

EUROPEAN CONTRACT LAW

28TH REGIME – BEUC'S 10 RESERVATIONS

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Introduction

The Commission plays roulette with consumer protection

The Commission's initiative for a European Contract Law which intends to introduce a new concept of rule-making is highly experimental and bears clear risks for European consumers and the future development of consumer law at national and EU level.

The "optional" European Contract Law claims to promote the online Internal Market, but its underpinning concept is inappropriate for b2c transactions. While BEUC acknowledges the instrument's high standard of consumer protection in some areas, we are opposed to its nature, which puts businesses in the driving seat and would allow them to decide what rules applies, even if this means the imposition of a lower level of protection than in national laws or avoidance of modern rules covering digital products.

By introducing a European body of law at the disposal of business, national law suddenly would become 'optional' too – it does not apply anymore if business so wishes.

The Commission will unveil its legislative proposal on European Sales Law, Tuesday 11 October.

On the following pages you will find a more detailed explanation of our reservations.

Glossary

28th Regime – Would be the consequence of the European Sales law proposal. Results in a European parallel system of law which business can choose in addition to the other 27 national Member State contract law systems.

Consumer Market Scoreboard - Every 6 months the European Commission publishes this detailed data on consumer market trends. It involves key statistics and conclusions as to the functioning of the Single Market. www.ec.europa.eu/consumers/strategy/facts_en.htm

Eurobarometer – The twice yearly surveying of 1000 consumers in each of the 27 Member States. Contains detailed statistics on a specific issue. For the 'optional' European Contract Law, the most relevant are 299 and 300 on consumer protection. www.ec.europa.eu/public_opinion/archives/eb_arch_en.htm

The Consumer Rights Directive - A major revision of the parts of EU consumer law acquis to be finally adopted October 10 after 3 years of work. This fully harmonises many of the main elements of distance (including online) and doorstep contracts such as information obligations, delivery and the right of withdrawal.

The Rome I Regulation - This 2008 law stipulates that in a cross-border dispute between a business and consumer, the judge can decide that the consumer benefits from the national level of protection if the legal system chosen by the business is lower in comparison. For example, a German consumer disputing the return of a homeware product bought online from an Italian trader using Italian law, will in case of court litigation have his German rights enforced should they be better than the Italian provisions. The European Sales law would bypass this regulation.

BEUC's reservations

1) 'Optional regulation' does not work for consumer contracts

Consumer contract law by definition is mandatory because it must protect the weaker party of the contract. It can only fulfil its purpose when it applies to ALL business and consumers, and both parties are obliged to respect it. This new instrument, which many doubt the EU even has competence for, would result in:

Scenario 1: If the level of protection remains very high, business will not offer it to the consumer. Because the trader is the one to decide on the availability of this new European 'law', the high level of protection will not be of any consumer benefit as it will never apply. Therefore this initiative would only cost a lot of money and time and might slow down other more important measures to improve consumer confidence.

Scenario 2 (and much more likely): If the level of consumer protection is lowered down to something average, a 'race to the bottom' would be the result. Business could sell in countries with high protection using this instrument of 'average' protection level. This would undermine national standards and disrupt competition. And so consumers would lose rights for the sake of the alleged improvement of the EU Single Market

2) No need for this initiative for the b2c market

Consumer law harmonisation has been a pillar achievement of the EU. A fine body of legal safeguards have been carefully constructed and put in place. As of 2013 the national laws for online b2c contracts will be almost fully harmonised by the recent Consumer Rights Directive, adopted 10 October, 2011.

The few missing pieces can be dealt with by business by applying high consumer standards valid across the EU in their contract terms and conditions (see point 8 below). This is precisely what successful traders already do.

3) The Commission's economic case is flawed

The Commission's Eurobarometer recently found a mere 9% of EU consumers made cross-border purchases in a year¹. The Commission repeatedly states one of the biggest obstacles to Single Market progress is the variety of national consumer contract laws, therefore a European contract law is an urgent need. However, no evidence has been shown to support the proposition that the differences in law are a major obstacle. SMEs say that this is not the case.

The statistics from a commercial perspective are revelatory. The Eurobarometer found that nearly 80% of traders said harmonised contract law in the EU would make "little or no difference to their cross-border trade"².

Crucially, the Commission's biannual Single Market analysis, The Consumer Market Scoreboard, found that the major reasons for a lack of cross-border trade are practical: 62% of consumers who had not bought cross-border cited fears of fraud, 59% feared what to do if problems arose and 49% were concerned about delivery. The 'European Sales Law' would not address any of these.

BEUC's reservations

4) Informed consumer choice impossible

European Consumers already have to make complicated choices between products and services in increasingly complex markets. It is unreasonable to expect consumers to know about two competing legal systems.

On what basis could they decide whether it is better to buy under the "optional" European Contract Law or look for a trader who offers the same product but under traditional, national, legal rules? This is not possible for consumers and it is not their role in the Internal Market.

5) More confusion for consumers and small business

The introduction of an 'optional' European Contract Law would increase legal uncertainty and create confusion not only for consumers, but also for SMEs. An additional layer of legislation would not achieve its stated aim of easing cross-border transactions for businesses and consumers, but instead increase their complexity for many years to come.

European consumers will be faced with a situation in which different rules apply to the same products (or services?). They will have to bear in mind how, and under which, conditions they have bought something in order to know which rules apply. This is not the clear and solid legal framework that European consumers need and want.

Moreover, Member States can decide to apply the 'optional' European Contract Law also to domestic and not only to cross-border purchases. This would create even more disorder for consumers and would not be at all acceptable.

6) High level of protection in specific fields, but no business obligation to apply

We acknowledge that the Commission proposes a very high level of protection in the field of legal guarantees for when a faulty or non-conforming good is delivered to a consumer. This is laudable, but as long as business can choose whether or not to use it, it will remain '*lettre mort*'.

Likewise, it is commendable that the Commission includes rules for digital products. But these rules are urgently needed in 'real' law so that all consumers have clearer and better rights in this quickly growing area. As proposed by the Commission, digital content rules will only apply if the businesses who sell these products want to use them. Will they in practice?

7) Traders are given the option to decide to what extent they are bound

The EU initiative will give the trader the choice whether the European rules or the existing national laws will apply or not. For example, an online business which sells software cross-border will decide if it wishes to use modern European rules on defective products or prefer to stick to national law, which is unclear as regards consumers' rights. So business may well be uninterested in using the new rules and nobody will oblige them to apply better standards.

BEUC's reservations

8) Never change a winning formula: EU consumer law at stake

There is a fundamental difference between b2b on the one hand and b2c on the other. One which the Commission does not seem to consider: to date no EU law harmonisation of b2b contract law has taken place at all. In contrast, in the field of consumer law, the EU has built a large acquis over the past 3 decades. There is no need to double the rules with a new EU sales law which apply to b2c contracts. There is no need to change the traditional, successfully employed regulatory tools in this field.

We call on the Commission to continue modernising and standardising EU consumer contract law by true legislation, not by optional rules.

The main market field to address in the short term is clear EU law (i.e. not optional) for downloaded digital products. A legislative proposal for a directive should be issued in the very near future and not only once the optional regulation enters into force – this could take years – well beyond the current Commission's term of office.

9) Better alternatives are at hand, but need more attention

The consumer specific aspects of the Commission's proposal could be an interesting initiative to guide business on what rules they should consider in their contract terms if they sell cross-border to consumers.

The EU Commission should facilitate the drafting of EU model contracts, based on the useful work of the Commission's expert group, instead of imposing a highly complex instrument which would prove very costly and create new legal uncertainty.

A European Model Contract has been proposed by BEUC and could be used to extend comprehensive protection to consumers whilst easing issues for businesses who have hesitations over cross-border trade. It would prove an effective, non-intrusive asset.

10) Redress is the real issue

The EU should be directing its energy towards redress for consumers in cross-border situations. The evidence shows a great need for these. Methods currently proposed include both judicial Collective Redress and Alternative Dispute Resolution (for more info see BEUC Factsheets, available at www.beuc.eu)