



# **Comments on the Action Plan of the Commission for a more coherent European contract law - COM (2003) 68**

## *Orgalime Position Paper*

14 July 2003

### **1. Introduction**

Orgalime is the liaison group representing the interests of the European mechanical, electrical, electronic and metalworking industries at the level of the EU. Orgalime's members include, at the present time, 32 national trade federations representing some 130,000 companies in 21 European countries. These industries, which include mainly small and medium sized companies, employ some 7.3 million people and account for around 1,200 billion Euro in the GNP and one third of the industrial exports of the EU.

### **2. Orgalime position**

Orgalime in principle supports the Commission's action plan. We welcome in particular the fact that the harmonisation of civil law within Europe is being approached in a considered manner and without undue haste.

Orgalime also welcomes the intention to continue to involve and consult stakeholders with respect to future measures.

We believe that a coherent civil law which does justice to all the interests involved can develop in the long term only if the practical experience of interested parties – and in particular industry – is taken into consideration. We are therefore pleased to take part in the dialogue with the Commission and the scientists and experts appointed by it and provide hereafter some initial comments

### **3. Clarifying the plan**

Orgalime feels that the action plan needs further clarification and discussion between the parties concerned. For example, the plan does not contain a clear statement on how to remove obstacles to the free movement of goods arising from binding provisions within the individual member states, as detailed in the Orgalime position paper of October 2001 on the Commission's notice on European contract law (examples are in Italy: formal rules applied for the inclusion of general conditions; in Germany: control over content of general conditions; in the Czech Republic: impossibility of limitation of liability).

As it is, the freedom of contract which is crucial for business transactions is curtailed to an unacceptable degree. Where the protection of the consumer is concerned, this may be a necessity which should be accepted, but this cannot be the case with regard to business-to-business contracts.

#### 4. Creating a common frame of reference

The idea of achieving more coherence within European contract law through a common frame of reference is interesting and we welcome it in principle. Such a frame of reference provides the opportunity to simplify EU law and to abolish existing obstacles within the internal market, in particular binding national legal provisions. However this frame of reference must be practical in form and take into account the interests of industry, in order to facilitate the development of the EU to become the ‘most dynamic economy in the world’.

Orgalime has fundamental reservations mainly with respect to the approach that has been chosen by the Commission, i.e. basic research and comparative studies of law. They are, of course, important instruments to support legislation but, in the area of European contract law in particular, comprehensive studies already exist, to which the Commission refers and which it wishes to use. Before any ancillary or even new studies are commissioned, the existing results of this research should first be analysed and explored with respect to their practical applicability. Our experience with scientific studies in this area shows that in attempting to find the best theoretical solution, scientists and experts quite often lose sight of the practical aspects. Some of the existing research appears to be rather theoretical and abstract, and not very practicable, perhaps because the business community was only involved in the work to a limited extent. From our point of view, special emphasis should be placed on re-examining existing research in respect to its practicability.

If one examines the democratic accountability of the proposed process, we believe that a frame of reference which is meant to serve as a pattern for numerous legislative proposals and which is developed without the participation of the legislative organs, is questionable. It is true that each and every legislative proposal related to this frame of reference will have to undergo the normal legislative procedures. However, if the European Parliament or the Council of Ministers were to push through changes which did not comply with the frame of reference (e.g. a different legal concept of ‘damage’), the coherence of European contract law would no longer be guaranteed. Therefore the question that arises is how the Commission wants to ensure the legal validity of the frame of reference and, at the same time, take into account the requirements of a democratic legislative process.

Especially questionable from our point of view is the intention to use the frame of reference as an *optional instrument*. This already implies to a very large extent the creation of a uniform civil law or, at least, gives rise to fears of an automatic move in this direction for which the time, in our view, is not yet ripe. A well-considered approximation of Member States’ civil law, initiated through a currently non-existent, coherent European law, also implies that reviews and corrections are carried out after each step. We believe that, here too, the various stakeholders should be involved.

In general we think that the frame of reference has to prove itself in practice – i.e. in daily business – before an optional instrument can be considered. In this respect, the UN law on sales (CISG) already provides a quite useful ‘optional instrument’ which offers a relatively large degree of freedom of contract to the parties involved (even if Art. 4 a CISG poses a potential difficulty) and which, in contract practice, is well-accepted. The question therefore arising in this context is how far the Commission expects greater benefits from an additional optional instrument than those already delivered by the CISG, which is already applied in practice, and what the relation between these two instruments should be.

In Orgalime’s opinion, an additional instrument comparable to the CISG would have a confusing effect on those involved with its practical application, as new questions regarding distinctions and/or delimitations between the two instruments would arise leading to an additional need for further expensive consulting services.

## **5. Promoting the elaboration of EU-wide standard contract clauses**

Orgalime fully welcomes the Commission's strategy with regard to the second set of measures that aim to promote the use of Europe-wide standard contract terms.

We were very pleased to see that the Commission took Orgalime's previous comments into account and that, in the Action plan a direct reference to Orgalime's General Conditions was made. We truly believe that, as an industry, we have been able to arrive at satisfactory industry-driven solutions for facilitating contractual relationships between enterprises, both within our industry and with our client sectors, i.e. the rest of industry, the public health services, etc.

We would therefore welcome all efforts to promote these General Conditions. Details of our General Conditions can be found on Orgalime's web site at <http://www.orgalime.org>. The conditions are also available in electronic form and can thus be used in different forms of so-called B2B electronic commerce, available at <http://licensing.Orgalime.org>. We would be grateful if the Commission could put these two links on the website which it plans to create for the promotion of standard terms.

## **6. Conclusions**

Orgalime on the whole welcomes the Commission's action plan. However, we believe that the creation of a uniform frame of reference could, under certain circumstances, lead to some problems. We are especially wary of the plan to extend such a frame of reference into a so-called 'optional instrument', in particular with respect to an automatic procedure which leads to a uniform European contract law. It is particularly important to us that industry should, as a major stakeholder, be involved in the work and the ongoing process. This will serve to further practical applicability and ultimately the acceptance of the work produced. As specified in our position paper, our attention is especially focused on the extension of the freedom of contract in order to abolish existing obstacles.

## **7. Future cooperation between Orgalime and the European Commission**

Firstly with regard to the workshop planned for autumn 2003, Orgalime is pleased to offer the Commission our full collaboration and participation.

Furthermore, in the context of the study to be commissioned for the preparation of the frame of reference, we would be pleased to take part in the preparation of the questionnaire through our legal panels. We would also be happy to offer any help to the scientists and experts responsible for the study and to answer any practical questions which may arise.