

OPTIONAL INSTRUMENT FOR B TO C CONTRACTS

English translation of the letter sent to
Mrs Françoise Le Bail, DG Justice Director,
on 27 October 2010

(Ref.: MGO/UPA/102010210/go)

Contact: Monique Goyens & Ursula Pachl – consumercontracts@beuc.eu

Ref.: X/088/2010 - 21/12/10

BEUC, the European Consumers' Organisation
80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

 EC register for interest representatives: identification number 9505781573-45 

Dear Ms. Le Bail,

On behalf of BEUC, the European Consumers' Organisation, I would like to extend my sincere thanks for the interesting discussion which my colleague Ursula Pachl and I held with you and your colleagues on Monday, 18 October. Thank you for listening and your openness to such a discussion.

We also take due note of the Commission's intention, within the framework of its preparation of an optional instrument on European contract law, to guarantee a high level of protection for European consumers. We welcome this approach.

However, I would like to reiterate here the concerns which consumer organisations are voicing as regards the process that is currently under way, as well as its very foundations.

First, it is obviously difficult at present to adopt a detailed position on the implications, and in particular on the relevance and added value both for businesses and consumers, of such an optional instrument because its scope **has not yet been spelled out** in terms of:

- The identity of the party who chooses its application;
- The types of contracts targeted (national, cross-border etc);
- The nature of the products and services covered (material, digital, intellectual);
- The contractual obligations targeted by harmonisation;
- Its relation to other legal instruments (Directives, national mandatory law, private international law).

Accordingly, **until the instrument's outlines have been clearly defined**, an assessment of its impact on the different economic operators is impossible and discussions cannot but remain vague and not as productive as could be.

I also wish to convey that the Commission's approach, which will result in an imbalance of choice between operators and consumers, in our view reflects a **significant deterioration of the consumer Acquis**, built up over the past half-century. Mutatis mutandis, we are returning to the 19th century system of civil law, based on an inequality of parties and the principle of contractual autonomy.

Indeed, the Member States have reflected in their successive legislations the awareness that consumer relations are **pre-formatted and based on acceptance**, with contractual terms imposed unilaterally by the operator. They have adopted mandatory measures which allow for no derogations by mutual consent between the parties, precisely with the aim of protecting consumers from pressure (particularly on prices) and exempting the operator from such protection.

That is precisely why, two years ago, the European legislator adopted rules for consumer contracts under private international law whereby consumers are by default protected by the law of their country of residence in the majority of online cross-border purchases. Even if the company opts for application of another law, consumers cannot be deprived of the protection offered by more protective rules in their country of residence.

However, even though the optional instrument would contain mandatory provisions that present a high level of consumer protection, its effect will be that if consumers wish to buy a product supplied by a company, provided that the contract is concluded under the rules of the optional instrument, or if they wish to obtain a lower price (which remains to be demonstrated and at present falls more within the realm of hope than probability, in the light of our experience), in some cases they will have to give up national protection that works in their favour.

This approach will inevitably lead to a decline of consumer protection in many countries and totally disregards the inequality of bargaining power and the reality of pre-formulated standard contracts in consumer relations.

It places completion of the Single Market at the service of enterprises ahead of the protection of consumers' interests. The advantages that companies will draw from a uniformisation of applicable law is real indeed, whereas the advantages for consumers of such uniformisation are non-existent or indirect in the best of cases, and can be easily neutralised by companies' commercial policies.

Overall, we consider that the process initiated by the Commission, and which entrusts the development of an optional instrument for consumer contracts to a group of experts and a "Sounding Board" is **premature**.

- First, because the draft directive on consumers' rights which will cover essential parts of legislation applicable to consumer contracts is still in the first-reading stage. Given the very large number of amendments tabled by the European Parliament and changes the Council is taking under consideration, the Commission's proposal is certain to be extensively amended. This is why the work in progress and the discussions under consideration by the Sounding Board on the aspects covered by the proposal for a directive seem to be somewhat hasty and constitute an inappropriate use of resources.
- Second, the documents from the expert group presented to date to the Sounding Board evidence a lack of sufficiently detailed analysis since the specific characteristics related to the mandatory nature of consumer protection legislation are not often taken into account.
- Third, there is no escaping the fact that the work carried out by the expert group reveals a lack of structure and strategy. This weakness is probably due to the fact that the experts themselves do not know the outcome of this initiative or how it will impact citizens. According to our analysis, the origin of these difficulties lies in the absence of essential preparatory work. For example, the work of the expert group should be based on a solid and complete evaluation of the rules likely to be changed at national level, rules from which there can be no derogations in consumer contracts (Art. 6, paragraph 2 of the Rome I Regulation). Such an evaluation appears necessary to identify which national mandatory rules would no longer apply in consumer contracts and what level of protection would be required in the optional instrument. In addition, the draft directive on consumers' rights should be compared with the common frame of reference and with provisions adopted by the Member States in application of the principles of minimum harmonisation. However, since such an analysis is not possible at this stage (see first sub-paragraph above), it would only make sense once the directive is adopted.

In this context, it is very difficult for the BEUC to contribute in a fully informed way to the reform process under way. You will doubtless agree that the ongoing reflection process within the European Commission will have a significant potential impact on the application of consumer law in the Member States. This impact could be such that it is essential to take the time needed to evaluate the scope of the measure seriously. For that reason, we urge the European Commission to suspend the expert group's work on consumer contracts and, before taking any other initiative in this area, to carry out the ground work needed to prepare an effective consumer protection instrument worthy of the confidence of European consumers.

Lastly, an optional instrument will require a large-scale information campaign among consumers to ensure that they do not feel duped by the European initiatives. Consumer organisations will have a key role to play in relaying this message to the public. In the present-day context, we cannot however support the initiative and will certainly not advise consumers to choose the optional instrument.

On the other hand, we recommend the adoption of an approach that gives effective consideration to the real problems encountered by cross-border consumers, which concern the handling of difficulties (practical implementation of guarantees, delivery problems, and complaints). For example, standard European contracts combined with an effective online alternative dispute resolution system would be a much less intrusive solution and would constitute an alternative in the interests of all parties, consumers and SMEs alike. This would limit the risks (which are very low in any case) for businesses of being involved in a lawsuit in another Member State with the application of foreign law.

Of course, we would be pleased to be able to continue the dialogue on these different aspects for the sake of identifying an effective system of contractual protection of consumers, which can enable enterprises, and in particular SMEs, to tap more widely into the European market.

Respectfully yours,

Monique Goyens
Director General