

# **Towards a European Contract Law**

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# Towards a European Contract Law – An Introduction

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The development of European contract law has entered a crucial phase. For the first time an Expert Group, appointed by the European Commission, has presented an extensive draft concerning the feasibility of such a set of rules.<sup>1</sup> In the coming months the European Commission will use this draft as a basis for a decision concerning whether it will propose a legal act and commence the legislative procedure.<sup>2</sup> At the end of this procedure a common European contract law could emerge that would be made available to parties concluding a contract as an optional alternative to national contract law.

After almost thirty years of academic research on European contract law the time now appears right for such initiative. Since the 1980s, international research groups have put forth a number of drafts and have discussed numerous monographs and articles concerning the many aspects of this subject. The pioneering work completed by the Commission for a European Contract Law,<sup>3</sup> headed by Ole Lando, has been succeeded by, inter alia, the Avant-Projet of the Academy of European Private Law in Pavia,<sup>4</sup> the “Principles of Existing EC Contract Law”<sup>5</sup> (Acquis Principles) of the “Acquis

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<sup>1</sup> The text of this draft is available in the annex to this volume.

<sup>2</sup> *Viviane Reding*, The Next Steps Towards a European Contract Law for Businesses and Consumers, in this volume.

<sup>3</sup> *Ole Lando/Hugh Beale* (eds), *Principles of European Contract Law*, Parts I and II, The Hague 2000; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann* (eds), *Principles of European Contract Law Part III*, The Hague, London and Boston 2003.

<sup>4</sup> *Giuseppe Gandolfi* (ed.), *Code Européen des Contrats – Avant-Projet*, Milano 2004.

<sup>5</sup> *Research Group on the Existing EC Private Law* (Acquis-Group), *Principles of the Existing EC Contract Law* (after the Lisbon Treaty “EU Contract Law”), Contract II – General Provisions, Delivery of Goods, Package Travel and Payment Service (Contract II), Munich 2009.

Group”, the academic Draft Common Frame of Reference (DCFR),<sup>6</sup> which is partly based upon the work of the “Lando Commission” and the “Acquis Group” and the revised edition of the “Lando Principles”, supplemented by “Principes directeurs”, drafted by the French Association Henri Capitant and the Société de législation comparée.<sup>7</sup>

The political discussion in the EU on the subject of European contract law had already begun more than twenty years ago. In 1989 the European Parliament approached this subject in a first Resolution.<sup>8</sup> Yet, for the past ten years this subject has been on the agenda of the European Commission. The 2001 Communication<sup>9</sup> was followed two years later by the Commission’s action plan for a coherent European contract law.<sup>10</sup> Since this time there have been two proposals that have dominated the discussion: firstly, a common frame of reference could serve as a guideline and a “tool box”<sup>11</sup> in order to revise the *acquis communautaire* and to give greater coherence to future legislation. Secondly, it was to be considered whether a European “Optional Instrument” could be made available to contracting parties as an optional law, alongside national law, that would govern their contract.<sup>12</sup>

<sup>6</sup> *Christian von Bar/Eric Clive et al* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition*, Munich 2009.

<sup>7</sup> *Bénédicte Fauvarque-Cosson/Denis Mazeaud* (eds), *Terminologie contractuelle commune, Projet de cadre commun de référence*, Paris 2008; *Id.*, *Principes contractuels communs, Projet de cadre commun de référence*, Paris 2008.

<sup>8</sup> Resolution of the European Parliament of 26 May 1989, On action to bring into line the private law of the Member States, A2-157/89, O.J. (1989) C 158.

<sup>9</sup> Communication from the Commission to the Council and the European Parliament, On European contract law, COM(2001) 398 final, O.J. (2001) C 255.

<sup>10</sup> Communication from the Commission to the European Parliament and the Council, A more coherent European contract law – An action plan, COM(2003) 68 final, O.J.(2003) C 63.

<sup>11</sup> Communication from the Commission to the European Parliament and the Council, European contract law and the revision of the *acquis*: the way forward, COM(2004) 651 final.

<sup>12</sup> *Dirk Staudenmayer*, *Weitere Schritte im Europäischen Vertragsrecht*, (2005) *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 103 et seq.; *Reiner Schulze*, *Gemeinsamer Referenzrahmen und *acquis communautaire**, (2007) *Zeitschrift für Europäisches Privatrecht* (ZEuP) 130 et seq.; *Reiner Schulze*, *Der DCFR – Funktionen, Methoden, Struktur*, in: *Reiner Schulze/Christian von Bar/Hans Schulte-Nölke* (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen*, Tübingen 2008.

However, in contrast to its original announcement,<sup>13</sup> the Commission did not present a draft for a common frame of reference in 2009. Rather, the newly formed Commission made great progress in 2010 with the work concerning European contract law by founding the Expert Group tasked with working on this project.<sup>14</sup>

The Expert Group has succeeded, in an astonishingly short time of less than one year, in submitting their draft to the Commission. Without the prior extensive academic research, political consultations and position papers submitted by stakeholders and legal practitioners, it would certainly not have been possible.<sup>15</sup> It is apparent that the Expert Group's draft is, in many parts, above all based upon comparative research and the research into the *acquis communautaire*, as they have been compiled in Books I-III and IVa DCFR. If one compares the DCFR as a whole with the draft of the Expert Group one will nevertheless observe substantial differences. In particular, in contrast to the DCFR, an extensive "recontractualisation" – corresponding to the repeated demand over recent years<sup>16</sup> – is characteristic of the draft.

However, the draft of the Expert Group – without prejudice to its merits – does not imply that the goal of a common contract law for the European Union has been reached. Further political decisions and further legal work are necessary in order to take the next step of moving from this draft to an appropriate proposal from the European Commission for the European legislature. With respect to the political decision regarding the character of such a proposal, there is much in favour of working as soon as possible towards a legal instrument,<sup>17</sup> which creates an optional European contract law (and not, as originally planned, waiting until the "political" common frame of reference has been completed). Yet, it remains to be considered whether the project of a common frame of reference should continue to be

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<sup>13</sup> See (n. 11).

<sup>14</sup> Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, 2010/233/EU, O.J. (2010) L 105.

<sup>15</sup> See introduction to: A European contract law for consumers and businesses: Publication of the results of the Feasibility Study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, p. 1-3 ([http://ec.europa.eu/justice/contract/files/feasibility-study\\_en.pdf](http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf)).

<sup>16</sup> *Reiner Schulze/Thomas Wilhelmsson*, From a Draft Common Frame of Reference towards European Contract Law Rules, (2008) *European Review of Contract Law* (ERCL) 154 et seq.; *Reiner Schulze* (n. 12).

<sup>17</sup> *Viviane Reding* (n. 2).

pursued if the “Optional Instrument” does not progress due to concerns from Member States.

The Expert Group’s Study is far from being a proposal for a legal instrument. It is just a preparatory text for such an instrument. Certain important issues, that were outside the remit of the group, are not dealt with. First the text does not contain any concrete rules on conflict of laws, such rules being particularly important for the relationship of the instrument with mandatory rules of national law. Second, questions regarding the scope are still to be addressed. One of these questions is raised by the title of the Study that refers to “European contract law for consumers and businesses”. The editors hope that the political decision will actually cover this broad scope and that this will be clarified in more detail in the Commission’s proposal. This is particularly desirable, as – just like consumers – SMEs also urgently need support in utilising the potential of the internal market (both in their relationships to consumers as well as to other businesses). Another key issue that still needs further clarification is the application of the planned instrument to cross-border transactions only or also to domestic contracts.<sup>18</sup> A restriction to just cross-border transactions would be problematic because, as a result, the aim would not be reached of easing transactions for businesses and consumers in that they can obtain and market products and services within the whole internal market under the same legal conditions. It would be highly problematic if, in one Member State, foreign businesses could conclude contracts under other conditions (above all without being bound to particular provisions of national mandatory law) than domestic businesses due to the optional contract law only being applicable to cross-border transactions.

The transformation of the text of the Expert Group into a Commission proposal for a legal instrument requires an answer to the questions of private international law and of the substantive and geographical scope of such instrument. The same can be said of the questions regarding the structure and content of the instrument, in particular the choice of the contracts to be covered and the relationship between general contract law and the specific rules for each of these individual contracts. The draft of the Expert Group determines the obligations and remedies of the parties only for contracts of sale and for sales-related service contracts (and particularly for each of these contract forms).<sup>19</sup> In contrast, the suggested provisions in the first part of the draft are so general in wording to the extent that they

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<sup>18</sup> Viviane Reding (n. 2).

<sup>19</sup> See Part IV and V of the Feasibility Study.

refer to the “making of a binding contract”<sup>20</sup> and to the “assessing what is in the contract”.<sup>21, 22</sup> In so doing the first part of the draft contains, on the one hand, general rules for a number of matters (such as, inter alia, pre-contractual duties, the conclusion of the contract, the right to withdraw, the interpretation and unfair contract terms); whereas, on the other hand, the subsequent parts are limited to specific provisions regarding the obligations and remedies for two contract forms (sales and sales-related services). In the latter respect the proposed scope of application – corresponding to the current political drafting intention – is relatively narrow (it is limited to sales and sales-related services). Here the question will have to be considered whether obligations and remedies could be placed in a chapter that covers, in general, all forms of contract; specific rules and supplements for sale and service contracts could be included in a separate section. Be as it may, the fact that the text contains general provisions on making a binding contract and assessing what is a contract opens the possibility for a future legal instrument that applies to other types of contract (for example, insurance contracts,<sup>23</sup> timeshare or package holiday contracts) can draw upon this general contract law and only have to provide specific rules for obligations and remedies (if a corresponding political desire should arise in the future). It will have to be considered in detail whether this approach is generally convincing and whether it can be implemented appropriately.<sup>24</sup>

At a more technical level, questions arise as to the basis and the detail of the provisions contained in the draft. We have identified the provisions on pre-contractual duties,<sup>25</sup> the formation of contract,<sup>26</sup> unfairness and non-

<sup>20</sup> See Part II of the Feasibility Study.

<sup>21</sup> See Part III of the Feasibility Study.

<sup>22</sup> Furthermore, the end of the draft is particularly concerned with damages and restitutions, which are not restricted to individual forms of contract. See Part VI and VII of the Feasibility Study.

<sup>23</sup> Cf. Jürgen Basedow/John Birds/Malcolm Clarke/Herman Cousy/Helmut Heiss (eds), *Principles of European Insurance Contract Law (PEICL)*, Munich 2009.

<sup>24</sup> Cf. in this volume, in particular: *Guido Alpa*, *Towards a European Contract Law*; *Hans Schulte Nölke*, *Scope and Function*, and *Fryderyk Zoll*, *The Influence of the chosen Structure of the Draft for the Optional Instrument on the Functioning of the System of Remedies*.

<sup>25</sup> *Hugh Beale/Geraint Howells*, *Pre-contractual Information Duties in the Optional Instrument*, in this volume.

<sup>26</sup> *Anna Veneziano*, *Conclusion of the Contract*, in this volume; *Evelyne Terryn*, *Contract Formation – An Illustration of the Difficult Interface with National Law and Enforcement*, in this volume; *Giovanni De Cristofaro*, *“Invalidity” of Contracts*

negotiated terms<sup>27</sup> and, finally, performance and remedies.<sup>28</sup> This volume gives opinions on these different core issues, by experts who were not involved in the drafting of the Expert Group's text, and indeed of experts who were members of the group.

We hope that the comments, suggestions and critical review of the draft of the Expert Group in this volume offer an excellent opportunity for academia to contribute, at a decisive stage of the (pre)legislative process, to the outcome of this process and, in the long run, to influence the content and the nature of European contract law. We further hope that, on the one hand, scholars from all over Europe – beyond the circle of the contributors to this volume – will devote their best efforts in the coming months to this important project and that on the other, the Commission will find useful inspiration in the papers of this volume and those that will follow when drafting a convincing and coherent proposal for an optional European contract law.

We realise that the proposal will face a double challenge. First, it will have to pass successfully the legislative process within the other institutions of the European Union and the responsible bodies in the Member States. Second, it will have to convince the businesses and consumers in the European Union that the European instrument is to be preferred above national law. The proposal for an optional European contract law must therefore not only obtain the assent of the European Parliament and the Council, but also has to convince those who are in the field.

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and Contract Terms in the Feasibility Study on a future Instrument for European Contract Law, in this volume.

<sup>27</sup> *Denis Mazeaud*, Unfairness and Non-negotiated Terms, in this volume; *Martijn Hesselink*, Unfair Terms in Contracts Between Businesses, in this volume.

<sup>28</sup> *Luc Grynbaum*, Performance and remedies, in this volume; *Fryderyk Zoll*, The Influence of the chosen Structure of the Draft for the Optional Instrument on the Functioning of the System of Remedies, in this volume.