ORGALIME

Position Paper

Brussels, 31 January 2011

Orgalime comments on the Commission Green paper on policy options for progressing towards a European Contract Law – Comm (2010) 348

1. INTRODUCTION

Orgalime welcomes the opportunity given to stakeholders to comment on the ideas developed by the Commission in its Green paper on progressing towards a European Contract Law.

Orgalime has for many years followed the European Contract Law issue and has contributed with its expertise throughout the discussion. Orgalime is very much committed to simplifying international trade for engineering companies, including SMEs, by for example issuing model contracts and general conditions that are widely used in cross-border business, both within as well as outside the EU.

Since the majority of industries represented by Orgalime concerns the capital goods industry, we will here only comment purely from a B-2-B perspective. Orgalime will not comment here on the discussion in the B-2-C area.

2. THE STARTING POINT OF THE GREEN PAPER IS WRONG

The rationale and starting point of the Commission's ideas developed in the Green paper is the firm belief that different contract laws create significant problems in cross-border trade. Orgalime - as an industry association representing one of the most export-oriented industries within the EU - opposes this view. Differences between national systems of Contract law generally do not cause a problem for cross border trade in the B-2-B area since exporting companies have found ways to cope with these differences. **Freedom of contract** is the determining principle of Contract Law in all European legal systems, which allows companies to negotiate contracts with relative ease by using their own standard contracts or those developed by industry associations. This is especially true for SMEs. For decades companies have been doing cross-border sales on a daily basis, most of the time without any legal assistance.

Only in cases when freedom of contract is hindered by mandatory national rules, obstacles may arise (for example in Germany due to the restrictive jurisdiction on the law on General Conditions or in France due to mandatory rules concerning vice-caché).

Orgalime, the European Engineering Industries Association, speaks for 32 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 22 European countries. The industry employs some 10.6 million people in the EU and in 2009 accounted for some €1,427 billion of annual output. The industry not only represents some 28% of the output of manufactured products but also a third of the manufactured exports of the European Union.

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3. ORGALIME COMMENTS ON THE DIFFERENT OPTIONS AND SCENARIOS SUGGESTED BY THE COMMISSION

3.1 General Comments

Orgalime supports the status quo. The Commission should privilege a simplification and harmonisation of the existing texts instead of creating new ones.

Orgalime believes that “freedom of contract” and its meaning for a competitive European economy are not sufficiently considered in the Commission texts. Orgalime sees the protection of freedom of contract as the top priority and objects to the introduction of mandatory legislation in this area. We explicitly warn against the tendency to apply mandatory rules created for consumer contracts (B-2-C) to the business contract framework (B-2-B). In this context, Orgalime emphasises that consumers and SMEs are not in the same situation regarding their vulnerability in business relations. Being an SME does not automatically mean being the weaker party: the negotiating power of a company is measured not only by its size, but also by its position in the market, for example, as owner of innovative technologies. In addition, the position of strength is relative and may accordingly change (a medium-sized company of 200 employees negotiating a contract with a huge multinational company could be considered as the weaker party. The same company however may enter into negotiations with an SME of e.g. 20 employees and in that case the medium-sized company is the stronger party). If legal protection is only implemented due to the small size of a company, competition might be distorted. Therefore we do not believe that a fair and clear differentiation is possible, between, on the one hand companies which need protection and, on the other hand, those which do not.

3.2 Orgalime comments on the idea of publishing the work of the expert group (Option 1)

Orgalime believes that the work of the expert group needs to be published in order to allow stakeholders to follow the process.

3.3 Orgalime comments on the idea of working with an “official toolbox” (Option 2)

Orgalime sees certain opportunities in having a “toolbox”, provided that certain limits are respected.

A similar “toolbox”, the so-called New Legislative Framework, has already been introduced in the field of technical harmonisation (Decision 768/2008/EC on common framework for the marketing of products). Such a "toolbox" can - provided it has a certain degree of binding force - increase the coherence of European legislation. Orgalime believes that the rules created by this “toolbox” should be accompanied by an inter-institutional agreement, in order to ensure that the adopted measures are more binding.

3.4 Orgalime comments on the idea of developing recommendations for Member States (Option 3)

This suggestion does not seem to offer any advantages. On the contrary, if some Member States follow the recommendations but others do not, it might lead to a confusing situation for businesses.

3.5 Orgalime comments on the idea of proposing a Regulation for setting up an optional instrument of European Contract Law (Option 4)

Orgalime does **not see the need for the creation of an optional instrument of European Contract Law in the B-2-B field**. As explained above, the differences between national systems of Contract law generally do not cause major problems for cross border trade in the B-2-B area. Many sub-sectors of the engineering industries have an export quota of up to 80%, which is sufficient proof that cross-border trade functions very well, despite of differences in the national law systems.

Due to **freedom of contract**, which is the determining principle of Contract Law in all European legal systems, companies cope relatively easily with cross-border trade. Contract law differs greatly from other areas of law such as company law, where companies are dependent on national legislation. In contract law, companies can chose the applicable law, negotiate the contract terms as they wish and they can rely on established model contracts for cross border transactions, such as, for example, the Orgalime model contracts and General Conditions[1].

Moreover, the **UN Sales Law (CISG)** is already a useful "optional instrument" that is well accepted. Thus, Orgalime asks to what extent the Commission expects the additional optional instrument to offer greater benefits than the already practically applied CISG and what would be the relations between those two instruments. Orgalime considers the introduction of a new optional instrument at European level more confusing than practical, since its scope would be limited to Europe, whereas the CISG is recognised worldwide. We believe in a globalised economy, multilateral approaches would be more interesting than regional approaches.

Orgalime fears that the new, additional instrument will create **legal uncertainty**. It will take decades for the instrument to become well-established case law, and in the meantime it will be subjected to diverging interpretations that increase legal uncertainty. Such a transition period could only be acceptable if the instrument were the only solution. However, all things considered, Orgalime regards such an instrument as unnecessary in the capital goods industry.

3.6 Orgalime comments on the idea of proposing a Directive or a Regulation on European Contract Law or on a European Civil Code (Options 5,6,7)

Orgalime considers the harmonisation of European Contract Law or the establishment of a European Civil Code as unrealistic regarding the differences between national legal systems and traditions, and problematic from the point of view of the subsidiarity principle.

[1] Orgalime General Conditions for the supply of industrial goods have been used millions of times in B-2-B.

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4. INDUSTRY ASKS FOR A ”REALITY-CHECK” OF THE CFR

Orgalime has for many years followed the European Contract Law discussion and has constantly contributed to the work on the CFR. During all those years, the position of researchers and academics on the one hand and of industry representatives on the other hand has diverged considerably, which is why the engineering industries oppose any decisions concerning the way forward taken in haste and without a genuine consensus among industry, academia and governments. Orgalime invites the Commission to subject future plans and drafts to an additional evaluation by a wider audience - including by those most directly affected, the companies and businesses that trade on European and international markets - before deciding on what common action to take.

Since April 2010, the European Commission’s Expert Group meets monthly in order to discuss the draft of the CFR. Orgalime considers as too ambitious the aim of this Expert Group, given the limited time frame and the size and complexity of the CFR.

In order to avoid that the results do not meet the needs, Orgalime suggests subjecting the draft of the CFR to a public consultation for legal practitioners to be able to submit their comments.

Business needs a stable legal framework. This means that every change must be justified by adequate evidence that highlights the gaps or incoherencies between Member States' national regulations.

5. CONCLUSIONS

Orgalime does not see added value in developing an obligatory or an optional 28th contract law regime. Having an “official toolbox” could have some merits, provided that certain rules are respected in order to truly increase the coherence of European legislation.

Companies within the engineering industries do not experience serious problems in cross-border business resulting from differences in the national contract law systems. Thanks to the freedom of contract principle and to the possibility of using self-developed contracts or other standard contracts and general conditions, European engineering companies - of which the vast majority are SMEs - are coping well with the different national legal systems. We therefore do not see the need for any changes in the B-2-B area.

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