

Cracking the code

Commentators should stop worrying about whether the EU's contract law initiative is a code for all countries and see it for the beneficial venture that it is, says

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Over recent months there has been much speculation, debate, accusation and even alarm that the European Commission's contract law initiative and the accompanying *acquis* review are a cover for the development of a full-blown European contract code. This has to some extent distracted attention from the more laudable and stated aims of the project as an exercise in better lawmaking, which was how the UK presidency presented it at their conference 'Better Lawmaking through the Common Frame of Reference' held on 26 September 2005. In his opening address, the Lord Chancellor sounded a note of alarm and made it clear that as far as he was concerned English contract law was not up for amendment or discussion through this process; it was a definite 'hands-off' warning to the Commission. But was it necessary? Is the whole debate about whether or not it is a code just a distraction? What should be the real concerns or preoccupations in this process?

Perhaps first of all it is sensible to be realistic about the wider political environment in which this debate is occurring, most importantly in the aftermath of the two 'no' votes in France and Holland. In this context all the European institutions are rightly nervous about

coming forward with big European projects, especially if they can be portrayed as centralising or harmonising. On the other

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hand, any initiatives that can be presented as practical, sensible and a consolidation or slimming down of existing legislation are very much in vogue.

Looking at the genesis of the contract law initiative, it appears in some earlier resolutions of the European Parliament stretching back to 1989 which have continuously pointed out the savings to be made in transactional terms across the internal market for business and consumers if there were further harmonisation – the theory being that differing laws can in themselves form a barrier to the good functioning of the market. This conclusion or perception may well be correct but what is also clear is that now is not the political moment – coming at a time when the voters of Europe have just rejected a constitution – to hit them with a code. Rather, there is a need to approach it from the other way and show what can be achieved by better legislation that has a beneficial effect on

transactions undertaken in people's daily lives.

So, in this situation, the European Parliament and even the Lord Chancellor

have no difficulty in signing up for a project based on the concept of better legislation. There should be no mistake, this is the largest project of its kind that the EU has yet seen and certainly the biggest news in the whole area of European civil law for the coming years. The centrepiece of the project is the creation of the common frame of reference. This has variously been defined as a 'toolkit' for the legislator, a sort of dictionary or encyclopaedia of terms and comparative law. But while it may look like a code in terms of its chapters or headings, what will make it a code or not, will be its actual content and the way it is to be used. Some see it as just a soft law aid to the legislator, although commissioner Kyprianou has indicated he wants to see it agreed as a 'binding instrument' by the institutions by 2009.

This difference is paramount to the European Parliament. Any review of legislation, for instance of

the existing consumer directives that cover contract law, will need the involvement of the Parliament as a co-legislator. By comparison, the creation of any 'soft' instrument would leave the Parliament as a mere 'consultee', arguably with no more influence than the army of stakeholders and researchers who are already engaged by the Commission in the process. Indeed, this wide-ranging process and involvement is much to be welcomed, but what has to be clear is that political and policy decisions are actually being made by the European legislator in the form of Parliament and member states. Contract law might seem like a technical area for experts and working groups, but it is of course full of 'political' choices; most especially, but not exclusively, where consumers are involved and mandatory rules may be needed.

It might be that in finding a way to engage meaningfully the Parliament has regard to how the Dutch Parliament was involved in its recent redraft of the Dutch civil code. Such a model does not mean that the European Parliament thinks it is dealing with a code, it does mean however that it believes it is shaping something very important that has to be right for future generations, who might just, in a different political context, use it as the basis for a code. ■