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International Association of Legal Protection Insurance (RIAD)

Position on the 'Green Paper on policy options for progress towards a European Contract Law for consumers and businesses' [COM(2010)348].

I. Summary

In general RIAD views favourably the Commission's efforts to better integrate the European market, and sympathises with the aim of improving the functioning of the Internal Market.

However, without a full impact assessment of the extent of and the current problems and concerns for businesses and consumers, it is extremely difficult to comment with any degree of certainty.

Nevertheless, establishing a Directive (option 5), European Contract Law (option 6) or a European Civil Code (option 7) is extremely difficult to achieve even in the medium- to long-term. As a more realistic option appears the development of an optional instrument (option 4) which would, however, only have a real added value if Member States dispensed with the application of their mandatory consumer protection provisions; a prospect which seems very unlikely.

Options 1, 2 and 3 would not really bring any significant changes to the status quo, but could help to pave the way and indicate the direction to take.

It should be noted that any action undertaken by the European Commission has to be closely linked with the current work on the proposed consumer's rights directive.

II. Legal nature of the instrument

The introduction of a single set of rules, uniformly applicable throughout all Member States, whether in the form of options 5, 6 or 7, would constitute a revolution in most Member States' law systems and traditions. Therefore, it currently does not seem a realistic option, neither politically nor judicially. Most likely resistance would be fierce on the part of local actors attached to their traditions and rules; the widely differing judicial cultures would make a uniform application of the rules throughout Europe illusory. This would defeat at least two of the main purposes of the reform, namely, enhancing transparency in cross-border contracts, hence consumer confidence, and ensuring that companies can lower the costs of adapting contracts to different national markets.

Although no panacea, a directive setting out minimum common standards for contracts (option 5) could benefit contracting parties in settling cross-border disputes more easily and would afford the consumer a consistent level of protection across the EU. Before commenting further, it would however be necessary to see further information for the proposed minimum common standards and whether its implementation would really surpass any national requirements, i.e. require new codification.

In parallel or as a second step, the development of a self standing optional instrument (option 4) which contracting parties chose to replace national law could encourage persons buying cross-border. However, the obstacles to making such an instrument a success are considerable. For instance, Member States are very reluctant to restrict the application of national mandatory (in particular consumer protection) rules, a precondition that must be met to give it a real added value.

Also, many contracts, e.g. for legal protection insurance, are determined by other national rules which would not necessarily fit together with the optional instrument. Other issues which are in particular important for insurance contracts such as language barriers or compliance requirements would remain unsolved. The impediments on a free Internal Market for legal protection insurance include also differing sales traditions, judicial systems and national mentalities. The differences in the taxation systems are also a problem as well as the fact that products are often designed according to national culture and local needs. Insurance companies would thus continue to face significant costs in trying to adapt to local market conditions, even if common rules were implemented.

Moreover, the coexistence in each country of two alternative regimes would complicate the legal environment and might create confusion. Consumers might also object to such contracts if this regime was conceived less favourable than the rules provided under national law. Conversely, if the level of consumer protection was too high and costly and seemed less favourable to business, companies might be reluctant to use this regime.

In any case, such an optional instrument would have to be applicable to cross-border and to domestic contracts to enable companies to propose uniform insurance contracts. It would be central to the instrument's success that the European Court of Justice (ECJ) has jurisdiction to ensure a sufficient degree of uniform interpretation and application. In fact, unless the ECJ ensures a homogenous application of the optional instrument the rules applied in each country would differ widely.

Indeed, an in-depth cost-benefit analysis ought to be undertaken before introducing new rules as it is important to define whether the costs (and therefore uncertainty and complexity) of adapting to such rules would be offset by a real opening effect on the market. Thus, it could arguably be best to leave the situation essentially unchanged, given that the obstacles to achieving real and effective reform of contract law are considerable.

III. Scope of application of the instrument

An optional instrument (option 4) should apply to both "business-to-business" and "business-to-consumer" contracts. A single instrument should suffice, provided it is made clear which provisions apply to the different types of contract.

Regarding "business-to-consumer" contracts, it should be noted that any action undertaken by the European Commission has to include the current work on the proposed Consumer Rights Directive¹. This will avoid any inconsistency and parallel work on the same subject.

IV. Material scope of the instrument

The question is whether a European instrument should also introduce rules for specific contracts, e.g. insurance contracts. For legal protection insurance it seems like a very ambitious goal since these kinds of contracts are very particular, the product is very specialised and its standard practices and legal regimes differ substantially from country to country. In each Member State legal protection insurers are governed by rules applying to insurance in general but also by specific rules, for instance on the provision of legal services. Consequently, a new instrument could easily create additional and unnecessary difficulties and obstacles if "fit all" legislation ignored either the specific needs and realities of the various national markets or those of very specialized sectors such as legal protection insurance.

RIAD represents legal protection insurance companies from 17 European countries, Australia, Canada, South Africa and South America. RIAD members are specialised in insurance and/or services linked to legal protection insurance. Most of RIAD's members are SMEs offering a very specific product: they offer to their clients, through an insurance policy, the resources that are necessary for access to high-quality and easily accessible legal advice and services. They also protect their clients effectively against financial risks associated with engaging legal experts and gaining access to the law.

¹ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM(2008)614 final of 8 October 2008