

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

**on the European Commission's feasibility study on  
a European Contract Law**

**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 157,000 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 appreciates the opportunity to state its position and submits the following comments on the feasibility study carried out by the European Commission's Expert Group on a European contract law:

### I.

The German Federal Bar welcomes the European Commission's and the European Parliament's intention to create a European contract law instrument that would exist alongside the Member States' existing national legal systems. This regime, applicable in all EU Member States, would be an optional instrument available to businesses and consumers for their contractual relationships and would simplify business transactions as well as legal advice throughout the European Union.

A European contract law increases legal certainty for consumers and simplifies the drafting of cross-border contracts; furthermore, it decreases transaction costs for businesses and significantly reduces existing trade barriers. A uniform European contract law regime will, as a result, bring considerable advantages for all those involved – businesses as well as consumers, including lawyers who provide legal advice.

Therefore, The German Federal Bar strongly supported the creation of this regime in earlier position papers<sup>1</sup>.

### II.

The feasibility study on European contract law, carried out by the Expert Group along the guidelines of the European Commission, clearly falls short of the expectations that were raised.

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<sup>1</sup> BRAK position papers 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) (BRAK Position paper no. **07/2011**), Proposal for a Directive of the European Parliament and of the Council on consumer rights (BRAK Position paper no. **18/2010**, only in German), European Commission Green Paper “Review of the Consumer Acquis”, (BRAK Position paper no. **14/2007**), European Union initiative to create a uniform European contract law (BRAK Position paper no. **13/2006**).

1. In The German Federal Bar's view, a major shortcoming of the feasibility study, which owes its present form to the European Commission's working premises, is the fact that its regulatory content is limited to the sale of goods and associated services. These types of contract, however, are regulated in detail by the United Nations Convention on Contracts for the International Sale of Goods, CISG, large parts of which have flown into the draft, as well as by the EU Directive on the sale of consumer goods and associated guarantees (1999/44/EC). Other types of contract causing legal problems in the areas of B2B and B2C, such as insurance contracts, contracts for work and services (*Werkverträge*), leasing contracts, etc. and for which - particularly regarding cross-border transactions - there is no uniform substantive law yet, are not covered by the feasibility study.

A European contract law should comprehensively include the types of contract that prevail in contractual practice, taking into account the existing international treaties.

2. One of the objectives of a uniform European regime is to cut cross-border transaction costs for small and medium-sized enterprises. Creating a regime which varies partly from the UNCISG does not serve this purpose as this would mean that a legal regime would be placed next to the national legal systems and the UNCISG which remains applicable in transactions with third countries. It seems preferable to incorporate - basically unchanged - the UNCISG, which, due to the fact that it is an international treaty, constitutes the best guarantee for enforcement against national provisions, into the uniform European regime and to provide supplementary rules for issues that are not regulated by the UNCISG in the European contract law.

As far as provisions supplementing the UNCISG are concerned, The German Federal Bar endorses apart from provisions covering the usual issues, provisions regarding specifically the *in rem* aspect of sales contracts. This applies in particular to a standardisation of trade credit securities, especially the reservation of title. If a uniform legal solution does not seem feasible at the moment, at least uniform conflict of law rules should be established.

3. Furthermore, we strongly support checking the feasibility study against the contents of the proposed EU Consumer Rights Directive, in order to integrate the provisions of the latter into the further elaboration of the uniform European regime.

4. The feasibility study does not specify whether the scope of application of the European contract law is limited to cross-border business transactions or if the European contract law can also be chosen for national transactions. The German Federal Bar is in favour of an indiscriminate application of European contract law to national as well as cross-border

transactions. Reducing European contract law to cross-border transactions will, in our view, hardly lead to an enforcement of European contract law since, next to the UNCISG which has to a large extent flown into the feasibility study, there is actually no further area of application left for European contract law.

### III.

Below please find The German Federal Bar's comments on the questions raised in Section V of the feasibility study:

#### **Question 1:**

*On the one hand, a European contract law instrument should cover most of the problems which could appear in contractual practice. On the other hand, the instrument should also be user-friendly and therefore as concise as possible. To which extent does the text developed by the Expert Group meet these objectives? To which extent could it be improved?*

The German Federal Bar is of the opinion that the text is helpful as a toolbox for the development of a uniform European contract law instrument, but insufficient as an autonomous regime.

#### **Question 2:**

*For consumer contracts, Article 81 of the feasibility study extends the unfairness control of business-to-consumer contract terms, to terms which are individually negotiated (as opposed to covering only non-individually negotiated terms as in the existing EU legislation). Do you think this is appropriate?*

Contractual freedom should be maintained in the framework of individually negotiated terms, which means that we reject the extension of unfairness control beyond the pre-formulated general terms and conditions (*Allgemeine Geschäftsbedingungen, AGB*) to individual agreements.

The German Federal Bar is in favour of differentiating between negotiated and non-negotiated parts of a contract. Consequently, article 81 et seq. of the draft should continue to apply to non-negotiated or pre-formulated terms and conditions. As far as individually negotiated terms are concerned, however, a black list could be established, according to which the terms listed would be inadmissible.

**Question 3:**

*Article 92 foresees an exceptional possibility to alter a contract due to change of circumstances. Do you think that this provision represents real added-value, especially in consumer contracts? Do you think that the procedure which leads to the alteration of a contract is appropriate?*

We reject this provision for B2B as well as B2C contracts.

In the area of B2C, such a provision may be useful for contracts with a longer contract period at most, but in no way is it useful with regard to typical sales transactions.

In the B2B sector, businesses usually make contractual arrangements to provide for situations where the circumstances that have become the contract basis change substantially after conclusion of the contract, such as price adjustment clauses, for example. The fact that the CISG dispensed with such a rule has not lead to unfairness in the area of B2B over the past 20 years.

**Question 4:**

*According to Article 110, in business-to-business contracts, the seller of a faulty product has in principle a right to cure the defect. Do you consider this rule appropriate?*

Yes.

**Question 5:**

*Article 177 determines that a buyer who avoids or terminates a contract is, as a matter of principle, liable if the goods to be returned have been destroyed in the meantime. Article 178 also includes an obligation for the buyer to pay for the use of the goods to be returned. However, this obligation only exists under certain, restricted circumstances. Thus the risk of destruction of the goods is placed on the buyer and the risk of depreciation mainly on the seller. Do you consider these rules appropriate, especially in business-to-consumer transactions?*

In The German Federal Bar takes the view that, in contrast to Art. 178 (1), it is in principle not unreasonable to hold the buyer or recipient of goods liable to pay compensation for the use of the goods for the entire period of their use, regardless of the fact if the buyer/recipient acts in good or bad faith. As an exception, compensation payments could be excluded if, in individual cases, their performance were inequitable vis-à-vis the buyer.

**Question 6:**

*Article 172 contains specific rules for consumers who are late with payments. In particular, the consumer is obliged to pay interest for late payment only 30 days after receipt of a notice informing him about this obligation and the interest rate. The interest rate is set at the average commercial bank short-term lending rate to prime borrowers. Do you think these rules are appropriate?*

The provision contained in Article 172 granting the consumer who is late with payment a 30-day sanction-free waiting period, is rejected. For payments that are not made on time, it is preferable to lay down gradual interest rates for the different periods of time, taking as a reference a fixed average interest rate, e. g. “x percentage points above the base interest rate”. In this model, the interest rate could be lower during the first 30 days following the notice, and could then increase.

**Frage 7:**

*The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?*

The distinction between hard- and software as it is drawn in the feasibility study in derogation from the UNCISG is not self-evident. It is incomprehensible why a data carrier should fall under the proposed provision, but not the software it contains and which is usually considerably more valuable. The term “goods” should subsume hard- as well as software, as in the UNCISG.

**Question 7 a):**

*If you consider it should, do you then believe that the rules on pre-contractual information in Article 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)?*

We approve of the proposed duty to disclose information.

**Question 7 b):**

*If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for*

*specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs)?*

Special rules are necessary with regard to termination. These and other adaptations, however, should be made in coordination with the provisions and definitions of the Consumer Rights Directive.

#### **IV.**

To conclude, we should like to make the following comments regarding select individual aspects and standards contained in Annex IV of the feasibility study:

1. The incorporation of the proposed provisions into a contract is proposed as an opt-in-solution. However, the study fails to specify in concrete terms how this incorporation can be achieved, especially in B2C contracts. Is it sufficient vis-à-vis the consumer to include these provisions by way of pre-formulated contract terms and conditions? Does the consumer have to be familiarized with the provisions beforehand? If so, how and in which language?
2. We consider the manifold approaches allowing the solution chosen by the parties can be modified by a judge to be problematic. Article 7 postulates 'Freedom of Contract', whereas e.g. Article 48, on the other hand, provides far-reaching judicial fairness control. Furthermore, the term 'good faith', which has no legal definition, is highlighted repeatedly (cf. Article 27, for example). Reminding contract parties to act in accordance with 'good faith and fair dealing' in Article 8, should be sufficient.
3. The criteria listed in Article 23 (2) which determine if and to what extent the supplier has to provide pre-contractual information to the recipient in B2B transactions, are clearly too comprehensive and partly elusive for legal practitioners.
4. The provisions on damages are drafted as facts that are independent from the question of fault. With respect to consequential damage or indirect damage, however, The German Federal Bar believes it would be appropriate to connect payment of damages to other factors in addition to the objective violation of a contractual obligation.
5. Pursuant to Article 78 (3), prices are not subject to an unfairness test in B2B contracts. The fact that prices correlate with the other contract terms is thus not taken into account.

Thus, less favourable terms of contract at a particularly favourable price are still acceptable, whereas a higher price requires that the rights of the buyer are set out in appropriate terms.

**6.** Article 85 should only be maintained for contracts between businesses under distinctly tighter conditions.

**7.** Article 89 should be deleted since it is impossible to tell to what extent contracting parties - beyond the exchange of the goods and services owed under a sales contract – should cooperate with each other. The types of contract referred to are not aimed at achieving a common goal, but at the mutual exchange of diverse goods and services.

**8.** Article 94 (1) (c) should read „... *documents as may be required by the contract.*“

**9.** In Article 96 (1) (b) (i) the words „*by a carrier or series of carriers*“ should be deleted. The feasibility study does not stick to this terminology. This rule could therefore also be misunderstood.

**10.** The following or a similar provision on the burden of proof should be included in Article 102 (1): „..., *unless the buyer proves that they ...*“.

**11.** In Article 105 clarification should be provided regarding the national states whose intellectual property rights are referred to.

**12.** In contrast to parallel laws of the German Commercial Code (*Handelsgesetzbuch, HGB*) and the UNCISG, Article 124 does not provide for the assignment of the risk of transportation regarding the notification of defects to be issued by the buyer. The provision in Article 10 (3) does not seem appropriate for this situation.

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