

Editorial: the Action plan on a more coherent European contract law

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Editorial: The Action plan on a more coherent European contract law¹

Jan Smits

In February 2003, the European Commission issued its Action plan on ‘a more coherent European contract law’.² In this document, the Commission sets out its plans for the further development of contract law in Europe, building upon the reactions invoked by the Commission’s Communication on European Contract Law³ of two years earlier. The Action plan is one of the most important documents on European private law of the last few years: it provides us with insights on the European Commission’s policy regarding private law in general and contract law in particular. However, this does not mean that the views laid down in this action plan can all be accepted. To the contrary: some part of it suffers from serious methodological weakness, another part can be criticised for its not providing a solution for the true problems that European contract law suffers from. To explain this, we need to look at the contents of the action plan in more detail.

In the Action plan, two different questions are raised. The first is concerned with the problems existing in the (national) contract laws in the European Union, the second with how these problems should be solved. For the answer to both questions, the Commission could rely on the more than 180 reactions to its Communication, although – as we will see – it cannot be said that the Commission has listened very carefully to the interested companies, consumer organisations, governments and academics that have responded to the Commission’s call.

As to the existing problems in contract law, the reactions to the Communication of 2001 made two things abundantly clear. The first was that one of the most important problems in contract law was created by the intervention of the European institutions themselves. The European directives in the field of private law (now more than fifteen) are often rather vague and inconsistent among each other. Thus, the right of the consumer to withdraw from the contract, the time period within which withdrawal is possible and the information to be provided by the professional party to the consumer often differs without good reason from one directive to another. Likewise, the directives often contain abstract terms, such as ‘damage’ or ‘equitable remuneration’. It is also unclear whether a definition of a term in one directive can be used to clarify a similar term in another directive. This was for example recently denied by the European Court of Justice in the Simone Leitner case,⁴ where it concerned the term ‘damage’ in the Package Travel directive: the definition of ‘damage’ in the Product Liability directive could not be applied. It would be an understatement to say that any action of the European Union to eliminate this vagueness and inconsistency is welcome: it is self-evident that the European Commission should take up its responsibility to remedy the deficiencies in the *acquis* it has created itself.

¹ This editorial builds upon the review of the Action plan that I wrote together with Robert Hardy and that was published in Dutch in WPNR 6532 (2003), 385 ff.

² Communication from the Commission to the European Parliament and the Council, A more coherent European contract law: an action plan, 12 February 2003, COM (2003) 68 final, also available at <http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0068en01.pdf>.

³ Communication from the Commission to the European Parliament and the Council on European Contract Law, 11 July 2001, COM (2001) 398 final. For many comments on this communication, see S. Grundmann & J. Stuyck (eds.), An Academic Green Paper on European Contract Law, The Hague 2002.

⁴ Case C-168/00, [2002] ECR I-2631.

The second thing that was made very clear by the many respondents to the 2001 Communication, is that they did not really suffer from the divergences between national contract laws in the European Union. It is in particular fascinating to see that the great majority of companies in Europe is opposed to any action whatsoever in the field of contract law. This is striking because it is always held, in particular by academics, that the main reason for establishing a uniform contract law for Europe is that the present diversity stands in the way of transfrontier trade. To quote from the reaction by *Orgalime*, representing 100.000 companies in the metalworking sector: 'it will, of course, always to some extent be easier to trade with companies and persons from your own country. This has, however, more to do with ease of communication, traditions and other factors, which are not dependent on contract law'. This outcome of the consultation of 2001 should be taken very serious: it implies that any initiative to create a European civil code of contracts should be preceded by a careful (economic) study of the extent to which diversity of law really hampers the development of the internal market. And even if divergence of laws is a barrier, the costs of unification (that will be huge) should still be compared with the costs of present day diversity.

In this respect, it is surprising to see that the Action plan pays much more attention to the 'problem' of diversity of laws than to the lack of consistency in the existing *acquis*. The Action plan sums up sixteen differences among Europe's legal systems, all of a rather anecdotic nature, to prove that diversity of law is problematic.⁵ But why this diversity leads to problems is not made clear in the Action plan, which makes the Commission's approach hardly convincing.

In the second part of the Action plan, the Commission explores how the above problems should be solved. Three measures are proposed. The first of these is the elaboration of 'a common frame of reference' in order to promote the consistency and application of the existing *acquis*. The Action plan refers to the drafting of 'common terminology and rules'. Although the Commission does not make explicit what this frame of reference should look like, it is beyond doubt that the Commission has great sympathy for the principles approach, as practiced by the Commission on European Contract Law⁶ and the Von Bar group.⁷ Unfortunately, the Action plan does not mention these projects by name. If it had done so, it would have given the discussion more focus. Now, we are forced to talk about a rather abstract 'common frame of reference', without knowing for certain what the Commission means with that. Should it indeed be so that the Commission is aiming at filling up this frame with the Principles of European Contract Law (PECL), the old argument against the drafting of European principles pops up again: they are often just as abstract as the directives they aim to provide a framework for.⁸ Even more, sometimes the PECL are contrary to the solutions adopted by the directives. I would therefore be much more in favour of a more down to earth approach, simply defining the terms in the European directives themselves. In addition, the Commission could issue a consolidated and more consistent version of the existing directives in the field of contract law, preceded by a general part on definitions.

The second measure that is proposed, concerns the promotion of EU-wide standard contract terms. At present, European companies have to make use of different sets of general conditions, dependent on the country they are doing business in. The German rules on general conditions are, for example, stricter than the Spanish rules. It goes without saying that this is

⁵ Action plan, no. 25 ff.

⁶ The third part of the Principles of European Contract Law, prepared by this commission, was published recently: O. Lando et al (eds.), Principles of European Contract Law, Part III, The Hague 2003.

⁷ On the 'European Civil Code'-project: C. Von Bar, Le groupe d'études sur un Code Civil européen, RIDC 53 (2001), 127 ff.

⁸ This argument is elaborated in J.M. Smits, The Future of European Contract Law: on Diversity and the Temptation of Elegance, in: M. Faure et al (eds.), Towards a European Ius Commune in Legal Education and Research, Antwerp 2002, 239 ff.

in particular a problem among companies and in particular where information on foreign legal systems is missing: in the relationship between a company and a consumer, the Unfair Contract Terms directive applies. The solution that is chosen by the Action plan is rather soft: it wants to stimulate the drafting of general conditions for cross-border transactions by 'facilitating the exchange of information on initiatives'.⁹ To this end, the Commission wants to launch a website on which the existing initiatives to come to transfrontier general conditions will be published, together with an overview of the limits that follow from European law. I find this approach somewhat meagre: the best, and also rather simple, way of dealing with this problem would be to bring together the *national* limits to drafting general conditions. If companies can find information about these limits on a website, much of the problem will be solved.

The final, and most ambitious, part of the Action plan concerns the third measure: to introduce an optional instrument on European contract law.¹⁰ The Commission adopts a cautious approach: it wants to have a further discussion on the 'opportuneness' of such an instrument, leaving open whether it should be applicable to all cross-border transactions or only to those contracts which parties decide to subject to it through a choice of law clause. In itself, it is surprising that this idea of an 'optional instrument' (which is apparently the European Commission's 'Newspeak' for a European civil code of contracts) is presented, while it showed in the consultation round that the interested parties could very well live with diversity of laws. This leaves the first option of an instrument applicable to all international contracts, regardless the choice of the parties, undesirable. The second option of a contract code for cross-border transactions that the parties can adhere to if they wish so, is to be praised, however. It provides the parties with a new legal regime, next to the existing national legal systems and the regime of the Vienna convention on international sale of goods. It would leave the parties maximum freedom to choose the European optional instrument if they prefer this one above one of the existing regimes. This implies that its success will depend entirely on the extent to which it will be used in practice. I am a bit sceptical about this practical use for the simple reason that if there is anything that contracting parties want, it is legal certainty. The parties will probably not be prepared to look for this certainty in a set of rules that is newly created and on which there is no experience available yet as to how it will be applied by the courts. The frequent exclusion of the Vienna sales convention by commercial parties (and the subsequent choice of English law as the applicable legal system) also points in this direction. But I may be wrong: all the European Commission has to do,¹¹ is to provide for the optional model and we will see what happens.

On the whole, I find the Action plan somewhat disappointing. On the one hand, I would have expected the Commission to have chosen a different solution for the true problem in European contract law of the vagueness and inconsistency of European directives. This problem can be solved in a relatively easy way, without having to rely on abstract principles. On the other hand, the Commission seems not to have listened enough to the parties on the market by suggesting that there might be a need for a set of rules that is automatically applicable to all cross-border transactions. What it really is the market wants, can only be discovered by putting into place an optional contract code.

⁹ Action plan, no. 86 ff.

¹⁰ Extensively on this optional instrument: Smits & Hardy, WPNR 6532 (2003), 385 ff.

¹¹ This might not be as easy as presented here. Apart from deciding on the contents of this instrument, there is an important question of competence. At present, it is at least doubtful whether the EC-Treaty contains a basis for an optional code of contracts.