

de la force obligatoire du contrat, au contrat appréhendé comme fait économique et social. On pourra ainsi mieux apprécier le régime de la responsabilité des tiers envers les parties et, inversement, des parties envers les tiers.

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X. The Commission's Action Plan on European Contract Law and the Research of the Acquis Group

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The *Acquis Group*, founded in 2002, currently consists of more than 30 legal scholars from (nearly) all EC Member States and accession candidates who will contribute their research in national teams⁴³. As a reaction on activities of EU institutions in the field of European contract law⁴⁴, 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*.⁴⁵

With its Action Plan on “AMore Coherent European Contract Law”⁴⁶, the European Commission intends to stimulate both discussion and research on European contract law in order to prepare a “Common Frame of Reference”⁴⁷. Due to this consultative approach, the Commission does not provide the research community with a closed set of research tasks or a definition on what shall constitute the Common Frame of Reference.

Hence, this paper pursues a twin-edged approach: firstly, it intends to provide the reader with a suggestion on what the possible content and function of the Common Frame of Reference could be. Secondly, it presents the research approach of the *Acquis Group*⁴⁸ and the way this research could contribute to the formation of the Common Frame of Reference.

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⁴⁴ Cf. *inter alia*: European Parliament, resolution on the approximation of the civil and commercial law of the Member States of 15/11/2001 (C5-0471/2001 – 2001/2187(COS)) and its predecessors; European Council, Council report on the need to approximate the laws of the Member States in civil matters and the Presidency Conclusions of the European Council meetings in Laeken (14-15/12/2001) and Tampere (15-16/10/1999); European Commission, Communication from the Commission to the Council and the European Parliament on European Contract Law (COM(2001)398 final) of 11/7/2001 and the summary of the responses to this Communication.

⁴⁵ Cf. Schulte-Nölke/Vogel, EuR 2002, 750.

⁴⁶ COM (2003) 68 final, OJ 2003, C 63/01.

⁴⁷ COM (2003) 68 final, OJ 2003, C 63/11, No. 59.

⁴⁸ Further information: www.acquis-group.org.

1. The Common Frame of Reference

In the Action Plan, the Commission describes the necessity to establish common principles and terminology of European contract law by introducing the Common Frame of Reference.⁴⁹ One way to provide answers to the question of what should be contained in the Common Frame of Reference could be to describe and analyse its function and possible sources.

a. Function

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, helping to increase coherency with regard to the legal language and its 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 homogenous system of sector-specific legislation.
- Additionally, the Common Frame of Reference will not only be useful when preparing legal acts on a European level: it can also provide member states with an important aid 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 (such as members to the EEC) 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 a sector-specific legislation such as the envisaged “optional instrument”).

b. Sources

As proposed in the Action Plan, the Common Frame of Reference should be built upon several basic sources⁵⁰. One of the 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

⁴⁹ COM (2003) 68 final, OJ 2003, C 63/11, No. 59.

⁵⁰ COM (2003) 68 final, OJ 2003, C 63/11, No. 63.

could follow the restatement approach brought forward for example by the Lando Commission.⁵¹

However, it will not be sufficient to refer only to common legal principles (as provided for in 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 which currently influences 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.

c. Content

Combining these perceptions of the purpose and sources, it is possible to suggest that the Common Frame of Reference should consist of three key 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 effectively comprise the same meaning.
- Secondly, a set of legal rules, possibly formulated in “principles”, are needed 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” or those principles derived from pure 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).

2. Focus of the Acquis Group

The *Acquis Group* intends to contribute to the task of providing material for the Commission to build the Common Frame of Reference. Its task is to derive common “Principles of the Existing EC Contract Law” following a new approach by focusing upon the genuine EC Law itself instead of comparing different national legal orders.⁵²

a. Main objective: “Principles of the Existing EC Contract Law”

The research of the *Acquis Group* will be published as “Principles of the Existing EC Contract Law”. These principles will consist of three elements:

⁵¹ *Lando/Beale (ed.)*, Principles of European Contract Law – Parts I and II, Den Haag, 2000, Part III published on the internet, http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/pecl_full_text.htm; cf. also von *Bar/Lando*, Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code, *European Review of Private Law*, 2002, 183-248.

⁵² *Schulte-Nölke/Vogel*, *EuR* 2002, 750, 752.

- Firstly, 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.

The principles will be presented in three languages, 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.

Obviously, 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.

b. Different Approach Compared to Existing Projects and Initiatives

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 domestic legal orders. Therefore the "Principles of Existing EC Contract Law" cannot and should not replace the existing Principles of European Contract Law and those works with a similar objective. Rather, they are to build on an important perspective which has so far been neglected. Focusing on Community law will present the economic reality of the European legal area more strongly than has hitherto been the case. At the same time, it will serve to promote the compatibility of Community law with the legal systems of Member States.

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.