



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE

Directorate A : Civil justice
Unit A.2 : Civil and contract law

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EXPERT GROUP ON A COMMON FRAME OF REFERENCE IN EUROPEAN CONTRACT LAW

Synthesis of the Fifth Meeting, 30 September – 1 October 2010

I. THE RELATIONSHIP BETWEEN AN OPTIONAL INSTRUMENT (OI) AND PRIVATE INTERNATIONAL LAW INSTRUMENTS

The Chair¹ informed the group on the following tentative preliminary approach of the Commission but emphasised that no decision has been taken yet:

While an OI should be without prejudice to the normal application of the Rome I Regulation appropriate measures have to be taken to ensure that the OI, where chosen, is the only applicable law and solves all the problems arising within its scope of application. Therefore, it is necessary to exclude the applicability of Article 6 (2) of Rome I. The lack of application of the divergent nationally mandatory consumer protection rules, which would defeat the very purpose of an OI, has to be counter-balanced by a high level of consumer protection in the OI itself. The Chair mentioned as a possible approach a Regulation comprising uniform substantive law as a suitable method to exclude the applicability of Rome I. In B2B relations the choice of the OI would be equivalent to an implicit agreement to opt out of the Vienna Convention regime.

The treatment of gaps in the OI would follow two different approaches depending on whether the gap occurs within the OI's scope of application or whether the issue at stake falls outside the scope. In the former scenario the gap will have to be filled by autonomous interpretation of the OI and the principles on which it is based. In the latter situation it will have to be stipulated to have recourse to the national law applicable pursuant to Rome I.

With regard to Rome II for pre-contractual duties, the Chair set out the options of a) the direct application of Article 12 Rome II whether or not a contract has been concluded, b) a (declaratory) derogation from Rome II laying down a separate rule with the content of Article 12 Rome II, and c) a differentiated rule leading to the application of the OI to pre-contractual duties where a contract has been concluded and to the applicable national law where no contract has been concluded.

¹ Mr Dirk Staudenmayer, Head of the Civil and Contract Law Unit, Directorate General Justice, European Commission

The proposal of uniform substantive law received a rather positive feedback by the experts. The group agreed that work has to start on the adequate by high level of consumer protection. As a result of the discussion it was decided to create two new sub-groups on scope-related issues and on consumer protection rules respectively. Both groups will submit a first report by the end of November.

The scope group will draw up an inventory of overriding mandatory provisions in Member States, will address the issues of illegality and immorality and consider recommendations on scope matters in the form of both a positive and negative list.

The consumer protection group will compile information on where the DCFR already exceeds the acquis requirements and will discuss where else an OI should provide a higher level of protection, possibly also in areas outside the current consumer acquis. To that end it will compare the legislation in Member States with the DCFR and will suggest which types of provisions that exist in Member States should feature in an OI and which should not be included.

II. PRE-CONTRACTUAL INFORMATION AND INVALIDITY

A) Re-structuring

In a brief exchange of views on an alternative structure merging the chapters on pre-contractual duties and invalidity it was agreed to follow the Rapporteur's proposal to neither choose or reject such a re-structuring at this stage. The group will keep considering it for the time being and take a decision following a discussion of the concept with the stakeholder group. The Rapporteur will present the approach to the stakeholders .

The following discussions took place in respect of the **traditional DCFR approach**:

B) Pre-contractual duties

In general, the Group agreed to revisit a number of provisions once further progress in the CRD negotiations is achieved (notably articles on the duty to provide information for consumer distance contracts, on information duties in real time distance communication, on information about price and additional charges and address and identity of business).

There was some discussion on whether it is desirable to exclude C2C relations from the scope of the article (II-3:101) on the duty to disclose information on goods, assets and services as done in the current wording. However, it was noted that C2C relations are anyway unlikely to be covered by the OI due to the difficulties to identify a suitable legal basis. . It was decided to refer in the provision exclusively to the 'relative expertise of the parties' to clarify that the extent of disclosure varies considerably across different sets of circumstances – notably between B2B and B2C relations.

The group did not reach a final conclusion on the need to incorporate the provisions of the fully harmonised Consumer Credit Directive (CCD) on pre-contractual duties (but also on withdrawal, contractual information and early performance) into an OI.

It was agreed to move the provision on the liability for loss caused by reliance on incorrect information to the chapter on pre-contractual duties and to keep the reference to reasonable reliance. The Drafting Committee (DC) will look at the exact formulation to ensure

consistency with the other provisions in the chapter and will also look at the issue of whether and how to include a rule on misleading information.

C) Invalidity

Only a small number of provisions were discussed. In particular, the Group agreed that the provision on fraud should cover recklessness. Moreover, it was agreed to revisit the drafting of the provision on threats in respect of "coercion" on the basis of the PECL text.

III. GOOD FAITH AND FAIR DEALING

The Group addressed the issue of the mandatory nature of the provision in the light of the question raised in the key stakeholder meeting whether and to what extent the parties should be permitted to re-define or even lower the standard of good faith (GF). There was a broad consensus that the terms agreed by the parties to a contract can be relevant for the interpretation of what GF requires in the specific situation but must not lead to a lowering to the standard of GF as such and that any modification of the black-letter rule to make that clear would imply the risk of spreading uncertainty on the whole concept of GF.

The experts further discussed the necessity to clarify the residual nature of this provision and in particular of the right to damages for its breach. A consensus emerged that the recourse to this article should a) be excluded by the *lex specialis* rule where another provision establishes a standard of conduct as an emanation of the GF principle that should not be undermined and b) play a supplementary gap-filling ('catch-all') role where no such other and more specific rule exists.

IV. CHANGE OF CIRCUMSTANCES

Following an extensive discussion the Group concluded that a provision on change of circumstances should be included in the OI whilst underlining the exceptional character of the provision.

With regard to the definition of a "change of circumstances" the Group decided to remove the reference to the notion of "manifestly unjust" and make use of the criterion of "excessively onerous" as in PECL.

The question on the need for a requirement/condition of renegotiation proved to be the most difficult and complex within this Chapter. Two options were on the table: one follows the UNIDROIT principles and provides for a specific "entitlement to request renegotiations"; those renegotiations constitute a precondition for initiating the court proceedings. The alternative proposal refers to renegotiation as a precondition for granting remedies and spells out that a court can take the parties' conduct in relation to renegotiations into account when deciding on a remedy. However, there was a disagreement as to the consequences of failed renegotiations. Some experts would like to strengthen the link between the renegotiations and the remedies by replacing "court can" with "court must take into account" in the second sentence of the alternative proposal.

In conclusion, the Group decided against both proposals. Instead, the Group adopted a combined solution: duty to renegotiate + renegotiation as a precondition for judicial proceedings + damages for the lack of renegotiation as a breach of the good faith principle.

VI. STRUCTURE

The Chair opened the discussion by clarifying that it is clear that the OI will have to contain some degree of separate rules for B2C and B2B. Furthermore, the Chair clarified that rules subject to the maximum harmonisation in the CRD will be directly taken over in the OI, whereas rules subject to minimum harmonisation will constitute a point of departure for discussions in the Group.

Without discussion, the group agreed with the proposal by the Commission to earmark the chapters on set-off and on plurality of creditors and debtors as well as the non-assignment-related sections of the chapter on change of parties for deletion.

Having in mind diverging views on the need for separate chapters on prescription, representation and assignment, the Group agreed to defer the decision pending comments from the stakeholders.

VII. FORMATION

Without further discussion the Group agreed that the proposal on formation can be finalised in written procedure. Experts are requested to submit their comments in writing. In the light of those comments, the DC will finalise the text and ask the Group for the final approval in writing.

VIII. PERFORMANCE

The Group considered that the definition of "an obligation", "performance", "terms regulating obligations" and "reciprocal obligation" are redundant; therefore it decided to delete those provisions. The substantive elements of the definition of "reciprocal obligation" will be used wherever needed throughout the text. The Group felt that the definition of "non-performance" is better placed in the chapter on non-performance. Therefore, it was decided to defer discussion on its substance for the chapter on non-performance.

The Group supported the need for a provision on the duty to cooperate drawing from III – 1:104 of the DCFR. . Following a brief discussion the Group decided to delete the entire article on alternative obligations or methods of performance (III – 2:105 of the DCFR) since the provision merely states the obvious and introduces unhelpful presumptions.

Finally, the Group agreed to merge the article on performance entrusted to another (III – 2:106 of the DCFR) with III-2:107 and develop one uniform provision on the performance by a third party. Due to time constraints the Group did not discuss the remaining part of the provisions, which will be on the agenda of the next Group's meeting. For this meeting, the Rapporteur will submit the revised version of those articles, which were discussed .

IX. OTHER ISSUES

The Chair briefly outlined the possibility of extending the OI to the transfer of digital rights. In particular, the rules on sales contract might need to accommodate the specific character of the transfer of digital rights.