

WOULD A PAN-EUROPEAN CONTRACT LAW HELP EUROPE'S SMALL BUSINESSES? - SJ BERWIN

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In particular, the Commission is worried about the reluctance of small and medium-sized enterprises (SMEs) to engage in cross-border business for fear of incurring unwanted legal expense – this in turn, the Commission argues, hinders cross-border competition to the detriment of the wider European market. But while the theoretical benefits may be apparent to those in Brussels, the practical value to businesses operating on the ground is far less clear.

The Commission's proposals are still tentative, and the possibilities set out in their Green Paper are wide ranging. In essence, though, the multiple proposals are founded upon two alternative suggestions: either a European contract law that would replace national systems, similar to the Uniform Commercial Code in the United States, or an optional system that would offer contracting parties an alternative to national law if they wanted to use it. Early feedback on the responses to the consultation suggests that the Commission has found relatively little support for a compulsory system, but more support for an optional one.

For Europe's private equity and venture capital backed businesses this is an important debate, especially because many of them already operate across the EU and have found effective ways to deal with Europe's myriad legal systems. In practice, a more significant legal issue for businesses operating across borders is not with the law itself, but with a claimant's ability to enforce the decisions of their home court in the country where the defaulting party is based – and where its assets are located.

That issue has already been dealt with effectively in Europe, and the existing system for enforcement of foreign EU judgements works well in practice. As for the content of contract law itself, critics of the EU proposals point out that firms which do business across Member States to any significant degree are typically in a position to seek legal advice on contractual relations, and (if they wish) make use of one of a number of legal systems that are habitually used in cross-border contracts. Those legal systems also provide a degree of legal certainty, having been developed over centuries, which would necessarily be absent in any "new" system.

And the real issues for pan-European trading go far beyond the lack of a contractual framework. Differing consumer protection laws, transport costs and multiple regulatory regimes are compounded by linguistic, geographic and cultural barriers.

Many argue vociferously that the Commission's proposals would in fact do little to assist business – with one respected group of UK lawyers saying that the key proposals are not "useful, appropriate or justified". The Commission has produced little evidence to support its view that SMEs would benefit, and since it is clear that the change would create significant cost and disruption (even if the optional route were adopted) – and would have far reaching effects for Europe's financial centres – more careful analysis is certainly needed.

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