

Position Paper

UEAPME¹ position on the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses

General remarks

UEAPME, the European Association of crafts, small and medium-sized enterprises, takes notice of the fact that the European Commission continues the debate on the European Contract Law. Since 2004, when the last communication was published, much work has been done without real stakeholders' involvement in this topic. For this reason, UEAPME welcomes the possibility to comment on this issue in the framework of this consultation. We also appreciate that for such a complex topic the Commission has given sufficient time for consultation.

The overall aim of the Commission is that citizens can take "full advantage of the internal market"². In order to achieve this, cross-border transactions must be boosted. UEAPME agrees on this and supports the Commission's intention to strengthen the cross-border activities of enterprises and consumers. However, according to the experiences of our members, the different contract law regimes of the Member States cannot be considered as **a major** obstacle in respect of the cross-border activities of enterprises. There are many more significant problems for SMEs when it comes to business activities in other member countries; for example, language barriers, different taxation systems of the Member States or complex and costly notifications procedures for different kinds of certificates. UEAPME welcomes in general harmonisations at European level, since this is the only way to achieve a full Internal Market. But we do not consider the harmonisation of European Contract Law as a priority for SMEs, because – as mentioned before – the main problems are not related to this issue. UEAPME highlighted this already in its reply to the consultation in 2003: "**the differences among the Member states regarding contract law do not constitute a significant problem for cross-border transactions** (as opposed to difficulties for businesses to have real access to other national markets)"³.

In order to avoid further misunderstandings, we would like to clarify some points in respect of cross-border business activities of SMEs. During the consultation period we have been hearing that a possible European Contract Law instrument would simplify the cross-border activities of SMEs so that they can carry out business activities in all the 27 Member States. In reality the overwhelming majority of SMEs are not active in all the 27 Member States and **may not have this intention**. In practice, assuming that an SME has the necessary financial and human resources, it will go cross-border first in one country, after having done detailed market analyses to find out whether it is useful from a commercial point of view to go cross-border. Only after the experience and monitoring of the relevant market has shown that the business can operate successfully in one foreign market will SMEs **probably** consider extending their activities to the territory of other Member States. In

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

² Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, 2010

³ UEAPME Position Paper on the Communication of the Commission "a more coherent contract law – action plan", May 2003

most cases SMEs undertaking cross-border activities are focusing only on a few countries of the 27 Member States of the European Union.

We also would like to underline in this context that the targeted full harmonisation of the Consumer Rights Directive would have had a much more positive effect on the cross-border activities of SMEs if it were to happen in a balanced way. But we can already see how difficult it is to interfere in the different legal traditions of the Member States. A harmonised European Contract Law should be drafted in a way which is understandable even to the smallest, one person enterprise. Otherwise, the involvement of lawyers is unavoidable and this would mean increased costs for enterprises. On the other side, it is doubtful that a European Contract Law can be drafted in such a simple way especially because there will be still fields of the law which will be not covered and then again the national laws of the Member States will apply. This would make the whole issue even more complicated and even for experts will be difficult to deal with it. Furthermore, after the experience with the Proposal for a Directive on Consumer Rights and after having gained knowledge about the Draft Common Frame of Reference (DCFR), we have doubts that the outcome of the future possible European Contract Law will be balanced as not to harm SMEs.

On the basis of the Green Paper and the information provided at this stage, UEAPME considers that it is not possible to reach a clear conclusion on which of the options (if any) would be the most beneficial for SMEs. In order to reach such a conclusion information about the following would be required:

- would only B2C or also B2B contracts be within scope of the harmonised law of contract?
- would only cross-border or would also domestic contracts be within scope ?
- the Proposal for a Directive on Consumer Rights will have a significant impact on the content of a possible European Contract Law. Since this directive is currently under negotiations in the ordinary legislative procedure, it is not possible to have clarity about its impact on the European Contract Law and it is unknown by the end of the consultation period on this Green Paper how far the impact of the future Consumer Rights Directive will last. As the future **Consumer Rights Directive is a clear priority for UEAPME**, we have to know its effect on the European Contract Law in order to provide the Commission with clear statements regarding the different policy options of the Green Paper. We also do not understand how the Expert Group which “will assist the Commission in selecting those parts of the of the DCFR which are directly or indirectly related to the contract law, and in restructuring, revising and supplementing the selected provisions”⁴ is able to do that so long the final agreement on the Consumer Rights Directive is missing. According to our knowledge the Expert Group has to leave many issues open because of the aforementioned reasons and this again leaves us stakeholders in uncertainty.

As mentioned before because of the lack of information it is not possible in the current stage to make any clear decision on which option would be meet the requirements (if any) in order to “use the full advantage of the internal market”⁵.

If the Commission is to publish a proposal the following main **cumulative** conditions have to be taken into account:

- 1) The option chosen must be indeed sufficiently clear;
- 2) AND the alternative contract law must offer sufficient protection for SMEs.

⁴ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses

⁵ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses

UEAPME believes that a step-by-step approach could be more reasonable in respect of several points. First of all, it would be rational to monitor the implementation of the future Consumer Rights Directive, consider the impact of the Directive and then establish a possible European Contract Law instrument in accordance with what was experienced. This would be a more comprehensive and coherent approach in the field of European Contract Law. Secondly, concerning the question whether a possible new instrument should apply only cross-border or also to national law the step-by-step approach could show which what effect a possible instrument would have on the business activities of SMEs. If it is to be applicable to cross-border activities at the beginning we will be able to evaluate whether it, in fact, benefits SMEs. After having analysed it, domestic application can be considered or dropped.

Whatever choice the Commission will take at the end, we would like to state that any kind of instrument could be only acceptable for our members under the following conditions with particular attention to option 4:

- Initially the instrument will be used on a voluntary basis; if, in time, it is considered beneficial this could be reviewed.
- The instrument will be drafted in a balanced way. Consumers' rights and interests have to be protected, but the responsibility cannot be put all on SMEs. In the current stage of the work we do not have the impression that the text of the DCFR and the work of the expert group would follow this approach. We call the lawmakers to take into account the "Think Small Principle" during the whole drafting procedure.
- The trader has the option to decide whether he wants the application of the European Contract Law instrument regarding his business activity or not.
- On the question of whether the instrument should apply to cross-border transactions or, also, to domestic contracts, this cannot be decided without detailed impact assessments and studies. On one hand if the instrument was to apply to domestic contracts a situation could arise where a more beneficial national law could not apply. On the other hand, if the instrument was to apply only to cross-border activities it could lead to the distortion of competition for businesses who do not want to go cross-border. This is why the step-by-step approach is preferable.
- The chosen instrument will apply to both B2C and B2B transactions. If it was only to be applicable in B2C cases there is no sense in introducing the legislation, since at European level we have directives which regulate B2C relations in this field. Furthermore if an instrument of European Contract Law was to be introduced it has to encourage competition. In case the scope would cover only B2C relations the instrument would not have any coherence. Including B2B in the scope of the instrument would not mean that the principle of the freedom of contract will be harmed. Businesses would still be able to ignore the optional instrument. We also believe that a possible future instrument in this field has to give for SMEs the right to use it amongst themselves. In order to avoid any difficulties concerning implementation and adoption we call for the clear separation of B2C and B2B within the instrument.
- With respect to the material scope of a possible future instrument, we cannot define the scope since we do not have certainty about the outcome of the future Consumer Rights Directive, but we believe that the following should be included in any event:
 - General good faith obligation
 - Restrictions on the use of "unconscionable clauses"
 - Bolstering of remedies where they are deficient or non-existent: for example, many national contract or restitutionary regimes do not allow legal recourse to a party who has remained unpaid in circumstances where he has enhanced a product (and therefore provided a benefit) belonging to a third party

- Option for speedy dispute resolution procedure: SMEs prefer a speedy and cost-effective means of resolving contractual disputes (particularly payment disputes). For this reason disputes through arbitration or the courts is not a commercially viable option for SMES. One option is for a quick and inexpensive interim procedure for resolving disputes. This would provide a binding decision unless a party ultimately decided to have the dispute resolved in arbitration or the courts

Specific remarks on the different policy options

1) Option 1: Publication of the result of the Expert Group

The publication of the result of the Expert Group could be more interesting from an academic point of view but would have less impact at European level.

2) Option 2: An official “toolbox” for the legislator

We can see the benefits of the option of a “toolbox” especially if it is in the framework of an interinstitutional agreement. This would serve for more coherence between the three lawmakers at European level when adopting new legislative instruments.

3) Option 3: Commission Recommendation on European Contract Law

We do not see the added value of this option.

4) Option 4: Regulation setting up an optional instrument of European Contract Law

UEAPME believes that the European Commission and the leading responsible committee in the European Parliament are advocating option 4.

The solution of an optional instrument builds on the existing Vienna Convention on International Sales of Goods and the UNIDROIT Principles of International Commercial Contracts. As some of our members recommend that SMEs should not use these instruments we see the danger that this can happen in case of a future possible optional instrument, if not drafted in a balanced way.

Since there are several open questions (see under general remarks) regarding this instrument, UEAPME cannot currently see how option 4 would improve directly the cross-border trade of SMEs. We have also doubts that this instrument would have any kind of effect on cross-border SMEs activities. We fear that this option would lead to an extra instrument at European level without real added value.

Assuming that this option becomes a reality, and an SME wants to go cross-border, it will still have to examine the law applicable in the country where the business activity will take place. Only in this way will it be clear for an SME which law is more beneficial for it: the national law of the country where the business activity is going to take place or the optional instrument. This would mean again that the situation has not changed for SMEs, because the enterprise has to contact a lawyer anyway; not to mention that the optional instrument will not be drafted in form of a “model contract”, but in form of a codex. Here again SMEs have to contact a lawyer to implement these articles in a real contract. We would like to remind lawmakers that SMEs do not have their own legal department, contrary to big multinationals, and have to contact in all cases a legal professional. That will mean that no costs will be saved. For these reasons it is doubtful whether such kind of instrument could make the cross-border activities of SMEs easier at all.

5) Option 5: Directive on European Contract Law

Minimum common standards could have added value compared to the current situation but since the implementation in member states would be different the effect could not be considered as significant.

6) Option 6: Regulation establishing a European Contract Law

Our opinion is that this option “replaces the diversity of national laws with a uniform European set of rules” and that “these rules would apply to contracts not by a choice by the parties, but as a matter of national law” is not realistic neither concerning cross-border nor concerning domestic contracts. As it is rightly stated in the Green Paper “this solution could raise sensitive issues of subsidiarity and proportionality”⁶.

7) Option 7: Regulation establishing a European Civil Code

According to our opinion this option is not realistic because of the same reasons mentioned under point 6.

Additional remark:

According to the Green Book “contributions received will be **published, possibly in a summarised form**, unless the author objects to publication of their personal data on the grounds that such publication would harm his/her legitimate interest”⁷. We are against of the publication of UEAPME’s position paper in a summarised form. Our position paper **in its whole length** can be published and used any time.

Furthermore, we would like to point out with respect to the final examination of the received inputs to the consultation, that the Commission should monitor seriously who is providing which reply. As the Commission’s intention is to establish a possible future instrument which should serve in the first line SMEs and consumers, their opinion should be decisive rather than the opinion of those who already make a profit at the expense of small and medium-sized enterprises and consumers.

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⁶ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses

⁷ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses