

## **Call for Evidence and Views on the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses**

### **List of questions for response**

We would welcome responses to the following questions set out in this Call for Evidence and Views. Please email your completed form to: [andrew.lee@justice.gsi.gov.uk](mailto:andrew.lee@justice.gsi.gov.uk).

**Question 1.** Does the current regulation of contract law, and, in particular, any divergence of laws at national level, present problems or not?

If problems are present, how significant or otherwise are they?

How can any problems be quantified, and who is affected by them?

Comments:

In light of the evidence gathered to date from our Advisory Groups (which we describe in the "About you" section at the end of this questionnaire), and our assessment of existing published material, we suggest that the current regulation of contract law, and resulting divergences of contract law at national level, do present problems. We suggest that the impact of the problems differs between businesses and consumers, and we have accordingly dealt with these issues separately below.

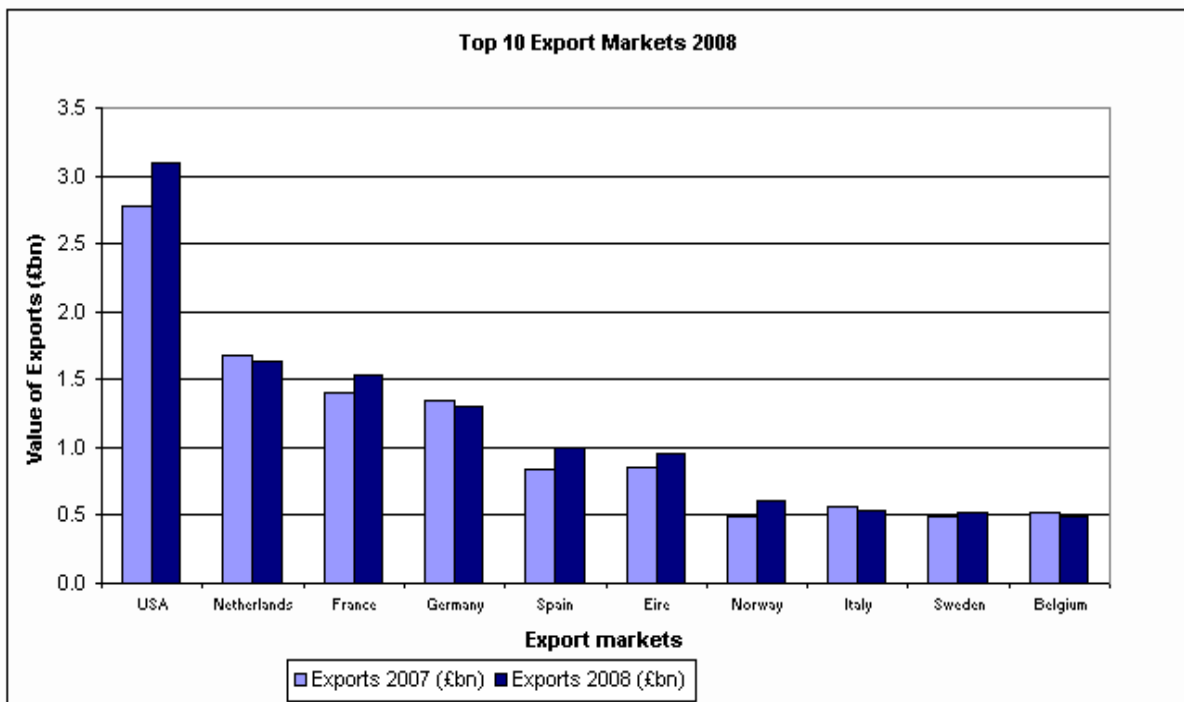
#### ***Cross border contracting and Scottish businesses***

We begin by sketching the outlines of a picture of Scottish trade, through a selection of relevant statistics. We look in particular at cross-border trade. Most of Scotland's trade is within the UK. For example, in 2008 Scotland exported goods and services worth an estimated £42.3 billion to the rest of the UK, with England remaining Scotland's biggest trading partner (The Scottish Government: Scottish Export Statistics, available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Economy/Exports/RUKExports>). In the same year (2008), however, Scottish businesses exported goods and services worth an estimated £20.7 billion to the rest of the world (The Scottish Government: Scotland's Global Connections 2008, January 2010, available at

<http://www.scotland.gov.uk/Topics/Statistics/Browse/Economy/Exports/GCSpdf>).

Of this, an estimated £9.5 billion was to the EU, with the Netherlands, France, Germany, Spain and Ireland being the most significant markets. This is more than three times the value of exports to the USA. The top five exporting sectors (by value) were: chemicals (£3.5 billion), food & beverages (£3.4 billion), business services (£2.3 billion), the wholesale, retail and accommodation sector (£1.4 billion), and manufacture of machinery and equipment (£1.4 billion).

The following graph illustrates Scotland's export destinations by country:



**Figure 1: Scottish Government Global Connections Survey (available at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Economy/TrendExports>)**

Clearly, contracting in a cross-border context, particularly within the EU, is a significant concern of Scottish businesses.

Public sector representatives on our Business Advisory Group drew our attention to the European public procurement rules, which have had a significant impact on Scottish public sector contracting practice (see <http://www.publiccontractsscotland.gov.uk/default.aspx> generally). The representatives noted that, although these rules opened up the possibility of cross-border contracting within the European Union, in practice the number of approved contractors for Scottish "Category B" contracts (i.e. for services/products required nationally across all local authorities and universities/colleges) based outside the UK amounted to

three out of some 400 altogether, and those three came from the Republic of Ireland. The representatives acknowledged, however, that non-UK contractors might well incorporate in the UK in order to bid for Scottish public sector contracts, in which case they would not appear on the list as being from outside the UK. A prominent (if not very fortunate) example of such a public sector contractor (albeit not in the Category B group) is Bilfinger Berger UK Ltd, the contractor in the Edinburgh tramways project. BBUK Ltd is a subsidiary of a business group originating in Germany and was set up to undertake civil engineering projects in the UK and the Republic of Ireland (see [http://www.edinburghtrams.com/include/uploads/story\\_so\\_far/InfracoContractSum.pdf](http://www.edinburghtrams.com/include/uploads/story_so_far/InfracoContractSum.pdf), <http://www.bilfinger.co.uk/>, and <http://www.bilfinger.com/en/Profile/Corporate-History>).

Thus measuring the extent to which Scottish public authorities engage in cross-border contracting is not a simple matter. It appears, however, that Scottish public sector contracting is almost invariably under Scots law.

### ***Problems for Businesses***

The evidence gathered from our Business Advisory Group suggests that businesses in Scotland generally place great emphasis and care on the detail of their contracts, whether contracting with other businesses, or engaging with consumers. Businesses generally view the provisions of their contract as essential to a smooth-running business endeavour and accordingly treat the process of agreeing a deal and drawing up an appropriate contract as an important part of trade. While our Advisory Group suggested that it is common for the essential scope of any transaction or deal to be agreed relatively quickly between the parties, it was further suggested that delays can be suffered due to protracted legal negotiation over the exact terms and conditions of any deal, including the applicable law of the contract. One example drawn to our attention by a Scottish solicitor was of two companies, a Polish and a Scottish one, which agreed the terms and scope of an international trade contract within a matter of days. However, execution was held up by three weeks of negotiation over the applicable law election for the contract. As neither party had any knowledge of the other's legal system, and indeed had no accessible means of finding out the relevant law in that jurisdiction in their own language, the parties could not agree on either Polish or Scottish law. Our Business Advisory Group has emphasised that in the current difficult economic climate the maintenance of good relations with other businesses is key to economic recovery, but the resulting delays stemming from such protracted negotiations can affect the development of trust between enterprises. Accordingly, this can present problems for businesses contracting in a cross-border context.

Evidence gathered from our Business Advisory Group supports the idea that businesses'

differing levels of bargaining power and dominance in their respective markets can affect their ability to persuade another party to contract under a certain applicable law. Evidence suggests that businesses in Scotland typically contract under the applicable law of the jurisdiction in which they are conducting business, and in cross-border trade this will generally be the home jurisdiction of their client or customer. Without extensive market-dominance, it is difficult to negotiate changes to applicable law under cross-border contracts. Accordingly, larger and potentially more market-dominant incorporations may be able to insist on their preferred applicable law and conversely smaller, potentially less market-dominant operators may find themselves contracting under unfamiliar contract laws. While we can offer no quantitative data to this effect, it is clear from the qualitative evidence we have gathered that this has at least the potential to increase the costs of contracting and uncertainty in cross-border contracting. The evidence gathered to date from the business community suggests that such uncertainty results in the perception of risks in cross-border contracting, whether merited or not, and that the existence in itself of perceptions of risk is undesirable in the internal market.

Perception can present further problems when contracting in a cross-border context. The evidence of our Business Advisory Group suggests that there may be negative perceptions (perhaps entirely unsubstantiated in practice, but nonetheless in existence) that certain jurisdictions' laws of contract are unsatisfactory for business-to-business (B2B) contracting in a cross-border context. For example, one member of our Business Advisory Group reported that indemnity insurance is not made available in his business (new technology licensing contracts) if the applicable law is to be that of a US state. The potential indemnity exposure under US law is too great a risk, and so another applicable law must be chosen. Moreover, as seen in the Scottish-Polish example above, reluctance to contract under certain laws may stem from ignorance of, or difficulties in finding out about, the law of the state in question. This is only exacerbated by the lack of foreign language versions of national laws. Whether these perceptions are ultimately accurate or substantial seems to matter little, for the fact such perceptions exist at all impacts upon the extent to which contracting in a cross-border context may take place under those applicable laws in the first place.

Specific problems affecting the business community in Scotland have been identified in relation to the divergence of national laws regarding "e-contracting", and the formation of contracts through the medium of email. Business to business e-contracting is becoming more prevalent in Scotland, particularly in a cross-border trading context. Indications from our evidence suggest that the use of this method of contracting will grow in future. Businesses think there are divergences between national laws on the issue of e-contracting,

and this raises significant contract formation issues. In light of the increasing use of electronic contracting, and its capacity to develop cross-border trading in the internal market (see below, question 3), our qualitative evidence suggests that businesses in Scotland feel this particular divergence of national laws, or indeed a perception of divergence, is not satisfactory.

Thus, the combined effects of market-dominance, perception of differences, and real divergence of national laws suggests that problems do currently exist. For these reasons, some members of our Business Advisory Group have suggested in their evidence to us that a European law of contract, perhaps in the form of a written code, would be welcomed to some extent by businesses in Scotland, and would be used in cross-border trade. Other members of the group have expressed doubts about whether such a European law of contract would be achievable or workable in practice. However, there is at least some measure of support for such reform within the Scottish business community. This is broadly in line with the results of the Clifford Chance Survey on European Contract Law (2005), albeit on a much smaller empirical scale.

We note generally that there is a dearth of quantitative evidence to assist with quantifying the scope of these problems, and we are unable to assist further with assessing the economic impact of these problems, beyond the limited qualitative material on evidence gathered from Scottish businesses, set out above.

### ***Problems for consumers***

As regards consumers, we are not at present in a position to offer qualitative evidence such as we have gathered in relation to B2B transactions, and in undertaking our review of Scots contract law in light of the DCFR we have not conducted any meaningful research on the impact of divergence in national laws in the internal market upon consumers. Accordingly we have reached no firm view on the need for a European law of contract with regard to consumers. However, we have been able to gather and analyse some existing empirical evidence and other published materials, on which we base the following comments.

As a preliminary view, we would suggest that the case for a European contract law is not as strong for consumers as it is for businesses, as discussed above. The EC Green Paper may perhaps over-state the case with regard to the benefits a European contract law may afford consumers. There is already a substantial body of harmonised European consumer protection law, mostly providing for a minimum level of harmonisation in the field. Thus there already is the core of a European consumer contract law, albeit one which is not always

internally coherent when viewed as a whole. A European contract law "toolbox" could help reduce that incoherence, in so far as it is a problem. (We have also noted with interest in this regard a recent report to the UK Government recommending a complete overhaul of consumer law to bring together the disparate rules, many of EU origin, currently regulating the supply of goods and services to consumers: [Department of Business, Innovation and Skills, Consumer and Competition Policy Directorate: Consolidation and Simplification of UK Consumer Law, November 2010.](#)) But by virtue of Article 6(2) of Rome I Regulation, consumers may not be deprived of any mandatory protections afforded to them under their domestic law. Therefore, it can be argued that consumers purchasing across EU borders are already relatively well protected from the problems divergent national laws can create, despite the current lack of a European contract law, at least where, as in the UK, their domestic law offers a higher level of protection than the European minimum. This position might be compromised to some extent by the "full" or "maximum" harmonisation approach now apparently favoured by the European Commission for such consumer protection measures as the proposed Consumer Rights Directive and, perhaps, the proposed European contract law, especially if the maximum harmonisation fell short of the highest levels of protection currently conferred by national laws.

Notwithstanding the protection provided by Rome I, consumers may frequently face significant linguistic problems in accessing any foreign law, leading to ignorance of their entitlements under the current law. Furthermore, the burden of proving differences in consumer protection between jurisdictions is a costly and onerous one for consumers. Moreover, the problems with unfamiliar applicable laws, mentioned already in our comments on business contracts, are not adequately addressed by the business community in consumer contracts. Many businesses across the EU show little regard for the protections built into Rome I Regulation, and continue to contract with consumers under legal systems that may be different from those of the consumer. From our limited investigations, this seems to be particularly prevalent in on-line transactions. This is particularly significant given that consumer exposure to cross-border trade across the EU is most likely to be through such on-line transactions. In September 2010 we conducted a survey of the applicable laws under the standard form contractual terms offered to consumers when buying goods from some of largest e-retailers across the EU. The retailers surveyed were: eBay, Amazon, Etsy, Argos, Play, Apple Computer (including iTunes), Tesco and easyJet. The majority of these companies offered consumers "domestic-facing" sites, directed towards consumers in their own jurisdictions, e.g. language, flag, and product specific information would be directed towards consumers in that jurisdiction's domestic market. But, while some sites adopted the applicable laws of the jurisdiction towards which the website

was directed, many others adopted divergent legal systems, with consumers ultimately contracting under terms governed by laws with which they typically will not be familiar. For example, eBay Spain and eBay Italy both contract with domestic consumers under the law of the Netherlands. Additionally, all of Amazon's European sites contract with their domestic consumers under the laws of Luxembourg; this includes Amazon.co.uk. In only one case, that of easyJet, did all European websites require consumers to contract under the laws of England and Wales exclusively. This may of course be problematic for consumers outside that jurisdiction.

Despite the protections already afforded to consumers, some small divergences in national laws may still cause problems for consumers across the internal market. The European Consumer Centre Network (ECCN) reported in August 2010 that its Consumer Centres across the EU were becoming increasingly aware of the problems consumers faced due to a lack of uniformity in consumer legislation across different applicable laws ([The European Online Marketplace: Consumers Complaints](#), August 2010). For example, it drew attention to the fact that whilst throughout the EU withdrawal from an e-commerce contract without reason is possible in the cooling-off period, the length of this period differs across jurisdictions when implemented in national legislation – France (7 days), Czech Republic (14 days) etc. The ECCN argues this lack of uniformity throughout the internal market can cause misunderstandings and confusion for consumers, particularly when problems with contractual terms arise. We would additionally draw attention to the divergences surrounding the contractual remedy of rejection, which is only available in 9 EU jurisdictions (see Joint Report of the Law Commission and the Scottish Law Commission on Consumer Remedies for Faulty Goods, November 2009, Law Com No 317, Scot Law Com No 216, page 25). This potentially leads to further confusion for consumers when faced with such divergence within the internal market.

Despite these problems, the extent of the rationale for a European contract law, and how it might benefit consumers, is not entirely made out in the Green Paper. We have found no detailed or quantitative information there or elsewhere with which to measure the extent to which consumers (whether on- or off-line) actually encounter legal difficulties when purchasing goods and services from traders based in, or operating under, the laws of other jurisdictions than the former's own, or are deterred from such transactions by uncertainties about the law to be applied. But in this regard we think that there might be some interest in investigating further the recent operation of another set of EU consumer protection rules. We have in mind EC Regulation 261/2004, noting the considerable consumer dissatisfaction expressed at the time and since with regard to the responsiveness of at least

some airlines to the compensation claims lodged under the Regulation after the mass cancellations of air flights across Europe resulting from the Icelandic volcanic ash clouds in the spring and early summer of 2010. A comparison of how this has worked out around the EU might well produce useful results in telling us something about consumer perceptions of consistent legal protection across Europe.

Therefore, while we would suggest that the case for a European contract law is stronger for B2B contracts, we recognise that legal divergences continue to exist for consumers despite the extensive existing harmonisation efforts. We think that more research is needed to determine whether these cause real problems for consumers across the EU. But, as a matter of logic, we can see no reason why an instrument creating a European contract law should not cover all contracts, including those between businesses, between individual consumers and those of a business-to-consumer (B2C) character, a point we develop further below in our response to Question 3.

### **Conclusion**

In summary, we suggest that there is evidence that current divergences in laws of contract can disrupt the smooth operation of the internal market, particularly for businesses. We are not able to offer quantitative evidence of the economic significance of the impact caused by such divergences.

**Question 2.** What are your views on the relative advantages and disadvantages of each of the options and sub-options identified in the Green Paper? In particular, which should be preferred and why?

*Option 1: Publication of the Results of the Expert Group*

*Option 2: An official “toolbox” for the legislator*

*2(a) via a Commission act; or*

*2(b) via inter-institutional agreement*

*Option 3: Commission Recommendation on European Contract Law*

*3(a) via encouragement for Member States to replace national laws with the European Union instrument; or*

*3(b) via encouragement to Member States to incorporate the European Union instrument as an optional regime*

*Option 4: Regulation setting up an optional Instrument of European Contract Law*



*Option 5: Directive on European Contract Law*

*Option 6: Regulation establishing a European Contract Law*

*Option 7: Regulation establishing a European Civil Code*

*It would be helpful if your response could address all the points raised in the Green Paper and discuss the relative merits of the options (e.g. the relative merits of choosing a soft law option from a hard law one; the balance of argument between an optional legal instrument and a mandatory one, etc.).*

*If you wish to declare a preferred option from amongst these (or suggest other ideas) then please do so. As with all aspects in this exercise, please cite and reference any available evidence to support your submission. In particular if costs and impacts are presented as determinative factors in your option appraisal please include / reference any evidence for those.*

Comments:

***Option 1***

We suggest it would be clearly beneficial to publish the results of the Expert Group; this would help to address the relative dearth of substantive expert evidence on this matter. We think this would be particularly beneficial following the DCFR's own publication, as it will allow the relative advantages and disadvantages of reform to be considered in more depth.

***Option 2***

We suggest there are clear advantages to be gained from the adoption of an official "toolbox" for the legislature. This may improve the coherence and quality of any legislation emanating from national and European legislatures. We would find this particularly helpful in our own current review of the Scots law of contract in light of the DCFR. We express no preference as to whether an official "toolbox" might be in the form of a Commission act (option 2(a)), or an inter-institutional agreement (option 2(b)).

***Option 3(a)***

We do not see any advantage in a Commission recommendation on European Contract Law, encouraging member states to replace national laws with an EU instrument. Such a recommendation would not be binding on member states. It would be likely to take many years, if not decades, for such reform to be achieved through member states' domestic legislatures. Equally, this option would entail the replacement of national laws and would remove the option businesses and consumers currently have to contract under them.

### **Option 3(b)**

Neither do we see any advantage in a Commission recommendation encouraging member states to incorporate an EU instrument on contract law as an optional instrument. We view this as a rather inelegant solution. As with option 3(a), adoption of such an instrument would inevitably not be carried out simultaneously across all member states, resulting in unnecessary delays for businesses and consumers who may wish to use it.

### **Option 4**

We can see merit in the adoption of an optional instrument, permitting what is sometimes (wrongly) known as a “28<sup>th</sup> regime” of contractual regulation in the EU. This would provide parties with what we think would be a useful and attractive alternative to domestic contract law, and the evidence of our Business Advisory Group suggests that such an option would be welcomed by at least some businesses and would be used in Scotland, provided the regime afforded certainty, and clarity in its allocation of risk. We would be strongly in favour of this optional instrument being made available in all EU member states via the medium of an EU Regulation. This would result in the automatic incorporation of an optional European law of contract in all domestic legal systems, while retaining national laws of contract. This has the clear advantage of acting as a suitable and accessible alternative, available in all relevant languages, in cases where no agreement on choice of law can otherwise be agreed between international parties, such as the Scottish-Polish example referred to above at Question 1. We would be keen for a European law of contract to be presented as an option across the whole EU in this manner, in order to gauge the reaction of businesses and consumers, to analyse how much a European law of contract was being used, and how useful parties found it as an applicable law. This would be an advantageous step before the European Commission gives further consideration to Options 5, 6 and 7.

Finally, we note that this option would only be useful in practice if sufficient rules and procedures were in place to allow domestic courts across the EU to recognise and enforce a European law of contract, where parties had elected this as their applicable law. To this end, we also view further consideration of the role of the European Court of Justice (ECJ) in interpreting any optional instrument as imperative. We would suggest particular consideration should be given to which domestic courts are able to make a reference to the ECJ, whether all first instance, or appellate only. As we understand it, the Advocate General within the ECJ is already making reference to the DCFR as an informal guide to general contractual principles. (The opinions in question are all by AG Trstenjak: see *Commission of*

*the European Communities v Italian Republic*, Case C-275/07, 11 June 2008; *Renate Illsinger v Martin Dreschers*, Case C-180/06, 11 September 2008; *Pia Messner v Firma Stefan Krüger*, Case C-489/07, 18 February 2009; *Eva Martín Martín v EDP Editores SL*, Case C-227/08, 7 May 2009.) In our view, the ECJ is the appropriate ultimate arbiter for guidance on interpretation of any instrument applicable across the internal market

**Options 5, 6 and 7**

We view the implementation of each and any of these three options as premature and, to that extent, undesirable. We regard these options as disproportionate at the present time, and would point to examples where the lack of a uniform law of contract within trading blocks has not led to any significant barriers to trade, e.g. USA, Canada, and most notably, the United Kingdom itself (although in each case there has been significant convergence of the various contract laws available, resulting both from legislation and judicial activity). A single law is not necessarily required for the effective operation of a single market. Nonetheless, the *option* of a an EU-wide law, in addition to national laws, may be attractive, as we outline in our preference for Option 4.

**Question 3.** Should any future work / response cover any or all of:

- business-to-business contracts?
- business-to-consumer contracts?
- on-line transactions?

What are the specific points that lead you to conclude this?

Should any solution attempt to regulate both cross-border and domestic contracts or approach those separately / differently?

What would be the priority needs to be addressed for each of these groups and how might that be done? What would be the key features of any solution and why?

Comments:

We suggest that the scope of any future work or response should cover B2B contracts, B2C contracts, and also on-line transactions. We note in passing that we find the placing of “on-line transactions” alongside B2B and B2C contracts potentially confusing. Both B2B and B2C contracts can, of course, be concluded on-line, as can consumer-to-consumer contracts, particularly through the growth of on-line auction sites. The defining characteristic of an on-line transaction is the electronic means by which offer and acceptance are

communicated, rather than the identify of the parties to the contract. Subject to what we say about the “blue button” under *Priority Needs* below, we see no reason to treat on-line transactions as a distinct category, separate from B2B, B2C or C2C contracts.

Given the significance of the problems identified through the evidence shared above at Question 1, it is clear that consumers and businesses (both when contracting with other businesses, and with consumers) experience some level of difficulty due to divergences in legal systems across the internal market. On that basis, we would be keen to see both B2B contracts and B2C contracts included within any future work.

Additionally, we are particularly keen to see on-line transactions included within the scope of any future response, based on our evidence gathered to date. We think that the subject of on-line transactions has yet to receive the attention it merits, particularly in relation to the impact which divergent national laws may have for on-line cross-border trade. From our analysis of the evidence we have gathered, it is clear that (a) on-line transactions are now a significant part of the economy, and indeed may be playing some role in economic recovery; and (b) both businesses and consumers are using this method of contracting to a significant degree. We therefore view consideration of on-line transactions in the internal market as particularly important in any response to, or future work involving, the EC Green Paper proposals.

### ***The impact and scope of on-line transactions***

We have found the work of the [IMRG Capgemini e-Retail Sales Index](#) particularly helpful in analysing the impact of on-line spending on consumer contracting and would suggest that the Index’s findings can assist in painting a picture of how e-retail has fared in difficult trading conditions in the UK over the last five years. The Index measures and tracks “on-line sales” in the UK, which are defined as “transactions completed fully, including payment, via interactive channels”. It provides comprehensive coverage and monthly analysis of trends in e-retail.

The latest IMRG Index figures available at the time of writing for e-retail trading in October 2010 show a 23 per cent increase in trading year on year. This is the highest level of e-retail trading since June 2008, and indicates that UK consumers spent approximately £5.2 billion buying on-line goods during October 2010, equivalent to a £87 spend for every person in the UK. Combined with consistently high levels of spending on-line throughout this year, analysts posit this growth as an indicator of marked recovery from a relatively depressed period of consumer confidence over the last two years.

We are aware that UK retail has long been based on the British high street and other outlets, with the traditional purchase model featuring the consumer presenting him/herself at traders' premises. However, the latest figures available from the UK Government Office of National Statistics show that, year on year, retail sales in October 2010 fell by 0.1 per cent from October 2009 (Office of National Statistics, Economy Statistics, September 2010, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=256>). This is in contrast with the IMRG Capgemini e-Retail Sales Index figures noted above, which suggest e-commerce has grown far quicker than high street retailing spending, in difficult trading conditions. This is supported by recent figures released by the ONS, suggesting that internet spending has risen rapidly as a proportion of total UK retail sales in the last three years, from 3 per cent in January 2007 to 8 per cent in July 2010 (Office of National Statistics, Economic Review, September 2010, available at <http://www.statistics.gov.uk/statbase/Product.asp?vlnk=14772>). We therefore suggest that on-line transactions may be particularly significant for economic recovery and future growth in the UK, and the same is probably true for the EU as a whole.

### ***Consumers and on-line transactions***

The UK Government reports that 31 million adults bought or ordered goods/services on-line in the last 12 months, which equates to 62 per cent of the UK adult population being engaged in e-commerce as internet shoppers (Office of National Statistics, Society Statistics, August 2010, available at <http://www.statistics.gov.uk/cci/nugget.asp?id=8>). We suggest that both businesses and consumers are clearly significantly engaged with on-line transactions and, along with our survey of applicable law clauses of major on-line retailers above, it does appear that this method of contracting may represent the most accessible way for consumers to engage in cross-border trade.

We further note that a comprehensive survey on the topic of internet trends amongst businesses and consumers conducted by CBI UK and Google suggested that as early as 2006 only 5 per cent of internet users in the UK were not doing so to purchase goods on-line (available at [www.cbi.org.uk/pdf/cbigoogleurvey1106.pdf](http://www.cbi.org.uk/pdf/cbigoogleurvey1106.pdf), page 13).

### ***Businesses and on-line transactions***

A recent report commissioned by Google suggests that the UK is now home to the largest per capita e-commerce market in the world, and the second largest on-line advertising market globally (The Connected Kingdom: How the Internet is Transforming the UK Economy, October 2010, page 5: available at <http://www.bcg.com/documents/file62983.pdf>).

Moreover, the report notes that UK is a net exporter of e-commerce goods and services, exporting an estimated £2.80 for every £1 it imports, the reverse of what is happening elsewhere in the economy (page 5). These are significant findings. Clearly, on-line transactions are of value to businesses in both domestic and export markets, and therefore contribute significantly to the economy as a whole.

Moreover, the use of the internet generally by UK businesses has grown exponentially over the last three decades and has now become a fundamental part of business in the UK and worldwide. The results of the CBI/Google survey, noted above (<http://www.cbi.org.uk/pdf/cbigoogle survey1106.pdf>), suggest that the internet has had a “revolutionary” or “substantial” impact for over half of UK businesses, influencing both their dealings with consumers and other businesses and also their own internal working practices. We suggest that this development has increased opportunities for businesses to engage in cross-border trade. It additionally poses conceptual questions over recognition of formation of contracts concluded by electronic means, such as e-mail. Even as regards small businesses in Scotland, for whom only 9% of trade is cross-border, 88 per cent of such businesses use the internet in some capacity, whether for emailing, finding advice/guidance, or maintaining a business website (Federation of Small Businesses Report 2009: Reports of Key Findings from Members in Scotland, available at [http://www.fsb.org.uk/policy/rpu/scotland/assets/publi\\_survey\\_fsbicmscotland\\_2009.pdf](http://www.fsb.org.uk/policy/rpu/scotland/assets/publi_survey_fsbicmscotland_2009.pdf), page 5). We further note from evidence gathered from our Business Advisory Group, and our analysis of case law from the Court of Session and Sheriff Courts of Scotland over the last decade, that the use of e-mail in the formation of cross-border contracts is becoming prevalent in practice (see for example, *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95; *W S Karoulias SA v The Drambuie Liqueur Company Ltd* [2005] CSOH 112; *George Wimpey West Scotland Ltd v Alan John Henderson*, Sheriff Principal Bowen, Edinburgh Sheriff Court, 11 October 2010).

Thus, subject to existing consumer protection remaining in place, we see no case for differentiating between any categories of contracts in any future work or response to the EC Green Paper. To have different rules for different types of contracts would add an unwelcome extra layer of complication to contractual analysis.

### ***Treatment of cross-border and domestic contracts***

We consider that cross-border and domestic contracts should be treated equally (on the assumption that the European law of contract is implemented as an optional instrument). At present, two parties operating within the same jurisdiction can, if they wish, agree that their

contract is to be subject to a specified foreign law. We therefore see no reason why such parties should be prevented from specifying the European law of contract as the applicable law of the contract.

Furthermore, in relation to on-line contracts we see real practical difficulties in distinguishing between domestic and cross-border transactions. How, in such a scenario, would the “border” be defined? Would it be by reference to the IP addresses of the relevant computers used in the transaction? If so, what would be the justification for doing so?

In conclusion, we would suggest that no attempt be made to regulate domestic and cross-border contracts any differently, such a distinction being of little value in practice, and conceptually confusing in some instances.

### ***Priority Needs***

From evidence gathered from our Business Advisory Group, we suggest that businesses in Scotland view certainty, and a clear allocation of risk within any regime of contract law, to be their priority needs when contracting. That being so, we suggest that the European Commission pays particular attention to ensuring that obligations and allocation of risk are clearly articulated within any instrument on a European law of contract.

Secondly, we suggest that appropriate and clearly defined consumer protection is a priority for both sides in B2C contracts, to engender both certainty for businesses and consumer confidence. Finally, any European law of contract would need to be available in all official EU languages – perhaps an obvious point, but the current position, whereby national laws of contract are generally unavailable in such a variety of languages, can present a significant barrier to the efficient completion of contracts.

The priority needs in on-line transactions are, to an extent, the same as those listed above in respect of B2B and B2C contracts. One particular priority need might be to ensure that any European law of contract is supported by a kite-mark accreditation symbol. This is one feature of the suggestion of a “blue button”, which would be an icon which traders could incorporate within their on-line site. This will not only give purchasers the confidence that the trader is prepared to do business across the EU but, more concretely, by clicking on it the purchaser will also be able to choose to make the contract subject to the European law of contract.

**Question 4.** What should be the preferred “material scope” of any instrument? In particular should it:

- (a) have a narrow or a broad scope (see paragraphs 4.3.1 & 2 of the Green Paper)?
- (b) cover all or only specific types of contracts – which ones and why (paragraph 4.3.3)?
- (c) if a code is created should it also cover any other issues and what might those be (see paragraph 4.3.4 of the Green Paper which specifically mentions tort, unjustified enrichment and the benevolent intervention in another’s affairs as possibilities here)?

Comments:

(a) We view a narrow scope as preferable, as outlined at paragraph 4.3.1 of the EC Green Paper. But we are particularly attracted to the suggestion of the Green Paper that such a narrow scope would include prescription. The case for including prescription within the scope of any instrument is particularly strong, as at present the length of prescription periods across jurisdictions within the EU varies greatly e.g. in Scotland it is 5 years (section 6, Prescription and Limitation (Scotland) Act 1973), while in Greece, the period of prescription for contractual relations is 20 years (Article 249, Greek Civil Code (CC)). Moreover, in terms of international private law, prescription is generally classified as part of the substantive law of contract, rather than as a procedural matter; thus it would be in keeping with this approach to include prescription within any European contract law instrument.

We are not in favour of a broad scope to any instrument being adopted. In particular, we are reluctant to see acquisition or loss of ownership and proprietary security in moveable property addressed at this stage. We would, however, encourage further consideration on whether restitutionary-contractual remedies might be included within a narrow scope instrument. This is not addressed in the EC Green Paper, but we think that consideration of such remedies within any instrument would be useful, since otherwise when contracts fail for invalidity or illegality, or are terminated for non-performance or through change of circumstances, the remedy will vary according to the otherwise applicable national law.

(b) We are in favour of all types of contract being included within the scope of any instrument. In particular, we are keen that the sale and lease of goods be addressed within any instrument. The supply of goods is characteristic of many e-commerce transactions and, as outlined above, these transactions clearly play an important role in facilitating cross-border trade within the EU. Moreover, were the rules about quality and description of goods to be omitted from any instrument, we think that its utility in practice would be significantly



lessened, insofar as it would fail to address the most important issue in such contracts, from either the business or the consumer perspective.

(c) We express no view on this option, as we deem the implementation of a “code” inherently premature at this stage, as outlined further in our response to Question 2 above.

**Question 5.** Are there any other matters not covered in the Commission’s Green Paper or this Call for Evidence which you think should be addressed in this exercise and any following work?

What are those issues and why should they be covered here?

Comments:

From the work we have carried out in compiling this paper, we think that there is a need to gather further data on the subject, and perhaps even to commission the collection of relevant data, particularly of a quantitative kind on cross-border and on-line contracting in the UK and the EU. We suggest that this may be of particular value in relation to on-line contracting, where there is rapid expansion which could usefully be monitored in a focussed way. We think this is particularly applicable at a European level.

Moreover, it strikes us that the options presented for consultation, addressed in Question 2, are somewhat incomplete. Option 4 could have usefully been broken down into an “opt in” or “opt out” model, and the list could also have included an option of having a published CFR available for incorporation by those parties who wish to do so. This latter point may be alluded to in Option 1, at the foot of page 7 of the Green Paper; however, it could usefully have been made more explicit as an option throughout the rest of the paper, allowing a fuller consideration of its merits.

## About you

Please use this section to tell us about yourself

<b>Full name</b>	Professor Hector MacQueen
<b>Job title</b> or capacity in which you are responding to this Call for Evidence and Views (e.g. member of the public, etc.)	<p>Commissioner, Scottish Law Commission</p> <p>This response is from the Scottish Law Commission, a statutory body set up under section 2 of the Law Commissions Act 1965 and tasked with promoting the reform of Scots law. Under our Eighth Programme of Law Reform, we are presently engaged in a review of Scots contract law in light of the DCFR. In undertaking this, we have gathered existing published evidence on the problems created by the divergence of contract laws at national level. In addition, we have convened a number of advisory groups to assist the development of policy in this project. One body of advisers represents the views of Scottish business, and as a result we have met representatives of small and medium scale enterprises and large or international incorporations as well as those working in the public sector. Many representatives boast several decades of experience of contracting in their industries, and remain active in their sectors; they were accordingly able to comment on changes and trends over time. While we acknowledge that the evidence gathered in this way is essentially qualitative and subjective in nature, and is not empirically comprehensive, we have nonetheless found the views helpful in presenting an up to date picture of the current issues, particularly in a cross-border context. Our other advisory groups comprise Scottish legal practitioners and academics, and the Scottish judiciary, respectively.</p>
<b>Date</b>	19 November 2010
<b>Company name/organisation</b> (if applicable):	Scottish Law Commission
<b>Address</b>	140 Causewayside
	Edinburgh
<b>Postcode</b>	EH9 1PR

If you would like us to acknowledge receipt of your response, please tick this box	<input checked="" type="checkbox"/>  (please tick box)
Address to which the acknowledgement should be sent, if different from above	<a href="mailto:Charles.garland@scotlawcom.gsi.gov.uk">Charles.garland@scotlawcom.gsi.gov.uk</a>

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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19 November 2010

Andrew Lee  
Ministry of Justice  
6<sup>th</sup> Floor  
102 Petty France  
LONDON  
SW1H 9AJ



Your ref:  
Our ref: L/1/8/1B

by email only: [andrew.lee@justice.gsi.gov.uk](mailto:andrew.lee@justice.gsi.gov.uk)

Dear Andrew

**A European Commission Consultation on Contract Law  
UK Government Call for Evidence**

We attach a completed response form in answer to the UK Government's recent Call for Evidence in relation to the European Commission's Green Paper. Although we have set out the Scottish Law Commission's comments and views in full in that document we would also like to make some general remarks, which we do in this letter.

The first point to mention is that the response has been agreed collectively by the Scottish Law Commissioners. The main reason we have decided to respond as a Commission is that (as you know) our current programme of work includes a project on the law of contract in the light of the DCFR. We have been engaged on this for a number of months now and so the Commission is in a position to offer what we trust will be useful observations in response to the Call for Evidence. The three main sources of relevant information are: first, information obtained from the advisory groups we set up as part of our contract law project; secondly, publicly available sources (many of which are official) of statistical data; and lastly our own research into business and consumer contracts. (We should add that our internal resources have not allowed us to carry out a fully comprehensive review of available material.) Our impression from the work we have done is that there is room for the gathering of further statistical data, perhaps even for the commissioning of the collection of relevant data. We suggest that this may be of particular value in relation to on-line contracting, where there is rapid expansion which could usefully be monitored in a focussed way.

The second point is that we have not always found the Green Paper wholly clear. In particular, some of the argumentation is not easy to follow. We give two illustrations. First, the discussion of scope in paragraph 4.2.1 deals with B2B and B2C only, ignoring C2C and other types of contract. And the following paragraph, 4.2.2, begins by discussing cross-border and domestic contracts but its final paragraph swerves away into a discussion of whether on-line contracts would form a feasible category. This feeds through into the MoJ questionnaire, where question 3 divides contracts by party and then by medium without any clear recognition of the "category shift" involved. The other illustration concerns the completeness of the options offered in paragraph 4.1. It strikes us that at least two further options might usefully have been added: option 4 could have been broken down into an "opt in" and an "opt out" model, and the list could also have included the option of having a published CFR available for incorporation by those parties who wish to do so. (This latter point may be alluded to in Option 1, at the foot of page 7 of the Green Paper; however, it

could usefully have been made more explicit as an option throughout the rest of the paper, allowing a fuller consideration of its merits.)

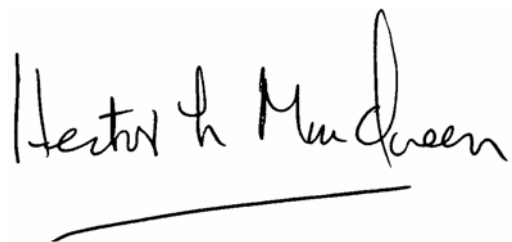
We are left with the slight impression that these flaws in the Green Paper are caused by the drive towards integration forging too far ahead of debate about the requirements of substantive law. This means that the paper overlooks, or at the very least downplays, relevant comparative material. In Great Britain, for example, there are two contiguous jurisdictions which have different, though similar, contract laws (and which have been in this position for several centuries without any clear effect on trade within the territory). The convergence between Scots and English contract law has in part come about through mutual awareness of each other's laws (as well as those of other jurisdictions, eg the Commonwealth and the USA) but also helped along from time to time by statutes such as the Sale of Goods Act 1893 and the Contracts (Rights of Third Parties) Act 1999. The USA is another example, with the UCC working alongside "soft laws" such as the Restatements to provide an effective stimulus for convergence of laws between states without there being any formal unification or harmonisation of the law of contract across the union.

Finally, but importantly, we trust that our response will highlight the distinctiveness of the Scottish angle for the European Commission's work. Scottish-based traders (though this also applies to consumers) may have a good knowledge of English, which is undoubtedly an advantage in international trade, but are in no better position to find out about the laws of a good many other jurisdictions than their Danish, Estonian, Portuguese, etc counterparts are in respect of Scots law. There is, therefore, a real role for a pan-European contract law in Scotland, and this is borne out by comments from business members of our advisory groups. We suspect that, although the same point applies to an extent to those based in England and Wales, it does not do so with the same force, very largely because of the renown and accessibility of English law for those in other jurisdictions. Scots law does not enjoy that advantage, and so the option of a common instrument would be a very useful tool in transactions into and out of Scotland.

In relation to the UK response to the Green Paper, can you let us know what timetable is envisaged? We would be very keen to see a copy of the response when it has been agreed.

We are sending, also by email, a copy of this letter and of the attachment to Richard Dennis, Head of Civil Law Division in the Scottish Government (at [Richard.Dennis@scotland.gsi.gov.uk](mailto:Richard.Dennis@scotland.gsi.gov.uk)).

Yours sincerely,

A handwritten signature in black ink that reads "Hector MacQueen". The signature is written in a cursive style and is positioned above a horizontal line.

HECTOR MACQUEEN  
hector.macqueen@scotlawcom.gsi.gov.uk