



EuSoCo Agenda 2010

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Draft Programme

Time	Area	Title	Discussion Leaders
08:20	Hotel	<i>Pick-up for Bus Ride to University</i>	Clerc- Renaud
09:00	Intro	<i>Welcome, Agenda/technical details (protocol; time-table; choose discussion leaders)</i> Memorandum discussion (1 page proposal on the table)	Reifner
09:30	DCFR	Prospects for a European Contract Law: State of the Procedure: CES 26 th Regime; DG Justice; Consumer Law and DCFR Labour Law and DCFR	Antoniolli Howells Nogler
10:30	Theory	Lifetime, Relational or Long Term? Social: Protective; Informed; Social Policy? Basis Legal Forms: Rent, Credit or Service Contract?	
13:00		<i>Lunch at Arkadash Restaurant</i>	
14:00	Principles	Early Termination: dismissal, early termination, eviction protection Price Controls: Rent Control, Minimum Wages, Usury Ceilings	
15:30		<i>Coffee break</i>	
15:45		Adaptation: procedures, rights, interdictions Participatory Procedures: collective, protective ... Access and Information – Neo-liberal challenges: the consumer law trap Consumer or Credit Law?	
17:00	To Dos	Legal Expert Group – Support Bob Schmitz Contact with Trade Unions, Consumer and Tenancy Associations on a European Level - Who? What? Next Meeting 2010 pr 2011? Where? Publication of a Reader? Again: Memorandum	
18:00	End	<i>We meet at 20:00 in a St Georg's Restaurant (Casa di Roma, Lange Reihe 70) (near Your hotel)</i>	

1 Meetings

1.1 Trento September 25, 2009

Participation: (11+1+1): Luca Nogler (LN); Udo Reifner (UR); Geraint Howells (GH); Eva Kocher (EK); Emmanuel Dockès (ED); Elena Perez-Carilló (EPC); Nick Huls (NH); Frey Nybergh (FN); Andrea Nicolussi (AN); Marcus Pilgerstorfer (MP); Luisa Antonioli (LA); Sebastien Clerc-Renaud (SCR); Katsutoshi Kezuka (Japan/Trento University).

Project partners unable to attend: Prof. Brigitta Lurger, Karl-Franzens-Universität Graz (contract); Dr. Claes Martinson, Göteborg University (consumer); Dr. Johanna Niemi, National Research Institute of Legal Policy (consumer credit); Prof. Iain Ramsay, University of Kent (consumer credit); Prof. Maurice Tancelin, Free lancer (ex-Université Laval) (contract); Prof. Toni Williams, University of Kent (consumer).

1.2 Hamburg July 1, 2010

Participation: Luca Nogler (labour law, Trento); Udo Reifner (law and finance, Hamburg); Geraint Howells (consumer and credit law, Manchester); Eva Kocher (labour law, Frankfurt/Oder); Nick Huls (credit and bankruptcy law, Rotterdam); Frey Nybergh (Helsinki, utility law); Andrea Nicolussi (Milano, legal theory, private law); Luisa Antonioli (Trento, international law); Katsutoshi Kezuka (labour law, Chuo University Japan); Kai-Oliver Knops (Hamburg, Finance Law, tenancy law); Claes Martinson, (Gothenburg Sweden consumer); Iain Ramsay (Kent, UK; consumer law, credit law); Toni Williams (Kent UK, consumer law, anti-discrimination law); Anne-Sofie Henrikson (Umea, Sweden Credit and Bankruptcy Law)

Project partners unable to attend: Brigitta Lurger, (Graz Austria contract, consumer law); ; Emmanuel Dockès (Paris labour law); Elena Perez-Carilló (Santiago de Compostella, commercial law); Prof. Maurice Tancelin, (Montreal, contract, legal theory); Marcus Pilgerstorfer (labour law, London)

1.3 Santiago de Compostella September, 2010?

2 Objectives

The group wants to explore and present an innovative approach to modern (European) contract law. The project is driven by two separate incentives: increase the social responsibility of a future European contract law and include longterm contractual relations concerning basic needs ("social contracts") between especially borrowers, tenants and workers on one side and capital and its protective, collective and social elements into the Principles of European Contract Law.

3 Task and Duties

3.1 Dimensions of the Task

Dimension	Project partners
1. Regulation of price	Pilgerstorfer (?)
2. Regulation of market power (rebalancing relationships)	Dockès
3. Considering the specificities of the real persons (emergencies/desperate situations)	Kocher, Nicolussi (links between 3 & 6)
4. Access	Nybergh
5. Risk allocation (economic risk)	Nicolussi (partial), Kezuka
6. Variety of sources of law (Günstigkeitsprinzip, coordination, collective bargaining law, EU law etc...)	Dockès
7. Participation procedures (strike and boycott; legal process; insolvency procedures) and institutions	Kocher, Huls (esp. bankruptcy and find colleague from labour law for comparison), Antonioli, Reifner

3.2 Duties to perform

Global view: Overall amalgamation of the 8 dimensions and conceptual work	Nogler and Dockès
Explore other legal areas	Kocher
Weaker parties by looking at minority investors	Perez-Carilló
Different models and different definitions of contracts	Pilgerstorfer
Explore Infrastructure law	Nybergh
Link labour law and Access (find help from colleagues)	Nybergh
Find ius commune (a new way to look at contracts). Pilgerstorfer.	Dockès
Theory and history: Rent contract and capital	Reifner

4 Discussion (points)

Nogler: human relationships and concrete problems, and explores how to incorporate more aspects of [distributive justice](#) (about the person, as opposed to [commutative justice](#)). a) ruled, governed, or under the sway of another; b) under the influence or domination, in a moral, spiritual, or similar sense, of another person, entity, force, etc. – opposite of autonomy).

Reifner: weaker party (perhaps a vulnerable consumer) and implicit dangers such as usury (wide definition) and low quality (use value based thinking at a disadvantage against exchange values). Law that helps avoid excesses (e.g. 1792 Extremis law in France).

Kocher: *Not* more personal than *urgency* and less than *desperation*: **situation of necessity**/pressure (Zwang) rather than need/privation/hardship (Mangel), distress/affliction (Bedrängnis), trouble/difficulty (Sorge).

Kocher: Civil law is important also for labour law. Need to concentrate on procedures.

Perez-Carilló: Procedure (see also Huls): Wider scope (join [Lurger paper](#) include banking, insurance, pensions and even minority investors). 'Private contract to satisfy basic living conditions' is subjective and difficult to measure. 'Lifetime contracts' better 'contracts of social cohesion' . 'Social' instead of 'Care'. Real justice is related to procedures, fairness, 'equity', principles etc...).

Dockès: Take real contracts, read them and find common principles e.g. presence of dependency. We should seek to find [ius commune](#) (*droit commun*). Contracts within a negotiation margin/power balance in the relationship

Pilgerstorfer: good faith concepts. .

Nybergh: Access to services; lessons from infrastructure services and utilities (communication, electricity).

Howells: Difficulty with general civil law in providing social justice (trying to change the hardest thing to change) 1) social contracts as long-term contracts but how broad? 2) long-term fairness of contracts. E.g. timeshare contracts.

Huls: Previous regulation of financial services to consumers in the Netherlands is no longer appropriate. Behavioural aspects of contract law. New wave of consumer protection. Also too big to fail, power relations, bankruptcy, credit databases etc...

The European Coalition for Responsible Credit (ECRC) promotes 'productive credit' as the key concept for modern law. In this context, the substantive credit contract itself must reflect its life-time character, so that many contractual concepts from one-spot commercial market transactions do not apply here. Under this approach to contract law, consumer bankruptcy (which is part of civil procedural law) comes too late and is critically characterised as a means of 'keeping substantive contract law free from social poison'.

Nicolussi: 'contract' is a term in Italian that often refers to the terms and regulation of the contract and not just the agreement. Mixture of liberty and rules, autonomy versus heteronomy. Subordination can be formal and/or substantive (structure, power of parties). Unlike housing, supplying ones labour involves work with oneself (performances). Explore the idea of autonomy of being (ethics).

2010: example for discussion: Informed consensus in longterm relations between consumers as investors with regard to banks.

Antoniolli: Practical problems instead of concepts. We need a workable definition and not just social justice. Define what a 'long-term contract' is and what a 'consumer' is (Community law may differ). Include administrative and procedural rules. Involve tenancy law which differs from country to country?

Reifner: Is substantive law (responsibility) the answer or is procedural (fairness) best. Time or duration is the key. Do we really need to involve behavioural economists? Tenancy law can be carried out by consumer credit experts from the group because tenancy law is similar to credit law (60% of all consumer law is credit law and no

longer sales law). We should not exclude other fields by principle, however in practice we will focus on the competencies we have among us 12 partners.

Kocher: Instead of long-term contracts basic living conditions need to be defined. Importance of procedures and representation in labour law.

Howells: Consumer contracts are still seen as spot contracts and thus this area needs to learn more than the others. Develop principles first and then find contracts that match.

Kezuka: Neutrality of contracts, emphasised dimensions of time and space.

Dockès: Use language that is not specific at the start. We just need to move on first.

5 CFR 2012

Shortfall of the DCFR: Just one model which we want to juxtapose with our social contracts model. Our criticism lies in why tenancy, credit, labour law have all been excluded from the DCFR exercise, and explains why we do not see it as complete and why we are thus looking at other common frames of reference in excluded contracts. We can find common principles in these 2 branches. Credit contracts were excluded from the DCFR because DG SANCO was not competent for financial services. However, people involved in the DCFR have all been trained on issues of commercial/sales law which explains why they have thus missed the social dimension which we are defending.

Reifner 2010: The EU Commission has now officially installed a Commission of 20 experts to draft a Common Frame of Reference for a future European contract law. It is based on the given DCFR which we already criticized for its omission of longterm contract and social problems of workers, tenants and borrowers. Since the expert group will be dominated by the advocates of the DCFR (i.e. Schulte-Nölke, Whittaker, Beale, Hesselink, Cleave, v. Bar etc) reflecting its deficiencies we think that our endeavour becomes more urgent, necessary and also politically useful. This is also true since the Economic and Social Committee of the EU wants to promulgate the future CFR as a 28th regime allowing parties to opt out from the application of their national contract law. The Commission has already taken up this proposition in its inauguration for the expert group.

We could show the increasing signatories of the Finance Watch Initiative that they should be concerned with the way consumer finance and banks will be regulated in the DCFR. We could show that the decrease in size and effectiveness of collective agreements could be matched by turning more consciously to the other field of workers' rights: individual contracts. We even could add collective elements to the CFR like collective agreements or unilateral declarations or good faith principles.

Gonzalez/Monti paper on *Europe 2030* admits that the existing models including its legal counterparts have to be revised because "in the last two decades, the EU's potential to generate growth and jobs, and consequently to improve living standards, has lagged behind that of its main trading partners." (p 15). There is also a new inter-party group at the European Parliament called "<http://www.finance-watch.org>" which will defend regulation for banks in response to the financial crisis: Their declaration starts with "We, as European elected officials in charge of regulating financial markets and banks, can see every day the pressure exerted by the financial and banking industry to influence the laws governing it."

Howells 2010: For me the most pressing issue at the moment is this question of the optional instrument. Some people even hope that both the CFR and Consumer Rights Directive will be jettisoned in favour of a 28th regime. I myself favour keeping consumer law distinct from any general contract law reform. Again a purely personal statement, but I do not think one page political statement are really something I want to be part of. The nuances of the arguments cannot be expressed and there is a risk we lose our independent academic voice. I even wonder if these statements have an impact. But others are of course free to sign up. I still think we have a good basis for a research project. This may simply require us building up a number of bilateral projects that we can involve the team in. I would also be prepared to devote free time to review UK law from our perspective, but I think we need to consider what our objectives are the best means to meet them.

Ramsay: 2010 All agree that the existing European initiatives in contract law neglect the relational contract literature (e.g. Macneil). Credit card contracts and other consumer financial contracts often last for many years and may be adjusted or changed during this period. Consumer credit contracts may also include networks of financiers, intermediaries and suppliers. While credit law has partly recognized network contracts, further analysis could be valuable. Four obvious issues arise in this context. 1. The expectations of adjustment e.g. interest rate changes and mechanisms for addressing this. 2. The expectation of trouble and its recognition (e.g. social force majeure) and the need for mechanisms of adjustment: structured bargaining, the role of third parties—courts, private institutions etc. 3. The role of consent at the time of entering the contract is diminished. 4. The assignment of liabilities within credit networks. Our discussion could explore the application of insights from relational contracting to consumer credit law

Bob Schmitz 2010: Merci de faire part du message suivant à Udo : A ce stade, le CFR (Common Frame of Reference) ne travaille que sur les contrats en général et des questions générales comme le "good faith & fair dealing." Ce qui me serait fort utile à ce stade : les commentaires critiques sur le DCFR . Plus tard, je serai évidemment prêt à me battre sur des questions contractuelles particulières comme souhaité par votre Groupe.

6 Dimensions

6.1 Price

6.2 Market power

6.3 Social problems of real persons

6.4 Access and Information

Ramsay/Williams: Neo-liberal regulation promotes access to consumer credit and the creation of confidence in an expanding and competitive consumer credit market.⁶ Consumer choice and the promotion of individual management and responsibility for one's finances are assumptions guiding regulation. Regulation within neo-liberalism assumes that consumer credit is beneficial by permitting income smoothing over an individual's life cycle, for example permitting younger consumers to accumulate assets during periods of low income and addressing temporary income deficits.⁷ Facilitating access to consumer credit is promoted as contributing, albeit indirectly, to alleviating poverty in developing countries

6.5 Early Termination

6.6 Risk allocation

6.7 Variety in Sources of law

6.8 Participative/Collective procedures

Huls 2010: Introduce Collective dimension: Supervision by the state is classic paternalistic intervention. However, the state can also nudge the consumer side by means of indirect interventions that create more space for autonomous societal developments. Two Dutch practices in the context of modern consumer protection are worth mentioning here. An important recent Dutch legal innovation is the Act on the Collective Settlement of Mass Claims (WCAM), on the basis of which a court can declare as binding a settlement that has come about following a collective action. A second, more harmonious type of collectivisation is negotiation between consumer organisations and central business organisations about general legal provisions governing consumer transactions.

Huls 2010: From my perspective, however, procedural law – which is generally considered to be a very dull field of civil law – is an exciting field to explore the autonomy-paternalism tension, because it constitutes a battleground for competing claims of all kinds of creditors, both among themselves and vis-à-vis their debtors. Bankruptcy is the litmus test of the strength and weaknesses of civil obligations and liabilities. (see also Kocher, Perez-Carillo)

7 Social Problems

7.1 Overindebtedness

Henrikson: The amendment to the bankruptcy procedure will therefore make it possible also for business proprietors who are natural a person and have business activity of simple character to obtain debt restructuring. Note, of special interest is that in Swedish law a natural person remains personally liable for debts outstanding after a bankruptcy. The reason behind the proposed amendment is that for many entrepreneurs who are declared bankrupt, failure spells private financial disaster and a heavy burden of debt precludes any new entrepreneurial activity for a long time ahead. Newer debts will not prevent the debtor from getting debt restructuring.

7.2 Unemployment

7.3 Homelessness

7.4 Illness, Separation, Poverty, Immigrants etc.

8 Future Work

Group 1 (European Contract Law): Antonioli, Nybergh, Perez-Carilló, Nicolussi: Social contracts are: Durable contracts where parties have an unequal negotiating power and whose objective is to satisfy relevant/basic needs for the weaker party of the contract. Tenancy law was not seen as very serious. Importance of where the rules are placed. Differentiate between changes in circumstances by whether these were foreseeable or not.

Group 2 (Labour Law): Nogler, Dockès, Kocher, Pilgerstorfer: 3 Essential characteristics: power, human involvement, 'time thickness' (or size of time interval). Must take account of basic/relevant needs, thus suggest: "Life essential contracts" (Reifner commented that 'basic needs' and 'first necessities' were terms already employed and defined in EU Directives). Basic need versus participation. Dockès explained bargaining power and the economics behind why trade unions are worth creating because the benefits outweigh the costs associated with self-organisation.

Group 3 (Consumer credit): Reifner, Howells, Huls: Cultural differences exist. Usury ceilings and black market for credit provision were discussed. Procedural aspects should be part of the project i.e. thus bankruptcy law will be incorporated. [ECRC principles](#) for responsible credit and other codes of best practice will be looked into. E.g. The UN guidelines influence legal developments in many countries from Australian law to those of developing countries. They noted that participation is different to enforcement, and also said that a definition of "institution" would be necessary.

8.1 Agreed Commitment volunteered by the Partners 2009

Name	Dimension	Name	Dimension
Luca Nogler	1-8	Nick Huls	8 & Find colleague
Udo Reifner	8 & rent contracts & theory & history	Frey Nybergh	4, other
Geraint Howells	Concepts in English law	Andrea Nicolussi	3 & 7 (links between 3 & 6)
Eva Kocher	3, 8 & other (areas)	Marcus Pilgerstorfer	1 & 5 & other
Emmanuel Dockes	2, 7, & 1-8	Luisa Antonioli	8
Elena Perez-Carilló	Other (minority investors)		

Dimensions

1. Regulation of price
2. Regulation of market power (rebalancing relationships)
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8.2 EuSoCo Timeplan and deadlines annotated 2009 and 2010

What	Who	When in 2009	Result 2010
Secure the involvement from colleagues?	Nybergh & Huls	1. November 2009	
Trademark term: Brainstorming & exchange on http://eusoco.com/	ALL	15 November 2009	Yes Website exists.
Funding: Investigate possibilities from national research bodies (Coordination via Clerc-Renaud)	ALL	31 December 2009	abandoned
Report to the Hans Böckler Foundation (Trade Union support for EuSoCo)	Reifner/ Nogler	31 October 2009	done
Find commonalities between law areas: 1 st - Credit and labour (make a list e.g. u/e) and post on the Internet	ALL	27 November 2009	
Provide first general structure and draft of our common Article (in German)	Reifner Nogler	1 November	See Article for Antioniolli book.
Collect ideas for the 10 pages articles in the envisaged book (Question: Why do we need a Social Contract Law in Europe? with either national or sectoral approaches); Collect outlines or Drafts of contributions for our Article in different languages Look for additional editors; Explore funding possibilities for Networking of Scientists in the EU including exchange money for seminars etc. (i.e. DAAD, EU Socrates etc); Funding: Formulate a project proposal which we are all happy with Funding: Send out proposals to national research bodies with a formal request; Translate article into different languages and publish the article in national journals; Long-term Funding: Approach the European Commission and try to influence the agenda for DG Research's FP7 work programme for 2011 and 2012. (<i>suggested action only</i>)			We have looked at different funding opportunities. FP7 needs too much investment. We agreed mutually that everybody seeks his or her own funding at a national level and contributes as such. Meanwhile iff is partner in different European research projects. We could use the instruments also for EuSoCo
Next Meeting scheduled (in Hamburg one day before int. German ECRC Conference)	ALL	1 July 2010	Done
Try and publish Book with 10 pages articles (or publish articles in journals and link them on the Internet)	ALL	Spring 2010	Still to be done
Long-term Funding: Apply to relevant topics on DG Research's FP7 work programme for 2011 and 2012. (<i>suggested action only</i>)	Clerc- Renaud	Fall 2010	With some pressure we may get support from DG Justice if we offer to work for the CFR expert committee.

Udo Reifner/Sebastien Clerc-Renaud (2009/2010)