

Workshop of the network of Member State Experts on European Contract Law

Brussels, 31 May 2005

Summary

I

On 31 May 2005 the Commission held the second workshop of the network of Member States Experts on European Contract Law.

This workshop provided a forum for experts from the Member States and observers from Romania, Bulgaria and the EEA, to express their views on the first steps of preparation of the Common Frame of Reference in European Contract Law (CFR), both in terms of process and substance.

II

The workshop began with an opening address from Mr. **Dirk Staudenmayer** (Head of Unit, DG Health and Consumer Protection, Unit B.4) who presented an overview on the progress and the future development of the CFR.

Mr. Staudenmayer outlined the procedural aspects of the CFR project, in particular the work of the researchers, stakeholders (CFR-net) and Member States experts.

Mr. Staudenmayer also outlined the general timeframe envisaged for the completion of the CFR and indicated that the Commission expects an overall draft CFR to be available by the end of 2007. The Commission intends then to launch an informal consultation round with the CFR-net, the Member States experts and the European Parliament, with a view to refining the work and defining the scope of the final CFR. In the second half of 2008 a White Paper including the final draft CFR should be made public for further consultation with the public at large. The CFR shall be adopted by the end of 2009.

Throughout this process, the Commission will report to the Council about the state of play of the CFR project: an annual progress report will be delivered in the second semester of each year, whilst oral reports are envisaged in the first semester.

Mr. Staudenmayer concluded his foreword by underlining the importance of the contributions of the Member States experts and indicated that in the following years the Commission plans to hold three to four workshops of the Member States expert network.

III

The opening speech of Mr Staudenmayer was followed by the intervention of Mr. **Giuseppe Abbamonte** (Head of Unit, DG Health and Consumer Protection, Unit B.2) who informed the Member States experts about the ongoing revision of the existing consumer acquis. Mr

Abbamonte indicated that the Commission is gathering evidence as to whether possible inconsistencies in the sectoral directives and the implementation of the minimum harmonisation approach followed therein risk hindering their consumer protection and market integration objectives. Such diagnostic phase is expected for completion by the end of 2006.

Mr Abbamonte indicated that, first of all, the Commission intends to complete the transposition checks currently undertaken for eight directives, in order to assess how the Member States have implemented EC consumer law. A comprehensive document reporting on the review of the consumer acquis is expected for publication in the first half of 2006 and infringement proceedings may be launched where necessary. At the same time, a comparative analysis of the transposition measures in the Member States and their impact on the relevant markets will be available, complemented by a public database of national legislation and case law implementing the consumer acquis.

Mr. Abbamonte confirmed that any policy decisions will only be taken at the end of the diagnostic phase. The preliminary findings of the CFR could then be used, where applicable, as a practicability test when drafting possible proposals for the acquis review.

Mr Abbamonte announced that the first meeting of the Member States experts working group on the revision of the consumer acquis, envisaged by the Communication on European Contract law of 2004, would be convened in the fall of 2005, while consultations with stakeholders are expected to take place in 2006.

IV

After the opening remarks of the Commission, the Member States experts were invited to present their general comments on the CFR project and to ask specific questions on procedural issues.

A few experts asked further clarifications as to the objectives of the CFR i.e. whether the CFR would be intended to work merely as a toolbox for the revision of the acquis or it would have more far-reaching aims. One expert questioned the theoretical opportunity to define general principles in the CFR context in order to revise the existing acquis, advocating for a preliminary analysis and systematisation of the acquis, from which general principles would naturally emerge.

The Commission clarified that it is not intending to produce a European civil code, for such project would be unrealistic and would have no legal basis. Although the Communication on European Contract Law sets some parameters for reflection on a possible future optional instrument, this is not at the moment on the Commission's agenda. The main use of the CFR will be to provide a toolbox for the revision of the acquis and for the future development of legislative measures having a bearing on contract law. Any decision as to the adoption of possible optional instruments (which could also be limited to specific areas) will need to be linked to an appropriate impact assessment.

Some experts wondered about the practical and procedural links between the development of the CFR and the revision of the acquis, with specific reference to the role of stakeholders and the relation between the two Member States expert networks.

The Commission clarified that since the existing directives regulate some contractual aspects of consumer transactions, the revision of the acquis is inherently linked with the CFR project. On the one hand, the CFR will work as a toolkit for the review of the acquis; on the other

hand, the possible revision of sectoral directives will test the practicability of the CFR and allow any relevant input to be incorporated in the final draft.

Several experts underlined that the amount of information made available by researchers requires resources to be devoted to the CFR project, which risks becoming unmanageable and complex. One expert also expressed the concern that stakeholders need more time in order to provide meaningful input during the workshops.

The Commission agreed that the drafting of discussion papers would facilitate participation in the workshops. Although the Commission cannot undertake the task of summarising the work of the researchers, it could ask the researchers to provide an abstract, outlining the most relevant features. Also the Commission will soon produce summaries of the issues discussed in the stakeholders' workshops, which should facilitate the work of Member States experts. Finally, the Commission informed the Member States experts that in the future the CFR-net workshops with stakeholders will be organised two months after the researchers have made available their draft reports, thus leaving more time for stakeholders to provide their input. The Commission also offered the possibility for Member States to participate as rapporteurs into the CFR-net workshops

At the end of the morning session, Ms. **Susanne Knöfel** (Policy Officer, DG Health and Consumer Protection, Unit B.4) explained briefly purpose and format of the forthcoming conference on better law making, to be held in London on 7-8 July.

V

At the beginning of the afternoon session the Commission asked the experts if they had further questions concerning the process of preparation of the CFR.

One expert asked clarifications about the instructions given by the Commission to the researchers. The Commission clarified that the researchers were not given any instructions as they were not commissioned a study under a procurement contract. The researchers and the Commission signed a grant agreement within the framework of the 6th Framework Program for research and development which finances fundamental research. The researchers were however committed to deliver a draft CFR in line with the Commission Communication of 2004 on European Contract Law and the revision of the *acquis* as indicated in their research programme, which is part of the grant agreement. In this context the Commission also clarified that the researchers would own the copyright on the work carried out in the context of the grant agreement.

The Commission asked the experts to provide input on the substantive issues which had arisen from the CFR workshops that had already taken place in view of transmitting said input to the researchers. In this context it was explained that in the CFR-workshops the Commission played the role of the moderator without intervening on the substance.

Some experts stated that, due to their length and degree of detail, it was very difficult to go through the reports submitted by the researchers and to make comments. A clarification was asked on the input that the Commission expected from Member States in this respect. The Commission replied that in the future Member States would receive summaries of the issues discussed at the workshops, which would make it possible for them to identify the more

relevant policy points and to comment on them. The Commission would also submit every year an annual progress report which would prepare the discussion in Council. Reactions from Member States on the summaries and the annual progress report would be welcome.

Some experts asked which form and length the CFR would have at the end of the procedure and stressed the importance that the CFR is first and foremost focused on general principles and common definitions which form a coherent system. An expert pointed out that it would be very difficult to reduce a long and detailed legal text into a short and general one at the end of the process and that it would be easier to decide from the start the degree of detail required for the CFR.

The Commission said that at that stage of the process it could not give any definite reply on the length and degree of detail of the CFR, as no decision had been taken. It was however necessary to make a distinction, in the researchers draft reports, between black letter rules, comments and comparative notes. The Commission stressed that not all researchers' work would necessarily be incorporated in the CFR and that the Commission would not favour the inclusion of too detailed provisions in the CFR. The need to have a coherent system linking all the work-packages to be included in the CFR was strongly acknowledged.

Some experts expressed reservations on the fact that consumer protection could prevail over contractual freedom in the CFR preparation and underlined the importance of a distinction between consumer and general contract law. The Commission pointed out that the principle of contractual freedom which was expressly mentioned in the Commission Communication of October 2004 was considered by the Commission of paramount importance. The researchers would investigate when restrictions to this principle for the benefit of consumers would be justified. However the researchers would not make any political choice, as this would be the task of political institutions. The issues regarding the relationship between general principles and sectoral problems, between consumer law and general contract law, between binding and non binding rules would be reflected in the non-paper to be discussed in the context of a high level political debate at the forthcoming Conference in London.

Some experts asked further explanations on the organisation of the research network involved in the preparation of the CFR and expressed concern about the coordination of the different research groups involved. The Commission explained that the research Consortium involved in the preparation of the CFR included three research groups (the Study Group, the Acquis Group and the Insurance Law Group) and indicated that while Professor Schulte-Nölke was the coordinator of the Acquis group, Professor von Bar was the coordinator of the Study Group and Professor Beale was the joint editor of the so-called Lando Principles on European Contract Law on which part of the work was based. The three professors were the authors of the paper explaining the research approach which had been published on the restricted access website. Each of the three research groups was subdivided into different sub-groups and working teams, each responsible for different topics and work-packages. The network ensured the internal coordination of the different groups and the coherence of the CFR work via joint drafting teams which included participants from each of the research groups.

One expert asked if the CFR would be binding or non binding. The Commission confirmed that according to its Communication of October 2004 the CFR was not conceived as binding for Member States.

One expert expressed the wish that the summaries of the CFR-workshops to be discussed in future meetings with Member States experts would be accompanied by a short questionnaire pointing out the specific problems on which a discussion would be expected. This approach would enable Member States delegates to be more focused and the Commission to better channel their input.

The Commission concluded the workshop by summarising the main procedural and substantive issues to be reflected in the non-paper to be discussed at the forthcoming London Conference.

With regard to the CFR process the following issues were pointed out:

- The researchers will be asked to produce a short introductory paper before each CFR-workshop on the approach of their research;
- Member States could participate in the CFR-workshops on a voluntary basis as rapporteurs;
- The Commission should prepare short discussion papers, possibly including questions, in view of discussion at the next Member States workshops;

With regard to the substance of the CFR the following issues were raised:

- The principle of contractual freedom should remain paramount;
- A differentiation between consumer contract law and business to business transactions should be considered;
- The degree of detail of the CFR should be reflected upon in depth;
- The distinction between binding and non binding rules should be addressed;
- The relationship between the Principles of European Contract Law concerning general contract law and specific contract law provisions in the CFR should be examined;
- The importance of definitions should be stressed.

VI

Following the discussion the Commission concluded that the feed-back provided by the Member State experts will be taken into account in the preparation of the non-paper to be discussed at the London Conference.

Participants were also encouraged to submit their observations in writing in the future, should more comments on their part arise.

Another workshop to inform Member States and to receive their feedback on the progress of the preparation of the CFR is planned for 9 December 2005 (date to be confirmed). From 2006 onwards the Commission plans to organise similar workshops three to four times a year. Moreover Member State experts will be able to follow the progress of the research on the CFR on the restricted-access website.