

January 28, 2011

Public Consultation on the Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses

Response submitted by the EuSoCo Group¹

European Commission
Directorate General JUSTICE
Unit A2 Civil and contract law
Rue de la Loi 200
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Belgium

Dear Commissioner Reding,

We would like to share our observations on your Green Paper and your broader initiatives in contract law with you and your services. We thus take this opportunity to respond to the consultation by informing you of our concerns and making you aware of our declaration on this subject.

The EuSoCo Group is comprised of a team of legal experts that would like to see a more balanced approach to European efforts in developing EU contract law, taking account of those areas of contract law where the social dimension of labour, housing and consumption is predominant and where threats like unemployment, homelessness and over-indebtedness require an adequate consideration in the law. The goal of the initiative is to contribute to the debate on a Common Frame of Reference and to call for the work of your services to not overlook (or purposely ignore) certain aspects of consumer protection law but to investigate the usefulness of incorporating some of the special aspects of social contracts in labour, tenancy and consumer credit law in to your analytical process. Our contribution is from the perspective of EU consumers, workers and tenants.

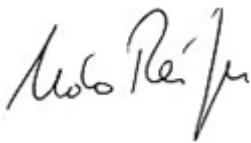
While under different circumstances, we may have contemplated assessing the options (legal nature of the instrument and its scope) listed in the Green Paper from the European Commission in greater detail, we are unable to do so as there is, in our view, an insufficient scientific, social and democratic basis for the draft, which can only lead us to consider *Option 1: Publication of the results of the Expert Group* as a worthwhile option.

We also would like to see the Commission propose, as a result of the evaluation of the results of this public consultation, a comprehensive quality check of the work conducted to date by collecting scientific opinion and analysis of European Contract law from a societal perspective. This initiative could complement the findings so far and would be an integral part of the necessary impact assessment which any EC legislative proposal requires. Likewise, we would recommend that the Commission carry out an independent assessment of the suitability of existing model rules or principles such as the *Principles of European Insurance Contract Law (PEICL)*. Following up from those assessments, we recommend that new expert debates are to be encouraged and serving to create a common culture, among academics and among European contract lawyers, which would be of great valuable interest before allowing any of the texts to serve as inspiration or to be used to decide their extended application to wider financial services contracts.

We question the assumptions made in the Commission's Green Paper as they reflect the neo-liberal standpoint that "consumers" in Europe need legal uniformity, that protection means information only and that they systematically benefit from any extension of markets without regard to the historic developments in law framing and taming market powers. These assumptions are not shared by all of us in Europe (scientists and non-scientists) and we have serious doubts that the assumptions made by the Commission for the drafting of the DCFR are truly shared by the democratically elected bodies in the EU and the Member States. We especially miss "(social) justice" and concern for work, housing and consumption and lifetime, in such an important enterpriseⁱⁱ. We would therefore be astonished if such a paper were to be published in any form other than as a mere opinion of an expert group selected by an administration. Particularly, and in relation with the proposals of approving either Recommendations, Directives or Regulations (all of them being legislative acts of the EU), we have serious doubts as to whether such possibility is clearly included within the competences of the EU in accordance with Art 3 and following of the Treaty on the Functioning of the EU (TFEU). Furthermore, even if those doubts were to be clarified, we would still need to answer the question of what the right procedure ought to be (Ordinary legislative Procedure, Special Procedure, etc. in accordance with Art 114 to 116 of TFEU).

In order to help the European Commission in reassessing the usefulness and democratic legitimacy of its work we hereby submit the main points we have raised as a group entitled "EuSoCo Declaration" on the following pages.

Yours Sincerely,



Prof. Udo Reifner

University of Hamburg

EuSoCo Declaration

Deutsch

¹Die Verfasser dieser Erklärung, Verbraucher-, Miet- und Arbeitsrechtler sowie Vertreter des allgemeinen Vertragsrechts sind tief besorgt, dass der Weg zu einem einheitlichen europäischen Vertragsrecht, wie ihn Europäische Kommission und Parlament eingeschlagen haben, auf einem verengten Kaufrechtsmodell aufbaut, demzufolge die Vertragspartner allein Informationen zum Ausgleich rechtlicher Benachteiligung erhalten können. ²Ökonomische und soziale Interessen der Arbeitnehmer, Verbraucher und Mieter in Langzeitverträgen haben dagegen bisher weder im Allgemeinen Teil der Vertragsrechtsentwürfe noch bei den besonderen Vertragsverhältnissen und auch nicht in der Auswahl der Experten adäquate Berücksichtigung erfahren. ³Gleichwohl wird das Ziel eines das nationale Recht auskonkurrierenden 28ten Regimes alle die Bereiche des Zivilrechts nachhaltig bestimmen, in die in der heutigen Dienstleistungs- und Kreditgesellschaft faktisch Arbeit, Konsum und Wohnen ohne den Schutz der traditionellen Rechtsmaterien abgedrängt worden ist.

⁴Das Modell des Zeit indifferenten Kaufvertrages muss um ein zweites grundlegendes Modell ergänzt werden, das wir als Lebenszeitvertrag bezeichnet haben.

⁵Es soll soziale Gerechtigkeit für die Menschen ausdrücken können, für die ökonomische Effizienz im Sinne von Profitabilität nur ein Mittel ist. ⁶Es sollte Antworten für Veränderungen in der Lebenssituation bereithalten und mehr als eine einfache Tauschgerechtigkeit bieten.

⁷Materieller Schutz für soziale Schwäche neben der Information für die Auswahl auf dem Markt gehört dazu ebenso wie eine

English

¹We, a group of academics knowledgeable in consumer, tenancy and labour law, are deeply concerned that the path to a harmonised European system of contract law as envisaged by the European Commission and the Parliament will be built on a reductive model of commercial and consumer sales where information is the only substantive gift to social interests.

²Economic and social rights of workers, consumers and tenants in long-term relations have instead found no adequate place, neither in the general principles nor in the specific parts of the existing drafts nor in the composition of the mandated expertise.

³Its legal outcome, a European contract law as a 28th regime, will anyhow deeply affect those areas in the modern service and credit society where labour, consumption and housing is increasingly dealt with outside the shelter of the traditional labour or tenancy law and debtor's protection realm.

⁴The liberal sales model of information indifferent to lifetime provides no sufficient protection for the weak and no regard for the productivity of those who work for their living. Commercial sales contracts need to be completed by a second model based on what we call lifetime contracts. ⁵It should provide social justice related to human needs and lifetime to which economic efficiency in the pure sense of profitability can only be a means. ⁶It should be able to cope with long-term relational problems of changes in human lives instead of providing only remedies typical for spot contracts. ⁷It should provide a substantive shelter for the weak instead of information for choice only, it should acknowledge the collective and social dimension of labour and consumption expressed in collective agreements and declarations of principles.

kollektive und soziale Dimension von Arbeit und Konsum, wie sie in Tarifverträgen aber auch in allgemeinen Prinzipien enthalten sind.⁸ Die Vertragsfreiheit der Anbieter und Arbeitgeber sollte um die Anerkennung sozialer Freiheit der Arbeitnehmer, Mieter und Verbraucher ergänzt werden, in der die drei großen Bedrohungen unserer Zeit: Arbeitslosigkeit, Überschuldung und Obdachlosigkeit ernst genommen werden.

⁹Wir werden international in den drei offiziellen EU-Sprachen zusammen arbeiten, um den Schatz nationaler Kulturen im Arbeits- und Privatrecht sichtbar zu machen.¹⁰ Dabei werden wir die grundlegenden Vertragsformen, Prinzipien, gemeinsamen Ansätze und rechtlichen Errungenschaften im gegenwärtigen wie auch im historischen sozialen Vertragsrecht erforschen.¹¹ Unsere Ergebnisse wollen wir entweder als Ergänzung oder als Alternative zum bestehenden Projekt eines Europäischen Vertragsrecht 2013 einbringen.¹² Dabei wollen wir nicht nur Gewerkschaften, Verbraucherverbänden und anderen Vertretern der Zivilgesellschaft sondern auch den offiziellen Stellen in der Gesetzgebung und anderswo, die mit der Erarbeitung betraut sind (z.B. <http://www.finance-watch.org>), unsere Hilfe anbieten, wenn sie mit uns der Meinung sind, dass die Akzeptanz eines zukünftigen Europas nur dann erreicht werden kann, wenn der Verlust an nationaler Autonomie durch ein wirklich soziales Europa kompensiert wird, das sich auch im Recht auf die sozialen Traditionen und Erfahrungen stützt.

⁸The contractual freedom of suppliers and employers in the traditional sales based contract model should be complemented with the freedom of social interests to be sheltered from the three perils of our time: unemployment, over-indebtedness and homelessness.

⁹We shall work together internationally, make use of all three official EU languages and incorporate the treasure of national legal cultures in labour and private law.¹⁰This will be done in order to study the basic contractual forms, principles, common approaches and achievements in the existing as well as the historical national social contract law.¹¹The results will be offered to the existing EU project on a Common Frame of Reference for a European Contract Law in 2013. We offer our professional support not only to trade unions, consumer organisations, tenant organisations and community groups in the civil society.¹²We would like to also support those officials involved in the legislative processes (see <http://www.finance-watch.org>) who believe that only a social Europe will compensate for the loss of national autonomy and who hold that a social Europe needs social law based on democratic experience in its Member States.

Signed on behalf of a group of 15 European law professors who form the EuSoCo Group by Professors Udo Reifner (Germany) and Luca Nogler (Italy).

ⁱ The European Social Contract Law Group was formed in 2005 to promote the social aspects of Member State national law for consumers. The EuSoCo Group is an expert group set up as an initiative from within the European Coalition for Responsible Credit. Information on the work of the Group is available from the working blog: <http://eusoco.com>.

ⁱⁱ This critique of the DCFR is lengthy elaborated in *Nogler/Reifner Social contracts in the light of the Draft Common Frame of Reference for a future EU Contract Law*, in: Common Core Evaluating Group, L. Antonioli & F. Fiorentini (eds) *A Factual Assessment of the Draft Common Frame of Reference*, Sellier December 2010 pp 365 – 407.