European Federation of Building Societies
Fédération Européenne d'Epargne et de Crédit pour le Logement
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Position of the European Federation of Building Societies on the Green Paper on European Contract Law

The European Federation of Building Societies (EFBS) welcomes the opportunity to contribute to the European Commission's consultation dated 1 July 2010.

1. What should be the legal nature of the instrument of European Contract Law?

The EFBS gives preference to the fourth option that was proposed in the European Commission`s Green paper. This option offers many advantages while the disadvantages of those options that are more intrusive for national laws (option five to seven) are being avoided.

The advantages of a 28th regime lie within the promotion of the internal market and the prevention of costly and elaborate harmonising measures on EU Member State level. Only minimal changes in the national laws regarding the choice of law for contracts with customers would be necessary for the establishment of a 28th regime. If this optional instrument was designed in a workable way and was accepted in the markets it could lead on to a real single market.

Many attempts in the past to strengthen the single market by harmonising different areas of national laws did not result in the anticipated benefit. In the past, minimum harmonisation did not lead to any alignment of different national legislations. Even fully harmonised provisions reveal legal differences, regarding the procedural application or when links to other legal areas exist (e.g. property law), which cannot be fixed by EU law. The problem of the malfunctioning of the single market cannot be solved with higher pressure of harmonisation, as the difficulties have another cause. The problem can be located in international contract law, namely in the provision of art. 6 para 2 of regulation no. 593/2008 (Rome I Regulation), as described in the Green paper on pages 3 and 4. Pursuant to art. 3 of the Rome I Regulation choosing the applicable law is possible in principle. However, concerning business-to-consumer contracts this only applies under the restriction that the contract cannot deprive the consumer of the protection guaranteed by the law of the country of permanent residence of the consumer. On the one hand this leads to the problem of having to find out about the permanent place of residence. On the other hand one has to face the difficult, if not impossible task of finding out about the pertinent consumer protection law. In the end the application of binding national rules cannot be restricted and the advantage of the choice of law is lost if eventually the law of the Member State applies in which the consumer has his permanent place of residence. In order to achieve full effectiveness of the optional regime a change of the Rome I Regulation would be necessary. In contrast to further means of harmonisation this modification and the introduction of the optional regime promise to actually improve the single market.

For practitioners, particularly in cross-border cases, it would be easier to deal with just one additional legal system (the optional instrument) than with 26 foreign systems. The freedom of choice of law is not only relevant for cross-border cases, but also for people with different places of residence and for people who move to another member state during the contract period. The aforementioned advantage takes effect in these cases as well.

Another reason to positively assess the optional instrument is the lack of compulsion to use the instrument as there is a choice to apply the 28th regime. Likewise Member States with a high degree of regulation, for example in the area of consumer protection, do not have to apprehend a decrease of the level of protection or any interventions in their legal system. A legal framework beyond national rules would be established.

Especially consumers and small and medium sized enterprises (SMEs) could obtain the necessary legal security in order to make cross-border transactions more attractive and to make the risks easier to calculate. Up to now, most of all companies have to face the problem of having to know foreign customer protection laws when making transactions with customers abroad (see above Rome I Regulation). The introduction of an optional instrument can possibly even increase the standard of customer protection, as compared to existing minimum standards, improvements can occur. An approximation of this kind is likely, as market participants will probably choose the optional instrument if, compared to their local law, it offers an advantage for one or both participants. In the long run, this competition between the different legal systems will lead to an approximation of the systems without unnecessary harmonisation on EU level.

The fact that political resistance against an optional instrument is likely to be much lower than the resistance against harmonisation is another advantage. In contrast to the other options, option four has a true chance of being realized.

It is to be welcomed that the Green Paper proposes to issue the optional instrument as a directive. A regulation leaves too much leeway to the Member States and the desired effect for the internal market could be undermined because of big differences in implementation.

All other options that were introduced in the Green Paper have to be rejected. In order to achieve an actual effect for the single market, option number one, two and three are not sufficient, as they provide too little incentive for implementation. The positive effect for the internal market would not kick in or take too long. Furthermore, these options do not leave any possibility to the European Institutions to take any democratic influence. The remaining options, namely option five to seven interfere strongly in the national legal systems. Harmonisation of traditionally grown legal systems, whose particularities, including the jurisdiction, have developed over decades and are fitted to the respective country, is not desirable. Moreover, the costs of such an intervention are much higher than the costs of the optional instrument. At the same time it is doubtful if the benefit was higher. In addition to this, these options contradict the principle of proportionality and the principle of subsidiarity.

2. What should be the scope of the application of the instrument?

a) Should the instrument cover both business-to-consumer and business-to-business contracts?

Both, business-to-business and business-to-consumer contracts should be covered, as the benefit for the single market is that SMEs can more easily participate in cross-border trade. The burden could be taken off the companies if the export could be coordinated by using a single instrument instead of having to deal with multiple foreign legal systems. A real benefit for the internal market can only be achieved if business-to-business contracts are included.

b) Should the instrument cover both cross-border and domestic contracts?

Ideally, consumers and businesses should be able to choose the optional instrument not only for cross-border, but also for domestic contracts. If the political opposition against domestic application turns out too strong, a gradual implementation could be considered. In the beginning the cross-border reference can be made a necessary criterion. In order to achieve the aforementioned advantage of approximation of laws it is necessary to apply the optional instrument to domestic contracts as well.

3. What should be the material scope of the instrument?

a) Narrow or broad interpretation?

According to the EFBS, the scope of the interpretation of the instrument should be broad in order to achieve the maximal benefit and legal certainty. If questions of restitution and non-contractual liability were excluded, the optional instrument would automatically be less attractive, as one of the contracting parties could have to face the disadvantage of having to deal with a foreign legal system.

b) Should specific types of contracts be covered by the instrument?

It has to be taken into account that focusing on specific types of contracts limits the benefit for the single market to these kinds of contracts and related transactions. However, it cannot be denied that, if other types of contracts should be included, the optional regime hast to be elaborate enough to constitute a real alternative to national laws. If this is the case, there is nothing to prevent an application on services agreements. If the progress of the 28th regime is advanced enough to allow an application on services agreements, cannot be assessed today, as the Expert Group has not yet finalized its works on the chapter of special contracts. The results are still pending. Basically, it can be said that the maximum benefit of an optional instrument can only be achieved if it is applicable to as many types of contracts as possible.

The EFBS even wants to go one step further and broaden the perspective on the area of mortgage credits. From the EFBS point of view, an optional instrument in the area of mortgage credit is extremely attractive. Currently, there is no functioning single market for mortgage credits in the EU. The Association of Private German Bausparkassen, the German Public Bausparkassen and the Association of German Pfandbrief Banks have launched an expert report on this topic which is authored by the Institut der deutschen Wirtschaft in Cologne. The result is the study "A European Internal Market for Housing Finance". The study concludes that an optional instrument is the best solution for the area of mortgage credit. The study comprises, inter alia, an analysis of seven largely representative markets, namely Denmark, Germany, France, Netherlands, Poland, Spain and UK.

This analysis reveals major differences in housing finance and explains the underlying reasons extensively and elucidates the reasons why a fully integrated internal market is not feasible. The reasons are, inter alia, the customer's preference for local providers, greater confidence in national banks, a preference for locally present providers and linguistic and cultural barriers. Cross border housing finance is a major exception in the EU. For this very reason, it is fatal that the Commission promotes egalitarianism with its current proposal to harmonise the area of mortgage credit. *„Full harmonisation of mortgage credit would, of necessity, lead to reduced, not expanded product diversity. Precisely the example of early repayment fee regulation shows what consequences political interventions may have. In Spain, for example, the cap on early repayment fees has resulted in an almost complete disappearance of fixed-interest loans. Macroeconomic risks are visibly on the increase as a result of steep residential property price declines. It must be added that the high consumer protection standards most probably introduced within the framework of harmonisation in*

certain countries may lead to massive problems. Restrictive liability regulations, for example, may result in a clear decline of lendings to subprime households, which would be the origin of housing access problems in countries with poorly developed rental housing markets."[1]
A better method to allow further integration of the internal market is an optional instrument for mortgage credits. *„A uniform European mortgage credit contract existing in addition to national products might help overcome problems of cross-border financing without causing damage to national markets. To this end, the European mortgage credit contract should be made as flexible an instrument as possible so as to cover the widest possible range of products. The European company statute represents an example of such a solution. The introduction of such a European product will cause systemic competition which will lead to continuous improvements in the frameworks of national and European products. At the end of such a process could then really be a uniform market for mortgage credits. (…) Such a 28th regime should be supported by a Eurohypothek, and access to land and credit registers should be made easier."*[2] The legal basis for an optional European mortgage credit contract can be found in Art. 114 TFEU (former art. 95 EG).

4. Establishment of a European Civil Code?

The EFBS is explicitly opposed to the establishment of a European Civil Code as no unification of law can be achieved by this. According to the Green Paper a European Civil Code would deal with contract law, tort law, unjustified enrichment and the benevolent intervention in another`s affairs. Other areas of civil law would not be covered, thus, some legal relationships would not be regulated on European level even though they might have a major influence on the specific contract. Even if the conclusion of a contract, the contract itself, declaration of intent and legal capacity were regulated in a European Civil Code and even if these rules were identical throughout the EU, the spousal consent for example, which is necessary in many legal systems would lead to different results due to the differences. In some Member states the contract would be concluded while in other Member States no contract would emerge. Another area of law that differs considerably between the Member States is real estate liens.

What is more, the legal enforcement at court will vary as the court systems differ in the Member States. The same applies to appeal procedures and judgements that can be passed by jurors or judges. Rules on evidence for proving the conclusion of a contract are regulated differently.

Any intention to establish a European Civil Code will not lead to an identical application and implementation in the 27 Member States but differences will remain. Because of this and the previously mentioned disadvantages an intervention of this kind cannot be justified. Moreover, it was already mentioned before that a European Civil Code contradicts the principle of proportionality and the principle of subsidiarity.

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[1] Study of the Institut der deutschen Wirtschaft Köln (IW) in cooperation with Zentrum für Europäische Wirtschaftsforschung Mannheim (ZEW) and Prof. Dr. Johannes Köndgen, University of Bonn, title: A European Internal Market for Housing Finance, p. 176.
[2] ibid.