SMEs IN EUROPEAN CONTRACT LAW
SMEs IN EUROPEAN CONTRACT LAW

BRIEFING NOTE
This note was requested by: The European Parliament's committee on Legal Affairs.

This paper is published in the following languages: EN

Authors: Prof.Dr. Martijn W Hesselink, Centre for the Study of European Contract Law, The University of Amsterdam,

Manuscript (draft) completed in June 2007 - (up-dated 5 July 2007)

Copies can be obtained via:
Tel: 43730
Fax: 2832365
E-mail: daniele.rechard@europarl.europa.eu

Information on DG IPOL publications: http://www.ipolnet.ep.parl.union.eu/ipolnet/cms

Brussels, European Parliament

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.
SMEs in European contract law

Background note for the European Parliament
on the position of small and medium-sized enterprises (SMEs)
in a future Common Frame of Reference (CFR)
and in the review of the consumer law acquis

*Final version - 5 July 2007*

Prof. Dr. Martijn W Hesselink
Centre for the Study of European Contract Law
Universiteit van Amsterdam
The Netherlands
# Table of Contents

1 **Introduction** 3  
2 **The reality of SMEs in Europe** 3  
   2.1 **SMEs defined** 3  
   2.2 **SMEs between B2B and B2C** 4  
      2.2.1 **SME contracts: SME2C, SME2SME, SME2LE, SMEasC** 4  
      2.2.2 **A large and heterogeneous category: MiE, SE, MeE** 4  
3 **SMEs in contract law today** 5  
   3.1 **SMEs in the contract laws of the Member States** 5  
   3.2 **SMEs in the EU contract law acquis** 7  
   3.3 **SMEs in the Green paper on the review of the consumer acquis** 10  
   3.4 **SMEs in the academic CFR** 11  
4 **Extending consumer protection to SMEs** 13  
   4.1 **The rationale of consumer protection** 13  
   4.2 **SMEs as weaker parties** 14  
   4.3 **Categorical protection for SMEs?** 16  
      4.3.1 **Extending protection to all SMEs in contracts with all counterparties** 16  
      4.3.2 **Extending protection to micro and small businesses** 16  
      4.3.3 **Extending protection to SMEs in contracts with large businesses** 17  
      4.3.4 **A combined approach** 17  
      4.3.5 **Drawbacks of categorical protection** 17  
      4.3.6 **A nuanced approach: general clauses** 18  
   4.4 **A sharp distinction between B2B and B2C?** 18  
   4.5 **Legal basis** 19  
5 **Facilitating cross-border B2C contracting for SMEs** 21  
   5.1 **Consumer protection against SMEs** 21  
   5.2 **Administrative burden of 28 regimes; the blue button** 22  
6 **Facilitating cross-border B2B contracting for SMEs** 23  
   6.1 **SME contracts and the Internal Market** 23  
   6.2 **SMEs and the CFR: towards an optional instrument?** 25  
7 **Acquis review and CFR process: the importance of normative coherence** 27  
8 **Conclusion** 27
1 Introduction

The aim of this paper is to identify what the position of SMEs should be in a draft Common Frame of Reference on EU contract law and in the review of the EU consumer acquis. In particular, this paper will answer the following questions: How can the position of SMEs be defined in relation to the distinction between B2B and B2C contracts? (Sections 2 and 3) Should consumer protection in the revised acquis and in the CFR be extended to SMEs? (Section 4) How can the European Union further facilitate cross-border transactions (B2B and B2C) by SMEs? (Sections 5 and 6) Finally, it addresses the importance of normative coherence (treating like cases alike) (Section 7) and draws some conclusions (Section 8).

2 The reality of SMEs in Europe

2.1 SMEs defined

The European Commission defines SMEs as follows: ¹

‘enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.’

The definition is contained in a Commission Recommendation of 2003 which is meant to be used consistently in all Community policies with regard to SMEs. ²

---

¹ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ 2003, L 124/36, Annex, Art 2, Para 1. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million (Art 2, Para 2). Within the SME category, a micro enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million (Art 2, Para 3). An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity (Art 1).

² Art. 1.
According to this definition, there are some 23 million SMEs throughout the Union,\(^3\) which amounts to 99% of all enterprises in the EU.\(^4\) This means, in turn, that the vast majority of contracts which are concluded in Europe involve SMEs, be it in business-to-consumer (B2C) or in business-to-business (B2B) relationships. Therefore, it is not surprising that the European Commission regards SMEs as the ‘motor’ and the ‘backbone’ of the European economy.\(^5\)

SMEs are a very broad category. It includes very different kinds of businesses ranging from micro (less than 10 employees) to small (between 10 and 50 employees) to medium-sized (between 50 and 250 employees) businesses, from self-employed persons and family businesses to companies financed by venture capital, and from craft and ‘social economy enterprises’ to high-tech companies.

2.2 SMEs between B2B and B2C

2.2.1 SME contracts: SME2C, SME2SME, SME2LE, SMEasC

SMEs may engage in all sorts of contracts, both with consumers and with other businesses, and sometimes even as consumers.

As a business, an SME may engage in three types of contractual relationships, ie with a consumer (SME2C), with another SME (SME2SME) and with a large enterprise (SME2LE). The first is a consumer contract (B2C); the other two are commercial contracts (B2C). In addition, sometimes SMEs are themselves regarded as consumers (SMEasC). In those exceptional cases a contract between an SME and another business (an SME or large company) is also defined as a consumer contract (B2C).

2.2.2 A large and heterogeneous category: MiE, SE, MeE

SMEs are a rather heterogeneous category. Of course, this is not surprising in view of the fact that it includes 99% of all European businesses.

---


\(^4\) Ibidem.

\(^5\) See ‘A comprehensive policy to support SMEs’ (http://ec.europa.eu/enterprise/entrepreneurship/sme_policy.htm) and ‘Facts and figures - SMEs in Europe’ (http://ec.europa.eu/enterprise/entrepreneurship/facts_figures.htm) respectively.
Indeed, the official Commission definition already distinguishes three types of SMEs, Micro enterprises (MiE), small enterprises (SE) and medium enterprises (MeE). This means that each of the three types of contractual relationships in which an SME may be engaged as a business can be subdivided into subcategories. The category of contracts between two SMEs (SME2SME), for example, includes MiE2SE, MiE2MeE, SE2SE, SE2MeE, and MeE2MeE. In terms of relative bargaining power, experience et cetera a contractual relationship between a micro enterprise (eg a commercial agent with no employees) and a medium enterprise (eg a company with 249 employees) may be just as unbalanced as a contract between an SME (eg the same company with 249 employees) and a large enterprise (say, a company with 300 employees).

This may not create any problems as long as the category is used for distributing eg economic aid and benefits (which has been the main aim of the official Community definition cited above). However, it becomes more problematic when a separate but uniform and maybe protective regime of contract law for SME contracts is considered.\(^6\)

3 SMEs in contract law today

3.1 SMEs in the contract laws of the Member States

None of the Member States has a comprehensive contract law regulation which applies exclusively to contracts where one or both parties are SMEs. However, occasionally contract law in the Member States distinguishes between SMEs and large enterprises. A good example is the Dutch rules on policing unfair standard terms. These rules contain, in addition to a general clause, a grey and a black list of clauses which are respectively presumed and deemed to be unfair. Those lists do apply to consumers and SMEs but not to large enterprises.\(^7\) Another example is the proposal by the Law Commissions for England and Scotland, taken over by the Government,\(^8\) to police non-negotiated unfair contract terms in contracts with small businesses.\(^9\)

\(^6\) See below, Section 4.

\(^7\) See Article 6:235(1) BW. The definition of large companies in this article is broad and includes, for example, companies with 50 or more employees. It covers many companies that the Community legislator would consider to be SMEs (remember that according to the Community definition companies with 50-250 employees are medium-sized enterprises).

\(^8\) See the letter of 24 July 2006 from the Minister of State for Trade, Investment and Foreign Affairs to the
Several Member States have Commercial Codes which only apply to commercial parties.\(^9\) These codes - in addition to rules on subjects other than contract law, eg company law and securities - contain some specific rules for certain contracts, eg sales. They were typically conceived and adopted in the 19\(^{th}\) Century, for example in France in 1804 and in Germany in 1897.\(^{11}\) However, these commercial codes, which distinguish commercial contracts from consumer (where one party is a consumer and the other a professional) and civil contracts (where at least one of the parties is a non-consumer and a non-professional), do not draw any distinction between SMEs and large companies.\(^{12}\) The same applies to the Convention on the International Sale of Goods (Vienna, 1980).\(^{13}\)

In some Member States consumers and consumer contracts are defined, in some cases, in such a way that they may actually include (some) SMEs.\(^{14}\) In particular, some Member States also extend the definition of consumers to businesses that conclude contracts outside their field of usual business.\(^{15}\) In France, with regard to unfair terms,

---

\(^9\) Section 27 of the draft Bill defines a “small business” as follows: ‘(1) “Small business” means a person in whose business the number of employees does not exceed (a) nine, or (b) where the Secretary of State specifies by order another number for the purposes of this section, that number. (2) But a person is not a small business if adding the number of employees in his business to the number of employees in any other business of his, or in any business of an associated person, gives a total exceeding the number which for the time being applies for the purposes of subsection (1). (...)’.\(^{10}\)

\(^{10}\) See eg arts 110-1 ff and 121-1 ff French Code du Commerce and §§ 1 ff German Handelsgesetzbuch.

\(^{11}\) Moreover, some other Member States that had adopted Commercial Codes in the 19\(^{th}\) Century abolished them during the 20\(^{th}\) Century, on the occasion of the enactment of a new civil code, for example Italy in 1942 and the Netherlands in 1992.

\(^{12}\) However, German law gives small business (Kleingewerbe) the option whether or not to be subject to the Commercial Code (Kannkaufmann) (see §§ 1 and 2 HGB).

\(^{13}\) See art 2 CISG: ‘This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (...)’.

\(^{14}\) With regard to the extension of the scope of consumer protection directives upon their transposition into the law of the Member States, see below, Section 3.2.

the *Cour de Cassation* decided in 1987 that a business was considered a consumer when the contract fell outside the ambit of the business's professional competence (decisive was *'le même état d'ignorance que n'importe quel autre consommateur'*),\(^{16}\) but it subsequently narrowed the definition considerably when it excluded from its scope contracts which directly relate to the business activity carried out by the party.\(^{17}\) In England, when a company purchases goods of a type in which it does not ordinarily deal and which are not for a purpose integral to the business, it may "deal as a consumer" in the sense of the Unfair Contract Terms Act.\(^{18}\)

### 3.2 SMEs in the EU contract law acquis

Over the years the European Community has developed a number of policies which are specifically aimed at or favour SMEs. In 2000 the European heads of government adopted a 'European charter for small enterprises'.\(^{19}\) In 2005 the Commission adopted a 'Modern SME policy for growth and employment' which was meant to 'provide a coherent framework for the various enterprise policy instruments and aims at making the "Think Small First" principle effective across all EU policies.'\(^{20}\) The Communication was adopted with a view to implementing the Lisbon Programme. According to this Communication, SMEs do not fully benefit from the opportunities provided by the Internal Market.\(^{21}\) In 2007 the Commission launched a European portal for SMEs.\(^{22}\) However, the actual policies are mainly limited to funding plans, which has led to some frustration.\(^{23}\)

\(^{16}\) See *Cass. civ. I*, 28 April 1987, D. 1988, 1, note Delebecque. In this case a housing bureau bought an alarm system.


\(^{18}\) *Court of Appeal, R&B Customs Brokers Ltd. v United Dominions Trust Ltd* [1988] 1 All ER 847. In this case a shipping broker had bought a car for its managing director.


\(^{20}\) Communication, p 4.

\(^{21}\) Communication, p 6.


\(^{23}\) Cf Lorraine Mallinder, 'Small is beautiful', *European Voice*, 7-13 June 2007, 18: 'In this era of big global markets, EU politicians find it hard to think small. EU business legislation, largely focussed on the major challenges facing the EU economy in a joined-up world, rarely makes direct attempts to address the concerns of small- and medium-sized enterprises (SMEs). Fighting for their place in a maze of EU regulation SMEs, (...), are feeling a little frustrated. Although politicians often seize on their flagging cause to voice well-intentioned words of support, brave decisions in their favour are sadly lacking. Bar a few
In the area of private law, in 2003 the Community created a Statute for a European Cooperative Society (SCE)\(^{24}\) and is currently considering a Statute for a European private company (EPC).\(^{25}\)

However, in the specific area of contract law, the Community legislator has never addressed SMEs as a category. In particular, the Community has never adopted any rules which create certain rights or obligations for parties to certain contracts on account of them being an SME. In this respect, there is a sharp contrast with another group, who are also the addressees of Community policy, ie consumers. Still, this does not mean that the contract law acquis does not directly affect SMEs. To the contrary.

In the first place, consumer contract law directives are highly relevant to many SMEs as well. The reason is that, in practice, most of the time the parties against whom the directives provide the consumer with protection are SMEs.\(^{26}\) Indeed, probably the harmonisation of consumer contract law is more beneficial to SMEs, who are repeat players (but without the resources necessary to adapt to the laws of all the Member States of their consumer customers, in contrast to larger businesses which may have such resources available), than it is to consumers who are typically only occasional buyers of most goods and services.\(^{27}\)

Moreover, the European Community has also issued some directives in the area of commercial contracts. The first was the commercial agency directive of 1986.\(^{28}\) That directive contains a number of rules which protect self-employed commercial agents (through mandatory rules), notably against untimely termination. Probably, most self-

---


\(^{26}\) Remember that 99% of all European enterprises are SMEs.


employed commercial agents are SMEs under the Commission’s definition. Further, in 2000 the European Parliament and the Council adopted a directive on late payment in commercial transactions. Clearly, small and medium-sized businesses may be particularly vulnerable to the consequences of late payment by their debtors, and, therefore, are especially helped by the directive. Indeed, the consequences of late payment for SMEs are explicitly addressed in the preliminary recitals. See recital 7:

‘Heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment. Moreover, these problems are a major cause of insolvencies threatening the survival of businesses and result in numerous job losses.’

The Directive may even be regarded as a direct consequence of the Commission’s integrated programme in favour of SMEs. See preliminary recital 1 of the Directive:

‘In its resolution on the integrated programme in favour of SMEs and the craft sector, the European Parliament urged the Commission to submit proposals to deal with the problem of late payment.’

Furthermore, the e-commerce directive, which was also adopted in 2000, applies to both consumer and commercial contracts. The Community legislator expects e-commerce, and hence the directive, to be of particular relevance to SMEs. See recital 2:

‘The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies (…)’

29 Directive 2000/35/EC on combating late payment in commercial transactions.
30 Moreover, Art 3, Section 5, of the directive determines that the Member States should provide that organisations representing small and medium-sized enterprises may take action on the ground that contractual terms drawn up for general use are grossly unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
Finally, the scope of some Community rules, which were designed in the first place to protect consumers, also extends to some SMEs. Although the definitions of consumer in Community legislation typically exclude businesses - the consumer is usually defined as a natural person who is acting for purposes outside his trade, or something similar (though never identical) - there is the well-known exception of the package travel directive, which contains a definition of a consumer that may include professional travellers including SMEs. However, the tendency in the latest directives has been to exclude professionals. Nevertheless, Member States have often extended the scope upon the directives' transposition, sometimes to legal persons, or final consumers or even employees. Even if the Community were to move from minimum to full harmonisation, the Member States would remain free to extend the same protection to others than consumers as defined in the Community legislation, eg SMEs.

A specific question is the question of mixed use. The typical example is a consumer who buys a computer which he occasionally wants to use also for business purposes. Is the buyer a consumer for the purposes of Community law? The consumer contract law directives do not answer this question. With regard to international jurisdiction (art 15 Brussels I regulation), the ECJ has adopted a strict definition. However, this decision has no direct bearing on the interpretation of the directives.

3.3 SMEs in the Green paper on the review of the consumer acquis

In February 2007 the European Commission published a Green Paper on the review of the Consumer Acquis. The Green Paper addresses the position of SMEs in two respects. First, it points out the interest that, in particular, SMEs have in a less fragmented consumer contract law in the European Union. When discussing the objectives of the consumer acquis review, the Commission says:

---

31 See art 2, Section 4: “consumer’ means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')”. The overbooking regulation goes even further: it speaks of ‘passengers’ rather than consumers (Regulation (EC) No 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91).


34 Green Paper on the review of the Consumer Acquis, 5.
'We must also make sure that businesses, not least SMEs, may benefit from a more predictable regulatory environment and simpler EU rules in order to decrease their compliance costs and more generally to allow them to trade more easily across the EU, irrespective of where they are established.'

Secondly, when discussing the definitions of ‘consumer’ and ‘professional’, the Commission points out that the laws of the Member States differ, especially with regard to mixed contracts, ie when individuals buy a product to be used both privately and professionally.35

Finally, the Green Paper raises the question whether some businesses, such as individual entrepreneurs or small businesses, which may sometimes be in a similar situation to consumers when they buy certain goods or services, should benefit to a certain extent from the same protection as provided to consumers.36

3.4 SMEs in the academic CFR

In 2003 the European Commission published an Action Plan on European contract law in which it announced that it would adopt a Common Frame of Reference, establishing common principles and terminology in the area of European contract law (CFR).37 The CFR would be a publicly accessible,38 non-binding document which might become the object of an inter-institutional agreement.39 It would serve three main purposes.40 First, the Commission would use the CFR when reviewing the existing acquis and when proposing new measures. The second objective was that it could be instrumental in achieving a higher degree of convergence between the contract laws of the EU Member States. Thirdly, the Commission's reflections on an optional instrument would be based on the CFR. The adoption of the CFR by the Commission is foreseen for

36 Ibidem. See also Question B1.
38 Ibidem.
40 Action Plan, 62.
A draft CFR would be prepared by a network of European academics.41 The preparatory work started in the spring of 2005. In its first annual report in the autumn of 2005 the Commission announced that it would give priority to the revision of the consumer contract acquis.42 In 2007 the Commission published its Green Paper on the revision of the consumer acquis.43

A network of European scholars (CoPECL) are currently preparing an academic draft for a Common Frame of Reference for the European Commission.44 A first version will be submitted by the end of 2007.45 In the forthcoming draft academic CFR consumers are defined as follows:46

'A “consumer” means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.'

Under this definition rules applicable to consumers may in certain cases apply to SMEs as the European Commission defines them.47 This is especially true in the case of 'mixed contracts', eg where someone buys a computer primarily for personal use but intends to use it also for his business, which may be an SME.48

The draft academic CFR, as it now stands,50 does not contain any rules that specifically apply to SMEs as such.51 However, it contains many broad and open-ended rules and concepts in the interpretation of which the characteristics of the parties can, or even

41 The Way Forward, 13.
42 Action Plan, 53.
46 The final version will be submitted at the end of the contract, ie in 2009.
47 See Draft Academic CFR, Articles with Comments and Notes plus Annexes 1 and 2 (May 2007), Annex 1 (Definitions). The definition of a business is: “Business” means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.’
48 See above, Section 1.
49 See above, Section 3.2.
50 The exact formulation and place of the black-letter rules may still vary.
51 Neither did its predecessor, the Principles of European Contract Law.
should, be taken into account. Often the relative size of the parties involved will be among the most relevant characteristics. Obvious examples include the pre-contractual duties to inform\textsuperscript{52}, and the meaning of 'unfair' in relation to terms in contracts between businesses.\textsuperscript{53}

4 Extending consumer protection to SMEs

Community and Member state SME policy is usually based on the idea that SMEs are in need of some protection or assistance. This raises the question whether contract law should not also provide some protection to SMEs in at least some contract cases. In particular, the question arises whether small and medium enterprises (or some of them) should not be protected in the same cases (or some of them) in which consumers are protected. In order to be able to answer this question we need to know on what grounds and in what kind of cases consumers are actually protected.

4.1 The rationale of consumer protection

Community consumer protection started in 1975 when, as a result of the Paris Summit in 1972, the Council adopted a resolution on a preliminary programme for a consumer protection and information policy.\textsuperscript{54} This resolution, which was clearly inspired by the declaration in 1962 by the American President Kennedy,\textsuperscript{55} proclaimed five basic rights for consumers.\textsuperscript{56} Since then, the European Commission has produced a long line of policy papers. These papers formulate objectives and announce policies. However, they rarely analyze why consumers should be protected, and never why only they need protection. Often the argument is mainly limited to the idea that consumers should be protected because, in transactions with professionals, they are typically the weaker parties.

\textsuperscript{52} Currently in arts II. – 3:101 (Duty to inform about goods and services), II. – 7:201 (1) (b) (ii) (Mistake), II. – 7:205 (Fraud) of the draft.

\textsuperscript{53} Currently in art II. – 9: 406 (Meaning of “unfair” in contracts between businesses) of the draft.

\textsuperscript{54} Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy OJ 1975 C92/1.


\textsuperscript{56} See the Annex.
The economic analysis of the law has produced a powerful theory of consumer protection.\textsuperscript{57} According to this theory the rationale for consumer protection is the existence of market failures. Just as the market may not be working perfectly because of power concentration on the supply side (which can be remedied by competition law), there may also be market failures as a result of a lack of information on the demand side, which can be remedied by consumer law, in particular pre-contractual information duties. In addition to this neo-classical analysis, more recently behavioural law & economics has added, as an additional failure, the limited rationality of consumers (ie even fully informed consumers do not always take the decisions that are in their own best interest) which may justify further-reaching intervention by the legislator.

Much of the Community's consumer contract law seems to be inspired, or at least can be explained, by this economic rationale.\textsuperscript{58} The question is whether this rationale merely justifies the protection of consumers.

4.2 SMEs as weaker parties

Small and medium enterprises often also lack specific expertise, experience, information and bargaining power, in a way very similar to consumers. In commercial contracts, SMEs may be a much weaker party than their contour parties. This raises the question whether from the perspective of normative coherence (treating like cases alike) it is acceptable to treat SMEs in such cases so very differently from consumers as Community legislation is currently doing.\textsuperscript{59}


The European Commission is now aware of this problem and addresses it explicitly in the Green Paper on the revision of the Acquis.  

‘some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services which raises the question whether they should benefit to a certain extent from the same protection provided for consumers.’

The questions when and to what extent SMEs actually are in a similar situation as consumers is an empirical question which cannot be answered in this paper. It is also doubtful whether it can ever be answered in a categorical way. As we saw, there are many different types of SMEs and there are many different contracting situations.

However, it is undisputed that certain SMEs in certain contracts are in a vulnerable situation which is very similar to that of consumers. Indeed, there are some striking examples. One of them is the very precarious position of certain (but by no means all!) franchisees. Other examples include certain micro enterprises, in particular certain family, craft and 'social economy' businesses. Finally, there is the case of businesses (especially the smaller ones) that conclude contracts outside their field of usual business.

---

60 See also the working team of the SGECC, Herre et al, no 33. ‘A major concern might in some cases be what to do with small business, nonprofit organisations and other legal persons. In many regards they are in the same position as consumers as they usually do not have expertise on many issues.’ In the same sense eg Beale et al, Casebook, 527: ‘whilst consumers may require particular protection, a small business may also find itself dealing with a more powerful and experienced party, as where the manager of a petrol station deals with an oil company. These small businessmen arguably need the same protection as consumers.’

61 However, it should be reiterated that with regard to the categories of consumers and consumer contracts the situation is not entirely different in this respect. The now familiar category of consumers is in fact also very diverse. Note, for example, that when Rupert Murdoch buys a newspaper (ie a copy of one of the papers) he is a consumer, too. The mere existence of well-formed, expert and even powerful consumers has never led to the conclusion that consumer protection is undesirable.

62 See above, Section 2.

63 See above, Section 3.1
4.3 Categorical protection for SMEs?

Still, the heterogeneity of the category of SMEs leads to the question what is the best way to protect SMEs when such protection is needed.

4.3.1 Extending protection to all SMEs in contracts with all counterparties

A clear and rather straightforward solution would be to extend Community consumer protection to all SMEs in all contracts that they conclude. This would be quite a radical policy change since, as said, 99% of all businesses in Europe are SMEs under the European Commission's definition. Under such an approach the European contract law common to consumers and SMEs would be applicable to the vast majority of contracts in Europe. Effectively, it would amount to creating a separate, non-protective regime merely for contracts between large businesses which are well-advised and do not need any legal protection.

In this approach (as in the alternatives discussed hereafter), the question would arise whether the categorical protection would be subject to some sort of reliance protection on the side of the other party, if she did not know and could not have known that its counterparty was an SME. Obviously, this would severely undermine the effectiveness of the protective policy. On the other hand, it might be necessary in view of the low level of transparency of the category of SMEs.

4.3.2 Extending protection to micro and small businesses

An alternative solution would be to extend protection only to some SMEs. For example, the protection could be limited to smaller SMEs, ie only small businesses (up to 50 employees) or even only micro businesses (fewer than 10 employees). The threshold of small and micro enterprises was adopted respectively by the Dutch legislator with regard to the grey and the black lists (up to 50 employees), and proposed by the English and Scottish Law Commissions with regard to the policing of unfair terms (not more than 9 employees).

---

64 Definitions in terms of annual turnover seem impracticable for present purposes.
65 See above, Section 3.1.
4.3.3 Extending protection to SMEs in contracts with large businesses

Another option would be to protect SMEs only in contracts with large counterparties, ie with enterprises who have more than 50 employees (SME2LE). In this option no protection would be given in SME2SME contracts.

4.3.4 A combined approach

Obviously these two limitations can also be combined. For example, only small or micro enterprises would be protected and only in contracts with enterprises which are larger than themselves (ie respectively only in MiE2SE, MiE2MeE and Mi2LE or only in SE2MeE and SE2LE). This would be the most limited categorical extension of protection.

4.3.5 Drawbacks of categorical protection

The advantage of a categorical protection of SMEs (in one or the other version) is that it leads to some legal certainty. However, the approach also has its drawbacks. First, like in any other categorical approach, there is an element of arbitrariness: why is an enterprise with 249 employees protected and one with 250 not? Second, with categorical protection status becomes all important. This may lead to undesirable strategic behaviour and to rather formal disputes on status rather than on the substance of the actual contractual relationship, in particular the actual vulnerable situation of the SME.

On the other hand, however, these disadvantages are typical of categorical protection and have never been a decisive argument against categorical protection of consumers, minors, employees et cetera. Nevertheless, in the case of SMEs they seem to be more acute. First, because the criteria so far developed to distinguish SMEs from other enterprises (the number of employees and the annual turnover) seems to be more arbitrary than the established definitions of consumers, minors and employees. There seems to be a greater risk that categorical protection will be overprotective, ie to include parties that do not deserve any protection at all. Second (and related), because the category is less well settled and less transparent. The latter point is problematic

---

66 In the case of micro enterprises, respectively 9 and 10, and, in the case of small enterprises, respectively 49 and 50.
because it will make the applicability of rules in the protection of SMEs less predictable. This, in turn, will make it difficult for counterparties to comply with them. For example, it will be difficult for a large enterprise to know whether it has to disclose certain information, can rely on its standard terms et cetera.

4.3.6 A nuanced approach: general clauses

The definition problem may prove to be insurmountable. However, this does not necessarily mean that any attempt to provide some protection to those SMEs who actually need it as much as consumers or even more so should be abandoned.

A less formal and more substantive approach might prove to be a viable alternative. Protection could be extended to all other parties who actually need it (and only to those). This result could be achieved with the help of general clauses. Most subjects that the consumer acquis has dealt with so far and especially the subjects that are candidates for a ‘horizontal approach’ in the review of the acquis, notably pre-contractual information duties, unfair terms, and non-performance and remedies, seem to be well adapted for such an extension through general clauses like good faith. Many Member States including Germany, the Nordic countries and France have a long-established experience which proves that the lack of formal legal certainty is sufficiently compensated by substantive foreseeability: the parties know that protection is provided to weaker parties in (very) unbalanced contractual situations; then can rest assured that in the case of more or less equal bargaining the parties are left alone. Moreover, the forthcoming academic draft for a Common Frame of Reference, which contains many general clauses, provides an excellent basis for such an approach.

4.4 A sharp distinction between B2B and B2C?

In its first annual report concerning the CFR process the Commission announced that it would draw a clear distinction between business-to-business and business-to-consumer contracts. It said:67

67 Already in October 2005 in London, in his opening address to the conference “European contract law: better lawmaking to the common frame of reference” Commissioner Kyriakou had said: ‘We have further identified substantial issues that require close attention, for example: (...) clear distinction between business-to-business and business-to-consumer contracts.’
'Appropriate differentiation between B2B and B2C contracts is paramount. Consumer law adjusts structural imbalances between a consumer and a trader; therefore policy decisions might be taken differently in a B2C and in a B2B context.'

This approach was welcomed by the European Council in its resolution concerning the Commission’s first annual report,\textsuperscript{68} and by the European Parliament in its reaction.\textsuperscript{69}

However, in its resolution the Parliament also pointed to the position of SMEs:\textsuperscript{70}

\begin{quote}
‘Reminds the Commission that the term "business" covers more than just large corporations and includes small - even one-person - undertakings which will often require contracts that are specially tailored to their needs and that take account of their relative vulnerability when contracting with large corporations’
\end{quote}

Indeed, a sharp distinction between business-to-business (B2B) and business-to-consumer contracts (B2C), where the former are dominated by pervasive freedom of contract and where protection of weaker parties is limited exclusively to the latter, seems to be incompatible with doing justice to the vulnerable position of certain SMEs (in particular small and micro businesses) in certain contractual situations. Especially from the perspective of normative coherence (treating like cases alike), a more nuanced approach with appropriate attention to the position of weaker SMEs seems advisable, both in the review of the acquis and in the Common Frame of Reference.

\textbf{4.5 Legal basis}

At first sight the idea of extending Community consumer protection to SMEs might seem to lack a legal basis. However, it should be recalled that most consumer contract directives are not based on a specific Treaty provision concerning consumer protection

\textsuperscript{68} Conclusions of the Competitiveness Council, 28-29 November 2005, no 13: ‘Emphasises: (...) the need to acknowledge the distinction between business-to-consumer and business-to-business contracts.’

\textsuperscript{69} European Parliament resolution of 23 March 2006 on European contract law and the revision of the acquis: the way forward (P6_TA(2006)0109), 6: ‘Calls on the Commission to distinguish, where necessary, between legal provisions applicable to the business-to-business sector and those applicable to the business to-consumer sector, and to separate the two systematically’.

\textsuperscript{70} See no 4.
but on art 95 concerning the harmonisation of laws with a view to completing the Internal Market.

Looking at the content of the consumer contract law acquis one would expect the relevant directives to be based on an article specifically relating to consumer policies in one of the founding treaties. However, the reality is very different. Even though the European Community effectively has had a consumer policy since the 1970s which has been recognised in the Treaty (art 153 EC) since Maastricht (1992), the consumer contract directives have been based exclusively or mainly on art 95 (or 94), i.e., on the policy of harmonizing the law of the Member States with a view to constructing an Internal Market. Obviously, European consumer policy has always been closely linked to the Internal Market, both in the general sense that the ultimate aim of the Internal Market is consumer welfare and in the more specific sense that the consumer interests that are protected by Community law are in the first place economic, market-related interests. However, the fact that these consumer contract directives were based on art 95 suggests that - to the extent that they are valid - harmonisation with a view to the completion of the Internal Market is a sufficient justification.

Therefore, if the harmonisation of consumer protection in certain areas of contract law is permitted, then why should the harmonisation of the protection of SMEs in the same areas be forbidden? This would only be different if the case for harmonisation would be weaker for SME contracts than for consumer contracts. However, the opposite seems to be the case. Indeed, the case for harmonising SME contract law seems to be even stronger. The reason is that cross-border contracts between SMEs are probably more hindered by disparities than both consumer contracts and contracts between large enterprises than SME contracts. The reason is that businesses, unlike consumers in many contracts, are repeat players, whereas, unlike large businesses, they usually lack the resources necessary to acquaint themselves with the laws of the different Member States. Moreover, as we saw, Member States have different approaches to extending

---

72 Since the ECJ’s Tobacco case (Case C-376/98 Germany v European Parliament and Council [2000] ECR I-8419) there have been some doubts with regard to the validity of some of the contract law acquis, both with regard to some commercial contracts (e.g., commercial agency) and with regard to some consumer contract subjects (e.g., doorstep selling). At least the case made in the preliminary recitals seems to be very thin.
consumer protection to SMEs. These different levels of protection in different Member States lead to a distortion of the level playing field that the Internal Market promised to provide.

As we saw, there are even specific Community legislation precedents in the protection of vulnerable businesses. The best examples are the commercial agency directive and the late payment directive. If these directives are valid, there seems to be no reason why extending consumer protection to certain SMEs should not be equally acceptable.

Obviously, the whole problem of a legal basis could be circumvented or concealed if protection was not openly extended to SME but would be shaped as an extension of the definition of consumers. SMEs would then be protected as consumers. However, such a confusion of legal categories seems hardly desirable if the Community wishes to attain better legislation.

5 Facilitating cross-border B2C contracting for SMEs

5.1 Consumer protection against SMEs

In consumer contracts SMEs are usually the stronger party. Consequentially, the law treats them as such: they are among the parties against whom consumers are protected. In both the acquis and the law of the Member States consumers typically have the same protection against small and medium-sized businesses as they enjoy against large businesses.

The European charter for small businesses suggests that small enterprises could be exempted from certain regulatory obligations. In theory it is conceivable that consumer rights are more limited against smaller businesses (eg micro and small enterprises) than against larger ones (eg medium and large enterprises). However, so far the Community legislator has never taken such an initiative.

---

73 On the (rare) cases where SMEs are regarded as consumers, see above, Section 3.2.
74 An exception is the Directive on unit pricing which allows, during a transitional period, to derogate from the general obligation to indicate unit prices in favour of small retail businesses.
75 Charter, 2.
It also seems doubtful whether such measures would have much political support in the near future. The reason for this is, of course, that such a policy in the protection of (smaller) SMEs in consumer contracts would directly diminish the level of consumer protection. Therefore, from the perspective of consumers such measures would be undesirable. Moreover, there is also a rather severe legal constraint: according to art 95 (3) EC, in its proposals concerning harmonisation measures in the area of consumer protection, the Commission must take a high level of protection as a base.

5.2 Administrative burden of 28 regimes; the blue button

However, there is another possibility to lighten the regulatory burden for SMEs which should be seriously considered.

Under the current rules of private international law (ie the Rome Convention) a seller is free to make a choice of law. However, according to art 5 such a choice may not have the result of depriving the passive consumer of the protection afforded to him by the mandatory rules of his country of residence. In other words, the seller must comply (in its standard terms, in the pre-information it provides etc) with the mandatory rules of all the markets that he wishes to enter. This is very burdensome, particularly for e-businesses on the Internet which may sell to clients all over Europe. Under the recent proposals for converting the Rome Convention into a regulation (‘Rome I’) consumer protection would be further extended into a more or less complete country-of-destination rule. Businesses now fear that article 5 of the new draft is worded in a way that would force online traders to comply with 27 different sets of consumer law. This would be a strong disincentive to start up an e-business.

However, Professor Hans Schulte-Nölke has recently proposed a way out which would respect both the consumer interest in a high level of protection and the business interest, especially of SMEs, in a business-friendly regulatory environment: the blue button. According to this proposal the seller should be given the choice to sell to the consumer either under the law of the consumer’s home country or under European consumer law. The latter would be a comprehensive set of rules which would contain all the consumer protection required under the acquis communautaire plus general

---

contract law rules. Hence, the consumer would have to indicate his home country and if the seller wants to contract under that law he accepts the order. If, however, the seller does not want to contract under that law, he is allowed to offer the consumer the choice between contracting under EU law or to decline the order. The choice would be made by the consumer by clicking on a ‘blue button’ designed as the European blue flag.

This solution would make life for e-business, especially the smaller enterprises, much easier. Professor Schulte-Nölke’s proposal could, of course, be amended. For example, in order to assure a high level of consumer protection the EU law under the blue button could contain more consumer law than the minimum required by the current directives. It could also contain the minimum, average or highest level of consumer protection that the consumer law of the Member States provides on subjects currently not regulated by Community consumer legislation.

6 Facilitating cross-border B2B contracting for SMEs

Supposing that the European Community legislator wishes to extend its SME policy (further) to contract law, is there anything else it could do in addition to providing protective rules for vulnerable SMEs and alleviating the burden for SMEs of compliance with consumer regulation in cross-border business? Yes, first it could consider (further) harmonising the parts of commercial contract law that are particularly relevant to SMEs. Secondly, it could facilitate cross-border B2B contracts concluded by SMEs by providing a coherent set of non-national contract laws for which SMEs could make a choice of law. Such measures in the area of B2B contracts could prove to be especially useful for all kinds of SMEs, both weak and strong.

6.1 SME contracts and the Internal Market

There is a strong case for the harmonisation of the parts of commercial contract law which are particularly relevant to SMEs. The case is probably even stronger than the one for the harmonisation of consumer contract law. The reason is that cross-border business contracts involving SMEs are probably more hindered by disparities than both consumer contracts and contracts between large enterprises. Businesses, unlike consumers in many contracts, are repeat players (with repeat costs), whereas, unlike large businesses, they usually lack the resources to acquaint themselves with, and adapt their (standard) contracts, to the laws of the different Member States.
In both its first communication on European contract law of 2001 and in its Action Plan of 2003 the Commission addressed the specific difficulties of SMEs in the Internal Market:\footnote{78} 

‘For consumers and SMEs in particular, not knowing other contract law regimes may be a disincentive against undertaking cross-border transactions. (...) Suppliers of goods and services may even therefore regard offering their goods and services to consumers in other countries as economically unviable and refrain from doing so. (...) Moreover, disparate national law rules may lead to higher transaction costs, especially information and possible litigation costs for enterprises in general and SMEs and consumers in particular.’

‘SMEs will either be dissuaded from cross-border activities altogether or will be put at a clear competitive disadvantage compared to domestic operators.’

Moreover, as we saw, there are specific precedents. The best examples are the commercial agency directive and the late payment directive. If these directives are valid,\footnote{79} there seems to be no reason why eg a franchising directive or a commercial sales directive should not be equally acceptable.

So far, the Community has never adopted a sales directive for commercial contracts, as an analogy to the consumer sales directive of 1999,\footnote{80} even though the consumer sales directive was based on art 95 (internal market) and most of the reasons that were mentioned in preliminary recitals to justify the adoption of the consumer sales directive apply just as well (or even a fortiori) to SMEs as to consumers. See, for example, recital 2:

‘(2) Whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed; whereas free movement of goods concerns not only transactions by persons acting in the course of a business but also transactions by private individuals;

\footnote{79} On this question see above, footnote 69. 
\footnote{80} Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.
whereas it implies that consumers resident in one Member State should be free to purchase goods in the territory of another Member State on the basis of a uniform minimum set of fair rules governing the sale of consumer goods.'

A similar case can be made for the other important commercial contracts, eg certain services, insurance, guarantee, lease, franchise.

However, the harmonisation of commercial contract law may also have its drawbacks. Apart from the costs involved in any law reform, scholars point to the loss of the benefits (in terms of choice and quality) that are yielded by the current situation where, as a result of the freedom to make a choice of law, there is a competition between different systems of (in this case commercial) law in the Member States.\(^\text{81}\) This may explain why the harmonisation of commercial contract law does not seem to be high on the political agenda.

6.2 SMEs and the CFR: towards an optional instrument?

There is a less intrusive way in which the European Union could facilitate cross-border B2B contracting for SMEs than harmonisation. In its Action Plan the European Commission announced that in 2009 it would publish a Common Frame of Reference. One of the purposes of the CFR was that it might provide the basis for one or more (optional) codes of contract.\(^\text{82}\)

As said, contrary to large businesses SMEs often lack the resources necessary to explore the implications of a choice of law. Therefore, the availability for SMEs of a

---


\(^{82}\) In its Resolution of 7 September 2005 the European Parliament reminds the Commission of this possible use of the CFR: ‘Underlines that - even though the final purpose and legal form of the CFR is not yet clear - the work on the project should be done well, taking into account the fact that the final long-term outcome could be a binding instrument; all the various possible options for the purpose and legal form of a future instrument should be kept open. 6. Calls on the Commission to take into account the long-term perspective of a CFR when presenting new legislative proposals.’
coherent set of European rules that they can opt for in all their cross-border commercial contracts could make their lives considerably easier.

It is often argued that such a 28th regime would be useless because the parties would never opt for it. The fact that the applicability of CISG is often excluded by the parties is often put forward as evidence that there is no need for such instruments. Even though reliable quantitative data are lacking, it seems to be true that sophisticated parties with high-profile legal advisors indeed tend to exclude the applicability of CISG (though less so than a few years ago). However, that is only part of the story which is relevant here. Many SMEs lack such sophisticated legal advice. As a consequence, many of them, especially the smallest ones, do not make a choice of law at all. As a result the CISG applies. Indeed, in much of the case law concerning the CISG the parties are SMEs.  

The Community legislator is currently considering the introduction of a Statute for a European Private Company (EPC). One or more optional codes might prove to be a useful corollary to the EPC. For example, the existence of an optional code concerning distribution contracts would allow SMEs maximum freedom in organising their business, through subsidiaries or distributors or a mix. It would be part of creating an ideal legal environment for SMEs doing cross-border business in European.

In order to be effective, the legislative form of an optional code should be a regulation (like for the SE). The most appropriate legal basis would probably be art 308 EC (like for the SE and the SCE). Article 95 EC could also be considered. However, is an optional code really a harmonisation measure and can it truly be said to have as its object the establishment or functioning of the internal market, especially if it is optional?

If the optional instrument is supposed to be useful, in particular for SMEs including the smallest ones, then probably an opt-out regime (like under the CISG) would be more appropriate than an opt-in regime. It would combine the benefits of allowing, in particular, sophisticated parties complete freedom of contract and offering especially the less experienced enterprises an appropriate default regime for cross-border business. However, a choice for an opt-in regime, as a less intrusive first step, might be politically more expedient.

83 Of course, again, reliable quantitative data are lacking.

26
As to the content, ideally the European Union should offer SMEs a coherent set of the main specific commercial contracts (sales, services, insurance, guarantees, lease, franchise) plus the relevant general contract law rules.

7 Acquis review and CFR process: the importance of normative coherence

It is of vital importance that the processes of reviewing the consumer contract law acquis and the work of the Common Frame of Reference and any optional instruments are well co-ordinated.

In the first place, any unnecessary differences between the revised acquis and the Common Frame of Reference and any optional instruments should be avoided. Such differences would be detrimental from the perspective of good legislation (normative coherence: treating like cases alike) and would lead to unnecessary costs for SMEs and the other parties involved in finding out how exactly the law of, say, sales differs depending on what parties are involved (consumers, SMEs, large enterprises).

If indeed, as it seems, the review of the consumer acquis will move in the direction of a horizontal approach with full harmonisation, at least in some areas, and if SMEs will not be covered by the definition of a consumer, then at least express coordination with the law relating to commercial contracts involving SMEs is desirable from the point of view of normative coherence since, as we saw, often the situation of SMEs in such contracts is very similar to that of consumers.

8 Conclusion

SMEs are a very broad category which includes very different kinds of businesses. The vast majority of contracts concluded in Europe involve SMEs. SMEs engage in both consumer contracts (B2C) and business contracts (B2B). (Section 2)

Neither the laws of the Member States nor the acquis communautaire contain a separate contract law for SMEs. (Section 3)
In commercial contracts, SMEs may be much weaker than their contour parties. In terms of experience, bargaining power and information their situation may be very similar to that of consumers. From the perspective of normative coherence (treating like cases alike) there is a strong case for extending consumer protection at least in certain situations to at least certain SMEs. (Section 4)

Any measures to protect SMEs in consumer contracts which would diminish the level of consumer protection would be undesirable from the perspective of consumer policy. However, the regulatory burden for SMEs, in particular e-businesses, who wish to enter foreign consumer markets, could be alleviated considerably by offering the possibility of a choice of law for European Union consumer law (the blue button). (Section 5)

The European Union could also facilitate cross-border commercial contracting for SMEs, who often lack the resources necessary for a well-informed choice of law, by offering a coherent set of the main specific commercial contracts (sales, services, insurance, guarantees, lease) plus the relevant general contract law rules (optional instrument). (Section 6)

With a view to normative coherence (treating like cases alike) and minimizing compliance costs for SMEs it is crucial that the processes of reviewing the consumer contract law acquis and the work of the Common Frame of Reference and any optional instruments are well co-ordinated. (Section 7)