A submission concerning the consultation launched with the

"Green paper on policy options for progress towards a European Contract Law for consumers and businesses"

COM (2010) 348 final

The Commission of the Bishops' Conferences of the European Community (COMECE) brings together Bishop delegates from the Bishops' Conferences of the European Union's Member States. For thirty years now, COMECE has been accompanying the process of European integration, offering its reflections. COMECE is a partner of the EU institutions in the dialogue foreseen by Article 17(3) of the Treaty on the Functioning of the European Union. Its permanent General Secretariat, based in Brussels, analyses EU policies on a day-by-day basis, striving to bring the specific contribution of the Catholic Church into the debate.

In the light of this, the COMECE Secretariat is pleased to submit to the attention of the European Commission the following remarks concerning the *"Green paper on policy options for progress towards a European Contract Law for consumers and businesses"* (COM (2010) 348 final).

Introduction

With our contribution we would like to tackle the consultation launched with the Green paper *'On policy options for progress towards a European Contract Law for consumers and businesses'* from a particular angle. It is not our intention or specific interest to focus on concrete and technical issues pertaining to the relations and interaction between consumers and businesses. We would rather focus on the general approach presented in the consultation document, on the possible future implications some of the options proposed could have for other related areas of law, as well as on the concepts underlying the different solutions proposed.

General approach

In general, the consultation paper seems to present divergences between national contract laws as mere 'barriers' (e.g. page 4). Considering that, on the contrary, the diversity of the

Member States' legal systems and traditions is a patrimony to be valued and preserved[1], it is essential that the provisions or recommendations contained in the chosen instrument do provide the necessary *neutrality*, so that any risk of imposing certain national or regional models/approaches over others is avoided. The proposed rules/recommendations should be *effectively* drawn on the common national law traditions of the Member States and this conformity should be carefully ascertained (we are referring more specifically to page 7 of the Green paper, end of paragraph 3.2.). By tackling contract law's more detailed aspects, the risk would obviously increase of single national models (or models typical of some parts of Europe) having an excessive and unwelcome influence on the general framework proposed and therefore on the rest of the national systems.

The best instrument for European Contract Law (paragraph 4.)

As for the type of instrument to be proposed, we would advocate for the recourse to a non-binding instrument like the ones indicated in Option 1 (*Publication of the results of the Expert Group*) or in Option 2 (*Toolbox*). As it is stated at page 8 of the Green paper with reference to Option 1 (with an observation that can however apply to Option 2 as well), the divergences in contract law would not be significantly reduced by such solutions. However, only by *not* reducing significantly the role of national legislations in this area (thereby still attaching a relevant value to them) the richness and patrimony constituted by the diversity of national legal systems and traditions could be preserved. In general, we see the 'toolbox' mentioned in Option 2 as the most balanced solution, as it would also provide for the necessary and most desirable degree of flexibility.

We would not recommend the recourse to Option 3 (*Commission Recommendation on European Contract Law*), as the role of national Courts (rather than that of the European Court of Justice) in this case should prevail and is sufficient to provide adequate guarantees for consumers, as well as the needed attention for the specificities of each Member State. Moreover, this solution could call (even though in a non-binding way) for a *replacement* of national contract laws with the one recommended (possibility *a*) and therefore, for the reasons already stated above, this option should not be pursued. The solution of the incorporation of a European Contract Law as an optional regime on the part of the Member

[1] Article 4, paragraph 2 TEU itself refers to the fact that the Union must respect, *inter alia*, the Member States' national identities.

States, providing for an alternative to national laws (possibility *b*), would be in our view even less advisable. There is no evident need or justification for creating this sort of 'competitive cohabitation', considering that all European legal systems provide EU citizens with a very high standard of protection. In general, we argue against the promotion and implementation of the concept of 2nd (or 28th) Regime as such at the EU level. This option has unforeseen implications and could lead to confusion rather than clarity. In this regard, we fully share the remark of made at page 10 of the Green paper (with reference to Option 4), according to which *"…a European optional instrument might be criticised for complicating the legal environment"* and by adding a parallel system *"…the legal environment would continue to be challenging and require clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis"*. This solution would also contribute to a progressive erosion and marginalisation of the rich and vastly differentiated approaches that exist in the national contract law systems as a result of centuries of stratifications and elaborations, inevitably based on (and inspired by) the different national sensibilities. We would therefore suggest the rejection of the solution of an optional EU 2nd (or 28th) Regime for the area of civil law in general, also in the light of its contrast with the principles of subsidiarity and of proportionality.

These last considerations should apply in an even clearer and stronger way to Option 4 (*Regulation setting up an optional instrument of European Contract Law*), which would *force* Member States to adopt such a '2nd Regime'. It must be added that the '2nd Regime'-solution would be particularly problematic in case its application was extended to *domestic* contracts, as suggested by the Green paper (Option 4, page 9), as this would create a dangerous friction *within* the national legal orders. At page 10 the Green paper underlines with regard to a binding alternative regime that *"Consistent reference to a single body of rules would remove the necessity for judges and legal practitioners to investigate in certain cases foreign laws, which is currently the case under conflict-of-law rules. This could not only reduce costs for businesses, but also alleviate the administrative load on the judicial system"*. While this approach is certainly ambitious, it seems to foster an unnecessary reduction and devaluing of the relevance of national law.

The harmonisation by means of a *Directive on European Contract Law* (Option 5) would also be not advisable, as it would still entail some of the problematic effects mentioned above with regard to previously mentioned Options.

For the same reasons already mentioned above, Option 6 (*Regulation establishing a European Contract Law*) would also not be advisable, considering that (as the Green paper itself also points out at page 11) it would cause the *replacement of the diversity of national laws*. The extension of such an option to domestic contracts, and not just to cross-border contracts (hinted at on page 11 of the Green paper) would prove particularly invasive. In this regard we fully endorse the statement made in the Green paper at page 11 as a strong argument to justify the rejection of the Option at issue (*"…this solution could raise sensitive issues of subsidiarity and proportionality"* as replacing the plurality of national laws *"…in particular if domestic contracts are also covered, with a single set of rules might not be a proportionate measure to deal with the obstacles to trade in the internal market"*). It is important to avoid that such a solution may create a precedent of interference of EU law in matters belonging to the evaluation and options of the Member States.

Finally, the solution of a *Regulation establishing a European Civil Code* (Option 7) is simply not acceptable, for its scope, which would go beyond the area of contract law (as underlined explicitly at page 11), for the destructive effects it would have on the rich diversity of national civil law systems (the spiraling process it would trigger might gradually lead to the irrelevance of national civil law systems), as well as for the arguable infringement of the limits of EU competences it would raise. In this case as well, we fully support the considerations made in the Green paper at page 11 (*"Although impediments to the smooth functioning of the internal market exist also in areas of law other than contract law, it is yet to be established to what extent an extensive instrument such as a European Civil Code could be justified on grounds of subsidiarity"*), as on grounds of subsidiarity (as well as, quite evidently, of proportionality) such a solution would have to be firmly rejected. As a consequence of this, paragraph 4.3.4. (*Scope of a European Civil Code*) as well deserves a negative reply, as a European Civil Code should be discarded as a solution in its entirety.

Scope of application (paragraph 4.2.)

As for the *scope of application* of a future (non-binding) instrument, we wish to underline that the added value of such an initiative would clearly lie in its focus on cross-border issues, whereas the inclusion of domestic cases in its scope, as it has already been stressed, would evidently go beyond what is necessary, required and advisable. As it is specified at page 12 of the Green paper, the sheer value of the national level of protection provided by national laws cannot be neglected, inter alia for its importance for consumers.

Material scope of application (paragraph 4.3.)

The *material scope of application* would ideally privilege a narrower ambit, with reference to some of the core-elements mentioned at page 12 (paragraph 4.3.1.) of the Green paper, as this would also increase the chances of finding a common ground among all the 27 European legal systems. The more the scope will be enlarged, the higher the risk will be of creating frictions with a number of national legal systems (especially in case the Commission should opt for a binding instrument). We would therefore advocate for the solution mentioned in paragraph 4.3.1. rather than for those identified in paragraphs 4.3.2.-4.3.3. In general we would advise for any eventual intervention to be kept within the area of protection of consumers in the context of commercial transactions, not investing the field of contract law in a broader sense, or even less other areas of civil law.

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