Amending the CESL proposal

Ursula Pachl
Deputy Director General

Hearing EP JURI Committee
Brussels
19 March 2013
Structure of intervention

1) Is the reduced scope to cover only distance selling contracts a positive step?

2) What is the impact of the proposed alternative amendments aiming at the reduction of consumer rights?

3) What is the impact of the amendments to digital content contracts and the attempt to include cloud computing?

4) Does CESL as amended fulfill its objectives to promote consumer and business cross-border e-commerce?

5) Conclusions
1) The amended scope – or how to increase fragmentation - part 1

A DUAL system for on-line and off-line contracts would create

• **Duplication** of the EU consumer right directive
• Fundamentally **different rights** for on-line versus off-line contracts on issues not justified by selling method
• **Undermining of consumer confidence** in cross-border on-line shopping
• **Discrimination against** consumers who do not want or cannot shop cross border on-line (for example regarding digital content contracts)
• **Regulatory costs** for business who sell offline and on-line which might have four different standard contracts (for off line, for on-line with Cesl, for on-line cross-border without Cesl and for on-line domestic contracts)
• **Increased Complexity and legal uncertainty** in cross-border e-commerce instead of fostering it
• **Competitive distortions** between businesses trading on-line domestically and those trading on-line cross-border and those trading off-line
1) The new scope - Is an « EU online consumer sales law » necessary? - Part 2

<table>
<thead>
<tr>
<th>Part I</th>
<th>General principles of contract law air dealing, freedom of contract etc</th>
<th>Not necessary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part II Making a binding contract</td>
<td>Pre-contractual information</td>
<td>Dir 2011/38 CRDir</td>
</tr>
<tr>
<td></td>
<td>Conclusion of contracts</td>
<td>Dir 2000/31 E-commerce Dir</td>
</tr>
<tr>
<td></td>
<td>Right to withdrawal</td>
<td>Dir 2011/38 CRDir</td>
</tr>
<tr>
<td></td>
<td>Avoidance of contracts from mistake, fraud, unfair exploitation</td>
<td>Directive 2011/38 partially covered /not necessary</td>
</tr>
<tr>
<td>Part II Assessing what is in a contract</td>
<td>Interpretation, Content and effect</td>
<td>Not necessary</td>
</tr>
<tr>
<td>Part IV</td>
<td></td>
<td>Dir 1993/13 Unfair Terms</td>
</tr>
<tr>
<td></td>
<td>Unfairness</td>
<td>Dir 1999/44 (partially covered: further harmonisation plus inclusion of digital content needed)</td>
</tr>
<tr>
<td></td>
<td>Obligations and remedies of the parties to a sales contracts</td>
<td>Not very relevant, not necessary for cross-border</td>
</tr>
<tr>
<td>Part V</td>
<td>Obligations and remedies of the parties to a related service contracts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Damages and interest</td>
<td>Not necessary for cross-border e-commerce</td>
</tr>
<tr>
<td>Part VI</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Part VII</td>
<td>Restitution</td>
<td>Dir 2011/38 CRD Dir 1999/44 Consumer Sales dir.</td>
</tr>
<tr>
<td>Part VIII</td>
<td>Prescription</td>
<td>Dir 1999/44 Consumer sales (partially) Not necessary for cross-border e-commerce</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>Model form on withdrawal</td>
<td>Dir. 2011/38 CRDir</td>
</tr>
</tbody>
</table>

- The major relevant elements of a b to c online contract are covered already by EU law;
- The consumer sales directive should be modernised and include digital content (see in green);
- An « On-line CESL » for b to c is not necessary;
2) Amendments to reduce consumer rights - part 1

3 alternatives proposed on the right to terminate

**Option 1:** Establish the seller’s right to cure after 6 months (AM 143):

**Result:** Reduction of rights of EU consumer acquis as regards choice of remedies and in several Member States

**Option 2:** No right to termination if consumer doesn’t notify (AM 150):

**Result:** Reduction of rights in several Member States

Confusion for consumers in relation to national rules on duty to notify (many MS do not have it for remedies / some differently)

Option 2 is least damaging in terms of consumer protection

**Option 3:** Consumers’ obligation to pay for use (AM 183):

**Result:** Significant worsening of rights of EU consumer acquis and at national level
2) Amendments to reduce consumer rights - part 2

**Option 1 & 2** (reduced right of termination)
in combination with
• amendment 185 (business right to claim damage for deterioration) and
• Art 174 (business right to claim payment for use if termination not equitable)

**Option 3** (business right to claim payment for use in all cases)
In combination with
• amendment 185 (business right to claim damage for deterioration)

RESULT:
**JURI draft: right to termination is no right in practice because of formal and economic barriers**
3) Amendments on digital content and cloud computing – Part 1

1) Remedies for « non-monteray » digital content (Am. 145)

Introduction of remedies is welcome

2) Restitution of digital content (Am. 175)

Problematic for example: if defective, consumer cannot return bc must be sealed; for non-tangible medium: depends on seller’s arrangements, not on the need of consumer;

3) Inclusion of cloud computing as a « related service » (Am 41)

Gret legal uncertainty
How CESL covers cloud computing and what forms are entirely unclear;
3) Amendments on digital content and cloud computing – part 2

CESL as proposed /amended by JURI draft on digital content is overall laudable BUT in practice will not solve consumer problems because

1) Its optional nature: Business selling digital content on-line will not use CESL and thus consumer will not benefit
2) CESL does nothing to clarify what is unfair in contract terms for the use of digital content
3) Confusing rules on cloud computing create legal uncertainty

RESULT: CESL will delay legal reform for many years and deprive European consumers of the necessary rights in relation to digital content –

The EU has an obligation to protect ALL consumers, not only those selected by business
4) CESL as amended - objectives better attained ?

BEUC’s reasons why we do not support an optional sales law remain valid in view of the new scope.

- No need: most concerned stakeholders agree, supported by evidence; 40% of consumers buy already cross-border on-line
- No real “choice” for consumers
- Confusion for consumers and SMEs
- Increased legal uncertainty and complexity for SMEs and consumers
- Consumers worse off under CESL compared to national law in certain fields
- CESL blocks necessary improvements and modernisation of consumer law
- A dual regime on-line/off-line creates more fragmentation
- Better alternatives are at hand
5) Conclusions

- JURI draft report doesn’t address BEUC’s concerns

- An **impact assessment** is needed for the proposed new scope; impact on on-line sales has not been evaluated

- Instead of CESL, we need to address the **real key barriers to cross-border trade**, i.e. tax regimes, copyright regimes, payment tools, delivery of parcels, business perceptions;

- Alternative tools, such as model contracts linked to ODR, should be developed;

- “**Mixed” harmonisation** via directives is a valid regulatory tool – review 1999/44 sales directive to modernise and include digital content
Thank you for your attention.

ursula.pachl@beuc.eu

Our most recent papers on European contract law available on website: :

www.beuc.eu

Consumer Contracts Team

BEUC/X/118/2011 Analysis of the Commission’s impact assessment
BEUC/X/14/2012 Position on the pCESL
BEUC/X/23/2012 Proposal for an EU model contract
BEUC/X/55/2012 The CESL chapter on unfair contract terms