



ICAEW TAX FACULTY REPRESENTATION

TAXREP 4/11

EUROPEAN CONTRACT LAW

Comments submitted on 31 January 2011 by the Tax Faculty of ICAEW in response to the Green Paper 'Policy options for progress towards a European Contract Law for consumers and businesses' published by the European Commission on 1 July 2010

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EUROPEAN CONTRACT LAW

INTRODUCTION

1. ICAEW Tax Faculty welcomes the opportunity to comment on the Green Paper '*Policy options for progress towards a European Contract Law for consumers and businesses*' published by the European Commission on 1 July 2010 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF>.
2. Information about the Tax Faculty and ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals to change the tax system.

WHO WE ARE

3. ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, ICAEW provides leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. ICAEW is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
4. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
5. The Tax Faculty is the focus for tax within ICAEW. It is responsible for technical tax submissions on behalf of ICAEW as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 11,000 members of ICAEW who pay an additional subscription, and a free weekly newswire.

COMMENTS

6. The European Commission's Green Paper is written in terms of proposing reforms to business to business ('B2B') or business to consumer ('B2C') contract law. Contracts between individuals such as arise when, for example, setting up a trust or employing a domestic servant or buying a house or goods such as a used car are not mentioned explicitly. This may be because it is felt that many such contracts are covered by other branches of the law (which are likely to differ in different member states), such as trust or employment or property law, or by *caveat emptor*. However, all other things being equal, we consider that it makes little sense for the law to be different depending on whether or not one of the parties to a contract is in business.
7. With this in mind, although we are not commenting on the B2B or B2C aspects, we have the submission dated 24 January 2011 by the Society of Trust and Estate Practitioners (see Appendix 2) which concentrates on what are in effect consumer to consumer contracts and agree with their comments.

PCB

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THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <http://www.icaew.com/index.cfm?route=128518>).

TEXT OF SOCIETY OF TRUST AND ESTATE PRACTITIONERS RESPONSE

European Commission Consultation on Contract Law

1. The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With almost 7,000 members in the EU (and over 16,000 members around the world), STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.
2. This response has been prepared by the STEP EU Committee which is composed of representatives of STEP branches across the EU Member States. STEP has branches in 9 EU Member States. The EU Committee assists national and international institutions on legal, tax and other matters relevant to STEP members across the EU.
3. STEP's ID number on the European Commission's register of interest representatives is 64339983762-18.

General comments on the Green Paper

4. STEP welcomes the opportunity to comment upon the European Commission's proposals on contract law. STEP members primarily focus on private client work and are asked increasingly frequently to advise on cross-border legal issues facing individuals within the EU. This reflects the long-term trend across the EU for citizens to move between Member States. The latest available data suggests that 1.4 million EU citizens emigrated from one EU Member State to another in 2008. Across the EU it is also estimated that 11.9 million people are citizens of a one Member State but live in another Member State (see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics).
5. The Commission's Green Paper has clearly given considerable thought to the likely growth in cross border business activity within the EU as the single market broadens and deepens. There is, therefore, a clear focus on business-to-consumer and business-to-business issues. It seems highly likely, however, that the cross-border flow of citizens between Member States – already very substantial - will continue to grow commensurately with the growth in cross-border trade. STEP believes that it is therefore important, apart from considering problems in the commercial field, to also consider the problems faced by individual citizens that could be addressed as part of any EU level intervention in contract law.
6. Domestic legal systems across Member States have typically failed to keep pace with the increasing mobility of EU citizens. To an extent this is recognised by the programme of work the EU is undertaking in areas such as marriage and succession. For example, work is already well advanced on the Commission's proposed regulation on succession and wills and proposed regulation on matrimonial and registered partnership property is expected shortly alongside the recent green paper on public and civil status documents. These are areas of particular interest in public policy terms, but there are also a range of other areas that would benefit from EU wide interventions on contract law. For example:
 - a. Gifts between married couples, registered partners, cohabitees and unmarried couples.
 - b. Contracts such as tontines similar to joint tenancies and their cross recognition.
 - c. Creation of trusts for life policies, personal pension plans and other personal investment vehicles.
 - d. Creation of trusts for employees' pension and death in service benefits.
 - e. Creation of trusts for family members such as disabled children.

- f. Creation of usufructs and trusts for estate planning purposes.
 - g. Creation of usufructs and trusts for business succession planning.
 - h. Contracts for the appointment of agents such as lasting powers of attorney before the donor has lost capacity.
 - i. Nominee arrangements for the holding of the majority of investments such as equities, gilts and collective funds
7. The above is a far from comprehensive list of examples of personal transactions which can often prove problematic if there is a cross-border dimension. Many of these transactions clearly do not fit comfortably into the Green Paper's focus on business-to-business and business-to-consumer transactions but are nevertheless deserving of attention in any discussion of EU wide contract law.

Responses to Specific Questions

What should be the legal nature of the instrument of European Contract Law?

8. The benefits of any co-ordinated approach to contract law across the EU are unlikely to be delivered within an acceptable timeframe by Options 1, 2 or 3. They run the risk instead of creating an incoherent and incomplete approach between Member States. We would also anticipate significant political difficulties with any move to require Member States to replace their current domestic contract laws with a European contract law as suggested in Options 5 and 6. Option 7, a Commission Regulation establishing a European Civil Code is likely to meet even more significant political opposition. The introduction of any new regime is also likely to be associated with frictional costs as users familiarise themselves with the new regime and these frictional costs could be particularly significant under Options 5, 6 and 7.
9. Option 4, the establishment of an optional instrument of European contract law is STEP's preferred option. As an optional instrument to sit alongside domestic contract law it is likely to be a solution that Member States will find relatively easy to accept. Moreover by giving those who are party to the contract the freedom to opt in or not, Option 4 meets the objections of those who argue that any new law brings with it problems of uncertainty. If parties to the contract are concerned by any lack of certainty they will still be free to use domestic law. The optional European contract law would only be used when all parties to the contract can see clear advantages in doing so. Option 4 therefore offers an attractive compromise which allows an effective solution in instances where the current lack of a coherent European contract law creates significant problems for the parties to a transaction while minimising the frictional cost of transition.

What should be the scope of application of the instrument?

10. We believe the instrument should cover the widest possible range of European contracts. It would be inequitable to allow businesses access to a form of contract law which is not available to individuals should they choose to use it. The emphasis on forms of business contract is therefore not appropriate. We would, however, agree that it may be sensible to have certain provisions in any European contract law offering additional protections to consumers in business-to-consumer contracts. It also seems sensible that European contract law should cover on-line transactions.
11. In the business-to-consumer context we would also highlight that families (and SMEs) often enter into contracts for the cross-border supply of professional services such as legal and accountancy services, personal services such as health, plus contracts for financial and investment services. A European instrument covering contractual arrangements in these areas, as well as trade in goods, could therefore prove extremely valuable.
12. STEP considers that it would be unreasonable to deny the contracting parties the freedom to choose the European instrument in purely domestic transactions if they should all wish to use it, although we acknowledge that this may be a matter for individual Member States and beyond the remit of the EU.

What should be the material scope of the instrument?

13. In the context of paragraphs 4.3.1 & 2 of the Green Paper we think the scope of any instrument should be as broad as possible. Any instrument which does not offer clarity on issues such as restitution and non-contractual liability is unlikely to meet the demands of most potential users of any European contract law.
14. We believe that any instrument should cover as wide a range of contracts as possible. Types of contracts should only be excluded where there is a public policy reason for doing so, such as, for example, property contracts. We note that the DCFR covers a broad range of contracts and there are strong grounds for considering that these are generally areas where a European instrument could prove valuable. Two sections of the DCFR, Book V and Book X, are of particular interest to STEP members. An optional EU matrimonial property regime, might also be useful.
15. Book V covers benevolent intervention in another's affairs. Many STEP members specialise in helping families look after the affairs of vulnerable family members. Pan-European studies have indicated that the incidence of dementia doubles with every 5 year increase across the age range.¹ As the European population ages this is likely to become an increasing problem. As it is, around 1% of the UK population, for example, suffer from dementia and if we apply this percentage to the number of citizens of one Member State living in another Member State it suggests that over 100,000 dementia sufferers are likely to have family or assets that raise cross border issues. These issues can be difficult to resolve under current EU legal procedures. International studies suggest broadly similar figures for the incidence of serious mental illnesses such as schizophrenia.² Added to the figures for dementia, it is clear that across the EU a significant number of citizens of one Member State living in another Member State have, or are likely to suffer, mental capacity problems to the extent that their families may wish to help arrange their affairs. Certainly the experience of STEP practitioners is that this is an increasingly frequent problem and one for which a common European instrument covering benevolent intervention would potentially be extremely valuable.
16. Book X of the DCFR covers trusts. Trusts are a notable feature of common law jurisdictions where they are widely used in areas such as pensions, life insurance and charities. Trusts also play an important role in capital markets. Bank for International Settlement figures, for example, suggest that the nominal value of bonds outstanding for UK-based issuers totalled £3,353 billion in 2009 and typically these are structured such that the bonds issuer appoints a trustee to look after the interests of bond holders. Trusts are also widely used in helping families arrange their financial affairs, particularly if a member of the family is considered vulnerable either through age or illness.
17. Trusts are found widely in the UK, Ireland, Malta and Cyprus although there are significant differences in trust laws and legal traditions between all these jurisdictions (and between England and Scotland within the UK). The Netherlands also has a major trust industry, even if it is rather different in nature from the trust industries found in the common law jurisdictions. To date, however, the International Convention on the Law Applicable to Trusts has only been ratified by 5 Members States (Italy, Luxembourg, Malta, Netherlands and the UK)
18. It is important to recognise that it is not necessary for a jurisdiction to recognise trusts for its citizens and institutions to interact with trusts - as settlors, beneficiaries, trustees or advisors. This can create serious difficulties for families with members in a range of Member States. Individuals who have, for example, used a trust as a way of regulating family property will find that countries such as Germany will certainly not recognise the arrangement and they are likely

¹ http://alzheimers.org.uk/site/scripts/download_info.php?fileID=2

² <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#Schizophrenia>

to encounter serious difficulties in a range of other jurisdictions such as France. Similarly, because the status of the trustee is not recognised in some EU jurisdictions, inheritance tax or gift tax can be payable on the death or retirement of a trustee even if he has no beneficial ownership in the property.

19. The draft trust law sketched out in Book X has been criticised as deficient by some commentators and there are clearly issues that it would be desirable to address in the negotiations towards a final text. An optional European instrument covering trusts would nevertheless bring the enormous advantage of establishing trusts as a universally recognised instrument across EU Member States.

Concluding Comments

20. Our response has focused on the broad principles that should underpin an EU contract law and we have not focused on any detailed textual issues. Such issues will clearly need to be considered in subsequent phases of work. It would also be useful to have more detailed empirical work across EU Member States on those aspects of any EU wide contract law which would be most useful to citizens and businesses within the EU. Assessing the priority needs of likely users of a European contract law instrument should be an integral component of the next phase of the work in this area.

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