

**Position  
of the Bundesrechtsanwaltskammer  
(The German Federal Bar)**

**on the Green Paper from the Commission on  
„policy options for progress towards a European Contract Law  
for consumers and businesses“  
(COM(2010)348 final)**

**drafted by The German Federal Bar's  
European Contract Law Committee**

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The German Federal Bar is the statutory umbrella organisation of the 27 regional Bars and the Bar at the Federal Court of Justice. The Bars represent a total of currently approximately 155,000 lawyers admitted to the profession in Germany. The German Federal Bar represents the economic and legal interests of the German legal profession.

The German Federal Bar welcomes the creation of a single European Civil Code, but believes that, for the time being, the introduction of an optional European Contract Law instrument, as proposed in option 4, stands the best chances of being realised.

The German Federal Bar supports the European Commission's and the European Parliament's intentions to create an instrument of European Contract Law. A contract law with uniform application in all Member States will facilitate the free movement of goods and services as well as the provision of legal advice in the European Union - and will have considerable external effects. Therefore, The German Federal Bar has already supported the creation of a single contract law in earlier position papers<sup>1</sup>.

#### **I. What should be the legal nature of the instrument of European Contract Law? (Green Paper section 4.1.)**

The German Federal Bar endorses the creation of an optional 28th regime in the form of a regulation. A regulation makes it much easier for lawyers to provide legal advice on the design of cross-border contracts. This applies to cross-border contracts as well as to drafting general terms and conditions for products which are to be marketed in several or all European Member States. An optional European Contract Law instrument would be available in all European languages and would have to be interpreted uniformly in accordance with European standards. It is thus foreseeable that it will contribute decisively to the removal of trade barriers in the single market. From the lawyer's perspective, this would at the same time enlarge the lawyers' sphere of activity.

A 28<sup>th</sup> regime provides more legal certainty for legal practitioners. In the long term, this will lead to a reduction of transaction costs: Small and medium-sized enterprises, too, as well as small and medium-sized law firms which do not specialize in the contract law of other individual Member States beyond their home state contract law, can advise their clients and their clients' contractual partners on the basis of the single optional European Contract Law

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on consumer rights (BRAC Position paper no. **18/2010**, only in German), European Commission Green Paper "Review of the Consumer Acquis", (BRAC Position paper no. **14/2007**), European Union initiative to create a uniform European contract law (BRAC Position paper no. **13/2006**).

instrument. This makes access to cross-border transactions much easier and reduces transaction costs.

The possibility to choose the applicable law gives the parties an opportunity to compare the possible applicable material law regimes before making their choice. Thus, the optional contract law instrument would compete with the otherwise applicable national laws. This represents an incentive to make the optional European Contract Law instrument a user-friendly instrument. An optional 28<sup>th</sup> regime offers the advantage that it can meet practical requirements and at the same time does not affect national regimes. An optional instrument has to be good in order to succeed in the competition with other regimes. In addition, applying the instrument in practice will result in a steady improvement of the instrument itself.

A European Contract Law in the form of a regulation could also be an interesting option for non-European contract parties regarding the choice of law, all the more since European Contract Law is an overarching product which covers all traditional legal systems.

In the EU, uniformity of a field of law at European level has already been achieved in other areas, e.g. company law. Here, European law puts the SE at the disposal of legal practitioners as optional European legal forms of companies alongside the national form. Competition law, too, has been unified at European level. The same applies to consumer law. It is therefore only consistent to harmonise contract law in the framework of the overall concept.

However, a 28<sup>th</sup> regime should be limited to contract law and should not incorporate other areas which, due to their cultural and traditional divergences, cannot be harmonised, such as, for example, property law, the law of succession and family law.

The German Federal Bar rejects the Green Paper's options 1, 2, 3 and 5, as these options do not create a single set of rules for the legal practitioner. These options do not achieve the project goal. Options 6 and 7, on the other hand, are too far-reaching for the time being and are not compatible with European law. Their disadvantage is that there is no competition between the various systems and thus they are not put to the test in practice.

An important precondition for the success of a 28<sup>th</sup> optional regime, however, is the guarantee of uniform jurisprudence. Uniform case law is the only way to safeguard harmonisation and to avoid a fragmentation of the law through national jurisprudence. Therefore, as regards option 4, the ECJ's competence for an autonomous interpretation of the optional contract law instrument must be ensured, just like the national courts' duty of

referral when there are doubts as to the interpretation, or when other national courts have decided differently.

## **II. What should be the scope of application of the instrument? (Green Paper section 4.2.)**

The optional instrument of contract law should provide for all types of contracts under the law of obligations (with the exception of family law contracts and contracts subject to the law of succession). It should take a form that can be used for business-to-business ('B2B') contracts on the one hand. With a view to general terms and conditions, however, it is also important to create an instrument that can be used for business-to-consumer ('B2C') contracts. Special care must be taken so as not to make consumer law applicable to business-to-business relations via general clauses, etc. Nor should the minimum standards contained in the European Directives on consumer contracts be exceeded.

In the interest of a genuine unification and simplification of the law, it is important to allow the optional instrument also for domestic contracts. This is particularly significant in cases in which, for example, it is hardly possible to assign the individual services provided within the Single Market to a specific location. It would furthermore save users from having to establish different general contract terms and conditions for the domestic market on the one hand and for the European market on the other. Thus, companies receiving Europe-wide services through subsidiaries in other EU Member States avoid the problem of legal fragmentation: Otherwise, such companies would continue to be obliged to conclude individual contracts in every Member State in accordance with the respective national law. This would compromise the objective of using the single market as a uniform market.

## **III. What should be the material scope of the instrument (Green Paper section 4.3.)?**

As long as the instrument is available as an optional instrument, interpretation must be narrow, since matters pertaining to property law have repercussions which can hardly depend on the option chosen by only two contractual parties.

In the interest of the EU's integration in the world market it must be ensured in any case that existing instruments of international law (e.g. CISG, CMR, Visby Rules) remain valid.

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