

Mark Ormerod, Chief Executive of the Law  
Commission and Malcolm McMillan, Chief  
Executive of the Scottish Law Commission

5 May 2011

Dear Mr Ormerod and Dear Mr McMillan

### **OPTIONAL INSTRUMENT UNDER EUROPEAN CONTRACT LAW**

Further to recent discussions between the Department for Business, Innovation and Skills ("the Department") and the Law Commission I am writing to request that the Law Commission and Scottish Law Commission ("the Commissions") should prepare a joint advice to the Department on the potential advantages and problems with a European Optional Instrument ("OI") derived from the Draft Common Frame of Reference.

#### **Funding**

Funding streams for this have already been identified in the previous discussions between officials here and officers of the Commission. Ministry of Justice's contribution, of half the cost, will be met from within the Commissions' existing general provision from the Ministry of Justice and BIS will pay £16,000 to cover the other half upon completion of the work.

#### **Timing**

The advice must be delivered by October 2011 at the latest. This has been agreed as deliverable in the prior discussions.

#### **Background**

The European Commission has suggested that the diversity of national contract laws within the European Union might impede the proper functioning of the internal market. In 2010 the European Commission published a green paper presenting seven options to take the CFR forward. One of these was the suggestion of an OI. The European Commission has made it clear this is its preferred option and it seems very likely that it will make a legislative proposal in the near future, we expect before the end of the year.

The OI is in effect a separate applicable law that the parties could choose to apply to their contract as opposed to the law of any Member State. The idea of an OI has raised a number of issues on which the Department would appreciate the Commissions' advice.

### **The Project**

I therefore propose that the Commissions should undertake a joint project for both the Ministry of Justice (MOJ) and the Department of Business, Innovation and Skills (BIS) with the following terms of reference:

1. To advise on the potential advantages and problems of an Optional Instrument based on the draft Common Frame of Reference and the work undertaken by the academic experts in the context of business to consumer transactions.
2. To advise on the potential advantages and problems of an Optional Instrument based on the draft Common Frame of Reference and the work undertaken by the academic experts in the context of business to business contracts with a focus on SME's.

The advice should also consider and cover some specific questions:

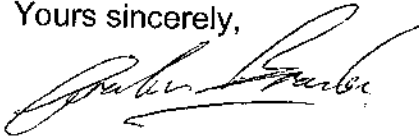
1. What could / should be the appropriate European legal (Treaty) basis for any OI?
2. What might be an acceptable and useful scope for any OI? For example, would it apply only to goods or to services as well? Would it apply only to cross border transactions or could it operate domestically too? What are the advantages and disadvantages of a wide or narrow scope?
3. How would the OI react with relevant national law and regulations?
4. How would the OI relate to Article 6 of Rome 1 for consumer contracts?
5. How would the proposed levels of consumer protection compare with existing consumer protection in the UK?
6. What type of costs would be incurred?

The consideration of these matters may reveal other questions and issues and any significant issue not covered above will need to be covered and it is expected there will be no need to amend the scope of the project to accommodate any such matter. If need be, however, these Terms of Reference may be amended by agreement between the Department and the Commissions. The Commissions should aim to deliver their formal advice by October 2011. However the Department would appreciate a review of the Commissions' progress in September 2011 in addition to regular meetings.

Katherine Stoate (katherine.stoate@bis.gsi.gov.uk) will be the Commissions' contact at the Department.

I look forward to receiving confirmation of your acceptance to undertake this proposal.

Yours sincerely,



Graham Branton  
Deputy Director, Consumer Policy, Regulation & Markets