

**A MORE COHERENT EUROPEAN CONTRACT LAW:  
AN ACTION PLAN  
RESPONSE OF THE UNITED KINGDOM GOVERNMENT**

**Introduction**

1. This is the United Kingdom Government's response to the Action Plan (COM 2003(68)), published on 12 February 2002. The Government is content for this response to be published on the Commission's EUROPA website.
2. The Commission seeks views on its proposal that as well as continuing to make appropriate sector-specific interventions, it should pursue a combination of legislative and non-legislative measures to:
  - increase the coherence of the EC acquis in the area of contract law
  - promote the elaboration of EU-wide general contract terms, and
  - examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument.
3. As set out at paragraph 5 of its response<sup>1</sup> to the Commission's Communication on European Contract Law (COM(2001)398), published on 11 July 2001, the UK Government continues to consider it axiomatic that
  - any action at EC level should be in response to a demonstrable need for action at that level to deal with a real (not just a theoretical) problem;
  - there should be a reasonable likelihood of achieving agreement;
  - the measures proposed should be proportionate to, and targeted on, the problem in question; and
  - action should be taken only after a careful assessment of the net effect of the change on business and consumers to ensure that it was, on balance, beneficial.

**Measure 1: increased coherence of the existing EC acquis in the field of contract law**

4. The UK Government, in paragraphs 23-24 of its response to the Communication, welcomed proposals for increasing the quality and coherence of the EC acquis in this area, and agreed to consider whether greater coherence of (in particular) consumer law might entail further harmonisation of consumer protection Directives which currently only provide for minimum harmonisation.
5. The Commission proposes that a 'common frame of reference' be developed as a tool for increasing the quality and coherence of the acquis. In summary, the Government:

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- welcomes, with reservations, the proposal to develop a common frame of reference;
  - agrees that the common frame of reference has the potential to be a tool of wider application than merely the improvement of the *acquis*; but
  - is concerned by the prospect of a hiatus in the necessary task of improving the *acquis* until the common frame of reference is completed.
6. The Government, at paragraph 9 of its response to the Communication, noted that problems caused, essentially, by unfamiliarity with different laws can be tackled in a practical and proportionate way by improving access to information and guidance about those laws. It is the Government's understanding that conflicts of mandatory provisions of national contract laws are in practice rare. This means that psychological barriers can be effectively addressed by a 'thesaurus' which will allow economic actors and their advisers to 'translate' concepts from one legal system to another. The common frame of reference can fill this role, by identifying common principles of law across the legal systems of the Member States and providing the terminology which will allow parties to contract across borders, confident that they understand the laws under which they are contracting.
7. However, the Government consider that a further note suggested for the common frame of reference is less sustainable. The Action Plan proposes that
- "the common frame of reference should also form the basis for further reflection on an optional instrument in the area of European contract law."<sup>2</sup>

The Government appreciates that the development of the common frame of reference may give a useful indication of the feasibility of the task of developing an optional instrument. It is less clear that the common frame of reference will provide any useful lessons on the opportuneness, legal form or legal basis of an optional instrument. The only direct link is that if the common frame of reference is successful in its own right in addressing psychological barriers to the internal market (as suggested in the previous paragraph), it would clearly weaken any argument that an optional instrument was needed to remove such barriers. Additionally, the Government is confident that the Commission will wish to begin its reflection in earnest long before 2008, when the common frame of reference is projected to become available.

8. The Government believes that the Action Plan is ambiguous about the scope of the common frame of reference. If the scope is to be limited to identifying common principles, and setting out the appropriate terminology for those principles, the task of setting out the common frame of reference can reasonably be largely an academic task. If, however, the scope is to include the identification of 'best solutions' where there are differences of principle or terminology, then to leave the formulation of the common frame of reference to academic study and the Commission would deprive Member States of an important opportunity for them to contribute to the process which will lead to

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<sup>2</sup> paragraph 64

the proposal of new Directives aimed at improving the *acquis*. The Commission will be more able to secure agreement to those new Directives if Member States have played a full role in the teasing out of solutions in the common frame of reference. The Government believes that a clear mechanism should be elaborated for developing the common frame of reference, and looks forward to hearing the Commission's proposals.

9. The Commission also identifies that the common frame of reference may be of assistance to domestic law reform processes - and that for this to be achieved, it will have to meet the needs and expectations of economic operators. The recognition of this driver of quality is welcome. But the Commission should also be open to the contribution which domestic law reform bodies could make, in turn, to the common frame of reference. The Law Commission and the Scottish Law Commission, in the United Kingdom, have huge expertise in developing improvements to the law through research, consultation and comparative analysis. This is another reason why governments of Member States should have a role in the development of the common frame of reference.
10. Given that the Commission has already identified problems arising from both inconsistent drafting of different Directives and inconsistent implementation of individual Directives in different Member States, it is plain that the work of improving the *acquis* cannot wait until the common frame of reference is ready in 2008. The Government looks forward to hearing the Commission's proposals for actions to improve the coherence and quality of the *acquis* in the absence of the common frame of reference.

## **Measure 2: to promote the development of EU-wide standard contract terms**

11. The Commission proposes to facilitate the exchange of information on initiatives to develop standard contract terms, by providing a website where interested parties across Member States can contact one another and learn from others' experiences.
12. As was said in paragraph 20 of its response to the Communication, The UK Government sees a potential role for the EC in sponsoring or supporting market-led solutions, like the development of model contracts. This proposal commends itself, as it leaves the development of standard contract terms to the economic operators themselves. It follows, therefore, that Commission participation in this exercise should be limited to the setting up and running of the website itself.
13. The Commission also intends to  
"publish guidelines, the purpose of which is to remind interested companies, persons and organisations that certain legal and other limits apply."<sup>3</sup>

Careful thought needs to be given to the content and status of these guidelines before anything is published.

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<sup>3</sup> paragraph 88

14. The Government agrees that there may be merit in issuing general advice on the legal limits that would apply to the effectiveness of standard contract terms (such as those limitations derived from the Unfair Contract Terms Directive). However, it is not clear what “other”, (i.e. non-legal) limits might apply; in principle, there should be no such non-legal limitations. The Government would recommend that the Commission confine itself to issuing advice on the strict legal position under EC law. As to the status of the guidelines, they do not have any legal standing; and the Commission must be aware of the possibility that economic operators, in developing cross-border standard terms, may reach a different conclusion on the content of EC law from that put forward by the Commission.

15. The Action Plan further suggests that

“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.”<sup>4</sup>

The Government accepts that such broadly-based contributions to the process of developing standard terms may well be desirable; and it is prepared to play an active role in encouraging private parties to consider making constructive use of the facility which the Commission is proposing to provide. However, the Commission may find (particularly if they intend to leave the substantive development of standard terms to the economic actors, and not intervene in the process on its own behalf) that parties are reluctant to participate in the exercise.

### **Measure 3: Further reflection on the opportuneness of non-sector specific measures such as an optional instrument in the area of European contract law**

16. The Action Plan notes that:

“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.”

17. The Government appreciates that since the Communication, the Commission’s views on the possible range and scope of a non-sector-specific (or ‘horizontal’) measure have changed. In particular, it is noticeable that the Commission has been influenced by the responses to the Communication which argued the unacceptability - on any timescale - of a compulsory code of contract law.

18. However, the Government’s position on horizontal measures in contract law has not changed from that set out in its response to the Communication:

“25. The UK Government is not attracted to this option in any of its forms, for the reasons set out in paragraphs 10-14 above. It considers this

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<sup>4</sup> paragraph 88

approach disproportionate and likely to cut across the principle of subsidiarity. Resources should be concentrated on more practical measures that can deliver real benefits in the short and medium term.

26. The UK considers that EC legislation should focus on specifically identified problems on a case-by-case basis. It would have considerable difficulty with any option that would displace the generality of its existing national contract law. The approach described in paragraph 66(b) of the Communication would do so to the extent that contracting parties did not make specific provision. The approach in paragraph 66(c) would do so entirely, and would also breach the principle of freedom of contract.
27. On the other hand, a purely optional model (paragraph 66(a)) would merely create an alternative contract law regime alongside the existing national laws. Economic actors could choose to make contracts under this European law, or not. By definition, this would do nothing to address any problems that may be created by the very existence of different national laws. The same is true of paragraph 66(b) to the extent that it remained possible to opt to use a national contract law.”
19. This position is not based on any dogmatic position, but on principled arguments against the desirability of a horizontal measure. However, in a spirit of openness and co-operation, the UK Government would wish to engage in a reflection on the opportuneness of a horizontal instrument, such as the Commission envisages. It is only by doing so that the arguments against a measure - legal, political, cultural and economic - can be fully exposed.
20. It follows from this that the UK Government will want to raise a number of detailed issues, concerns and questions for discussion. It proposes to begin this engagement by submitting a separate paper to the Commission later in the year.

### **Coda**

21. The Government wishes to record its appreciation of the openness with which the Commission has carried out its work so far, and declares its intention to continue to engage actively in this important process.

Lord Chancellor's Department

London

June 2003