

EUROPEAN CONTRACT LAW

Optional instrument for consumers to business contracts


Letter sent to Ms Françoise Le Bail, DG Justice Director/
European Commission, on 17 September 2010

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Dear Ms Le Bail,

Re: *European Contract Law – optional instrument for consumers to business contracts*

I am writing on behalf of BEUC, the European Consumers' Organisation to express our thoughts and concerns in relation to the Commission's initiative on European contract law, and more in particular on DG Justice's current deliberations and preparatory work related to an optional instrument for business-to-consumer contracts.

Firstly, I would like to underline that we appreciate the Commission's efforts to provide for an open and transparent debate on the process going on within the expert group on European contract law by setting up a "sounding board" for key stakeholders in which BEUC participates. We are committed to make a constructive contribution to this process, however in order to do so, we need more information on essential points in this debate.

We understand that the Commission's expert group on European contract law has the task of undertaking a feasibility study on an optional instrument, including for business-to-consumers contracts, but that a decision has not been taken yet whether such an instrument will be proposed by the College of Commissioners.

As you may be aware, BEUC has in the past expressed severe doubts about the usefulness of such an instrument for consumers, about its potential negative impact on consumer protection standards at national level and, finally, from a governance point of view, about its longer term consequences for the development of consumer protection legislation at EU and national levels in general. In addition, there seems to be no coordinated approach between the Commission's CFR initiative and the currently pending first reading negotiations on the proposed consumer rights, which provides for a lot of uncertainty.

To avoid any misunderstanding: BEUC and our member organisations are not against considering new forms of regulation. We are open for a discussion on how to achieve a more developed Internal Market for the benefit of consumers and of business alike, *as long as the consumer interest is fully taken into account and that there is a clear added value for consumers.*

Looking at the optional instrument from the perspective of the consumer interest, our main concerns are as follows:

There has been a lot of discussion including public statements by the Commission¹ about this "optional instrument" without giving any clear idea on how in reality this instrument would function and what its practical impact would be on consumers. Indeed it is still only a vague concept that may mean different things to different people.

¹ Commission Communication on a Digital Agenda.

The following questions are highly relevant to consumer interests in this context:

- 1) **Why is it necessary to deviate from the current regulatory system?**
- 2) **What are the potential advantages/disadvantages of an optional instrument from the consumer perspective?**
- 3) **What is the interface between the applicable law and an optional instrument for consumer contract law and how would these two spheres be linked?**
- 4) **What are the implications of an optional instrument, in terms of legal base, law making process, enforcement etc.?**
- 5) **Is it expected the optional instrument would only be used for cross border contracts, or for domestic contracts as well?**

Apart from these more fundamental considerations, another decisive element from the consumer perspective is the question

- 6) **For whom is the instrument “optional”?**
- 7) **Would business be obliged to always offer the optional instrument as an alternative to consumers or is the option granted to business only?**
- 8) **Is an optional instrument at all a suitable tool for business to consumer contracts?**

Consumer protection legislation has its *raison d'être* precisely in the presumption, that in a contract between a business and a consumer, because of the fundamental imbalance in bargaining power, there is typically *no choice* about the content of a contract, but rather an imposition of the contract terms by the trader. It is hard to see how an optional instrument fits into the logic of consumer protection legislation.

Do we talk here about the trader's choice, to impose an optional instrument albeit overruling legal mandatory standards of consumer protection, where the only choice left for the consumer would be not to contract with the trader?

Or do we talk about a choice for the consumer, who can decide to select a new tool as an alternative to the legal provisions applicable according to international private law?

Vice-President Reding stated that the optional instrument should work as a “blue button”, where it is the consumer who makes the choice for the application of the “European optional instrument” through simply clicking for example on a button on the sellers' website². This approach has however not been confirmed by your services in the first meeting of the sounding board on 7 September.

² European Voice, 17 June 2010.

More fundamentally, however, it is crucial to underscore, that it is highly improbable that consumers would be able at all to make an informed choice between two legal systems and to assess which of them would be more beneficial to them.

- 9) Would the optional instrument take precedence over the mandatory provisions applicable according to Rome I and Rome II?**
- 10) Would the optional instrument be used to bypass the principles of consumer protection in international private law?**
- 11) Could the optional instrument be (mis)used by business to divide the Single Market into those countries, into which they sell on the basis of the optional instrument and on the other hand those countries, where they prefer to contract on the basis of the traditional conflict of law rules?**

As you may be aware, BEUC and our member organisations have been strongly arguing in favour of maintaining the protection provided for by Article 6 of the Rome I regulation, as proposed by the Commission and confirmed by the EU legislators only a few years ago. From the Commission's green paper on European Contract Law it however appears that the optional instrument is considered as being able to provide for an added Internal Market value only, if Rome I is "affected"³. In relation to this question, the European Economic and Social Committee in its opinion on a "28th regime" clearly says that the optional instrument should take precedence over national mandatory law. From the consumers' interest perspective such an approach is obviously not desirable or acceptable.

- 12) The missing link: how does the optional instrument relate to the proposed consumer rights directive?**
- 13) What is the Commission's vision and strategy on the future development of the consumer legislation acquis and how does this relate to the CFR?**

According to the Commission's explanations to the sounding board meeting of 7 September, the fully harmonised parts of the proposed consumer rights directive will be directly transferred into the optional instrument. Those parts of the consumer rights directive, which will not be fully harmonised, might be included in the optional instrument by maybe going beyond the minimum protection standards in the directive.

If so, then the question is however, how the Commission envisages the necessary updating and further development of the consumer acquis itself which is currently minimum harmonised and will remain minimum harmonised, within or outside the proposed consumer rights directive .

³ Commission Green Paper on European Contract Law p.9.

This question is particularly pertinent given the recent statement by your services in a meeting of Parliament's Legal Affairs Committee, that the Commission will not support any amendments at all to the current directives covered by the proposed consumer rights directive, which are based on minimum harmonisation because minimum harmonisation "would only lead to higher costs for business and to legal uncertainty".

These developments raise major concerns within European consumer organisations about and how European consumers' needs and expectations are taken into account in the Commission's decision making process, which according to President Barroso's political guidelines and the recommendations of Prof Monti should be put centre stage in the EU's policy making.

We would appreciate your views on this and how you intend to develop consumer legislation in the future.

Looking forward to meet you on 18 October 2010, I remain

Yours sincerely,

Monique Goyens
Director General

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M. Alain Brun,
Mr Dirk Staudenmayer,
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