



February 2011
AK Position Paper

Green Paper on “policy options for progress towards a European Contract Law for consumers and businesses”

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm
Director

The AK position in detail

AK takes the following position within the scope of the ongoing consultation procedure regarding the Green Paper “on policy options for progress towards a European Contract Law for consumers and businesses”:

1. Introduction

It is the objective of the Green Paper of the Commission on “policy options for progress towards a European Contract Law for consumers and businesses” “to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law”. It is the declared and explicitly mentioned target to enable small and medium-sized enterprises (SMEs) with limited resources to engage more in cross-border transactions. According to the Green Paper of the Commission, businesses are reluctant to engage in cross-border transactions, as their General Terms and Conditions have to be adapted to comply with the different regulations and in addition legal know how and translation services have to be obtained.

As a vision, the concept of a European civil law has something going for it: the question of course arises why a Common Europe still has 27 different civil right laws with varying provisions on contract law, tort law or benevolent intervention. However, the ongoing deba-

te on this subject at European level has shown that the positions of the individual Member States are so far apart that agreement regarding a legal text for a European civil law will definitely not materialize in the near future. Furthermore, as even the Commission itself remarks in the Green Paper, significant questions on competencies, subsidiarity and proportionality arise in connection with the possible creation of a European civil law. However, the Green Paper of the Commission is not concerned with furthering or developing the vision of a European civil law; but the thrust goes in a completely different direction: the proposal exclusively focuses on the reduction of trade obstacles and the completion of the single market. With regard to the overall European civil law project, the Commission focuses only on contracts, with a special mention of consumer and business contracts, the latter in particular referring to the contract for sale of goods. The Commission’s main concern seems to be to make civil law resp. contract law fully subject to market economy principles. On the other hand, no thought has been given to question what impact resp. prejudices the European Contract Law project could have on other types of contracts, for example labour or lease contracts.

The lack of consumer confidence and the reluctance of consumers to engage in cross-border business activities are based on a wide range of causes.

2. Some thoughts from a consumer rights point of view

Concerning the European Contract Law project, the Commission once again refers to familiar arguments, in respect of which consumer protection organisations from all over Europe have several times, among others on the occasion of the review of the consumer acquis (proposal for a Directive on Consumer Rights COM (2008) 614/4) asked for rectification: not only the fact that there are 27 applicable legal systems in the EU causes uncertainty among consumers. The Regulation 593/200 on the law applicable to contractual obligations (Rome I) guarantees consumers the widespread application of the contract law of their home state. The lack of consumer confidence and the reluctance of consumers to engage in cross-border business activities are based on a wide range of other causes, such as language barriers, far more difficult out-of-court and judicial law enforcement across the border in cases of disputes, no consistent access of the population to the internet, an increase in dubious online offers, difficulties in general to evaluate the reliability of online providers or problems with data security.

From the point of view of consumer policy, the project regarding the introduction of a European Contract Law presented by the Green Paper does not point towards many advantages; however, there is reason to fear significant disadvantages:

- Depending on the degree of obligation with regard to the options made available, the scope for national measures is dwindling. The project calls legal policy innovation and developing general contract and consumer law into question. In the future an acute law-making requirement, for example in respect of consumer protection measures, would not only have to pass through the time-consuming and ponderous law-making processes of the EU; it would have no chance of being realized if it concerns problems, which only affect one or a small number of Member States.

- The Green Paper frequently refers to the consumer protection law as a pure single market obstacle, which needs to be curtailed. Similar to the EU consumer acquis review based on the concept of full harmonisation, with Option 4, the Commission plans above all to withdraw consumer contracts from national law and its better protection standards: through a private autonomy decision for an instrument of European Contract Law by the contracting parties and at the same time by the exclusion of Rome I. It is emphasised that the instrument of European Contract Law will guarantee a high level of consumer protection. However, since the existence of the proposal for a Directive on Consumer Rights COM (2008) 614/4, it has become evident that the EU has by far not used the best consumer protection standards in the EU as a reference point.

It is not desirable only to instruct an expert group, as done by the EU Commission, to prepare proposals; but, Member States should be integrated in these developments right from the start.

- From a business point of view, a very high level of consumer protection would make the instrument of European Contract Law not very appealing. That is another reason to expect that the development of a European Contract Law will be primarily orientated towards the wishes of the industry.

Concerning the conception of a European Contract Law, AK urges the Commission to pay special attention to Article 169 TFEU, according to which "in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests". Both Art 12 and 114 TFEU take consumer protection into account; hence, with regard to the Treaty, the Commission has to assume a high level of protection. Apart from that Art 38 of the Charter of Fundamental Rights also states that "Union policies shall ensure a high level of consumer protection" and takes the EU Directive 44/99 into account according to which national competence may adopt or retain stricter consumer rights regulations.

3. On the question, what should be the legal nature of the instrument of European Contract Law:

Option 1: Publication of the results of the Expert Group

AK is in favour of a non-binding instrument of European Contract Law. Without knowledge of the scope and the concrete contents of such an instrument it is difficult to assess an intelligent strategy resp. such far-reaching options. From that perspective, AK follows the first of the mentioned options, where an initial step should concern the publication of the results of the Expert Group on the website of the Commission so that the Member States can familiarize themselves with the issue before entering into an EU-wide content-related debate. In our opinion, it is not desirable only to instruct an expert group, as done by the EU Commission, to prepare proposals; but, Member States should be integrated in these developments right from the start.

Option 2: An official „toolbox“ for the legislator

Under Option 2, the Commission proposes to determine the results of the Expert Group as a "toolbox", which could be used as a constant reference when drafting and negotiating legislative proposals. This "toolbox" could be determined within the scope of a Communication or a decision by the Commission resp. an interinstitutional agreement between Commission, Parliament and Council. However, without knowing the results of the Expert Group, it is difficult to comment on the meaningfulness of such a "toolbox". Within the scope of its right of initiative, the Commission has the right to make use of the results of the Expert Group it regards as useful for future legislative proposals. However, to prejudge the democratic decision-

making process in Council and Parliament by an anticipated interinstitutional agreement would not be desirable.

Option 3: Commission Recommendation on European Contract Law

Option 3 provides a recommendation by the Commission on European Contract Law, on the basis of which the Member States could be required to incorporate the instrument into their national laws resp. to replace it by a single European regulation. Alternatively, the Member States could adopt the instrument of European Contract Law as an alternative to existing national law. The non-binding nature of this option has to be welcomed, according to which each Member State could decide whether or not to adopt national law. This measure is to be welcomed as a step closer to the unification of law and could be further developed by subsequent measures, which are based on the results of the implementation by the Member States. However, a discussion on the contents of the proposals of the Expert Group would also be necessary beforehand. This content-related debate should not be pre-empted by a recommendation of the Commission.

Option 4: Regulation setting up an optional instrument of European Contract Law

In the Green Paper, AK recognises a clear preference of the Commission for Option 4, a regulation on introducing a facultative instrument of European Contract Law, to which the contracting parties B2B and B2C shall have private autonomous access. At the same time it is planned that the application of Rome I

is excluded if European Contract Laws is chosen by the parties. Option 4 is clearly rejected by AK.

This option in particular removes the protective standard of Art 6 Rome I created for contractual obligations of consumers, which ensures that consumers can apply the legal system of their home country. Also problematic - and not only from the point of view of consumer policy, but also from a constitutional point of view - is the fact that the exclusion of Rome I undermines other compulsory regulation of Private International Law, i.e. Article 9 (Intervention Standards) and Article 21 (ordre public clause). These regulations ensure the application of regulations, which are regarded by the respective state as important above all for the preservation of its public interest, in particular of its political, social or economic organisation, as well as for the preservation of its basic principles. Ultimately, certain limits are also set for private autonomy.

The Commission also draws the completely wrong conclusions with regard to Option 4. The explanations refer to a freedom of choice for both contracting parties. In doing so, the Commission overlooks the fact that consumers are normally not in a position to choose the legal system to be applied to the transaction to be concluded. In particular in the case of mass business it is the companies who determine the terms and conditions. The consumer has no choice but to accept the legal system chosen by the enterprise or forego the respective transaction completely.

In the Green Paper, AK recognises a clear preference of the Commission for Option 4, a regulation on introducing a facultative instrument of European Contract Law. This Option is clearly rejected by AK.

The AK is at this stage in favour of a non-binding instrument (Option 1), the Options 5-7 appear to be relatively unrealistic.

The choice of law by companies has another negative effect: companies will always opt for the contract law regulation, which is beneficial to their interests and involves a lower level of consumer protection. The declaration of intent promising to ensure that a facultative instrument of European Contract Law guarantees a high level of consumer protection will just pay lip service. Curtailments at the cost of the consumers are obvious.

There are now considerations, in particular in respect of the Blue Button solution developed by Schulte-Nölke, to give consumers the final choice regarding the application of the facultative Contract Law instruments. Clicking on the Blue Button in the online shop should enable consumers to contractually agree on the European legal system. In our estimate, this opinion is based on fiction, i.e. that consumers are able to anticipate the significance of such a legal choice and the advantages and disadvantages of one or the other legal system, which would allow them to take a well-informed and reasoned decision in favour of one of the two legal systems resp. contract laws. Such considerations would ask too much of consumers - even with relevant prior information. They would have to obtain professional legal advice. However, to overload every-day business transactions with extensive prior information on alternatively to be applied legal systems and to make time-consuming examinations of the contract law necessary prior to concluding a contract is also impractical and unacceptable to consumers.

Option 5: Directive on European Contract Law

Option 6: Regulation establishing a European Contract Law

Option 7: Regulation establishing a European Civil Code

As stated above, AK is at this stage in favour of a non-binding instrument (Option 1) and suggests an open discussion on the results of the Expert Group. At the moment, Options 5-7 appear to be relatively unrealistic and politically not able to command a majority; furthermore, questions of subsidiarity and proportionality arise in particular with regard to Option 7.

With a Directive on European Contract Law (Option 5), the Commission proposes the creation of common minimum standards, above which Member States' legislation could go beyond. This Option would - according to the Commission - guarantee a high level of protection for consumers. However, with two very significant limitations: on the one hand it has to be feared that even if a European Contract Law would initially only apply between businesses, this could have also an indirect effect on the general civil law system, as it could prejudice any future discussion. On the other hand, the Commission proposes that deviations would have to be reported to the Commission and published. This would cause pressure to introduce a harmonisation at the low level of common minimum standards. Apart from that, a Directive also has the disadvantage that a common Contract Law would still not be established.

The legal instruments have to be created in such an open manner that they enable a general application.

According to the latest experiences concerning the discussion on full harmonisation of consumer protection laws (see above), AK has major reservations against a Regulation establishing a European Contract Law (Option 6). This applies independently of the fact whether a European Contract Law would only apply to cross-border or also to national matters. In general, full harmonisation always leads to a lower level of consumer protection, as otherwise it would not be possible to reach the agreement of all Member States in the Council.

4. On the question what should be the scope of the application of the instrument:

An instrument of European Contract Law should - independent of how one basically sees its legal form - be oriented towards a general application. Separating consumer contracts and business contracts as well as distance selling transactions and contract conclusions in stationary trade would be highly problematic. This would create parallel contract law worlds, which could follow different developments in fundamental civil law issues, such as warranty, delayed delivery or rescinded transaction.

However, dividing the contract law can also produce imbalances in the legal system and insoluble contradictions: for example when warranty or delayed deliveries are less favourably regulated for consumers in the EU than at national

level for all who are subject to law including businesses. That way, this project of an instrument of European Contract Law would not make a contribution to simplifying the law and to the simplified application of law, but have exactly the opposite effect.

5. On the question what should be the material scope of the instrument:

AK would like to emphasise also in this context that it would almost be negligent to tailor-make the legal instruments of a European Contract Law only to certain types of contracts and not to consider the relevance for other types of contracts. The legal instruments have to be created in such an open manner that they enable a general application.

We would ask you urgently to consider our suggestions with regard to the next part of the proceedings.

Should you have any further questions
please do not hesitate to contact

Alice Wagner

T + 43 (0) 1 501 65 2368
alice.wagner@akwien.at

or

Jutta Repl

T +43 (0) 1 501 65 2277
jutta.repl@akwien.at

as well as

Frank Ey

(in unserem Brüsseler Büro)
T +32 (0) 2 230 62 54
frank.ey@akeuropa.eu

Bundesarbeitskammer Österreich

Prinz-Eugen-Strasse, 20-22
A-1040 Wien, Österreich
T +43 (0) 1 501 65-0
F +43 (0) 1 501 65-0

AK EUROPA

Ständige Vertretung Österreichs bei
der EU
Avenue de Cortenbergh, 30
B-1040 Brüssel, Belgien
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73