

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT
AND THE COUNCIL DATED 12.02.03
A MORE COHERENT EUROPEAN CONTRACT LAW AN ACTION PLAN**

COMMENTS OF BARCLAYS PLC

1. Background

1.1 The Commission published a Communication from the Commission to the Council and the European Parliament on European Contract Law in July 2001 (“the Communication”). Responses to this Communication were requested and Barclays PLC’s (“Barclays”) response formed part of the consultation process. The outcome of the 2001 consultation as reported on by the Commission was that there is no need to abandon the current sector specific approach, but that there is a need for the uniform application of EC Contract Law. The Commission has now published a Communication from the Commission to the European Parliament and the Council “A more coherent European contract law – an Action Plan” (“the Action Plan”) and has invited responses to this.

1.2 The Action Plan:-

1.2.1 Confirms the outcome of the consultation process in respect of the Communication;

1.2.2 Summarises the problems identified during the consultation process; and

1.2.3 Suggests a mix of non-regulatory and regulatory measures in order to solve those problems being:-

1.2.3.1 To improve the quality of the EC acquis in the area of contract law;

1.2.3.2 To promote the elaboration of EU-wide standard contract terms;

1.2.3.3 Further reflection on the opportuneness of non-sector specific measures such as an optional instrument in the area of EC Contract Law.

1.3 The purpose of the Action Plan is to:-

1.3.1 receive feedback on the suggested mix of non-regulatory and regulatory measures;

1.3.2 receive input for the further reflection on an optional instrument in the area of EC Contract Law;

1.3.3 Continue the debate launched by the Communication.

1.4 This paper sets out Barclays response to the Commission's suggested approach.

2. **Suggested Approach: A mix of non-regulatory and regulatory measures**

2.1 To improve the quality of the EC acquis in the area of contract law

2.1.1 Barclays agrees that whilst it is still possible for the EU to continue a sector-specific approach there is also a need to increase coherence of the existing acquis in the contract law area.

2.1.2 Barclays considers that some of the main issues preventing or discouraging cross border transactions relate to EC Contract Law. There are 2 issues:

2.1.2.1 conflicts between different pieces of EC legislation; and

2.1.2.2 differences in interpretation of the same piece of legislation as between Member States.

2.1.3 Barclays agrees that:-

2.1.3.1 there is a need, both for business to business and business to consumer transactions, to increase coherence of the existing acquis in the contract law area and to avoid unnecessary inconsistencies in new acquis;

- 2.1.3.2 a common EC Contract Law frame of reference would help to address this issue;
- 2.1.3.3 the main objective of the common frame of reference should be to allow existing EC acquis to be improved and simplified and to ensure coherence of future EC acquis; and
- 2.1.3.4 research should be undertaken, in connection with existing research projects to achieve the objective set out in 2.1.3.3 above.
- 2.1.4 Barclays is however concerned at suggestions that the improved EC acquis could “indirectly remedy the fragmentation of national contract laws and promote their consistent application” and more particularly that if the common frame of reference is accepted as a model in the EU then it would be expected also to be taken as a point of reference by national legislature.
- 2.1.5 As discussed in Barclays response to the Communication there are a number of areas of contract law which vary greatly across the EU. Whilst it may be possible to agree a common framework in respect of the interpretation of existing EC Contract Law, Barclays feels it is unlikely that a common position could be agreed on the various aspects of contract law to enable any framework to be used as a point of reference by national legislature. In addition there are the obvious difficulties involved in any attempt to introduce a codified legal system into a common law system.
- 2.1.6 With regard specifically to financial services Barclays agrees with the proposal made by the Commission that it would launch a three strand policy to:-
 - 2.1.6.1 secure increased levels of convergence in respect of consumer protection rules;
 - 2.1.6.2 secure increased levels of convergence in respect of investor protection rules;
 - 2.1.6.3 review national rules relating to retail financial services contracts.¹

¹ Communication from the Commission to the Council and the European Parliament “E-commerce and financial services”, CON (2001) 66 final, p.10.

2.2 To promote the elaboration of EU-wide standard contract terms

2.2.1 Business to Business Transactions

Barclays agrees that standard contract terms may provide a useful starting point in negotiating contracts. However in Barclays experience standard terms are nearly always negotiated and simply provide guidance rather than obliging parties to comply with pre-defined terms. Barclays would not agree that the use of standard contract terms spares the parties the costs of negotiating a contract although it may reduce it.

2.2.2 Business to Consumer Transactions

As discussed in Barclays response to the Communication, having different national contract laws both discourages cross-border business to consumer transactions and increases the costs involved to businesses.

Standard terms for business to consumer transactions could assist in this area and could encourage cross-border transactions for example through e-commerce.

2.2.3 In respect of both business to business transactions and business to consumer transactions, Barclays supports the Commission's proposal to facilitate the exchange of information on initiatives and to offer guidelines on the use of standard terms and conditions. Barclays does, however, feel that this would be more beneficial in terms of encouraging cross-border transactions in the area of business to consumer.

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

2.3.1 Barclays opinion is that an optional instrument would not add greatly to a common frame of reference and the increased support for sector specific standard terms. The Action Plan suggests that any optional model would take the form of a regulation or recommendation which would exist in parallel with, rather than instead of national laws. As discussed in Barclays response to the Communication legal interpretation will differ from Member State to Member State in any event, unless such optional instrument simply addresses areas agreed – or to the extent that they are agreed – in a common frame of reference.

2.3.2 Barclays feels that the more important initial steps should be through increased coherence of the existing EC acquis and the common frame of reference.

3. Conclusion

3.1 Barclays supports the Commission's proposal to improve the quality of the EC acquis in the area of contract law to the extent that this is used to harmonise existing EC legislation and guide new EC legislation. Barclays feels that any further harmonisation (including using the common frame of reference as anything more than guidance) is unlikely to be possible in practice owing to the entrenched nature of the different Member States' national systems of law and the inherent differences between the common law and codified systems.

3.2 In respect of both business to business transactions and business to consumer transactions, Barclays supports the Commission's proposal to facilitate the exchange of information on initiatives and to offer guidelines on the use of standard terms and conditions. Barclays does however feel that this would be more beneficial in terms of encouraging cross-border transactions in the area of business to consumer.

- 3.3 Barclays opinion is that an optional instrument would not add greatly to a common frame of reference and the increased support for sector specific standard terms. Barclays feels that the more important initial steps should be through increased coherence of the existing EC acquis and the common frame of reference.
- 3.4 As discussed in the response to the Communication, Barclays believes that contracts between businesses and those between businesses and consumers should be looked at separately:-

BUSINESS TO BUSINESS

Market forces have led to contracting parties deciding on choice of law and, through use, becoming familiar with aspects of that chosen law. While extra costs are incurred in obtaining additional legal advice it remains the case that as between businesses if the parties are keen to close a particular deal then this will not dissuade them. A common frame of reference and, in appropriate cases, the use of standard terms as a starting point for negotiation, will ease the cross border business to business contracting process.

BUSINESS TO CONSUMER

We see no reason why informed consumers should not be able to choose the applicable law to govern their contractual arrangements in the same way that corporates can. A common frame of reference coupled with standard terms should serve to inform consumers of their choices.

Should you require any further information or if you wish to discuss the contents of this response, please contact Bill Eldridge. Tel: +44 20 7699 2895 Email: bill.eldridge@barclays.co.uk

Barclays PLC
May 2003