

The Action Plan on a more coherent European Contract Law:

Response on behalf of the Acquis Group

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1. On 12 February 2003, the European Commission published its communication “A More Coherent European Contract Law – An Action Plan”¹. In order to foster a transparent consultation procedure, the Commission has asked stakeholders to comment on the issues raised. This paper sets out the response of the *Acquis Group* on questions regarding the Common Frame of Reference and the Optional Instrument.
2. It contains an overview about the position of the *Acquis Group* with regard to the following questions:
 - What will be the content and function of the Common Frame of Reference?
 - How does the research of the *Acquis Group* fit into possible preparations of the Common Frame of Reference?
 - Where does the *Acquis Group* see possibilities to cooperate with other initiatives on European Contract Law?
 - What may be the content and function of the Optional Instrument?

I Introduction

3. Since the Commission communication on European Contract Law², scholars and practitioners have contributed their perceptions of a European Contract Law and its possible shortcomings to the Commission. These findings were included into the Action Plan. The *Acquis Group* appreciates the approach undertaken and believes that current EC legislation consists of numerous individual legal acts which follow different aims and are not always consistent. The coherency of these acts can and should often be improved.
4. Although we do not in any way doubt the necessity and practicability of a sector-specific approach, this approach has led – together with the often pursued aim of minimum harmonisation – to a fragmented and disparate transposition within the national laws of the member states. Thus, it is important to realise that the degree of harmonisation is limited.

¹ COM(2003) 68 final, OJ 2003, C 63/01.

² Communication from the Commission to the European Parliament and the Council on European Contract Law, COM(2001) 398 final, OJ 2001, C 255/01.

II The Common Frame of Reference: Possible Function and Sources

5. The *Acquis Group* therefore supports the intent of the Commission to foster coherency in European Contract Law by introducing a so-called Common Frame of Reference. We think that the research of our group which will be presented in more detail in Nos. 12-17 could contribute to the genuine European content of the Common Frame of Reference.
6. Since the Action Plan has been drafted in order to provide the Commission and stakeholders with a consultation document, the exact content of the Common Frame of Reference remains open. Before any research will be undertaken in order to prepare the content, it seems to be necessary to redefine and concretise its envisaged content. A starting point for this definition could be the aims which motivated the Commission in the first place to suggest the creation of the Common Frame of Reference. As proposed in the Action Plan, the Common Frame of Reference could improve European law with regard to the following issues:
 - First of all, it could serve as a common basis when preparing a revision of the existing *acquis communautaire* in the field of contract law: it will help to increase coherency with regard to legal language and contents.
 - Furthermore, this common basis could be used with regard to future legislative acts: it could help to avoid inconsistencies and could foster the creation of a more homogeneous system of sector-specific legislation.
 - Additionally, the Common Frame of Reference will not only be useful when preparing legal acts on the European level, but it can also provide an important aid for member states in the process of transposing European law or aligning national laws to neighbouring European law. The latter aid will also be important for non-member states, who nevertheless tend to adopt similar legal approaches in order to facilitate cross-border business.
 - The Common Frame of Reference can also provide practitioners, being it national or European courts or lawyers, with a valuable support in interpreting European law and the respective transposed provisions within the national legal orders. Lawyers could, in addition, profit from the Common Frame of Reference in the stage of drafting contracts, especially if these contracts contain provisions relating to fields of law which have been subject to harmonisation measures or which concern cross-border business and are therefore subject to legal orders of other member states.
 - Last, but not least, the Common Frame of Reference could and should serve as the basic structure with regard to the development of horizontal legal acts (i.e. legal acts that go beyond sector-specific legislation such as the envisaged “optional instrument”).

7. As proposed in the Action Plan, the Common Frame of Reference should be built upon several basic sources. One of these sources should obviously be the common legal principles found within the national legal orders, including not only legal acts but also the respective case-law and developments in drafting contracts. This process could follow the restatement approach brought forward for example by the Lando Commission.
8. However, it will not be sufficient to refer only to common legal principles (as provided for in the "Principles of European Contract Law", the so-called Lando Principles). Instead, special emphasis has to be laid upon the existing Community law in the field of contract law. This shall also include international uniform law such as the Convention on the International Sale of Goods (CISG) which highly influences EC law and the laws of most member states. In addition, the respective case law which can serve as a means to interpret the legal rules shall also be included.

III The Common Frame of Reference: Possible Content

9. Although the content of the Common Frame of Reference will be identified and formulated by the Commission, the Action Plan itself indicates that the Commission is open to suggestions from independent research regarding the structure and possible elements of the Common Frame of Reference. Following our perception of the purpose of the Action Plan, we believe that the Common Frame of Reference can only reach its goal of improving existing and future EC legislation if it consists of three major elements:
 - First, a clear set of definitions, being it in the form of a "dictionary" or a more elaborated commentary, is necessary in order to provide assistance to the EC legislator. Coherency in EC legislation can only be reached if the same legal terms do effectively comprise the same meaning.
 - Secondly, a set of legal rules, possibly formulated in "principles", are required to reflect the genuine economic and political intentions and to provide coherent guidelines as to the function and shape of European legislation. In order to improve *European* legislation they will have to include any existing genuine *European* content. Therefore, these principles will most likely deviate to a considerable degree from the existing "Principles of European Contract Law" of the Lando Group or other principles derived from purely national conceptions or restatements.
 - The legal rules (principles) will have to be complemented by an explanatory commentary in order to facilitate their application not only in the process of lawmaking but also with regard to their application by legal practitioners (e.g. in the process of drafting contracts).

10. These elements could be compared to building material which could help both the Commission in creating new legal instruments and the member states in transposing these instruments into their respective national legal orders.
11. The *Acquis Group* agrees to the proposal of the Action Plan to lay special emphasis on research regarding *general* contract law. Although other fields of contract law should also be referred to in the Common Frame of Reference, it seems to be of utmost importance to first of all construct a sound and solid basis. On this basis, other blocks could be added, such as the most important types of contracts (for instance contracts on the sale of goods or services etc.) or closely related areas of law (for instance tort law or property law).

IV Scope of research of the Acquis Group

12. The *Acquis Group*, founded in 2002, currently consists of more than 30 legal scholars from (nearly) all EC Member States and accession candidates which will contribute their research in national teams. Professor Dr. Gianmaria Ajani (Turin) represents the group as speaker and Professor Dr. Hans Schulte-Nölke (Bielefeld) co-ordinates its activities. The national teams are invited to prepare their work together with local research network. The teams will be supplemented with researchers from other member states in order to guarantee effective exchange of knowledge and a reduction of purely national viewpoints.
13. The *Acquis Group* targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law. In order to achieve this, the *Acquis Group* primarily concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*. Its research, which will be published as “Principles of the Existing EC Contract Law”, can serve as valuable building material for the Common Frame of Reference.
14. These principles will consist of three elements:
 - First, general outlines will be presented which formulate the underlying political and economic intentions. These outlines can be compared to the recitals within Community legislation.
 - Secondly, definitions of major legal terms used in Community legislation will be formulated. These definitions will also include evidence of deviations and inconsistencies within Community legislation.
 - Thirdly, in some areas, existing Community legislation on contract law issues has reached a density which allows the distillation and formulation of contract law rules on a slightly more general level. Such rules can be juxtaposed to the existing Community legislation from which they will be derived, thus also showing whether these rules

can claim general validity, or whether some deviations exist for particular areas of contract law.

15. The principles will be presented in three languages, namely English, French and German. They will be further elaborated by an accompanying commentary. Therefore, the intended "Principles of the Existing EC Contract Law" can provide elements for the Common Frame of Reference both with regard to the set of definitions and with regard to the intended set of principles.
16. However, the work of the *Acquis Group* is not intended to formulate the elements of the Common Frame of Reference itself, but to provide the Commission with the genuine European content. These elements will have to be combined with common rules or principles derived from national legal orders and national case-law.
17. It is intended that the "Principles of the Existing EC Contract Law" will be compared to the "Principles of European Contract Law", formulated by the Lando-Group, in order to identify deviations. This will also help in including common rules of national legal orders and national case-law into the rules derived from genuine European law.

V Working Itinerary

18. Having operated in preliminary working groups before, the *Acquis Group* held its first plenary meeting in January 2003. During this meeting, the group's itinerary has been scheduled for the next years and its focus on general contract law has been established.
19. The *Acquis Group* has commenced its preparatory work with a focus on general contract law. Additionally, other fields of private law will also form part of the research. Currently, group members are teaming up to build working groups in order to prepare a draft analyses of the following topics:
 - Private Law Contracts/Notion of Contract
 - Pre-contractual Obligations
 - Formation of Contracts and Validity
 - Contractual Obligations
 - Breach of Contract and Remedies
 - Special Contracts (e.g. sale, distribution, banking etc.)
20. In addition to the focus on contract law, closely related fields of law will also have to be included in order to prepare a thorough, conclusive and coherent research. Therefore, the *Acquis Group* will also focus on Tort Law and Property Law.
21. Besides this more or less sectoral (vertical) approach, several horizontal aspects will also be analysed, including *inter alia*:

- Duties of Information
 - Good Faith
 - Consumers and other Vulnerable Parties
22. The period of time envisaged for the "Principles of Existing EC Contract Law" is approximately four years from the start of the Project.

VI Additional Fields of Research

23. The "Principles of Existing EC Contract Law" to be formulated by the *Acquis Group* differ from initiatives relating to European private law to date, mainly in that they will be harvested from the existing Community law and not from national legal orders. Therefore the "Principles of Existing EC Contract Law" cannot and should not replace the existing "Principles of European Contract Law" of the Lando Group and those works with a similar objective.
24. Although the approach of the *Acquis Group* is both unique and necessary in order to include the existing *acquis communautaire* into the Common Frame of Reference, the group mainly covers one of the three sources identified in the Commission's Action Plan. Therefore, cooperation with other initiatives which take into account national case-law and national legal orders is intended and vital. On the other hand, the *Acquis Group* can provide other initiatives with its findings on the existing EC contract law and thus enhance and broaden the individual approach.
25. In addition, it will be necessary to attempt a close cooperation with research groups which aim at revealing the philosophical underpinnings of European private law in order to benefit from their findings when formulating the general outlines of the principles. Furthermore, it seems to be of utmost importance to involve practitioners or a group consisting mainly of practitioners into the research, favourably at an early stage. This will enable the *Acquis Group* to test its findings and receive feedback from individual or collective stakeholders.

VII The Optional Instrument

26. The *Acquis Group* considers it to be important to continue the approach presented by the Commission in the Action Plan regarding a so-called optional instrument. This instrument could possibly target several aims which could supplement each other. Therefore, several forms could be envisaged:
- First of all, it has to be decided whether a binding or a non-binding set of legal rules should be favoured.

- Besides the question whether the optional instrument will be considered binding or not, the optional instrument could ease voluntary harmonisation measures by member states, especially with regard to the accession candidates.
 - In addition, the way the optional instrument could be introduced into individual contracts has been discussed by legal scholars. It is possible to first of all imagine an “opt-in” version where the parties to a contract can (voluntarily) choose the optional instrument via a choice of law clause. Secondly, it is also possible to imagine an “opt-out” approach whereby the parties will be bound to use the optional instrument as long as they do not expressly waive its application. It has also been discussed whether this opt-out clause should only be mandatory for cross-border contracts or whether it should also apply to purely domestic contracts. This approach – similar to that chosen by the Convention on the International Sale of Goods – would however mean that the optional instrument will be considered to be binding.
27. Without regard to the question whether the optional instrument should be binding or not and how to implement it, the optional instrument will be similar to a legal act, both with regard to language and content.
28. The *Acquis Group* considers the decision of how to implement an optional instrument to be a purely political question which cannot be decided by legal research at this time. However, any decision has to bear in mind that the dynamic development of the internal market should not be hindered by a too strict, inflexible, or a premature codification.
29. To our mind, the Commission should be prepared to the political need to introduce an optional instrument in the mid or long term. Therefore, it would be most reasonable to base the work on the Common Frame of Reference on the presumption that this framework should serve as sound basis for an optional instrument at a later stage.