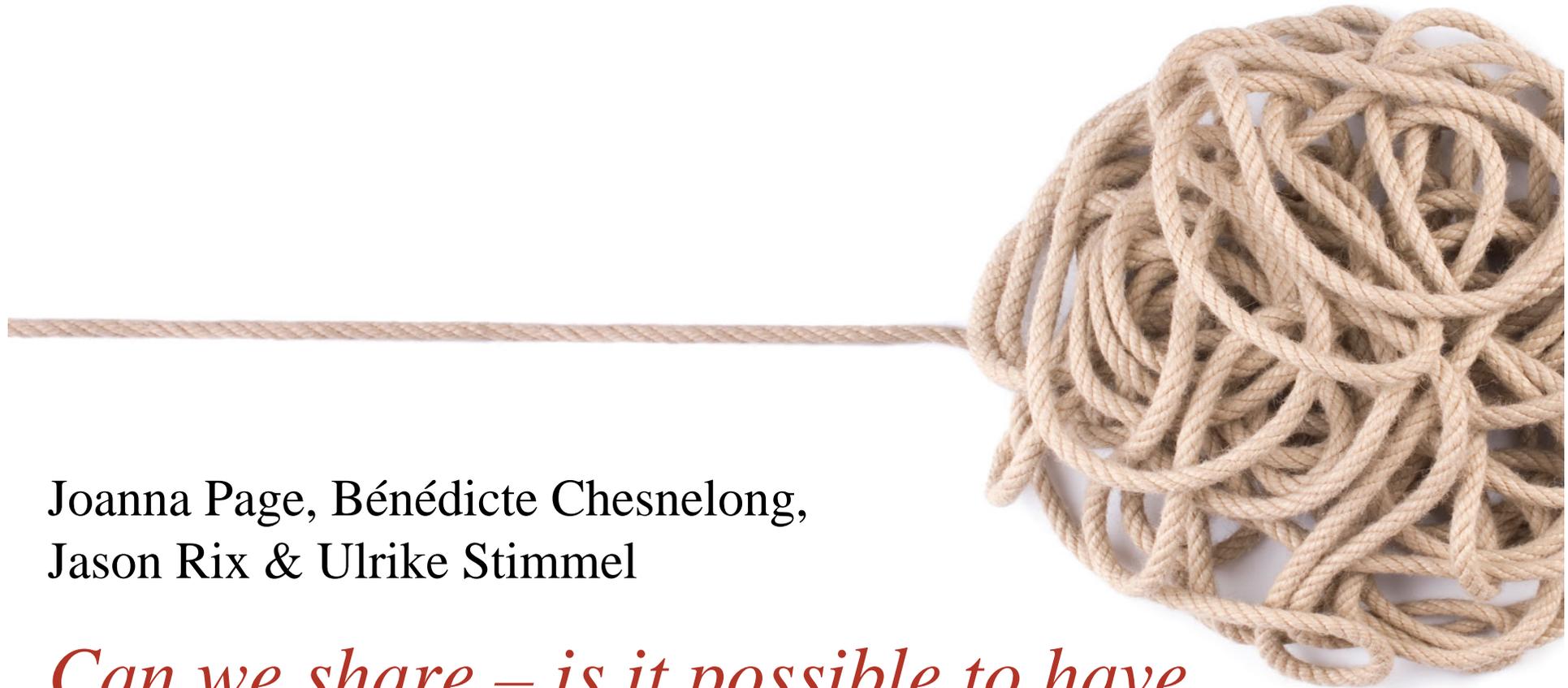


# ALLEN & OVERY



Joanna Page, Bénédicte Chesnelong,  
Jason Rix & Ulrike Stimmel

*Can we share – is it possible to have  
a single pan-European contract law?*

## Key players



**Viviane Reding**  
Vice President of  
the Commission

**Klaus-Heiner Lehne** MEP  
Chair of the Committee on  
Legal Affairs



**Diana Wallis** MEP Vice  
President of European  
Parliament



## Setting the scene – *Bénédicte Chesnelong & Jason Rix*

### *10 years to get the Green Paper*

- 2001**            Communication on European contract law
- 2003**            Action Plan
- 2005-2009**    Draft Common Frame of Reference (including contribution from Association Henri Capitant)
- Apr 2010**      Expert Group appointed
- Jul 2010**      Commission publishes Green Paper
- Jan 2011**      End of consultation on Green Paper
- May 2011**     Feasibility study published

## The Green Paper – 7 Options

1. Publication of the results of the Expert Group
2. An official "toolbox" for the legislator
3. Commission Recommendation on European Contract Law
- 4. Regulation setting up an "optional instrument" of European Contract Law**
5. Directive on European Contract Law
6. Regulation establishing a European Contract Law
7. Regulation establishing a European Civil Code

## Some responses to the Green Paper

- **UK Ministry of Justice** – absence of need
- **GC 100** – values certainty and that already exists in law of MSs
- **ISDA** – look at the global perspective
- European Association of Craft, Small and Medium-sized Enterprises (**UEAPME**) – contract law not a major obstacle to trade
- **European Consumer Organisations**
- Opinion letter of the **Fondation pour le Droit Continental** – lessons to learn from Louisiana (US) and Québec
- **Bundesministerium der Justiz**

## Expert Group's "feasibility study" – *Ulrike Stimmel*

- Expert Group:
  - Academics, former judges and legal practitioners from across EU
  - 12 monthly meetings
- Commission published results on 3 May 2011:
  - Explanation on relevance with examples
  - Summary of green paper responses
  - **Draft law – 189 articles**
- Commission Consultation:
  - 7 questions on contents
  - Less than 2 months time for review: **responses by 1 July 2011**

## Scope of proposed new law

- No provision on overall scope in draft
- Working premises for the Expert Group:
  - Self-standing instrument of European contract law
  - B2C and B2B contracts
  - Sales contracts and service contracts associated with sales
    - Art 150(2): **"This Part does not apply to [...] financial services"**
  - High level of consumer protection?
- Yet unknown:
  - Optional? For whom?
  - Only cross-border or also domestic?

## The structure of the draft

- Part I      Introductory provisions
- Part II     Formation of contract and rights to withdraw or avoid
- Part III    Assessing what is in the contract
- Part IV    Obligations and remedies of the parties to a sales contract
- Part V     Obligations and remedies of the parties to a related services contract
- Part VI    Damages and interest, restitution and prescription

## Overview of contents

- General concepts: reasonableness, good faith
- New law to be interpreted autonomously
  - References to ECJ
- Freedom of contract vs. consumer protection:
  - Many separate rules for B2C and B2B
  - B2B: almost all rules can be contracted away
  - B2C: many rules mandatory
- Incorporating EU consumer protection concepts:
  - Distance selling, unfair terms and conditions

## Impact: a German perspective – *Ulrike Stimmel*

Would the new law be popular in Germany?

- German responses on 28th regime as proposed in Green Paper:
  - *Yes*: Federal council, bar, private banks
  - *Sceptical*: government, parliament, consumers, chambers of commerce
  - *No*: Industry Federation, co-operative and savings banks, SMEs
- General views of many stakeholders:
  - Other obstacles for cross-border trade: language, culture
  - Uncertainty for lack of case law
  - 2 parallel sets of rules complicated and costly

## Impact: a German perspective – *Ulrike Stimmel*

- German stakeholders' wishes – achieved in draft?
  - User-friendly: clearer language and structure than Civil Code
  - Level of consumer protection?
    - Views: must be balanced for law to be acceptable for both sides
    - Draft: overall better protection than German law (instant return of faulty goods)
- How does draft compare with German law generally?
  - Familiar concepts: good faith, unfair exploitation
  - Some provisions appear to be taken from Civil Code, eg limitation periods, computation of time

## Impact: a French perspective – *Bénédicte Chesnelong*

### *General remarks*

- An amazing mix of codification and case law
- A three pillar set of common values: security, loyalty, freedom
- Some concepts familiar to French contract law
  - ✓ Information, good faith, "vice du consentement" (vitiating consent), freedom etc...
- The French fundamental concept of "force obligatoire des contrats" (the binding nature of a contract) is less clear
- A codification far removed from the French concept of codification which aims to set general rules rather than deal with specific matters

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## Impact: a French perspective – *Bénédicte Chesnelong*

### Strengths

- Same rules for B2B and B2C transactions within the EU
- A search for practical solutions
- A full set of rules from goods delivery until maintenance
- An attempt to be pragmatic

### Weaknesses

- No provision about the opt in rules
- Capacity to contract will remain governed by national laws
- Likely to be challenged because subjective and vague concept of "reasonableness"
- Many potentially contentious or unrealistic provisions
- Lack of coherence/simplification and attractiveness in comparison with French consumer law

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## Impact: an English perspective – *Jason Rix*

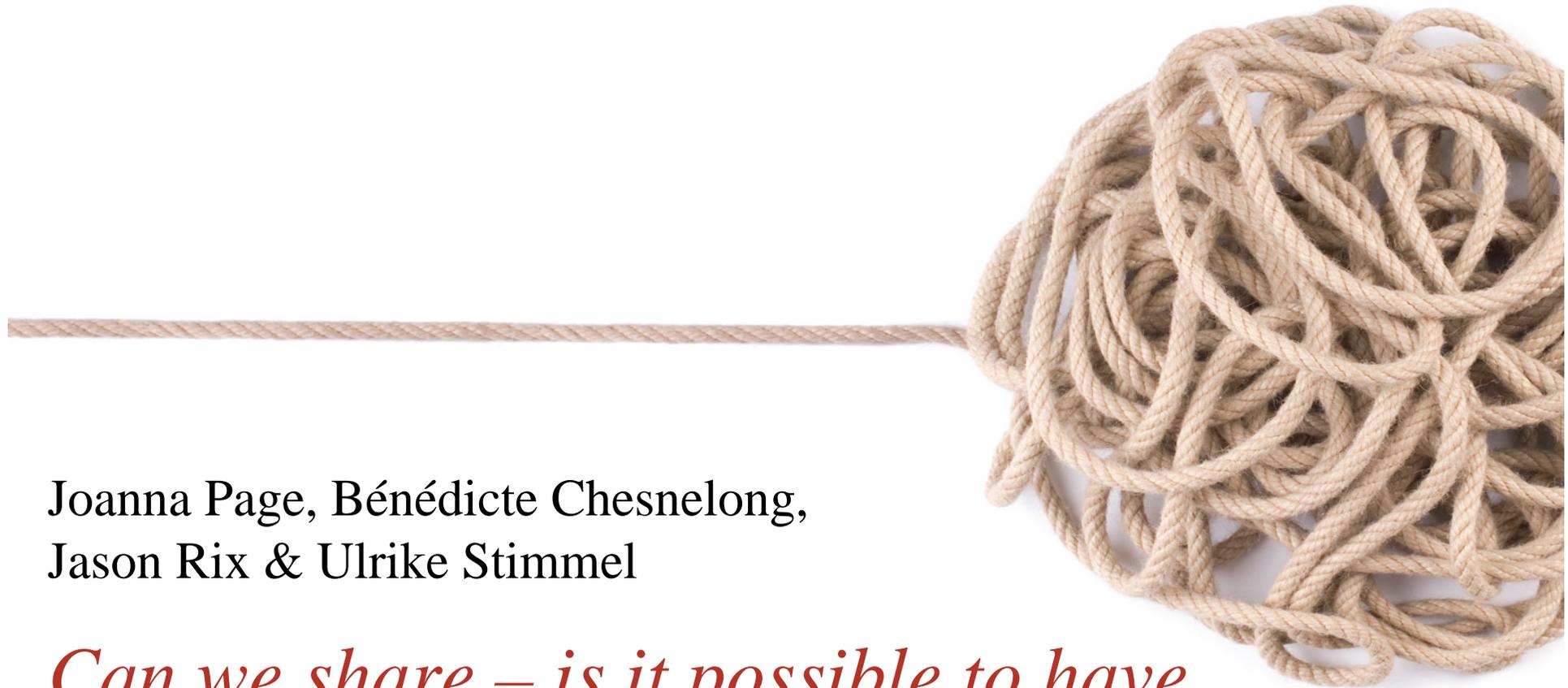
- Concept of autonomous code unfamiliar
- Cannot look at previous case law
- Negotiations: good faith and fair dealing
  - parties must "negotiate in accordance with good faith and fair dealing" and must not "break off negotiations contrary to good faith or fair dealing" (Art 27)
  - "the supplier has a duty to disclose to the other business any information concerning the main characteristics of ..... goods or services ..... which it would be contrary to good faith and fair dealing not to disclose to the other party" (Art 23)
  - A reversal of caveat emptor? Must not misrepresent but duty to disclose?

## Impact: an English perspective – *Jason Rix*

- Standard terms:
  - B2B terms unfair if they are not individually negotiated, significantly disadvantage the other party, and grossly deviate from good commercial practice, contrary to good faith and fair dealing (Art 85)
- Contractual interpretation
  - preliminary negotiations are relevant (Art 57)
  - interpreted according to common intention (even if subjective)
  - which trumps meaning given by reasonable person (Art 56)

## What next?

- UK European Scrutiny Committee meeting 24 May 2011
- European Parliament vote 6 June 2011
- Impact Assessment published by Commission
- Commission report on responses to Green Paper
- Commission makes legislative proposal Autumn 2011



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