



**Scottish Law Commission response to the European Commission Green Paper  
on policy options for progress towards a European Contract Law for  
consumers and businesses (COM (2010) 348 final)**

**Scottish Law Commission  
140 Causewayside  
Edinburgh  
Scotland, United Kingdom  
EH9 1PR**

**Tel: +44 0131 668 2131**

**Fax: +44 0131 662 4900**

**Email: [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk)**

**Web: <http://www.scotlawcom.gov.uk/>**

**EC Register of Interest Representatives Identification Number: 77030735104-51**

## Introduction

This response is from the Scottish Law Commission, a statutory body set up under section 2 of the Law Commissions Act 1965 and tasked with promoting the reform of Scots law.<sup>1</sup> We are the sister organisation of the Law Commission for England and Wales, set up under the same statute.

The response has been agreed collectively by the Scottish Law Commissioners. The submissions which follow build upon an earlier submission to the United Kingdom Government's call for evidence on the options presented by the Green Paper.<sup>2</sup> In light of further discussions (such as that organised by the Law Society of Scotland and Scottish Government in Edinburgh on 16 December 2010) and what we perceive as a specific Scottish interest in the proposed reform,<sup>3</sup> we have decided to submit our own direct response to the options presented by the Green Paper.

We have structured our response in three parts. We firstly describe the use which we, as a law reform body, are making of the DCFR and our consequent interest in the harmonisation of contract law across the European Union. Secondly, we set out what we believe is the case for reform in this area, providing evidence and analysis we have gathered from our investigations to date. Thirdly, we address the specific questions posed by the Green Paper, on the legal nature of any instrument of European Contract Law, the applicable scope of any instrument and the material scope of any instrument.

---

<sup>1</sup> <http://www.scotlawcom.gov.uk/>

<sup>2</sup> Ministry of Justice and Scottish Government Call for Evidence on the European Commission's Green Paper about Contract Law, closing date 26 November 2010, available at <http://www.justice.gov.uk/consultations/call-for-evidence-180810.htm>

<sup>3</sup> As distinct from the interests of other legal jurisdictions forming part of the United Kingdom.

## 1. Our use of the DCFR

1.1 Under our Eighth Programme of Law Reform launched in 2010,<sup>4</sup> we are presently engaged in a review of Scots contract law in light of the DCFR. This project aims to use the DCFR as a “toolbox” with which to review the Scots law of contract in light of suggested best practice from Europe. We have been engaged in this project for one year and we believe the Commission is therefore in a position to offer useful observations in response to the options presented by the Green Paper.

1.2 The Scottish Government recognizes the contribution that contract law can make to the development and expansion of economic activity in our jurisdiction<sup>5</sup> and to that extent, has a particular interest in the outcome of the DCFR project. Reference to the DCFR project as a toolbox, as at present, may be fruitful in producing modern, accessible and attractive laws conducive to encouraging sustainable business growth, not only in Scotland, but also in the European internal market.

1.3 The DCFR project is already having a significant impact on law reform thought in Scotland; for example, the Scottish Law Commission is presently engaged in at least four distinct projects, in addition to our review of contract law, where the DCFR or other European harmonisation efforts are being directly referred to as a standard of good practice when recommending legal reform.<sup>6</sup>

### *Our evidence gathering to date*

1.4 In undertaking our review of Scottish contract law in light of the DCFR, we have gathered existing published evidence and, to supplement this material, we have convened a number of advisory groups to assist the development of policy in this project. Three main groups were convened over the course of 2010, namely, a business advisory group, a legal advisory group (involving Scottish legal practitioners), and a judicial advisory group (involving members of the Scottish judiciary, including Commercial Court judges). This has not only been useful from our perspective of gathering the necessary evidence to inform our

---

<sup>4</sup> The Programme is available at <http://www.scotlawcom.gov.uk/publications/reports/2010-present/>

<sup>5</sup> See further the Report of the Business Experts and Law Forum, 3 November 2008, available at <http://www.scotland.gov.uk/Publications/2008/10/30105800/0>.

<sup>6</sup> Reference is being made to the DCFR in our reviews of Trust Law, Prescription of Moveable Property, and Moveable Transactions, details of which can be found on our website: <http://www.scotlawcom.gov.uk/law-reform-projects/>. Our joint project with the Law Commission for England and Wales, reviewing the law of insurance (<http://www.scotlawcom.gov.uk/law-reform-projects/joint-projects/insurance-law/>), has also made use of the Principles of European Insurance Contract Law: see Issues Paper No 6, Damages for Late Payment and the Insurer's Duty of Good Faith (March 2010), paras 4.55-4.49.

law reform project in this area, but also in engaging members of the legal community in Scotland with the DCFR in a meaningful, analytical and critical manner, beyond usual academic circles.

1.5 The group representing the interests of Scottish business, has involved both small and medium scale enterprises and large or international corporations, as well as those working in both the private and public sectors. In forming this group and gathering evidence from its deliberations, we were mindful that 99.2% of all Scottish businesses are small to medium sized enterprises,<sup>7</sup> and have accordingly given due weight to their representations, alongside those of larger enterprises and the public sector.

1.6 Many representatives in our Business Advisory Group boast several decades of experience of contracting in their industries, and remain active in their sectors; they were accordingly able to comment on changes and trends over time. While we acknowledge that the evidence gathered in this way is essentially qualitative and subjective in nature, and not empirically comprehensive, we nonetheless found the views of this advisory group very helpful in presenting an up to date picture of current issues for business, particularly in a cross-border context. Throughout our submission, we have made reference to findings gathered from this and the other advisory groups and think that this independent evidence gathering on the position of Scottish businesses in particular may be helpful in considering reform options across the internal market as a whole.

#### *Our attitude to reform*

1.7 As outlined above, while the use of the DCFR as a toolbox has been fruitful thus far, over the last year we have become aware that continued divergences in the regulation of contracts between member states may have a detrimental impact on the functioning of the internal market. We would, however, qualify this assertion by noting that the impact of the problems of divergent laws differs between businesses and consumers, and we have accordingly dealt with these issues separately below. Nonetheless, we think an overall reform solution is merited. We first outline our view of the case for reform, and then, second, discuss what we perceive as the most appropriate reform response to the problems raised by divergence of national contract laws in the European internal market.

---

<sup>7</sup> Figures provided by the Scottish Government, Scottish Corporate Sector Statistics for 2010, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Business/Corporate/KeyFacts>.

## 2. The case for reform

2.1 Most of Scotland's trade is within the UK. For example, in 2008 Scotland exported goods and services worth an estimated £42.3 billion to the rest of the UK, with England remaining Scotland's biggest trading partner.<sup>8</sup> In the same year, however, Scottish businesses exported goods and services worth an estimated £20.7 billion to the rest of the world.<sup>9</sup> Of this, an estimated £9.5 billion was to the EU, with the Netherlands, France, Germany, Spain and Ireland being the most significant markets. In total this amounts to more than three times the value of Scottish exports to the USA. Clearly, contracting in a cross-border context, particularly within the EU, is a significant concern of Scottish businesses. The figures represent all trade out of Scotland but do not reveal how much of it is to be accounted for by business-to-business (B2B) transactions as distinct from business-to-consumer (B2C) ones. We suspect that the greater part of it will be B2B.

### *Problems experienced by Scottish businesses in B2B contracting across borders*

2.2 The evidence gathered from our Business Advisory Group suggests that businesses in Scotland generally place great emphasis and care on the detail of their contracts, whether contracting with other businesses, or engaging with consumers. Appropriate contractual provisions are generally viewed as essential to a smooth-running commercial endeavour and accordingly the process of agreeing a deal and drawing up an appropriate contract is an important part of business. While our Advisory Group suggested that it is common for the essential scope of any transaction or deal to be agreed relatively quickly between the business parties, it was suggested that delays can be suffered due to protracted legal negotiation over the exact terms and conditions of any deal, including the applicable law of the contract. One example drawn to our attention by a Scottish solicitor was of two companies, a Polish and a Scottish one, which agreed the terms and scope of an international trade contract within a matter of days. However, signing of the contract was held up by three weeks of negotiation over the applicable law election for the contract. As neither party had any knowledge of the other's legal system, and indeed had no accessible means of finding out the relevant law in that jurisdiction in their own language, the parties could not agree on either Polish or Scottish law. This divergence held up and complicated what should be a straightforward exercise of businesses' rights to trade freely across the internal market. Of especial concern to our Business Advisory Group was that, while in the

---

<sup>8</sup> The Scottish Government: Scottish Export Statistics, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Economy/Exports/RUKExports>.

<sup>9</sup> The Scottish Government: Scotland's Global Connections 2008, January 2010, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Economy/Exports/GCSpdf>

current difficult economic climate the maintenance of good relations with other businesses is key to economic recovery, the delays stemming from such protracted negotiations can affect the development of trust between enterprises. Accordingly, this can present particular problems for businesses contracting in a cross-border context.

2.3 Evidence also gathered from our Business Advisory Group supports the idea that businesses' differing levels of bargaining power and dominance in their respective markets affects their ability to persuade another party to contract under a certain applicable law. The quality of a given law is a much less important factor in the choice of law than economic weight and the preference of the more powerful party in a transaction. Evidence suggests that businesses in Scotland typically contract under the applicable law of the jurisdiction in which they are conducting business, and in cross-border trade this will generally be the home jurisdiction of their client or customer.<sup>10</sup> Without bargaining power, it is difficult to negotiate changes to applicable law under cross-border contracts. Accordingly, larger and potentially more market-dominant operators may be able to insist on their preferred applicable law and conversely smaller, potentially less market-dominant operators may find themselves contracting under unfamiliar contract laws. While we can offer no quantitative data to this effect, it is clear from the qualitative evidence we have gathered that this has at least the potential to increase the costs of contracting and uncertainty in cross-border contracting. The evidence gathered to date from the business community suggests that such uncertainty results in the perception of risks in cross-border contracting, whether merited or not, and that the existence in itself of perceptions of risk is undesirable in the internal market.

2.4 Perception can present further problems when contracting in a cross-border context. The evidence of our Business Advisory Group suggests that there may be negative perceptions (perhaps entirely unsubstantiated in practice, but nonetheless in existence) that certain jurisdictions' laws of contract are unsatisfactory for business-to-business (B2B) contracting in a cross-border context. For example, one member of our Business Advisory Group reported that indemnity insurance is not made available in his business (new technology licensing contracts) if the applicable law is to be that of a US state. The potential indemnity exposure under US law is too great a risk, and so another applicable law must be chosen. Moreover, as seen in the Scottish-Polish example above, reluctance to contract under certain laws may stem from ignorance of, or difficulties in finding out about, the law of the state in question. This is only exacerbated by the lack of foreign language versions of

---

<sup>10</sup> A notable exception to this is that public procurement contracts let by a Scottish entity are almost invariably made subject to Scots law.

national laws. Whether these negative perceptions or concerns are ultimately well-founded or substantial seems to matter little, for the fact such perceptions exist at all impacts upon the extent to which contracting in a cross-border context may take place under those applicable laws in the first place.

2.5 Specific problems affecting the business community in Scotland have also been identified in relation to the divergence of national laws regarding “e-contracting”, and the formation of contracts through the medium of email. This is not confined to business-to-consumer transactions (B2C). B2B e-contracting is becoming more prevalent in Scotland, particularly in a cross-border trading context. Indications from our evidence suggest that the use of this method of B2B contracting will continue to grow. Businesses think, however, that there are divergences between national laws on the issue of e-contracting, and this raises significant contract formation issues. In light of the increasing use of electronic contracting, and its capacity to develop cross-border trading in the internal market (see below at paragraphs 4.3 - 4.8), our qualitative evidence suggests that businesses in Scotland feel this particular divergence of national laws, or indeed a perception of divergence, is not satisfactory.

2.6 Thus, the combined effects of market-dominance, perception of differences, and real divergence of national laws suggest that problems do currently exist. For these reasons, some members of our Business Advisory Group have suggested in their evidence to us that a European law of contract, perhaps in the form of a written instrument, would be welcomed by some businesses in Scotland, and would be used in cross-border trade, especially by small businesses, when they are able to negotiate effectively about choice of law. Evidence gathered from our investigations therefore broadly supported the notion of a European Contract Law. Representatives from both the public and private sectors highlighted to us the significant effect the introduction of the EU Public Sector Procurement regime has had on public contracting over the last decade, and pointed to this development as an example of European harmonisation efforts opening up the internal market across national borders. Evidence suggests that businesses take the view that a European contract law, if executed correctly, could also help in this regard.

2.7 Other members of the Group have expressed doubts about whether such a European law of contract would be achievable or workable in practice, or used, no matter what its quality. This view, where it is expressed, tends to come from big businesses rather than from the SME sector. However, there is at least some measure of support for such

reform within the Scottish business community. This is broadly in line with the results of the Clifford Chance Survey on European Contract Law (2005), albeit on a much smaller empirical scale.

*Problems experienced by Scottish consumers when contracting across borders*

2.8 It appears from our limited investigations, however, that the case for a European contract law is not as strong for consumers as it is for businesses. The Green Paper may perhaps over-state the case with regard to the benefits a European contract law can afford consumers. We recognise, though, that most consumer contracts will be of the B2C type rather than C2C, and we deal in paragraph 2.11 below with the business interest in a B2C contract. For the present, we are concerned with the consumer side of such a contract.

2.9 Our reasons for thinking that the Green Paper's options may be more attractive for business than consumers are twofold. First, there is already a substantial body of European consumer protection law, mostly providing for a minimum level of harmonisation (though we note that the current version of the proposed Consumer Rights Directive adopts a maximum harmonisation approach). Secondly, Article 6(2) of Rome I Regulation assures (or *should* assure) consumers of the continued protection of any mandatory protections afforded to them under their domestic law. We say that consumers *should* be assured, because we have recently carried out research which suggests that, in practice, some large cross-border traders purport to apply different choice of law provisions to their internet contracts. For example, eBay Spain and eBay Italy both contract with domestic consumers under the law of the Netherlands, and all of Amazon's European sites (including amazon.co.uk) contract with their domestic consumers under the laws of Luxembourg. Finally, easyJet's European websites require consumers to contract under the law of England and Wales exclusively. This may, of course, be problematic for consumers outside that jurisdiction.

2.10 One hurdle we have encountered in relation to consumers (as with businesses, in large measure) is a lack of sufficiently detailed quantitative evidence. For instance, what level of difficulty do consumers actually encounter when purchasing goods and services (whether on- or off-line) from traders based in, or operating under, the laws of another jurisdiction? To what extent are consumers deterred from entering into such transactions by uncertainties about the law to be applied? We think that there is a need to gather further data on the subject, and if necessary to commission the collection of relevant data, particularly of a quantitative kind on cross-border contracting in the EU. We suggest that this may be of particular value in relation to on-line contracting, where there is rapid

expansion which could usefully be monitored in a focussed way. We give two specific examples. The first concerns the late (or non-) delivery of orders caused by the adverse weather conditions experienced across Europe in the run up to Christmas 2010. We expect that this will have heightened consumers' desire to ascertain their contractual rights when contracting with retailers from across the EU and may provide an example of where a single system of European contract law could have benefited consumers. Secondly, there is the fall-out from the volcanic ash cloud earlier in 2010. We have in mind the considerable consumer dis-satisfaction expressed, both at the relevant time and since, about the responsiveness of at least some airlines to the compensation claims lodged under Regulation 261/2004 after the mass cancellations of flights across Europe and elsewhere. A comparison of how this has worked out around the EU might well produce useful results in telling us something about consumer perceptions of consistent legal protection across Europe.

*Problems experienced by Scottish businesses in B2C contracting across borders*

2.11 We are conscious that businesses may also desire a system of European contract law available for use in their dealings with consumers across the internal market. As we have just noted, we are not convinced that evidence is yet available to show that consumers directly suffer from a lack of harmonised contract law across the European Union. We think, however, that providing a system of European contract law for B2C contracts may afford benefits for businesses, perhaps more so than for consumers. Scottish businesses have consistently emphasised to us the importance of achieving certainty in their contracting. A clear and well articulated system of European contract law could achieve that certainty when contracting, not only with other businesses, but also with consumers across EU borders. An easily accessible, multi-language version of a European contract law might allow businesses to readily ascertain the consumer rights and protection applicable to their trade across EU borders and save them the expense of seeking advice on the national law of another member state. This is a particularly important consideration for small businesses. Such a system of European contract law, available for use in B2C contracts, has the clear possibility of stimulating further trade with foreign consumers across the internal market.

*Summary*

2.12 Therefore, while we would suggest that the case for a European contract law is more immediately apparent for B2B contracts, we consider that there are considerable advantages also for B2C contracts (as we explain particularly in paragraph 2.14) and probably also for C2C contracts. But, on that last point, we think that more research is needed to determine

whether divergences in national laws currently do cause real problems for consumers contracting across the EU. As a matter of logic, however, we can see no reason why an instrument creating a European contract law should not cover all contracts, including those between businesses, between individual consumers and those of a business-to-consumer character, a point we develop further below at paragraphs 4.1 – 4.2).

2.13 In summary, we suggest that there is evidence that current divergences in laws of contract can disrupt the smooth operation of the internal market, particularly for businesses. Some of these difficulties might be better addressed were an EU-wide contract law to be available, in particular for smaller businesses with less access to legal advice and also perhaps to consumers.

**3. What should be the legal nature of the instrument on European Contract Law? (paragraph 4.1 of the EC Green Paper).**

3.1 In response to the options presented by the Green Paper, we offer the following observations on each proposal:

*Option 1: Publication of the results of the Expert Group*

3.2 We suggest it would be clearly beneficial to publish the results of the Expert Group; this would help to address the relative dearth of substantive expert evidence on this matter. We think this would be particularly beneficial following the DCFR's own publication, as it will allow the relative advantages and disadvantages of reform to be considered in more depth.

*Option 2: An official "toolbox" for the legislature*

3.3 We suggest there are clear advantages to be gained from the adoption of an official "toolbox" for the legislature. This may improve the coherence and quality of any legislation emanating from national and European legislatures. We would find this particularly helpful in our own current review of the Scots law of contract in light of the DCFR as a means of standardising concepts and terminology, if not substantive rules. We express no preference as to whether an official "toolbox" might be in the form of a Commission act (option 2(a)), or an inter-institutional agreement (option 2(b)).

*Option 3: Commission recommendation on European Contract Law*

3.4 We do not see any advantage in a Commission recommendation on European Contract Law, encouraging member states to replace national laws with an EU instrument. Such a recommendation would not be binding on member states. It would be likely to take many years, if not decades, for such reform to be achieved through member states' domestic legislatures. Equally, this option would entail the replacement of national laws and would remove the option businesses and consumers currently have to contract under them.

3.5 Neither do we see any advantage in a Commission recommendation encouraging member states to incorporate an EU instrument on contract law as an optional instrument. We view this as a rather inelegant solution. As with option 3(a), adoption of such an

instrument would inevitably not be carried out simultaneously across all member states, resulting in unnecessary delays for businesses and consumers who may wish to use it.

3.6 We are generally unconvinced that Option 3 is a realistic option. In the course of our research and consultation amongst practitioners and businesses, it has become apparent that there may be antipathy towards the idea of a European contract law on the part of big business, with the consequently reduced probability of legislation being promoted at a domestic level.

*Option 4: Regulation setting up an optional instrument of European Contract Law*

3.7 We can see merit in the adoption of an optional instrument, permitting what is sometimes (wrongly) known as a “28<sup>th</sup> regime” of contractual regulation in the EU. This would provide parties with what we think would be a useful and attractive alternative to domestic contract law, and the evidence of our Business Advisory Group suggests that such an option would be welcomed by at least some businesses and would be used in Scotland, provided the regime afforded certainty, and clarity in its allocation of risk.

3.8 We would be strongly in favour of this optional instrument being made available in all EU member states via the medium of an EU Regulation. This would result in the automatic availability of an optional European law of contract in all domestic legal systems, while retaining national laws of contract. This has the clear advantage of acting as a suitable and accessible alternative, available in all official languages, in cases where no agreement on choice of law can otherwise be agreed between international parties, such as the Scottish-Polish example referred to above at paragraph 2.2. We would be keen for a European law of contract to be presented as an option across the whole EU in this manner, in order to gauge the reaction of businesses and consumers, to analyse how much a European law of contract was being used, and how useful parties found it as an applicable law. This would be an advantageous step before the European Commission gives further consideration to Options 5, 6 and 7.

3.9 We are, however, concerned by the completeness of the options offered by the Green Paper in this regard. It strikes us that a further option might usefully have been added: option 4 could have been broken down into an “opt in” and an “opt out” model. Moreover, consideration could have been given to whether parties opting in to any Optional Instrument, could then contract out of parts of that system, or whether a published CFR

would be available for incorporation by those parties who wish to do so. (This latter point may be alluded to in Option 1, at the foot of page 7 of the Green Paper; however, it could usefully have been made more explicit as an option throughout the rest of the paper, allowing a fuller consideration of its merits).

3.10 We also suggest that further consideration will be required on the effect of any Optional Instrument on the current regulations governing international private law in the European Union, namely the Rome I Regulation and the Rome II Regulation. Substantive amendment of their provisions may be required in order to guarantee the effectiveness of any Optional Instrument and we hope this might be publicly consulted upon, with the benefit of sight of a draft text of any proposed CFR Optional Instrument.

3.11 Finally, we note the importance of the speedy creation of a body of authoritative and accessible case law on the Optional Instrument. This will promote a consistent interpretation of it across the EU, and will be useful for professional advisors as well as businesses, consumers and others. To this end, we see a role not only for domestic courts but also for the European Court of Justice (ECJ). The ECJ's role in providing a consistent and authoritative interpretation of the provisions of any Optional Instrument will ensure its lasting value.

#### *Options 5, 6 and 7*

3.12 We view the implementation of each and any of these three options as premature and, to that extent, undesirable. We regard these options as disproportionate at the present time, and would point to examples where the lack of a uniform law of contract within trading blocks has not led to any significant barriers to trade, e.g. USA, Canada, and most notably, the United Kingdom itself. In the UK, there are two contiguous jurisdictions which have different, though similar, contract laws (and which have been in this position for several centuries without any clear negative effect on trade within the territory). The convergence between Scots and English contract law has in part come about through mutual awareness of each other's laws (as well as those of other jurisdictions, e.g. the Commonwealth and the USA) but also helped along from time to time by statutes such as the Sale of Goods Act 1893 and the Contracts (Rights of Third Parties) Act 1999. The USA is another example, with the Uniform Commercial Code working alongside "soft laws" such as the Restatements to provide an effective stimulus for convergence of laws between states without there being any formal unification or harmonisation of the law of contract across the union. A single law is not necessarily required for the effective operation of a single market, although we

recognise that all the trading blocks we have mentioned were unhampered by internal diversity of language to anything like the extent found in the EU.

**4. What should be the scope of the application of any instrument? (paragraph 4.2 of the EC Green Paper).**

4.1 We suggest that the scope of any future work or response should cover B2B contracts, B2C contracts, and also on-line transactions. We note in passing that we find the placing of “on-line transactions” alongside B2B and B2C contracts potentially confusing. Both B2B and B2C contracts can, of course, be concluded on-line, as can consumer-to-consumer contracts, particularly through the growth of on-line auction sites. The defining characteristic of an on-line transaction is the electronic means by which offer and acceptance are communicated, rather than the identity of the parties to the contract. Subject to what we say about the “blue button” at paragraph 4.14 below, we see no reason to treat on-line transactions as a distinct category, separate from B2B, B2C or C2C contracts.

4.2 Given the significance of the problems identified through the evidence shared above at Part 2, it is clear that consumers and businesses (both when contracting with other businesses, and with consumers) experience some level of difficulty due to divergences in legal systems across the internal market. On that basis, we think that both B2B contracts and B2C contracts should be included within any future work.<sup>11</sup>

*On-line transactions*

4.3 Additionally, we think that on-line transactions should be included within the scope of any future response, based on our evidence gathered to date. We think that the subject of on-line transactions has yet to receive the attention it merits, particularly in relation to the impact which divergent national laws may have upon on-line cross-border trade. From our analysis of published statistical evidence, it is clear that (a) on-line transactions are now a significant part of the economy across the internal market and indeed may be playing some role in economic recovery (see further paragraphs 4.4 – 4.5 below); and (b) both businesses and consumers are using this method of contracting to a significant degree. We therefore view consideration of on-line transactions in the internal market as particularly important in any response to, or future work involving, the EC Green Paper proposals.

4.4 We have found the work of the IMRG Capgemini e-Retail Sales Index<sup>12</sup> particularly helpful in analysing the impact of on-line spending on consumer contracting and would

---

<sup>11</sup> See especially our conclusions at paragraph 2.15.

<sup>12</sup> IMRG Capgemini e-Retail Sales Index, available at [http://www.e-christmas.com/8025741F0065E9B8/\(httpPages\)/FAE5B4EDA9020E448025744F0038D60B?OpenDocument](http://www.e-christmas.com/8025741F0065E9B8/(httpPages)/FAE5B4EDA9020E448025744F0038D60B?OpenDocument)

suggest that the Index's findings can assist in painting a picture of how e-retail has fared in difficult trading conditions in the UK over the last five years. The Index measures and tracks "on-line sales" in the UK, which are defined as "transactions completed fully, including payment, via interactive channels". It provides comprehensive coverage and monthly analysis of trends in e-retail. The latest IMRG Index figures available at the time of writing for e-retail trading in November 2010 show a 21.5 per cent increase in trading year on year. This indicates that UK consumers spent approximately £6.4 billion buying on-line goods during November 2010, equivalent to a £87 spend for every person in the UK. Combined with consistently high levels of spending on-line throughout this year, analysts posit this growth as an indicator of marked recovery from a relatively depressed period of consumer confidence over the last two years.

4.5 In contrast, the latest figures available from the UK Government Office of National Statistics on UK retail in the British high street and other outlets, with the consumer presenting him/herself at traders' premises, show that, year on year, retail sales in November 2010 grow by only 1.1 per cent from November 2009.<sup>13</sup> Together with the IMRG Capgemini e-Retail Sales Index figures noted above, this suggests that e-commerce has grown far quicker than high street retailing spending, in difficult trading conditions. On-line consumer transacting may therefore be particularly significant for economic recovery and future growth in the UK, and the same is probably true for the EU as a whole.

4.6 As consumers are most likely to engage in cross-border transactions with traders across the internal market where such transactions are on-line, if any instrument were to omit its application to on-line transactions, justification for extending the instrument's scope to B2C contracts might be lost.

4.7 Likewise, research suggests that the internet and in particular, on-line transactions, are also having a significant effect on the way businesses conduct trade.<sup>14</sup> We would agree that this development was increased opportunities for businesses to engage in cross-border trade in the internal market. To include on-line transactions in the scope of any legal instrument therefore seems wise.

---

<sup>13</sup> Office of National Statistics, Economy Statistics, November 2010, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=256>

<sup>14</sup> The Connected Kingdom: How the Internet is Transforming the UK Economy, October 2010, page 5: available at <http://www.bcg.com/documents/file62983.pdf> and see further the survey on CBI/Google of Internet Trends for Business and Consumers, see further at [www.cbi.org.uk/pdf/cbigoogleysurvey1106.pdf](http://www.cbi.org.uk/pdf/cbigoogleysurvey1106.pdf). Small businesses are not exempt from this trend either; even although only 9% of their trade is conducted cross-border, 88% of such businesses use the internet in some capacity, see Federation of Small Businesses Report 2009: Reports of Key Findings from Members in Scotland, available at [http://www.fsb.org.uk/policy/rpu/scotland/assets/publi\\_survey\\_fsbicmscotland\\_2009.pdf](http://www.fsb.org.uk/policy/rpu/scotland/assets/publi_survey_fsbicmscotland_2009.pdf), page 5.

4.8 Thus, subject to existing consumer protection measures remaining in place, we see no case for differentiating between any categories of contracts in any future work or response to the Green Paper. To have different rules for different types of contracts would add an unwelcome extra layer of complication to contractual analysis.

*The treatment of cross-border and domestic contracts*

4.9 We consider that cross-border and domestic contracts should be treated equally (on the assumption that the European law of contract is implemented as an optional instrument). At present, two parties operating within the same jurisdiction can, if they wish, agree that their contract is to be subject to a specified foreign law. We therefore see no reason why such parties should be prevented from specifying the European law of contract as the applicable law of the contract.

4.10 Furthermore, in relation to on-line contracts we see real practical difficulties in distinguishing between domestic and cross-border transactions. How, in such a scenario, would the “border” be defined? Would it be by reference to the IP addresses of the relevant computers used in the transaction? If so, what would be the justification for doing so?

4.11 In conclusion, we would suggest that no attempt be made to regulate domestic and cross-border contracts any differently in relation to European contract law, such a distinction being of little value in practice, and conceptually confusing in some instances.

*Priority needs*

4.12 From evidence gathered from our Business Advisory Group, we suggest that businesses in Scotland consider certainty, fairness and a clear allocation of risk within any regime of contract law, to be their priority needs when contracting. These will all need to be achieved in order to make the system attractive as a baseline for B2B contracts across the internal market.

4.13 Secondly, we suggest that appropriate and clearly defined consumer protection is a priority for both sides in B2C contracts, to engender both certainty for businesses and consumer confidence. Finally, any European law of contract would need to be available in all official EU languages – perhaps an obvious point, but the current position, whereby

national laws of contract are generally unavailable in such a variety of languages, can present a significant barrier to the efficient completion of contracts.

4.14 The priority needs in on-line transactions are, to an extent, the same as those listed above in respect of B2B and B2C contracts. One particular priority need might be to ensure that any European law of contract is supported by a kite-mark accreditation symbol, an idea which we understand is already under consideration within the Commission and one which we would support. The suggestion of a “blue button”, an icon which traders could incorporate within their on-line site would not only give purchasers the confidence that the trader is prepared to do business across the EU but, more concretely, by clicking on it the purchaser will also be able to choose to make the contract subject to the European law of contract. We think that this suggestion has the potential to elicit consumer confidence in cross-border transactions, particularly those carried out on-line, and might function as a welcome sign of quality assurance, thereby encouraging further cross-border contracting in the internal market.

**5. What should be the material scope of any instrument? (paragraph 4.3 of the EC Green Paper).**

5.1 We view a narrow scope as preferable for an Optional Instrument, as outlined at paragraph 4.3.1 of the EC Green Paper. In particular, we do not think that acquisition or loss of ownership and proprietary security in moveable property should be addressed at this stage. But we are particularly attracted to the suggestion of the Green Paper that prescription be included in the instrument. The case for including prescription is particularly strong, as at present the length of prescription periods across jurisdictions within the EU varies greatly e.g. in Scotland it is 5 years (section 6, Prescription and Limitation (Scotland) Act 1973), while in Greece, the period of prescription for contractual relations is 20 years (Article 249, Greek Civil Code (CC)). Moreover, in terms of international private law, prescription is generally classified as part of the substantive law of contract, rather than as a procedural matter; thus it would be in keeping with this approach to include prescription within any European contract law instrument.

5.2 We would further suggest that restitutionary-contractual remedies might be included within a narrow scope instrument. This is not addressed in the Green Paper, but we think that consideration of such remedies within any instrument would be useful, since otherwise when contracts fail for invalidity or illegality, or are terminated for non-performance or through change of circumstances, the remedy will vary according to the otherwise applicable national law.

5.3 While we are in favour of a narrow scope for the instrument, we are nonetheless not in favour of any arbitrary limit to the number of articles in it. We understand that the European Commission is now asking the Expert Group to confine any instrument to 150 articles. We suggest that such a limit may risk making it not sufficiently comprehensive for commercial transactions, and as a consequence, the market may find its utility extremely limited. Without commercial usage, the instrument will be a failure. We would therefore strongly suggest that no limit of length be imposed at this stage. It will be easier to decide upon cuts from a putative text than to fill in gaps which may be major ones.

*Should specific types of contracts be covered by the instrument?*

5.4 We are in favour of all types of contract being included within the scope of any instrument. In particular, however, we are keen that the sale and lease of goods be addressed within any instrument. The supply of goods is characteristic of many on-line

transactions and, as outlined above, these transactions clearly play an important role in facilitating cross-border trade within the EU. Moreover, were the rules about quality and description of goods to be omitted from any instrument, we think that its utility in practice would be significantly lessened, insofar as it would fail to address the most important issue in such contracts, from either the business or the consumer perspective.

#### *Scope of a European Civil Code*

5.5 We express no view on this option, as we deem the implementation of a “code” inherently premature at this stage, as outlined further at paragraph 3.12 above.

## 6. Conclusion

6.1 We trust that our response will highlight the potential importance of the European Commission's work for Scottish and other small businesses. Scottish-based traders are likely to have a good knowledge of English, which is undoubtedly an advantage in international trade, but are in no better position to find out about the laws of a good many other European jurisdictions than their Danish, Estonian, Portuguese, etc counterparts are able to find out about Scots law. There is, therefore, a real role for a pan-European contract law in Scotland, and this is borne out by comments from business members of our advisory groups. We suspect that, although the same point applies to an extent to those based in England and Wales, it does not do so with the same force, very largely because of the renown and accessibility of English law for those in other jurisdictions. Scots law does not enjoy that advantage, and so the option of a common instrument would be a very useful tool in transactions into and out of Scotland. This also applies to Scottish consumers.

6.2 We are in favour of the legal structure of any European contract law being adopted as an Optional Instrument, in the form of a Regulation. From our qualitative evidence gathering, we consider that an Optional Instrument would be welcomed and used by businesses, especially small and medium-sized ones. The beauty of an Optional Instrument is that those who choose not to use it remain unaffected by its existence; it merely provides another option for those parties who have a need for it. The fact that only some businesses may opt for an Optional Instrument on European contract law in their transactions does no harm to the argument that it is a useful endeavour. Small and medium-sized enterprises may find it particularly useful in expanding their trading operations across the internal market, both to other businesses and consumers. With 99.2% of all businesses in Scotland falling into that category,<sup>15</sup> the Scottish market may be particularly useful in observing whether businesses find the availability of an Optional Instrument valuable in expanding trading operations across the internal market.

27 January 2011

---

<sup>15</sup> Figures provided by the Scottish Government, Scottish Corporate Sector Statistics for 2010, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Business/Corporate/KeyFacts>.