹⁾ Cf. the report from the Commission on the state of the internal market for services, p. 8.
- ⁽³⁰⁾ As regards language barriers in the area of services resulting directly or indirectly from different regulatory environments cf. the report from the Commission on the state of the internal market for services, p. 44.
- ⁽³¹⁾ In view of these concerns, the Commission has launched a study into these matters (2002/ OJ S 154-122573), 9.8.2002.
- ⁽³²⁾ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35).
- ⁽³³⁾ Contributions indicate that these clauses seem to be effective only in France and Germany.
- ⁽³⁴⁾ Contributions indicate that these clauses seem to be effective only in Germany.
- ⁽³⁵⁾ Contributions indicate that these 'all-monies' clauses seem to be effective only in the UK and Germany.
- ⁽³⁶⁾ Cf. Article 4 of Council Regulation (EC) No 12/98 of 11 December 1998 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State (OJ L 4, 8.1.1998, p. 10) and cf. Council Regulation (EC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ L 279, 12.11.1993, p. 1).
- ⁽³⁷⁾ Communication from the Commission — Action plan 'Simplifying and improving the regulatory environment', 5.6.2002 (COM(2002) 278 final, p. 3).
- ⁽³⁸⁾ Cf. for example the communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions — Consumer policy strategy 2002 to 2006 (COM(2002) 208 final), p. 7 (OJ C 137, 8.6.2002).
- ⁽³⁹⁾ See already Commission communication on European contract law, point 34 and the references to the relevant case-law of the European Court of Justice.
- ⁽⁴⁰⁾ Cf. the Presidency Conclusions of the Lisbon European Council, 23 and 24 March 2000.
- ⁽⁴¹⁾ The European Parliament and the Council have, however, called for research to be undertaken also in the fields of tort law and property law in order to determine whether the differences in Member States' legislation in these areas constitute obstacles to the proper functioning of the internal market in practice. Following these demands, the Commission has published a tender for a study covering these fields (2002/ OJ S 154-122573), 9.8.2002).
- ⁽⁴²⁾ United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.
- ⁽⁴³⁾ Decision 1513/2002/Community of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (OJ L 232, 29.8.2002, p. 1).
- ⁽⁴⁴⁾ Communication from the Commission — Action plan 'Simplifying and improving the regulatory environment', p. 15.
- ⁽⁴⁵⁾ Presidency conclusion, Lisbon European Council 23 and 24 March 2000 (SN(2000) 100, p. 6).
- ⁽⁴⁶⁾ Presidency conclusion, Stockholm European Council 23 and 24 March 2001 (SN(2001) 100, p. 5); Presidency conclusion, European Council Meeting in Laeken 14 and 15 December 2001 (SN(2001) 300, p. 1); Presidency conclusion, Barcelona European Council 15 and 16 March 2002 (SN(2002) 100, p. 7).
- ⁽⁴⁷⁾ European Governance — a White Paper (COM(2001) 428 final).
- ⁽⁴⁸⁾ See footnotes 19 and 20.
- ⁽⁴⁹⁾ Communication from the Commission — Action plan 'Simplifying and improving the regulatory environment', p. 3.
- ⁽⁵⁰⁾ See footnotes 19 and 21.
- ⁽⁵¹⁾ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions — Consumer policy strategy 2002 to 2006, p. 7.
- ⁽⁵²⁾ Communication from the Commission to the European Parliament and to the Council 'e-commerce and financial services' (COM(2001) 66 final, p. 10).
- ⁽⁵³⁾ Communication from the Commission to the European Parliament and to the Council — E-commerce and financial services, p. 13.
- ⁽⁵⁴⁾ The final report of the Mandelkern Group on Better Regulation (p. 42) recognises this as one of the main objectives of legally effective consolidation.

- (⁵⁵) Consolidation means grouping together in a single non-binding text the current provisions of a given regulatory instrument, which are divided between the first legal act and subsequent amending acts.
- (⁵⁶) Codification means the adoption of a new legal instrument which brings together in a single text, but without changing the substance, a previous instrument and its successive amendments, with the new instrument replacing the old one and repealing it. An interinstitutional agreement on codification was concluded on 20 December 1994.
- (⁵⁷) Recasting means adopting a single legal act, which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act. The interinstitutional agreement adopted on 17 April 2002 (SEC(2001) 1364) for more structured use of the recasting technique for legal acts will make it easier to apply this method.
- (⁵⁸) Communication from the Commission — Action plan 'Simplifying and improving the regulatory environment', p. 15.
- (⁵⁹) For example, Orgalime, a European trade association in the metalworking, mechanical and electrical engineering sector has developed general conditions, model forms and guides to provide practical assistance for companies when they draw up different types of contracts which are commonly used in international trade in the sectors covered.
- (⁶⁰) Publication of this information on a Commission website does not mean that the Commission accepts any responsibility for the contents.
- (⁶¹) Cf. Article 6 of the CISG.
-

ANNEX

REACTIONS TO THE COMMUNICATION ON EUROPEAN CONTRACT LAW**1. INTRODUCTION**

Following the publication of the communication on European contract law, the Council and the European Parliament reacted to the communication in November 2001. Moreover, the Commission has received contributions from, at present, 160 stakeholders (see Appendices). This interest of the Community institutions and stakeholders shows the importance of the debate launched by the communication.

As regards the geographical origin of the contributions it is noticeable that the highest number of contributions have come from Germany and the United Kingdom. No or few contributions have been received from some Member States. A considerable number of international stakeholders have also contributed to the consultation. The academic and business communities have sent the largest number of contributions, but legal practitioners have also contributed to a considerable extent.

The Commission received by far the overwhelming majority of contributions after the date originally envisaged for the end of the consultation period. All contributions received up to 31 January 2002 have been included in this document and the Commission will also take account of further contributions in the future.

The analysis of the contributions received thus far is divided into three parts. In part 2 of this paper there is an analysis of the reactions of the European institutions. In parts 3 and 4 of this paper there is an analysis of the reactions of all other contributors, divided into their views on existing problems (part 3) and possible solutions (part 4). Part 5 summarises the Commission's next steps.

This synthesis aims to present the Commission services' understanding of the contributions received during the consultations. It may not reflect everything that has been said in these contributions. In the interests of transparency, the responses sent by electronic mail have been published on the Internet site of the Commission in so far as the contributors have given their consent to publication. However, the list of contributors in Appendix I excludes those contributors who have specifically requested confidentiality.

The Commission's Internet site on European contract law is at the following address:

http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

2. REACTIONS OF THE EUROPEAN INSTITUTIONS

The Commission communication was submitted to the Internal Market/Consumer Affairs Council on 27 September 2001. The Justice and Home Affairs Council took the opportunity of the Council report on the need to approximate Member States' legislation in civil matters, adopted on 16 November 2001, to react to the Commission's communication. On the previous day the European Parliament had adopted a resolution on the Commission communication.

2.1. The Council report

The Council report is fairly balanced. Its introduction clarifies how the Council interprets the mandate given by the European Council of Tampere. While referring to the European Parliament resolutions, the Commission communication and academic work, the Council emphasises the central role of contract law. The Council also mentions, with careful formulation, family law as a possible subject for a discussion on the approximation of national private laws.

In the following chapter the Council briefly mentions, similarly to the Commission communication, the other instruments, i.e. harmonised private international law rules and international instruments on harmonised substantive law. It is worth mentioning that the Council emphasises, again like the Commission communication, the limits of these approaches. Another interesting point in this context is that Member States that have not yet ratified relevant agreements are encouraged to do so. This is particularly important for the Vienna Convention on the International Sale of Goods (CISG), which has not yet been ratified by the United Kingdom, Ireland or Portugal.

This chapter also refers to the programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council. Moreover and for the first time the Council indicates that the necessary degree of confidence could be attained in the future if the convergence of substantive laws is enhanced.

The following part of the Council report constitutes, together with the conclusions, the central part of the report. The part emphasises repeatedly the need for greater coherence and improvement of the existing *acquis communautaire*. In this context it is also briefly mentioned that the results of harmonisation achieved through directives are sometimes regarded as insufficient, in particular because of the significant variations between national implementing measures. The Council also mentions, like the Commission communication, the problem of the lack of uniform definitions for general terms and concepts in Community law, which can cause different results in commercial and legal practice.

The Council mentions a number of the most important Community instruments in the area of private law and recognises that these instruments have created a *ius commune* in the relevant areas of national law.

Besides the demand for increased coherence in Community law, the Council report would seem to favour a more horizontal approach to harmonisation, aiming at the creation of a European common core of private law if a need for harmonisation is revealed. Finally, the Council expresses the wish to examine whether the differences in the areas of non-contractual liability and property law constitute barriers to the proper functioning of the internal market. This is the second area of law where the Council report goes beyond the scope of the Commission's communication.

The fourth part of the Council report deals with family law and does not need to be summarised in detail here as family law is outside of the scope of the Commission's communication.

The conclusions of the Council report are addressed to the Commission and include what the Commission, according to the Council, should do in the follow-up to its communication.

The most important conclusion is the request to the Commission to communicate the results of the consultation launched by its communication and its recommendations, if necessary in the form of a Green or White Paper, to the Community institutions and the public by the end of the year 2002. As far as the contents of this future Green or White Paper are concerned, the Council invites the Commission to examine at least some specific points. It should identify the Community acts to be reviewed and the reasons for such a review. Furthermore it should point to the areas of law where the diversity of national legislation undermines the proper functioning of the internal market and the uniform application of Community law. The Commission recommendations should also cover the possibility of adopting a more horizontal approach for new legislative initiatives and their impact on the consistency of private law. Another suggestion from the Council concerns regular coordination between Member States in the area of private law during the transposition of directives, an approach which is already partially practised. The last point refers to the working methods to be implemented to achieve greater approximation of national laws and to prevent inconsistencies.

In addition to the Green or White Paper, the Council would also like the Commission to launch a study in the areas of non-contractual liability and property law in order to find out whether the differences in Member States' legislation constitute obstacles to the functioning of the internal market.

2.2. The European Parliament resolution

The European Parliament specifically mentions two groups for which the internal market has, to a large extent, not yet brought desirable advantages: small and medium-sized enterprises and consumers. The resolution also emphasises the aim of equitably balancing the interests of undertakings and consumers as well as the burden placed on consumers and legal representatives. The European Parliament resolution, in agreement with the Council report and Commission communication, stresses the limits of private international law such as the Rome Convention and internationally harmonised substantive law such as the CISG.

The European Parliament criticises the restriction of the scope of the Commission communication to contract law. It also mentions, similarly to the request of the Council for a study, the areas of non-contractual liability and property law as relevant.

After having listed the main Community instruments in the area of private law the European Parliament states that the relevant directives are not well coordinated and their implementation poses problems in relation to national private laws. It therefore emphasises that the different rules should be applied more consistently.

The European Parliament underlines explicitly the need to pursue the harmonisation of contract law with the aim of facilitating cross-border transactions in the internal market.

The core of the European Parliament resolution is the request, addressed to the Commission, for a detailed action plan. The steps of this action plan can be regrouped in three phases: short, medium and long-term measures.

By the end of 2004, a database should be created in all Community languages which contains national legislation and case-law in the area of contract law. On this basis, comparative law research and cooperation are to be promoted with the aim of working towards common legal concepts and solutions and a common terminology for all national legal systems, i.e. option II of the Commission communication. The European Parliament wants to be regularly informed about the progress of the work and will provide its opinion on it. Parallel to this work on option II, option III is also to be pursued and the Commission is requested to put forward legislative proposals aimed at the consolidation of existing Community law. At the end of the first phase the Commission is to consider whether further provisions relevant to the internal market are essential, paying particular attention to the growing area of electronic commerce. In relation to these provisions, the European Parliament suggests the instrument of a regulation, while for specific areas of consumer protection law it still prefers the instrument of a directive.

From 2005 on, a comparative analysis of common legal concepts and solutions should be published. At the same time the Commission is to promote the dissemination of Community law and the results of option II in academic training and among legal practitioners. All Community institutions should apply the common legal concepts, solutions and terminology consistently when involved in the legislative process.

Thirdly, Community legislation implementing the common legal principles and terminology for cross-border and purely national contracts should leave intact the possibility of a different governing law. The practical effects of this legislation are to be evaluated from 2008 on. The results of this evaluation could possibly lead to the establishment and adoption of a body of rules on contract law from 2010 on. The European Parliament would prefer a regulation available for use on an optional basis under private international law. The European Parliament stresses the use of Article 95 as a legal basis.

3. RESPONSES WITHIN THE COMMISSION CONSULTATION PROCESS — NEED FOR FURTHER-REACHING COMMUNITY ACTION IN THE AREA OF CONTRACT LAW

3.1. Implications for the internal market

3.1.1. Responses from governments

The governmental bodies dealing in their responses with the implications for the internal market of diversities of contract law affirm that there are problems, or at least that there may be. However, only a minority of contributions mention specific problems; this is obviously in some cases due to the fact that national governments have summarised the results of their national consultations.

The Portuguese Government states that information costs resulting from different national contract laws are an obstacle to cross-border transactions. These differences also make it difficult to pursue cross-border litigation. For reasons of legal certainty, namely in order to avoid doubts and legal gaps in the area of *e-commerce*, it also identifies a need for harmonisation in the field of consumer contract law. In this context the Austrian Government reports from its national consultations that it was not so much consumers as business which pleaded for full harmonisation of consumer contract law, as opposed to minimum harmonisation, thereby avoiding divergent national implementation. Concerns relating to minimum harmonisation in consumer law are also reported by the Belgian Ministry of Economic Affairs and by the Finnish Government from its consultations. The latter also suggests that there are concrete problems in the area of insurance law and that differences between mandatory rules reduce the willingness of individual companies to participate in cross-border activities. While it considers the latter to be minor in comparison with other problems, it emphasises the more serious nature of problems in the areas of, for example, damages and property law. The Belgian Ministry of Finance suggests that contract law harmonisation would

allow the uniform classification of contracts for tax purposes and thereby avoid distortions of competition in the internal market caused by the application of different tax regimes. A concern of the Belgian Banking and Finance Commission is lack of harmonisation of rules affecting the contractual relationship between financial intermediaries and their clients, which constitutes an obstacle to the internal market. The German *Länder* suggest that the complexity of the current legal situation and the problem of the applicable law cause substantial obstacles.

The Government of the United Kingdom accepts that the internal market may not be functioning perfectly because of the type of barriers identified in the Commission communication, but considers that the extent of any such problems will vary from sector to sector. Pointing to the different legal regimes in Scotland and in England and Wales, it does not consider that the coexistence of different national contract laws is in itself necessarily inimical to the functioning of an internal market. The British Financial Services Authority could not identify any specific problems. However, it accepts that the coexistence of national contract laws may, at least in theory, constitute a potential obstacle to the functioning of the internal market, especially if other barriers are broken down by, for example, the introduction of the euro. The Danish Government reports from its national consultations that the preponderant proportion of consultation responses from industrial organisations states that there is no immediate basis for establishing the existence of any noticeable difficulties to the development of the internal market. A large number of areas have developed standard customs, international or common European standard contracts. These industries see no urgent need to promote the development of new standard contracts. However, the results of the Danish consultations also show that SMEs may encounter particular difficulties in the internal market as a consequence of differences in the contract laws of the Member States, mostly because of the risk of ignorance of the foreign rules or the costs of clarifying the uncertainties. Moreover, SMEs often have to accept their co-contractor's standard terms and the law of the latter as the applicable law due to their weaker negotiating power. Danish consumer associations are reported not to be aware of particular problems having the effect of preventing consumer cross-border commerce. However, they have pointed out that European contract law should be kept abreast of developments, for example concerning problems in connection with the formation and execution of consumer agreements in the internal market. Some of the Danish consultation responses point to the need for harmonisation within a more limited area such as the formation and validity of contracts because of major differences between national legal systems concerning formal requirements for the formation of contracts, including the assistance of a public notary. Finally a few responses state that, not least as a consequence of IT developments, some contractual harmonisation may be needed in particular industries, such as the field of financial services. On the basis of this, the Danish Government has not been able to confirm that the different national contract law rules hinder the satisfactory development of the internal market.

The Polish Government states that the existence of different systems of civil law in the EU does not constitute a substantial obstacle to the functioning of the internal market. However, it also emphasises that unification of contract law would lower the transaction costs of business. Furthermore it mentions that cross-border transactions are severely obstructed by diversities in the procedures to be followed in concluding a contract as well as in the assessment of its validity.

The EEA-EFTA States report that national contract laws may directly or indirectly obstruct the proper functioning of the internal market as they result in increased transaction costs, especially given the influence of new technologies in facilitating the conclusion of cross-border contracts, the introduction of the euro and other factors. More particularly they raise the issue of differences in mandatory rules, which may have a negative impact.

3.1.2. *Responses from business*

According to some contributors from **the manufacturing industry**, differences in national legislation do not represent a significant obstacle to cross-border transactions because in most cases private international law, the Convention on the International Sale of Goods (CISG) and existing Community law provide satisfactory solutions. Some business associations emphasise that diversities in national law lead to distortions of competition, e.g. through higher information costs, and a lack of legal certainty, especially with regard to different liability regimes. Liability for latent defects under French law has been named as one problem. Problems have been observed for SMEs in the services sector because of the great diversities in national legislation on services. Sometimes difficulties persist after the harmonisation of the law, for instance on commercial agents. That makes recourse to legal advice occasionally necessary. Particular problems are associated with the diversity of laws on the limitation of liability and laws on security interests. In cross-border transactions business perceives significant problems with liability for and the

enforceability of standard terms and the requirements for the incorporation of standard terms in contracts under foreign law, in particular Italian law. Ignorance of the fact that the law of the contract does not necessarily govern the proprietary aspects of transactions in some Member States causes additional problems. Furthermore, diversity in rules applicable to the transfer of title to and security in goods adversely affects the possibility of entering into cross-border leasing agreements. Pre-contractual differences cause great difficulties for EU business

While contributors from the **retail trade** name the uneven transposition of the Doorstep selling Directive 85/577/EEC as an obstacle to cross-border direct selling, almost all associations concerned with **financial services** indicate problems concerning cross-border trade due to different contractual requirements and the different approaches in the Member States. Variations in the implementation and application of directives and differing national contractual requirements are mentioned many times as a deterrent to cross-border trade. It is sometimes impossible to know when a contract has been concluded, how certain clauses will be implemented or which clauses will be disapplied as a result of statutory provisions or implied terms. Businesses are discouraged from cross-border transactions more by differences in the details of different consumer protection regimes than by diversity in the overall level of protection afforded. Assessment of different levels of protection involves high legal costs. Different time periods under different directives and the implementation of the directive on commercial agents pose problems as does, for instance, the implementation of the Directive on cross-border payments. For the insurance sector in particular the diversity of national regulations is perceived as an obstacle to cross-border activities.

Among **other business organisations**, some associations have observed barriers to cross-border trade due to uncertainty about mandatory rules and divergences in rules on agency and the formation of contract, necessitating different procedures in different Member States. The effect of differences between the various laws in deterring parties from transactions is felt in particular in SME-to-consumer relations. The different rules for the formation of contracts and the impossibility of applying uniform standard contracts is a problem that produces huge transaction costs to which in particular SMEs are vulnerable.

3.1.3. *Responses from consumer organisations*

According to consumers' organisations, disparities in national contract law create great uncertainties for consumers because they do not have enough information on the applicable law, e.g. the increases in interest rates charged on loans in Germany, which do not occur in France. This leads to increased transaction costs or even deterrence from cross-border transactions. One contributor adds that the differing contract laws are just one factor and that the practical means of obtaining advice and mechanisms for resolving disputes involve more important difficulties.

3.1.4. *Responses from legal practitioners*

Some contributors from the United Kingdom do not see the lack of harmonisation of contract laws as an obstacle to the development of an integrated financial market.

Concerns that the functioning of the internal market may be hampered by the existence of different national systems of contract law are seen as less substantial than assumed, as different systems often produced similar results.

Some contributors refer to the United States of America, where no unified system exists but where the Uniform Commercial Code serves merely as a model for certain aspects of the law of obligations, and the United Kingdom, where Scottish civil law coexists with English common law.

Language barriers, cultural differences, distance, habits and judicial attitudes are seen as more significant than the diversity of laws. It is suggested that divergences in civil procedure should be addressed as a priority.

However, some practitioners accept that consumers and SMEs, not being appropriately advised by in-house lawyers, unlike larger market operators, may encounter difficulties. On the one hand parties always have the choice of the governing law of the contract, but very often the more powerful party will impose the law of its domicile. Larger market operators will always find ways to cope with any problem by sophisticated contractual arrangements, even if lawyers need to know not only the relevant Community law but also how the directive in question has been implemented in the Member State concerned.

As regards additional information costs and the cost of additional legal advice, these are not seen as substantially higher in cases with a foreign connection than in other cases. However, the cost for expert opinions may exceed the sum at stake in consumer contracts. On the other hand, the implementation of a new law may give rise to greater costs incurred for legal advice than the present diversity of laws.

Those contributors who state that they have encountered difficulties report that these have arisen in particular from

- lack of knowledge of the other legal system in general, including rules on dispute settlement,
- confusion about who had authority to sign a given document,
- diversity in mandatory laws,
- requirements of authentication by a notary,
- provisions on form,
- reservation of title clauses,
- provisions on assignment of debt,
- indemnities and warranties.

3.1.5. *Responses from academic lawyers*

Those academics who address the question of implications for the internal market generally assert that the multiplicity of national laws does give rise to problems. Generally private international law is seen as an inadequate, inappropriate or incomplete solution, though there are differences of emphasis.

Specific examples of problematic areas include motor insurance and cabotage transport insurance, retention of title clauses and other security interests, factoring, standard terms, doorstep selling and funds transfers between banks. The failure of the Community to harmonise substantive insurance law has meant that insurance companies are unable to offer 'small risks' coverage in all Member States on the basis of one and the same policy. One company, after much research, found it impossible to formulate a single insurance contract capable of being sold with cars throughout the European Union because of irreconcilable mandatory rules. Security interests in movable property created in one jurisdiction may not be recognised in a second jurisdiction, for instance if the property is moved across the border between the two jurisdictions. Very different liability regimes with regard to transport operations result in unnecessarily high insurance premiums. It is practically impossible to use land in another EU State as security for a loan. Uniform standard terms and economies of scale may be hindered, which for instance affects the costs of international bank transfers. Factoring companies cannot use one and the same type of contract throughout the Community.

It has been noted that in electronic contracting any participant's ability to use a product depends on whether others use it. Such 'networked' markets may get locked into old technical standards, which may not keep pace with the law. Technological advances may permit the automated search for contract opportunities, using standard form contracts. If contract terms are not standardised when the technical standards are developed, it may be difficult or impossible to incorporate new terms at a later date.

Problems relating to more general rules of contract law, such as those governing the formation of contracts and assignment, have also been noted, and particular concern has been expressed about remedies for breach.

Academics indicate problems deterring or preventing transactions, increasing transaction costs, distorting competition and reducing legal certainty. Problems can affect all phases of business activity: planning, negotiating and concluding contracts, performing obligations and litigating. SMEs and consumers are particularly affected. One contributor suggests that problems arise from the formal multiplicity of laws rather than from substantive differences in law, because of the need to investigate the foreign law.

Some academics draw a distinction between rules that constrain the parties, including in effect rules on the formation of contracts, and those which do not. However, it is said that information costs and risks arise both from differences in mandatory law and from differences in non-mandatory law. It is said that the United States experience indicates that legal diversity cannot be a decisive barrier, but even so legal diversity is the overriding obstacle to trade. Another argument is that the United States system has led to a per capita ratio of lawyers eight times higher than in Europe.

3.2. Uniformity of application of Community law

3.2.1. Responses from governments

The Portuguese Government notes that the fact that Community rules are often dispersed among different instruments makes it more difficult to interpret and apply them. It also confirms that Community instruments and concepts are ambiguous. The contributions of the Belgian Banking and Finance Commission and the French Government also state that there are inconsistencies within the *acquis*. The former mentions as an example the directives on investment services and e-commerce. The Finnish Government mentions varying interpretations and disparities in Community law and in national implementation measures. Referring to the latter the Finnish Government specifically mentions that the discretion in implementing directives makes operators doubt whether there has been correct implementation. The German *Länder* also criticise the consistency of the *acquis*, quoting as an example the modalities of the information obligations and rights of withdrawal in the consumer contract law directives.

The Government of the United Kingdom is not aware of any contradictions in Community law and states that any problems of that nature should continue to be addressed on a case-by-case basis.

3.2.2. Responses from business

According to some contributors from the **financial services** sector, problems arise from diversities in the implementation of directives and the different applicable laws and jurisdictions can prove to be a very real hindrance to cross-border trade. Two associations from the **media**, representing among others persons who create copyrighted materials, mention a specific example of problems regarding the definition of terms: 'equitable remuneration' is, they say, a meaningless term in the British legislation implementing the directive on rental, lending and other rights relating to copyright. In **other business** sectors it is said that divergent implementation of directives in the Member States generally causes distortions of competition, e.g. in the context of consumer protection, especially if the implementing measure exceed the fixed minimum level of protection. Some associations said they had not encountered any problems in buying goods or services from other countries of the European Union.

3.2.3. Responses from consumer organisations

The well-known problems relating to inconsistencies among directives are exacerbated by implementing measures adopted by Member States, variations in the application of Community law, including its application to new technologies, and interpretation, especially because of the overlap between European law and existing domestic legislation.

3.2.4. *Responses from legal practitioners*

Legal practitioners commenting on the issue of the application of Community law agree that the current approach in Community legislation of regulating only particular aspects of contract law gives rise to a lack of transparency and consistency. Inconsistencies among directives include inconsistencies as to the recognition of general principles such as the principle of good faith. Examples of problems include the general lack of a definition of the term 'contract' and the different time periods in provisions on withdrawal from contracts. Moreover, there is the problem of uneven implementation and interpretation of directives by Member States.

3.2.5. *Responses from academic lawyers*

The quality of Community legislation was criticised. Existing directives include inconsistencies as to whether particular terms are defined, as to the contents of the definitions of the subjects affected (including 'consumer' and 'seller') and as to the cooling-off periods allowed. The scope of the directive on guarantees for consumer goods is, in particular, said to be unclear. One explanation for such difficulties is the lack of a common private law vocabulary.

A number of commentators mention problems relating to the implementation of directives in national law. Particular examples related to database protection, doorstep selling, package holidays, distance selling and the Directive on unfair terms. Furthermore, the directives on unfair terms, product liability, consumer guarantees, late payment of money debts and e-commerce raise the difficult problem of whether their scope should be extended at national level.

It is suggested that the vertical approach of subject-specific Community legislation has led to distortions in national legal systems and a lack of coordination among directives. It is said that directives threaten the coherence of national legal systems by introducing new concepts, because of the lack of consistency among directives themselves and because the European Court of Justice cannot maintain the internal coherence of all the national legal systems of the EU simultaneously.

4. RESPONSES WITHIN THE COMMISSION CONSULTATION PROCESS — OPTIONS

4.1. **Option I**

4.1.1. *Responses from governments*

In so far as governmental contributors have given their views on option I, the large majority are opposed to it.

Of the contributors who reject option I, France considers it to be incompatible with the smooth functioning of the internal market. The Italian Government raises the danger of the further fragmentation of contract law and the German *Länder* cite the need for clarity and transparency for economic operators. The United Kingdom's Financial Services Authority states that it cannot be sure that option I will adequately address the issues raised, which will depend on the scale of the problem.

The Government of the United Kingdom, however, sees considerable scope for the market to develop solutions to potential problems. The Belgian Banking and Finance Commission mentions one successful example of self-regulation (pre-contractual information on home-loans). It is in favour of support from the Commission for self-regulation as its first choice and intervention by the Community legislator as its second choice if self-regulation fails.

4.1.2. *Responses from business*

Of contributors from **the manufacturing industry** one association rejects option I while two others state that the market should be left to regulate itself as far as possible where industry has achieved a high degree of self-regulation by developing fair conditions of trade. Some contributors from the **financial services** sector consider option I to be an unrealistic one while one contributor states that market forces will provide a powerful incentive for countries to ensure that their national law is appropriate to international commercial needs and Community intervention in the

area of contract law would involve unjustifiable adjustment costs. Broad support was expressed from the **media** sector, essentially on the part of those whose business depends on copyrighted material created by others, for pure self-regulation. For some contributors from **other business** sectors, fully or partly market-based solutions, including codes of conduct combined with effective self-regulation, seem to be the strategy most likely to be successful.

4.1.3. *Responses from consumer organisations*

Except for one organisation, which prefers option I, the contributors agree that contract law cannot be left to the markets because statutory invention is needed to protect the weaker party.

4.1.4. *Responses from legal practitioners*

The large majority of legal practitioners think that the harmonisation of European contract law will not be achieved simply by reliance on the markets. There is the danger that the legal system of the home country of the contracting party with the most extensive economic resources will be applied. The Law Society of England and Wales indicates that it would prefer there to be no action in respect of certain particular types of transactions.

4.1.5. *Responses from academic lawyers*

The vast majority of academic opinion is opposed to option I, with contributors pointing to 'practical experience' as showing the inadequacy of such an approach. The Pavia Group states that commercial customs have too fragmented a character to fulfil the requirements of the internal market.

Generally private international law is seen as an inadequate, inappropriate or incomplete solution, though there are differences of emphasis. The Study Group on a European Civil Code and the Lando Commission point out that private international law is, in particular, no solution in the event of the unwitting conclusion of contracts. Contributors argue that practitioners' conflicts of interests with their clients and the lack of accurate, complete and freely available information prevent the market from solving existing problems.

However, it is suggested that dynamic competitive processes could produce voluntary harmonisation, and that this is more likely for facilitative than for interventionist law. The only strong support for option I among academics came from the Society of Public Teachers of Law of the United Kingdom and Ireland, which advocated option I in the context of commercial contracts.

4.2. **Option II**

4.2.1. *Responses from governments*

There is substantial support among governmental contributors for option II, although many see it as not sufficient on its own or as complementary to either option III or option IV.

The EU is seen as having a potential role in coordinating academic work or sponsoring and supporting the private initiatives of the markets and of legal practitioners. Italy supports option II, but only as a guideline for Community legislation. The Government of the United Kingdom says that the Commission could even lead initiatives itself in sectors where there is a clear need but no market solution under development. The Danish Government supports work developing existing standard contracts further and any initiative to encourage the industrial and professional bodies involved to draw up well balanced standard contracts that take greater account of the interests of the weaker contractual party or to take other initiatives capable of motivating particularly SMEs to take more part in cross-border transactions. It also supports the development of non-binding common contract law principles for use in standard contracts. Finally, in order to prevent the disincentive resulting from a lack of knowledge of national contract law regimes keeping in particular consumers and SMEs from taking part in cross-border transactions, it suggests promoting the possibilities for undertakings to retrieve information on the national legal systems.

The Austrian Government expresses its opposition to the 'institutionalisation' of research in the form of a 'European Law Institute'.

4.2.2. *Responses from business*

Some contributors from **the manufacturing industry** are in favour of the promotion of uniform European principles of contract law in order to strengthen European integration. Some suggest that priority should be given to the simplification of national and Community legislation and removing unnecessary layers of regulation. General principles and guidelines may serve as models for business contracts. Voluntary application would lead to greater acceptance, as has already happened in the case of the Vienna Convention on Contracts for the International Sales of Goods (CISG).

Support is given by contributors from the **retail trade** sector to the development of soft law and the improvement of the quality of existing Community legislation, provided that the new legislation includes maximum standards and does away with the minimum clauses which currently allow Member States to go further than required by Community legislation.

Support is given by some undertakings from the **financial services** sector to further investigation in relation to the development of common principles. The creation of a provisional code of principles has been suggested. Generally contributors from the **media** oppose option II. Many contributors from **other business** sectors are in favour of promoting research in order to elaborate common principles as a first step towards harmonisation. It is also said that the development of guidelines, codes of conduct or standard contracts by the European institutions is not the best approach, especially if such instruments are likely to become binding and represent a limitation on freedom of contract. It is said that such instruments should be promoted only by economic operators.

4.2.3. *Responses from consumer organisations*

Consumer organisations take the view that voluntary guidelines are not sufficient and might not be appropriate to deal with consumer concerns because consumer law is regulatory law. Therefore the practical usefulness of voluntary guidelines is questionable. Two contributors propose the elaboration of a set of common principles of consumer law, which could later, within the framework of option IV, be transformed into binding EU law.

4.2.4. *Responses from legal practitioners*

Some contributors consider comparative studies on contract law a prerequisite for any initiative and feel that the functioning of the internal market could be further improved by pursuing option II. The approach of 'soft' harmonisation by the promotion of the development of common principles as guidelines for legislators and the courts, whilst respecting the different traditions of existing legal systems, could over time eventually lead to a 'model law'. It is suggested that such principles should include property law and tort law.

Other contributors are concerned that non-binding instruments such as common principles and standardised contracts would only be of academic interest and in all probability would not receive wide acceptance in the market and would not be consistently implemented. Furthermore, harmonisation leading to similar but not identical laws would not provide a good solution.

4.2.5. *Responses from academic lawyers*

Contributors express broad support for option II, and the vast majority of opinion, where expressed, is in favour of further research, the elaboration of common principles or a restatement and the promotion of such work by the Commission. One contributor suggests that there should be institutional arrangements for the revision of restatements from time to time. A number of contributors stress the importance of the elaboration of common principles, and of option II generally, as preparatory work for the pursuit of option IV. A small number of contributors express concerns. These include the concern that merely relying on option II would compromise transparency. Moreover, the practical usefulness of common principles was questioned, especially on the basis that common principles require a common denominator and therefore contain too many gaps.

Sources to be used for future work on common principles include economic analysis, the *acquis communautaire*, national rules, international rules and the existing work of academic groups, especially the Lando Commission and the Pavia Group.

Support is expressed for the idea that common principles, once adopted, could be used as a resource for the approximation of national laws both by legislators and by the courts and as a resource to give structure to European legislation. Some contributors suggest that model laws should be promulgated, following United States practice, but some reservations have been expressed. It is noted that common principles could be incorporated into contracts by the parties, including in a public procurement context, although again reservations have been expressed. It is also noted that comparative legal work could be a useful source of information for market operators.

Comparative law is said to facilitate the improvement of national laws by means of the competition of legal systems and by freeing legal thought from dogmatism. There are calls for the promotion of a common legal culture, a common law curriculum, a common legal literature, a common legal terminology and a common legal dialogue, including by way of the creation of specific institutions such as a European Law Institute and a European Law Academy. Some support is also given to promoting the development of standard contracts, whose acceptance would depend on their substantive quality.

4.3. Option III

4.3.1. Responses from governments

Governmental responses are generally in favour of option III. The Italian, Portuguese and Polish Governments see option III as a potential step towards option IV.

The French Government calls for greater precision in the drafting of Community law, avoidance of overlapping legislative instruments (this point is also made by the Austrian Government) and effective review mechanisms in Community instruments. The Austrian Government advocates using the same model in different instruments if possible and cites the right of withdrawal in consumer contract law directives as an example of where this could be done. It also advocates the simplification of drafting and exceptions to general rules. Finally it raises the possibility of a transition from minimum to full harmonisation and states that the country of origin principle does not constitute a solution. The Finnish Government specifically states that in the consumer contract law area the Community should fill legislative gaps, make the rules easier to understand and reduce the variety in interpretation by supplementing and consolidating the existing legislation. It emphasises that the aim should be a high level of consumer protection. The Portuguese Government mentions as a problem concepts that are difficult to transpose into national law or have different meanings in different Member States. The Government of the United Kingdom sees considerable value in option III, advocating simplifying existing and improving future legislation as well as addressing inconsistencies between existing directives and differences in national implementation. It explicitly does not rule out further harmonisation of consumer contract law directives that provide only minimum harmonisation. The Danish Government suggests concentrating on laying down some overall principles rather than very detailed rules in the individual fields in order to reduce inconsistencies at national and Community level. According to the EEA-EFTA States, existing directives should be updated and adjusted when necessary. However, in general they prefer minimum harmonisation directives.

4.3.2. Responses from business

Most contributors from **the manufacturing industry** express support for option III, while one contributor states that industry is reluctant to have to deal with new mandatory rules reducing freedom of contract, which would not be justified from a business point of view. Generally contributors from the **financial services** sector state that the improvement of the quality of legislation already in place will support the drive towards an internal market. There is a diversity of opinion in the **media** sector on option III. Some contributors support comprehensive legislative improvement consisting in the removal of inconsistencies while others think that analysis of existing directives must be conducted on a case-by-case basis and improvement should be achieved by legislation targeting discrete areas of law rather than complete harmonisation. Generally contributors from **other business** sectors are in favour of the improvement, the coordination and the synchronisation of legislation already in place.

4.3.3. Responses from consumer organisations

Existing EU consumer protection legislation should be improved. Improvements should include clarifying its scope of application by giving, for example, a uniform definition of 'consumer' and by harmonising information duties, remedies and the right to withdraw from a contract across the different Community instruments. The level of

harmonisation should also be increased. One contributor notes that, consistency and coherence aside, there should always be room for new consumer protection rules dealing with specific problems.

4.3.4. *Responses from legal practitioners*

Almost all contributors express their support for option III, although a few consider that a mere review would, for instance, not be sufficient to render the application of diverse rules of mandatory national law unnecessary. The review of existing legislation should build on experiences with the SLIM and BEST initiatives.

4.3.5. *Responses from academic lawyers*

There is overwhelming support among academics for the improvement of existing Community legislation, some contributors ascribing it priority.

Reasons suggested in favour of the improvement of existing Community legislation include the excessive vagueness and confusion of existing terminology and the possibility of greater coherence, transparency and simplicity in Community law. Another reason is the possibility of progress towards the systematic arrangement of Community contract law, the improvement of its consistency and the filling of gaps. The mandatory contract law rules of the EU could also be updated.

The majority of academic opinion, where expressed, is however to the effect that improving Community legislation will not address the core problems of European contract law or will be at best a short-term solution. Even so, the development of a concept for the improvement of future Community law-making is suggested as a long-term strategy.

Particular suggestions include the revision of definitions and the harmonisation of the contents of the various directives, including cancellation periods for contracts and the legal consequences of cancellation. Further suggestions include the transformation of directives into regulations and the development of a European Consumer Code, covering all existing directives, and possibly other codes for public procurement law and intellectual property licensing law. Suggestions also include the filling of gaps relating to the passing of property and risk in consumer goods, producing a blacklist of prohibited contract terms and the extension of rules on unfair terms to non-standard terms and of rules on consumer goods to consumer services. Further suggestions include stricter sanctions for breach of informational duties and greater consumer protection in the event of supplier insolvency.

4.4. **Option IV**

4.4.1. *Responses from governments*

Governmental opinion on option IV is not as homogeneous as governmental opinion on the other options.

The Italian Government is of the opinion that horizontal harmonisation should be pursued in particular areas and mentions as an example consumer contract law. It states that the legislation should combine mandatory rules and non-mandatory rules and should allow for the possibility of the choice of a different governing law. The Portuguese Government does not consider option IV to be a realistic short-term objective, but thinks that it is an objective that could be pursued once option II has been effected. It suggests continuing and intensifying academic studies in this area. Option IV should be constituted by rules which are applicable if the parties do not otherwise agree. Mandatory rules should only exist in special cases. The Portuguese Government does not consider either a directive or a recommendation to be a suitable instrument as both lead to differences in national law. The Belgian Ministries of Finance and Economic Affairs are favourably disposed towards option IV. The Austrian Government explicitly does not oppose option IV, but emphasises that it would be a long-term and difficult exercise. It stresses that the Community institutions should not be against such an option. It suggests the use of instruments that apply if the parties agree on their application. Similarly, the German *Länder* consider option IV to be the appropriate instrument for the medium or long term, provided that a need for it is demonstrated. They stress that the present *acquis communautaire* would have to be fully integrated and a high level of consumer protection would need to be guaranteed. However, they do not consider that the Community has, at present, a legal basis for this, but state that in the framework of the preparation for the next IGC, in 2004, the question of such competence would need to be examined. The point on Community competence is also stressed by the Polish Government, which could however consider option IV as an idea for the prospective development of European law. The Austrian Government emphasises the need to examine the question of competence.

The EEA-EFTA States are sceptical towards the development of a new set of binding comprehensive principles of contract law, but consider the development of a set of non-binding model principles to be most welcome. The Finnish Government, while not in favour of comprehensive legislation across the broad spectrum of contract law, sees some scope for possible minimum harmonisation in insurance law. The idea that insurance law might be a potential candidate for harmonisation is also emphasised by the Austrian Government. The French Government opposes, at the present stage, a true European contract law replacing internal laws, but has not expressed an opinion on a set of provisions that leave national rules intact (whether opt-in or opt-out). The British Financial Services Authority considers option IV to be premature. They see it as extremely difficult to pursue option IV in the face of the principles of subsidiarity and proportionality. This would especially concern the automatic application of rules which could not be excluded. They consider that the adoption even of purely optional and fallback models would require further analysis of the weaknesses of the current system. However, they accept that a case may be made out for this in due course. The Danish Government considers general harmonisation to be a very large and difficult project which should in the light of the subsidiarity and proportionality principles only be considered if there is clear evidence that divergent national rules hinder the satisfactory development of the internal market, that such problems cannot be solved by other means and that the advantages of such harmonisation clearly outweigh the disadvantages. If such evidence can be given, the Danish Government would favour a recommendation setting up non-binding contract law principles which the Member States are encouraged to observe in their legislation as well as a recommendation or regulation containing contract rules by which the parties can agree to let their contract be governed.

The Government of the United Kingdom is opposed to option IV in any of its forms and considers it to be disproportionate and likely to cut across the principle of subsidiarity. In its opinion, Community legislation should focus on specifically identified problems on a case-by-case basis.

4.4.2. *Responses from business*

Generally option IV is rejected by **the manufacturing industry**. One association points out that the creation of a civil code can only be a long term aim and would have to be developed step by step by means of the voluntary approximation of national laws so that business is not suddenly confronted with massive adjustment costs. Furthermore, it is said that all EU action should be justified and that EU legislation should be tested on the basis of impact assessment, cost-benefit analysis, proportionality and its potential for the creation of employment or unemployment. Most of the contributors from the **media** do not see any need for intervention by the Commission by way of a new instrument. Some associations are opposed to any fixed contract conditions for business contracts because at the present time there is no need for the creation of a European civil code.

To many contributors from the **financial services** sector option IV seems to be suitable as a long-term objective and there are various suggestions as to the appropriate approach: a general legislative framework, a directive or a civil code consisting of mainly non-mandatory and partly mandatory rules. An opt-in system has been suggested. Some support is expressed for new comprehensive legislation from **other business** sectors, but only where concrete problems have been identified and as an opt-out solution like the CISG or the UCC (United States Uniform Commercial Code).

4.4.3. *Responses from consumer organisations*

The contributors differ on the necessity and justifiability of option IV. Opponents allege a lack of evidence of detriment sufficient to justify EU action — in any case, distortions of competition cannot be suggested. Supporters want option IV to be pursued, but have different ideas as to the best variation on option IV. According to one contributor, European contract law should not be introduced by a regulation, since the Member States should be given space to manoeuvre. Another wants option IV to be restricted to certain essential aspects. One organisation states that European consumer law should be limited to minimum harmonisation because European consumer law is only intended to bolster consumer confidence, whereas national consumer law is intended to protect the weaker party. Similarly another contributor suggests that European contract law should include more stringent European consumer protection rules. Finally it is said that European consumer law could facilitate the proper functioning of the internal market by encouraging consumers to make increased volumes of cross-border purchases.

4.4.4. *Responses from legal practitioners*

Only six of 27 contributors totally reject the suggestion of a European civil code. In particular, English legal practitioners fear that the global significance of English common law would suffer. To them it would be disproportionate, in the very least, to impose a mandatory European contract law on Member States. One contributor claims that a mandatory scheme would risk undermining the existing 'export' of English common law, which provides contracting parties worldwide with greater legal certainty than do legal systems in the civil law tradition. For instance, there are standard terms prepared by the International Swaps Derivatives Association using English law. The Law Society of Scotland, however, while describing option III as its 'preferred option', states that option III should not be pursued to the exclusion of options II and IV.

Others view a uniform and comprehensive European civil code as the best solution to the problems identified. However, there is no common opinion as to whether such an objective could best be achieved by a recommendation, a directive or, as directives are often wrongly implemented, a regulation. However, there is a tendency towards a preference for an opt-in system, a set of transnational rules which, at the discretion of Member States, might also be chosen by parties to purely domestic contracts. It is suggested that the first phase should be the unification of legal terminology. National principles on public law contracts, property law, family law and civil procedure which are linked to contract law should be taken into account.

4.4.5. *Responses from academic lawyers*

The majority view of academics is favourable to option IV, although it is seen as a long-term strategy or, by some, as something for the distant future and there is also outright opposition. It is also stressed that the success of a European contract law would depend on its substantive quality. Indicators of substantive quality include whether the rules are simple, clear, accessible, practical and comprehensive, take account of modern socioeconomic circumstances and are not excessively abstract. It is said that European contract law must not be a pale compromise between different national laws, but that the best and most just rules must be selected. It is even suggested that positivistic legal analysis, without regard for the social and economic impact of legal constructions, is useless. For default rules one crucial indicator is how closely they reflect what the parties would have agreed.

It is variously suggested that there should be progressive or phased implementation, for instance by adopting an opt-in approach before ultimately replacing national laws, and that there is a need for a test period. It is urged that some Member States could adopt European contract law before others, though one academic opposes this. One contributor suggests that the political case for pan-European codification should be tested against the background of a potential legislative text.

Many academics are in favour of ultimately replacing national law with a uniform European contract law or European civil code, although a considerable number prefer an opt-in or opt-out solution, in particular for non-binding or facilitative rules. It was noted that in English law it is possible for parties to opt into the 1964 Uniform Law on the International Sale of Goods, but that there has not been a single case where contracting parties have done so. Reasons for not replacing national law include the idea that European codification would lead to rigidity or stagnation in the law and the idea that the long-term parallel existence of European and national contract laws would combine the advantages of centralised and decentralised rule-making and avoid the disadvantages.

There is a strong preference for using a directly binding instrument such as a regulation or an ad hoc treaty, rather than a directive or recommendation. This is because the proper functioning of the internal market requires the harmonisation not merely of general principles but, in fact, of the rules that direct the activities of businesses and the courts. It is noted that if uncertainty is to be removed as to the legal situation in other states then the legal provisions will have to be identical from State to State and that legislating by directive would add a complication and inefficiency in the process of legal advice and drafting.

4.5. Other options; scope of the communication

4.5.1. Responses from governments

The German *Bundesrat*, while supporting options II and III and on a long-term basis option IV, even so considers that selective harmonisation measures would be useful if necessary.

The German *Länder* and the Austrian Government oppose the inclusion of family law and the law of succession. The Belgian Ministry of Finance also opposes the inclusion of rules on family law and immovable goods. The German *Länder* oppose the inclusion of property law. The Austrian Government raises the possibility of the inclusion of the law of tort. The French Government advocates a narrow understanding of contract law, namely excluding tort law and property law.

The Finnish Government, while suggesting that the need for new Community rules on insurance law should be investigated (see option IV), suggests that, at the very least, the rules of private international law applicable to insurance contracts should be reassessed in the near future.

The Danish Government suggests that the Commission should first focus on well-functioning international rules of jurisdiction and applicable law. It is furthermore in favour of a more detailed study as to whether general harmonisation of contract law or parts thereof can advantageously be effected in a wider international framework, such as that of the United Nations. It quotes the example of the CISG.

The Austrian Government and the Danish Government stress that in all future work the principle of freedom of contract should be the general rule and restrictions to it the exception.

4.5.2. Responses from business

Contributors from **the manufacturing industry** see there as being a special need for harmonisation of limitation periods and rules on limitation of liability. Furthermore, it is not felt justified to limit work on private law to contract law. If the aim is to facilitate cross-border transactions then contract law cannot be looked at in isolation from property law. There are some suggestions related to the inclusion of areas such as information requirements, tax law and company law in the harmonisation process from contributors from the **financial services** sector. As an alternative instrument, one suggestion from the **media** sector is for there to be a system for consumer law similar to that of Incoterms in contract law. The Commission could also provide a platform by setting up a Web-site where information on contract law and a comparison of standard contractual clauses could be set up, in the opinion of contributors from **other business** sectors.

4.5.3. Responses from consumer organisations

One contributor states that the Rome Convention on mandatory rules should be clarified by requiring the application of the law of the consumer's state, regardless of the domicile of the business.

4.5.4. Responses from academic lawyers

Alternative instruments suggested for the adoption of European contract law are: principles capable of being moulded more freely than ordinary legislation, so as to remain accessible, while still commanding the authority of a binding legal source; an ad hoc treaty; model laws as used in the United States. Further techniques include altering private international law to allow the adoption of common principles as an 'autonomous partial legal order'. It is noted that a legal system for cross-border contracts could be copied unilaterally in domestic law.

There are suggestions for the inclusion of mandatory and non-mandatory rules and for the codification of consumer law and its combination with European contract law in one instrument. It is suggested that there should be a distinction between consumer and commercial contracts, SMEs perhaps receiving special treatment, or between mandatory and non-mandatory rules, some contributors suggesting a further distinction between mandatory informational duties and mandatory outcome-related rules. It is suggested that as a political compromise there might be a range of permissible levels of protection by mandatory rules, or strictly defined options for the national legislator, combined with an opt-in system for non-mandatory rules. One contributor suggests that only mandatory rules should be harmonised.

Some suggestions are to the effect that rules should be formulated in particularly problematic areas first, such as the formation of contracts and security rights in movables. Other academics suggest that there should ultimately be a European Civil Code or the unification of 'patrimonial law', one commentator noting that subject-specific codes could lead to problems of coordination in national law. Contributors suggest including rules on the entire law of obligations, including not just contract and tort (delict) but also restitution (unjust enrichment), and rules on property, including assignment, intellectual property and intangible property generally as well as security interests, the latter as a priority, and trusts. In addition to these areas and consumer law, family law, labour law, company law, public procurement and insolvency have also been mentioned. One contributor suggested that the Community should not take action in areas where international conventions on substantive private law, such as the CMR and the COTIF, have been ratified by all Member States.

Calls for greater international coordination include the suggestion that the Commission should liaise with UN agencies such as UNCITRAL and Unidroit and that those Member States not having ratified the Convention on the International Sale of Goods should do so. However, the Pavia Group criticises that Convention for failing to take account of related transactions and for leaving many gaps.

Other suggestions relate to the harmonisation of the law of civil procedure and the improvement of private international law.

5. NEXT STEPS

The Commission has not yet drawn its conclusions. It intends to present its observations and recommendations, if appropriate in the form of a Green or White Paper, by the end of 2002. In this document the Commission intends:

- to identify areas in which the diversity of national legislation in the field of contract law may undermine the proper functioning of the internal market and the uniform application of Community law,
 - to describe in more detail the option(s) for action in the area of contract law which have the Commission's preference in the light of the results of the consultation. In this context, the improvement of existing Community legislation will be pursued and the Commission intends to honour the requests to put forward legislative proposals to consolidate existing Community law in a number of areas,
 - to develop an action plan for the chronological implementation of the Commission's policy conclusions.
-

*Appendix I***LIST OF ALL CONTRIBUTING STAKEHOLDERS**

The following list of contributors does not give the names of those contributors who have specifically requested confidentiality. The contributors are listed by category according to the classification system used by the Commission services in analysing the contributions. The order in which the names of the contributors appear does not bear any relation to the order in which the contributions have been received, nor does it bear any relation to any supposed judgement as to the relative importance of the contributions.

1. GOVERNMENTS

- 1.1. Bayerisches Staatsministerium der Justiz, Wilfried Krames, Regierungsdirektor, München
- 1.2. EFTA, European Free Trade Association, Einar Tamimi, Brussels
- 1.3. Finnish Ministry of Justice
- 1.4. Polish Government
- 1.5. Bundesrat (resolution)
- 1.6. Government of the United Kingdom
- 1.7. Italian Government, Ministero Affari Esteri
- 1.8. Portuguese Government
- 1.9. Belgian Ministry of Finance (*)
- 1.10. Belgian Ministry of Economic Affairs (*)
- 1.11. Belgian Banking and Finance Commission (*)
- 1.12. British Financial Services Authority
- 1.13. Swedish Consumer Agency and Consumer Ombudsman
- 1.14. Austrian Government
- 1.15. French Government
- 1.16. Finnish Consumer Ombudsman and Consumer Agency
- 1.17. Danish Government

2. BUSINESS**2.1. Manufacturing industry**

- 2.1.1. Bundesverband der Deutschen Industrie, Abteilung Recht, Wettbewerbspolitik und Versicherung, Berlin
- 2.1.2. Chambre de Métiers, Paris

2.1.3. Deutscher Industrie und Handelskammertag, Brussels

2.1.4. VDMA Verband Deutscher Maschinen- und Anlagenbau, Holger Kunze, Brussels

2.1.5. Zentralverband Deutsches Baugewerbe, Rechtsanwalt Elmar Esser, Berlin

2.1.6. Orgalime

2.2. **Retail**

2.2.1. [Confidentiality requested]

2.2.2. FEDSA, Federation of European Direct Selling Associations, Brussels

2.3. **Financial services**

2.3.1. Barclays plc, Bill Eldridge, EU Adviser's Office, London

2.3.2. Bundesverband Deutscher Banken, eV, Wulf Hartmann, Berlin

2.3.3. Bundesverband der Deutschen Volks- und Raiffeisenbanken, Bundesverband der Öffentlichen Banken Deutschlands, Deutscher Sparkassen- und Giroverband eV

Dr Danco, Berlin

2.3.4. Comité Européen des Assurances, Bruxelles

2.3.5. London Investment Banking Association, Timothy Baker, Director, London

2.3.6. Servizi Interbancari SpA, Sandro Molinari, Dr. hon. c. Cav., Presidente

2.3.7. Zurich Financial Services (UKISA), Adrian Baskerville, Director, Legal Services, London

2.3.8. Eurofinas (European Federation of Finance House Associations)

2.3.9. Euronext SA (*)

2.3.10. Nasdaq Europe SA (*)

2.3.11. Association of European Cooperative and Mutual Insurers

2.3.12. European Mortgage Federation

2.4. **Media**

2.4.1. Advertising Association, Phil Murphy, London

2.4.2. European Publishers Council, Angela Mills, Executive Director, Oxford

2.4.3. Federation of European Publishers, Anne Bergmann-Tahon, Deputy Director, Brussels

2.4.4. Motion Picture Association, Laurence Djolakian, European Office, Brussels

2.4.5. Neuromedia Intenational, Lyon

2.4.6. Pyramide Europe, Gwen Thomas, General Manager, London

- 2.4.7. UK Publishers Association
- 2.4.8. [Confidentiality requested]
- 2.4.9. British Copyright Council, London
- 2.4.10. British Music Rights
- 2.4.11. ENPA, European Newspaper Publishers' Association, Brussels
- 2.5. **Other**
 - 2.5.1. Business Software Alliance, Brussels
 - 2.5.2. Electricity Association, Jeff Woodhams, Head of Procurement Group, London
 - 2.5.3. EuroCommerce, Brussels
 - 2.5.4. International Chamber of Commerce, Ayesha Hassan, Senior Policy Manager, Electronic Commerce, Telecommunication and IT, Paris
 - 2.5.5. MEDEF, Mouvement des Entreprises de France, Jacques Creyssel, Paris
 - 2.5.6. NECP, New Engineering Contract Panel of the Institution of Civil Engineers, Nigel Shaw, London
 - 2.5.7. UEAPME, European Association for Craft, Trades and Small and Medium-Sized Enterprises, Brussels
 - 2.5.8. Wirtschaftskammer Österreich, Abteilungsleiter Univ. Doz. Dr. Hanspeter Hanreich, Wien
 - 2.5.9. Bundesverband der Freien Berufe (BFB), Berlin
 - 2.5.10. Stockholm Chamber of Commerce
 - 2.5.11. International Chamber of Shipping and EC Shipowners' Associations
 - 2.5.12. Confederation of Business and Industry
 - 2.5.13. Union of Industrial and Employers' Confederations of Europe
 - 2.5.14. European Federation of Leasing Company Associations
 - 2.5.15. Swedish IT Law Observatory (**)
 - 2.5.16. [Confidentiality requested]
 - 2.5.17. Leaseurope, Brussels
 - 2.5.18. FEDMA, Federation of European Direct Marketing, Brussels
- 3. CONSUMERS' ASSOCIATIONS
 - 3.1. BEUC, The European Consumers' Organisation, Legal Department, Brussels
 - 3.2. Consumers' Association, Alison Lindley, Principal Lawyer, London
 - 3.3. European Consumer Law Group, Brussels

3.4. Union Fédérale des Consommateurs

3.5. Belgian Consumers' Council (*)

4. LEGAL PRACTITIONERS

4.1. Bar Council of England and Wales, Evanna Fruithof, Director, Brussels

4.2. Paolo Bernardini, Dr Giudice presso il Tribunale civile di Lucca

4.3. Heiko Büsing, Rechtsreferendar, Göttingen

4.4. Bundesnotarkammer Deutschland, Dr Jens Fleischhauer, Geschäftsführer, Köln

4.5. BRAK, Bundesrechtsanwaltskammer Deutschland, Büro Brüssel

4.6. CentreBar, Prof. Arnold Vahrenwald, Munich

4.7. CMS Cameron McKenna and CMS Bureau Francis Lefebvre, Nathalie Biesel-Wood, Brussels

4.8. Nicolas Charbit, lawyer

4.9. Combar, Commercial Bar Association, William Blair, London

4.10. Conférence des Notariats de l'Union Européenne, Brussels

4.11. Deutscher Anwaltverein, Ausschuss für internationalen Rechtsverkehr, Prof. Dr Hans-Jürgen Hellwig, Frankfurt am Main

4.12. Deutscher Notarverein, Berlin

4.13. Herbert Gassner, Dr, Landesgericht Eisenstadt

4.14. Harvey McGregor QC, barrister, England

4.15. Eric Gummers, Amhurst Brown Colombotti, solicitors, London

4.16. Adrian Jack, barrister, Enterprise Chambers, London

4.17. Achim Kampf, Leiter Euro Info Centre, Mannheim and Joachim Förster, Bereichsstellenleiter Recht, Euro Info Centre, Mannheim

4.18. Landesnotarkammer Bayern, Dr Bracker, Praesident, Munich

4.19. Lovells Boesebeck Droste, London

4.20. Österreichischer Rechtsanwaltskammertag, Dr Klaus Hoffmann, Präsident, Vienna

4.21. Observatorio Juridico Transfronterio Iuris Muga, Colegio de Abogados de Gipuzkoa, San Sebastian

-
- 4.22. The Law Society of England and Wales, Hilary Siddle, Chair, Law Reform Board, London
4.22a.
- 4.23. Österreichische Notariatskammer
- 4.24. Sveriges Advokatsamfund
- 4.25. Consiglio dell'Ordine degli Avvocati di Torino
- 4.26. Consiglio dell'Ordine degli Avvocati di Milano
- 4.27. The Law Society of Scotland
5. ACADEMICS
- 5.1. Academia dei Giusprivatisti Europei, Prof. Giuseppe Gandolfi, Prof. José Luis de los Mozos, Pavia
- 5.2. Rainer Bakker, Professor Dr iur., Fachhochschule Konstanz
- 5.3. Christian von Bar, Prof. Dr iur., Direktor des Instituts für Internationales Privatrecht und Rechtsvergleichung,
5.3a. Universität Osnabrück
- 5.4. Prof. Dr Basedow, Direktor des Max-Planck-Institutes für Ausländisches und Internationales Privatrecht,
5.4a. Hamburg
- 5.5. Sergio Cámara Lapuente, Prof. Dr, Departamento de Derecho, University of La Rioja
- 5.6. Georges Th. Daskarolis, Professeur, Demokritos University, Thrace, Greece
- 5.7. Christina Duevang Tvarnø, ass. prof. Phd, MSc in Business Administration and Commercial Law,
Copenhagen Business School
- 5.8. Faculty of Law, University of Uppsala, Sweden
- 5.9. Marcel Fontaine, professeur, Directeur du Centre de droit des obligations, Université catholique de Louvain
- 5.10. Andreas Furrer, Prof. Dr, Forschungsstelle für Internationalisiertes und Europäisiertes Privatrecht, Universität
Luzern, Lucerne
- 5.11. Gabriel García Cantero, Catedrático de Derecho Civil, Emérito de la Universidad de Zaragoza
- 5.12. María Paz García Rubio, Dr, Catedrática de Derecho Civil & Javier Lete, Dr, Profesor Titular de Derecho
Civil, University of Santiago de Compostela
- 5.13. Silvia Gaspar Lera, Profesora de Derecho Civil, Universidad de Zaragoza
- 5.14. Walter van Gerven, Professor em., University of Leuven and University of Maastricht

-
- 5.15. Alain Khozi, Professeur à l'Université Panthéon-Assas, Paris II
- 5.16. Sir Roy Goode QC, Emeritus Professor of Law, University of Oxford
- 5.17. Dr Aristide N. Hatzis, Lecturer, University of Athens
- 5.18. Iannarelli Antonio, Prof. Ordinario di diritto agrario, Università di Bari & Nicola Scannicchio, Prof. Straordinario di diritto privato, Università di Bari
- 5.19. Jane Kaufmann Winn, Professor, Dedman Law School, Southern Methodist University, Dallas
- 5.20. Christoph Krampe, Prof. Dr, Lehrstuhl für Zivilrecht, Antike Rechtsgeschichte und Römisches Recht, Ruhr-Universität Bochum
- 5.21. Carlos Lalana del Castillo, Universidad de Zaragoza
- 5.22. Stefan Leible, Priv. Doz. Dr, Lehrstuhl für Zivilrecht, Universität Bayreuth
- 5.22a.
- 5.23. Carlos Martinez de Aguirre, Catedrático de Derecho Civil, Universidad de Zaragoza
- 5.24. Polish academics advising Polish Government: Andrzej Calus, Marian Kepiński, Jerzy Rajske and Stanisław Sołtysiński
- 5.25. Project Group: Restatement of European Insurance Contract Law, Chairman Prof. Dr Fritz Reichert-Facilides LL.M., Universität Innsbruck
- 5.26. Peter G. Stein, Queens College, Cambridge, Emeritus Professor of Civil Law in the University of Cambridge and Vice-President of the Academy of European Private Lawyers
- 5.27. Anna Quinones Escámez, Pompeu Fabra University, Barcelona
- 5.28. Norbert Reich, Prof. Dr Dr h.c., Rector, Riga Graduate School of Law
- 5.29. Oliver Remien, Priv. Doz. Dr, Max-Planck-Institut Hamburg, Universität Würzburg
- 5.29a.
- 5.30. Pietro Rescigno, prof. ord. f.r. dell'Università 'La Sapienza' di Roma
- 5.31. Christoph U. Schmid, European University Institute, Florence
- 5.32. Martin Schmidt-Kessel, Universität Freiburg
- 5.33. Hans Schulte-Noelke, Professor, Dr iur., Universität Bielefeld
- 5.34. Reiner Schulze, Professor, Dr Dr h.c. Centrum für Europäisches Privatrecht an der Universität Münster & Hans Schulte-Noelke, Professor, Dr, Universität Bielefeld
- 5.35. José Antonio Serrano García, Professor Titular de Derecho Civil en la Universidad de Zaragoza

- 5.36. Jan M. Smits, Professor of European Private Law, Maastricht University
5.36a.
- 5.37. Society of Public Teachers of Law of Great Britain and Northern Ireland, J. R. Bradgate, University of Sheffield
- 5.38. Hans-Jürgen Sonnenberger, Dr Dr h.c., Universität München
- 5.39. Ansgar Staudinger, Dr, Universität Münster
- 5.40. Stockholm School of Economics, Prof. Dr iur. Christina Hultmark Ramberg
- 5.41. Joint response of the Commission of European Contract Law and the Study Group on a European Civil Code, Professor Dr Dr h.c. mult. Ole Lando and Christian v. Bar, Professor, Dr, Universität Osnabrück
- 5.42. Issac Tena Piazuelo, Professor de la Facultad de Derecho, Universidad de Zaragoza
- 5.43. Mitsutaka Tsunoda, Prof., University of the Ryukyus, Nishihara Okinawa, Japan
- 5.44. Thomas Wilhelmsson, Professor of Civil and Commercial Law, University of Helsinki, member of the
5.44a. Lando Commission
- 5.45. Alexander Wittwer, European Institute of Public Administration, Luxembourg and Heinz Barta, Institut für Zivilrecht, Universität Innsbruck
- 5.46. Manfred Wolf, Prof. Dr, Johann Wolfgang Goethe-Universität, Frankfurt am Main
- 5.47. Zboralska Grazyna, LL.M. and Bernard Lukanko, LL.M., Europa-Universität Viadrina, Frankfurt/Oder
- 5.48. Professor Dr M. W. Hesselink, Faculteit der Rechtsgeleerdheid, Amsterdam
- 5.49. University of Lund, Faculty of Law
- 5.50. Prof. Dr LL.M. Josef Drexler, University of Munich
- 5.51. Geraint Howells, University of Sheffield
- 5.52. Professor Massimo Bianca
- 5.53. Prof. Ugo Mattei, University of Torino and UC Hastings
- 5.54. Prof. Hans-Peter Schwintowski
- 5.55. Prof. Dr Roger Van den Bergh, University of Rotterdam
- 5.56. Hugh Collins, London School of Economics
- 5.57. Professors Grundman and Kerber, Universities of Erlangen-Nürnberg and Marburg
- 5.58. U. Drobnig, Hamburg

-
- 5.59. Du Laing, Leuven
- 5.60. Jean Sace, ULB
- 5.61. University of Stockholm, Faculty of Law
- 5.62. Prof. Jean-Baptiste Racine and DEA students of the University of Nice
- 5.63. Kim Østergaard, research fellow, Copenhagen Business School, Law Department
- 5.64. Prof. Dr iur. Holger Fleischer, Dipl. Kfm., LL.M., Göttingen
- 5.65. Prof. Dr iur. Peter Mankowski, Lehrstuhl für Bürgerliches Recht, Internationales Privat- und Prozessrecht und Rechtsvergleichung an der Universität Hamburg
- 5.66. Ulrich Magnus, University of Hamburg
- 5.67. Hans-W. Micklitz, Professor an der Universität Bamberg, Inhaber des Lehrstuhls für Privatrecht, insbes. Handels-, Gesellschafts- und Wirtschaftsrechts, Jean Monnet Lehrstuhl für Europäisches Wirtschaftsrecht
- 5.68. Stefano Troiano
- 5.69. Fernando Martínez Sanz
- 5.70. Prof. Dr Wulf-Henning Roth, LL.M. (Harvard), Direktor des Instituts für Internationales Privatrecht und Rechtsvergleichung und des Zentrums für Europäisches Wirtschaftsrecht der Universität Bonn
- 5.71. Filali Osman, University of Lyon (II)
- 5.72. Antonio Lordi, Dottore di Ricerca in Diritto Privato dell'Economia
- 5.72. Prof. Nicola Scannicchio, University of Bari
- 5.73. UMR Régulation des activités économiques, University of Paris (I) Panthéon-Sorbonne
- 5.74. ERA-Forum, Academy of European Law, Trier, submission of Hans J. Sonnenberger
- 5.75. ERA-Forum, Academy of European Law, Trier, submission of Jean-Baptiste Racine
- 5.76. ERA-Forum, Academy of European Law, Trier, submission of Gerhard Wagner
- 5.77. ERA-Forum, Academy of European Law, Trier, submission of Klaus-Heiner Lehne
- 5.77. ERA-Forum, Academy of European Law, Trier, submission of Sergio Camara Lapuente
- 5.78. ERA-Forum, Academy of European Law, Trier, panel discussion summarised by Angelika Fuchs
- 5.79. ERA-Forum, Academy of European Law, Trier, submission of Richard Crowe
- 5.80. Prof. Jules Stuyck

5.81. Prof. Andreas Schwartz

5.82. Prof. Hugh Beale

5.83. Prof. Mauro Bussani

5.84. Prof. Gerrit de Geest

5.85. Prof. Bernard Tilleman

5.86. Prof. Christian Kirchner

(*) Included in the position from the Belgian Ministry of Justice, which is a synthesis of the various contributions received and not a position of the Belgian Government as such.

(**) The response from the Swedish IT Law Observatory has been treated as a business response because most of the members of the observatory are representatives of the IT business.

Appendix 2

STATISTICAL ANALYSIS OF CONTRIBUTIONS

	Government	Business (****)	Consumers' Organisations	Legal Practitioners	Academics (**)	Total
Austria	1	1	0	3	1	6
Belgium	1 (*)	0	0	0	2	3 (*)
Denmark	1	0	0	0	2	3
Finland	2	0	0	0	1	3
France	1	2	1	1	4	9
Germany	2	8	0	7	30	47
Greece	0	0	0	0	2	2
Ireland	0	0	0	0	0	0
Italy	1	1	0	3	9	14
Luxembourg	0	0	0	0	0	0
Netherlands	0	0	0	0	8	8
Portugal	1	0	0	0	0	1
Spain	0	1	0	1	10	12
Sweden	1	2	0	1	4	8
United Kingdom	2	11	1	7 (***)	6	27
International, including	0	21	2	4	4	31
EU total	13	47	4	27	83	174
Non-EU	2	0	0	0	5	7
Total	15	47	4	27	81	181

(*) The Belgian Government's contribution was a synthesis, put together by the Ministry of Justice, of the opinions of the Ministries of Finance and Economic Affairs, the Belgian Banking and Finance Commission, Euronext SA, Nasdaq Europe SA and the Belgian Consumers' Council. For the purposes of these statistics, this contribution is treated as a single governmental contribution. However, it is not a position of the Belgian Government as such.

(**) The attribution of academic responses to nationalities was based, except in the case of international groups, on the location of the universities concerned. Where individuals from institutions in more than one country collaborated, the contribution is listed as international. Where two separate submissions were received from a single individual, these have been counted as one combined contribution. The submission of the Society of Public Teachers of Law of the United Kingdom and Ireland is treated as a British submission.

(***) The two submissions from the Law Society of England and Wales have been treated as one submission.

(****) The response from the Swedish IT Law Observatory has been treated as a business response because most of the members of the Observatory are representatives of IT business.