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NOTE

from:	General Secretariat of the Council
to:	Committee on Civil Law Matters (Contract Law)
Subject:	Consolidated version of the conclusions of the Council

This note contains a consolidated version of the conclusions of the Council on the setting up of a Common Frame of Reference for European contract law, adopted during the first semester of 2007¹ (doc. 8548/07 JUSTCIV 90), the first semester of 2008² (doc. 8286/08 JUSTCIV 68), the second semester of 2008³ (doc. 15306/08 JUSTCIV 236) and the first semester of 2009⁴ (doc. 9741/09 JUSTCIV 120).

For the purposes of the consolidation, the wording of the various conclusions has been slightly adapted in order to ensure a consistent document.

¹ Council meeting (JHA), 19-20 April 2007.
² Council meeting (JHA), 18 April 2008.
³ Council meeting (JHA), 27-28 November 2008.
⁴ Council meeting (JHA), 4-5 June 2009.

I. Introduction

1. The Hague Programme, adopted in November 2004, specified that "*in matters of contract law, the quality of existing and future Community law should be improved by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a Common Frame of Reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union.*

Measures should be taken to enable the Council to effect a more systematic scrutiny of the quality and coherence of all Community law instruments relating to cooperation on civil law matters".⁵

2. In April 2007 the JHA Council decided to mandate the Committee on Civil Law Matters with defining a Council position on the fundamental aspects of a possible future common frame of reference (hereinafter "CFR"). On the basis of this mandate and against the background of the presentation of the Commission's Second Progress Report on the CFR transmitted to the Council on 25 July 2007⁶ the issue was subsequently discussed.⁷
3. In view of the importance of the project it seemed appropriate for the Council to develop and define its own position.⁸

⁵ Paragraph 1 of doc. 8548/07.

⁶ Doc. 12269/07 CONSOM 98 JUSTCIV 220.

⁷ Paragraph 1 of doc. 8286/08.

⁸ Paragraph 3 of doc. 8548/07.

II. Position of the Council

(a) Purpose

4. Discussions had assigned various functions to a potential frame of reference⁹ and several ideas had been floated: The frame of reference could be a "toolbox" for European legislators and possibly for domestic legislators as well. The frame of reference could be tailored for use by citizens and companies and could for example include models for standard business terms and conditions which citizens, companies and trade associations could use as a basis for their contracts. Another proposal had been that the frame of reference could take the form of an instrument which could be chosen (opt in) or rejected (opt out) as the law governing a specific contract.¹⁰
5. The option of using the CFR to harmonise the contract law of the Member States by creating a European Civil Code was rejected from the outset. The option of a CFR consisting of a complete set of standard terms and conditions of contract law which could be chosen by companies and trade associations as the law applicable to a specific contract was equally rejected.¹¹
6. It was agreed that the work within the Council should be concentrated on the establishment of a "toolbox".¹²

⁹ See Council Resolution on "A More Coherent European Contract Law" (OJ C 246, 14.10.2003, p. 1).

¹⁰ Paragraph 5 of doc. 8548/07.

¹¹ Paragraph 5 of doc. 8286/08.

¹² Paragraph 6 of doc. 8548/07.

7. The work to be undertaken should address the need to define the degree of detail with which the frame of reference should be drawn up. The options considered ranged from general guidelines for legislators to detailed model provisions which could even be used by citizens and companies.¹³
8. The option of shaping the CFR as one tool amongst others for better lawmaking targeted at Community lawmakers was favoured. This would mean that the CFR could be used by lawmakers at Community level when they draw up new legislation or review existing legislation. It would serve to ensure greater coherence in Community legislation and thereby to improve the quality of that legislation.¹⁴
9. The idea of targeting the CFR also at lawmakers at Member State level was rejected, but it was acknowledged that the CFR may nevertheless serve as a source of inspiration or reference for national lawmakers and may help ensure a more consistent implementation of Community legislation in the Member States.¹⁵

(b) Scope

10. The CFR could potentially cover all relevant aspects of contractual relations from the pre-contractual phase to performance or default in performance. Such a comprehensive CFR could constitute an effective tool for better lawmaking in the field of contract law. It should take into account the result of the current review of the consumer *acquis*.¹⁶

¹³ Paragraph 7 of doc. 8548/07.

¹⁴ Paragraph 6 of doc. 8286/08.

¹⁵ Paragraph 7 of doc. 8286/08.

¹⁶ Paragraph 11 of doc. 8286/08.

11. Three options as to the scope of the CFR were considered: consumer contract law only, general contract law excluding consumer contract law and general contract law including consumer contract law. After weighing carefully the various arguments for and against each option it was decided to opt for a comprehensive CFR covering general contract law including consumer contract law for the simple reason that it would be difficult to treat consumer contract law in isolation and also difficult to carve out consumer contract law from general contract law.¹⁷
12. It was agreed that the CFR should include consumer contracts because of their specific nature, as evidenced by the Commission's submission of a proposal for a Framework Directive on the subject¹⁸. In that connection, particular attention should be paid to the consistency of the CFR and the Directive.¹⁹
13. In order to achieve the appropriate consistency between the two projects it would be desirable during the setting up of the CFR to follow and to take into account the development in the negotiation of the proposed Directive. It was acknowledged, however, that the two projects are separate and are intended to pursue objectives which may not always coincide.²⁰
14. On a more general level, it was discussed whether special contracts should be dealt with separately in the CFR. It was concluded that, outside the area of consumer contracts, special contracts should not be treated with priority in the CFR. However, it was felt that the possibility of including special contracts falling within the Community *acquis* in the CFR at a later stage should not be ruled out.²¹

¹⁷ Paragraph 10 of doc. 8286/08.

¹⁸ Proposal for a Directive of the European Parliament and of the Council on consumer rights (14183/08 JUSTCIV 220).

¹⁹ Paragraph 11 of doc. 15306/08.

²⁰ Paragraph 19 of doc. 9741/09.

²¹ Paragraph 12 of doc. 15306/08.

15. The question was also raised whether the CFR should cover only the current and future Community *acquis* or go further. A realistic approach would be for the drafters of the CFR to focus first and foremost on the existing *acquis* and on matters likely to form part of it in the near future.²²
16. In this respect, it seemed appropriate to envisage the CFR as an evolving tool at the service of Community lawmakers and to provide for it to be revised regularly so as to adapt it, in particular, to the changing scope of the Community *acquis*.²³

(c) Content

17. Various options as to the content of the CFR were discussed. As the choice had been made in favour of a CFR as a better lawmaking tool, the option of letting the CFR be a mere systematic collection and compilation of national legal principles was rejected and the option of making it a mere consolidation and systematisation of the contract law developed so far at Community level was equally rejected.²⁴

²² Paragraph 13 of doc. 15306/08.

²³ Paragraph 14 of doc. 15306/08.

²⁴ Paragraph 8 of doc. 8286/08.

18. Instead the option of a CFR which could contain a set of definitions, fundamental principles and model rules in the area of contract law was favoured.²⁵ In line with the Commission's Communication entitled "The way forward"²⁶ it was confirmed that the CFR should consist of three parts:
- (i) one part containing definitions of key concepts in contract law;
 - (ii) a second part setting out common fundamental principles of contract law, possibly including guidance when exceptions to such fundamental principles could be required;
 - (iii) finally, a third part containing "model rules" inspired by those principles and using those definitions.²⁷
19. It must be said that the three parts are intimately linked and should always be seen as an indissoluble whole, since no part can be fully understood except in relation to the others. In any event, the CFR should be clear, concise and easy to understand.²⁸
20. Without prejudging the exact content of the definitions, fundamental principles and model rules it was agreed that they should be derived from the existing Community legislation in the area of contract law, from national legislation and legal traditions, from the extensive material which had been produced by the research network and the stakeholders as well as from other existing research in this area.²⁹

²⁵ Paragraph 9 of doc. 8286/08.

²⁶ European Contract Law and the revision of the *acquis*: the way forward (13802/04 JUSTCIV 158).

²⁷ Paragraph 5 of doc. 15306/08.

²⁸ Paragraph 9 of doc. 15306/08.

²⁹ Paragraph 9 of doc. 8286/08.

(i) Definitions

21. The aim of introducing definitions into the CFR is, in particular, to clarify key concepts of contract law which may vary in significance and scope within Community legislation.³⁰
22. It was felt that it is still too early to determine precisely what definitions the CFR should include.³¹ However, the view was that, in any event the definitions should relate directly to general contract law and to the scope and the priorities of the CFR as described in the Council conclusions. Hence, certain definitions relating to contracts or concepts which do not come within the ambit of the CFR should be omitted. On the other hand, other definitions relating to certain types of contract covered by the CFR should be included. Due attention should be given to the definitions in the area of consumer contracts as this area constitutes an important part of the Community *acquis* in the area of contract law. In this context it would be useful to clarify some key concepts specific to consumer contract law.³²

(ii) Fundamental principles

23. The identification of fundamental principles would reveal the fundamental values underlying European contract law and help to make the CFR a consistent whole.³³

³⁰ Paragraph 6 of doc. 15306/08.

³¹ Paragraph 13 of doc. 9741/09.

³² Paragraph 14 of doc. 9741/09.

³³ Paragraph 7 of doc. 15306/08.

24. It was considered advisable to lay down as of now certain fundamental principles which would definitely have to appear in this part of the CFR without, however, excluding that it could contain others. Such principles should reflect the values underpinning the CFR. They should apply to all stages of the contractual relationship, including the pre-contractual stage.³⁴
25. Of the principles that might apply throughout the contractual relationship, the following few should be mentioned by way of examples:
- the principle of freedom of contract (party autonomy),
 - the principle of legal certainty in contractual matters which includes, *inter alia*, the binding force of the contract (*pacta sunt servanda*),
 - the principle of fair dealing which includes, *inter alia*, the principles of good faith and of reasonable behaviour.³⁵
26. These principles would have to be delineated and described in greater detail in the CFR.³⁶

(iii) Model rules

27. The aim of the model rules, which follow the philosophy of the fundamental principles, is to provide model provisions governing the main contractual situations which arise.³⁷
28. The model rules should be general in nature so that they can apply to all contracts and should be drafted in sufficiently broad terms to be easily adaptable to all contractual situations. However, it is recalled that it has not been ruled out that special contracts falling within the Community *acquis* could be included in the CFR at a later stage. The CFR could therefore, if such were to be the case, include some more specific model rules applicable to certain special contracts, above all in the area of consumer contract law.³⁸

³⁴ Paragraph 9 of doc. 9741/09.

³⁵ Paragraph 10 of doc. 9741/09.

³⁶ Paragraph 11 of doc. 9741/09.

³⁷ Paragraph 8 of doc. 15306/08.

³⁸ Paragraph 16 of doc. 9741/09.

29. The number of model rules should be commensurate with what is necessary in the light of the scope and objectives of the CFR. Furthermore, the CFR could, under certain conditions, offer alternative solutions for situations where a substitute model rule may prove useful.³⁹

(d) Legal effect

30. The question whether the CFR should be without binding effects or whether it should have a certain impact in the sense that reasons must be given if such guidelines are not applied was examined.⁴⁰

31. A number of options as to the legal effect of a future CFR were discussed. The option of creating a binding legal instrument in the area of contract law to be implemented by the Member States was rejected as well as the option of giving the CFR a form which would make it binding for the Community lawmakers in the sense that they would be unable to deviate from it.⁴¹

32. It was considered too early at this stage to decide on the form in which the CFR should be presented. However, the form must be such as to allow a non-binding instrument to be drawn up comprising a set of guidelines which the Community legislators would use at the level of the Council, the European Parliament and the Commission as a common source of inspiration or reference in the legislative process.⁴² Indeed, it would be appropriate for these lawmakers to look to the definitions, fundamental principles and model rules contained in it when they draw up new legislation or review existing legislation.⁴³

³⁹ Paragraph 17 of doc. 9741/09.

⁴⁰ Paragraph 8 of doc. 8548/07.

⁴¹ Paragraph 12 of doc. 8286/08.

⁴² paragraph 20 of doc. 9741/09.

⁴³ Paragraph 13 of doc. 8286/08.

(e) Respect for diversity

33. It is important to recall that all legal traditions of the Member States should be respected fully in the setting up of the CFR. In this regard, it seems important, in the reflections before the Commission's submission of the constituent elements of the CFR, to take into consideration all relevant work on the subject, whether academic or practical, as well as an analysis of the comparative law of the Member States and of the Community *acquis* as regards the main questions studied. Taking account of those elements, the draft CFR could present alternative solutions on certain subjects.⁴⁴

(f) Involvement of the Council, the European Parliament and the Commission in the setting up and the use of the CFR

34. To ensure optimum conditions for the use of the CFR, it would seem necessary to involve the Council, the European Parliament and the Commission fully in the process of setting it up. If the CFR were adopted by only one of the institutions, its significance would be reduced. However, the details of the involvement of the various institutions will have to be examined when the Commission submits to the Council and the European Parliament all the elements which it proposes to include in the CFR.⁴⁵

⁴⁴ Paragraph 15 of doc. 15306/08.

⁴⁵ Paragraph 17 of doc. 15306/08.