# BEUC'S RESPONSE TO THE EUROPEAN COMMISSION EXPERT GROUP'S FEASIBILITY STUDY FOR A FUTURE INSTRUMENT IN EUROPEAN CONTRACT LAW

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BEUC's response to the Commission Expert Group's proposal for an optional instrument

## I. INTRODUCTORY REMARKS

- Disclaimer: we would like to underline that it is hardly possible to meaningfully comment on the substance of an optional instrument, when its structure, format and interfacing with national law of such a "second" instrument is unknown.

- Thus BEUC's comments below are only of a preliminary nature and do not preclude comments we will make once the Commission's final decisions on the overall approach for the optional instrument are made known.

- As member of the Commission's Sounding Board representing consumer interests, BEUC has submitted extensive comments on the work of the expert group (see 'BEUC comments to the work of the Expert Group'[1]) during the preparation of the 'feasibility study'.

- In this response to the final outcome of the expert group's work, we do not repeat all the comments from our previous papers which remain relevant. We would ask the Commission to consider our comments given as a member of the sounding board as part of our response to the current consultation (see footnote 1).

- We would like to draw the Commission's attention to the fact that BEUC will open a discussion on an alternative approach to the optional instrument, one which is less costly and less intrusive, namely a European Model Contract (EMC) linked to an Alternative Dispute Resolution system carried out online ODR). The aim is to produce a Truly Optional Instrument which consumer and also business organisations would support. One which is truly optional also because it will not prevent consumers from the protection afforded by mandatory national legislation (in the rare cases left for which this could be necessary). This project[2] is ongoing. We will present first results to the Commission in the course of the next weeks.

Comments on the introductory part of the expert group's feasibility study

On pages 3 and 4 of the introduction to the feasibility study, the Commission provides **examples** to show why the optional instrument is necessary. Both examples relevant for 'b to c' contracts are, in our opinion, based on false assumptions:

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[1] Ref: X/2011/001; X/2010/086; X/2011/005; X/2011/015; X/2011/035 available at www.beuc.eu

[2] The project is based on a study by Profs. Norbert Reich/Geraint Howells/Hans Micklitz on an "Optional Soft Law Instrument on EU Contract Law for Businesses and Consumers" June 2011, commissioned by BEUC

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## 1) Transaction costs - Hold on: what are we talking about?

The Commission indicates that transaction costs for a SME offering products throughout the EU would be approximately €310,000. The Commission includes within this amount:

a) The adaptation of contract terms and conditions to the legislation of 26 countries – for each potential country of habitual residence of the consumer;
b) The translation of those contract terms and;
c) Costs for software which identifies the country of residence of the consumer and retrieves the relevant set of pages displaying them in the relevant language.

BEUC considers this calculation - which, according to the Commission's oral comments in the sounding board meeting of June 9th, 2011, is based on a submission by the FSA (Federation of Small Businesses, UK) – to be unrealistic. A business offering goods in the EU would not follow such a complex procedure because there is no (legal) obligation to do so. Selling to all countries of the EU can be done simply on the basis of the trader's law. This is what most companies *de facto* currently do. As such, the Commission's calculation is simply not relevant. By suggesting that an estimated €310,000 is the normal transaction cost for a business who wishes to sell across the EU, the Commission simply misrepresents the legal environment applicable to cross-border b to c contracts. Their impact assessment is based on only half of the legal reality.

Firstly, the term "transactional costs" is not defined. This would obviously be a prerequisite for any meaningful assessment of whatever costs businesses face.

The Commission's presentation of the impact of Article 6 of the Rome I regulation is inaccurate. When selling cross-border, businesses are not obliged to adapt their contract terms to the legislation of the country of the consumer's habitual residence. They can choose their own law as the basis of the contract with the consumer. Only in instances of court litigation would the judge have to assess – according to the conditions indicated in Article 6 of the Rome I regulation - whether the trader pursues or directs its activities to the consumer's country and, if applicable, make an equivalence test between the law chosen by the trader and the legislation of the consumer's country of habitual residence in order to determinate that the consumer is not deprived of the better protection granted by the rules of his legislation which cannot be derogated by agreement[3].

**A meaningful understanding and definition of what the term "transaction costs" for businesses really means is entirely absent from the Commission's analysis. Instead of looking at the real legal implications of private international law rules and at business choices in dealing with the legal environment, the Commission has come forward with an unrealistic and exaggerated narrative.** The Commission should carry out a cost/benefit analysis based on how businesses that already now sell to several countries/across the EU deal with international private law rules, how much costs they had to carry because of contract law differences, compared to the profit they make due to this investment.

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[3] See also Prof Norbert Reich 'From "Hard" to "Optional" to "Soft Law" in B2C – transactions in e-commerce in the Internal Market", study for BEUC

We would like to underline that BEUC has already raised this issue with the Commission several times throughout the preparation period of the expert group's work on the optional instrument, most recently in a letter to Ms Michou, Director of DG Justice[4].

**2) Consumer Confidence – Does it depend on differences in national laws?**

Regarding the example on consumer confidence, the Commission points out that consumers do not shop across borders because they are uncertain about their rights. However, our members long-standing experience from daily contact with consumers reveal that consumer confidence does not depend on knowledge or awareness of consumers' precise rights, but on other factors such as practical problems mainly related to redress. According to the recently published Fifth Edition of the Commission's Consumer Market Scoreboard, 62% of consumers who had not made a cross-border distance purchase indicated that they were worried about fraud, 59% about what to do if problems arose and 49% about delivery.

In addition, there are other major factors preventing cross-border e-commerce, including cultural barriers such as language, preference for physical shops, demographic composition of the population, digital literacy, limited access to broadband, lack of choice between means of payment, discriminatory charges between the means offered, security problems, privacy, post-sale services, territorial limitations of intellectual property rights[5].

Moreover, the Commission's example of the Finnish consumer, who allegedly is worried because she does not know her legal guarantee rights when shopping from France, only shows that consumers are currently in general not well informed as to their rights: due to the 1999 consumer sales directive, which harmonised member states' laws at a minimum level, all consumers in the EU benefit at least from the right to either repair or replacement. This is the current minimum level of protection on which all EU consumers can rely. Consequently, there is no need for the Finnish consumer to worry about whether replacement would be available. This remedy is available in all EU countries. The Commission's example demonstrates that the optional instrument will not add any value to consumer confidence.

**Any lack of consumer confidence in cross-border transactions is <u>not caused</u> by differences between national contract laws.**

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[4] Please refer to BEUC's document ref x/080/2011 available at www.beuc.eu

[5] For a detailed analysis of these concerns, refer to BEUC response to the public consultation on e-commerce (ref: X/078/2010 - 8/11/2010) and BEUC Reflection Paper on E-commerce (ref: X/030/2010 - 06/05/10) available at www.beuc.eu



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## II. COMMENTS ON THE COMMISSION'S QUESTIONNAIRE

| 1. On the one hand, a European contract law instrument should cover most of the problems which could appear in contractual practice. On the other hand, the instrument should also be user-friendly and therefore as concise as possible. To which extent does the text developed by the expert group meet these objectives? To which extent could it be improved? |
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BEUC does not have major concerns regarding the general structure of the feasibility study. The division of the different parts which contain the rules applicable to each contractual phase should help to easily identify the provisions applicable to certain situations e.g. non performance, beach of information duties, etc. However, the interplay of the optional instrument with national laws which are still applicable should be better clarified i.e. existence of other grounds of avoidance not covered by the Feasibility Study, but included in national laws that could still apply.

Question 2:

| 2. For consumer contracts, Article 81 of the feasibility study extends the unfairness control of business-to-consumer contract terms, to terms which are individually negotiated (as opposed to covering only non-individually negotiated terms as in the existing EU legislation). Do you think this is appropriate? |
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The unfairness control should be extended to terms which are individually negotiated. The arguments are well known. In practice, the consumer will often lack the bargaining power and the knowledge required to be in a position to influence the content of contractual terms during an individual negotiation process.

As the Commission is aware, in approximately 10 Member States the unfairness control is also allowed on negotiated terms. It would be unacceptable for the optional instrument to exclude this unfairness control in these cases.

On unfair contract terms, BEUC would like to raise a number of additional questions that the Commission should consider:

**The definition of 'unfairness' deviates from the standard of the current directive, to the detriment of the consumer.** In the expert group's version, a contract term should be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.
As already set out in our comments to the expert group, the proposed text seems less advantageous for the consumer as "significant" is linked to the detriment of the consumer, not to the imbalance.
Furthermore, in some countries the requirement of a "significant" imbalance has not been yet transposed.

The addition of fair dealing/good faith is also problematic, as experienced with the transposition of article 3(1) of the Unfair Contract Terms Directive. Member States have done it differently due to the different possible interpretations of the said article and the term "good faith": 13 Member States have included the notion of good faith in the unfairness test (CY, CZ, DE, HU, IR, IT, LV, MT, PL, PT, SL, ES, UK) while other countries make direct reference to significant balance without mentioning the



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additional criteria of good faith (BE, DK, GR, FR, LU, LT, SK). Thus the threshold of a term being considered 'unfair' is higher than currently stands in many countries;

In relation to Article 82, the unfairness of the term should be assessed referring to all the circumstances occurring before, during and after the conclusion of the contract and to all other terms of the contract or those of any other contract on which the former is dependent.

BEUC regrets the exclusion in Article 78(2) of the control of the main subject matter of the contract and the adequacy of the remuneration. As the Commission is well aware, monitoring of core terms is possible in many countries. Recent court cases in the UK and Spain[6] show that an exclusion of the unfairness control on these aspects of the contract leaves consumers exposed to essential shortcomings in consumer protection legislation.

The mere disclosure of information (the fact the relevant contract terms are presented in an accessible and comprehensible way) should not be used to prevent the judge from assessing the main subject matter of the contract or the appropriateness of the price.

Finally, we assert that Article 80 should indicate that the contract terms shall be provided in the language in which the contract is concluded.

Question 3:

3. Article 92 foresees an exceptional possibility to alter a contract due to change of circumstances. Do you think that this provision represents real added-value, especially in consumer contracts? Do you think that the procedure which leads to the alteration of a contract is appropriate?

The re-negotiation duty would be detrimental in consumer contractual relationships because the consumer would have to prove that the parties tried to reach an agreement in the revision of the contract terms. This is an excessive burden because in most consumer contracts the consumer has no chance to negotiate the terms and, if they do so, the result of the 'negotiation' could not be the most favourable to the weaker party in the relationship. If the sense of the rule is to (re)establish the balance between the performances by obliging consumers to negotiate with a powerful party, that objective would not necessary achieved.

Question 5:

5. Article 177 determines that a buyer who avoids or terminates a contract is, as a matter of principle, liable if the goods to be returned have been destroyed in the meantime. Article 178 also includes an obligation for the buyer to pay for the use of the goods to be returned. However, this obligation only exists under certain, restricted circumstances. Thus the risk of destruction of the goods is placed on the buyer and the risk of depreciation mainly on the seller. Do you consider these rules appropriate, especially in business-to-consumer transactions?

[6] CJEU, 3 June 2010, C-484/08 and UK Supreme Court decision of 25 November, 2009 in Office of *Fair Trading v Abbey National plc & others*

Regarding article 177 and 178, we consider these general principles inappropriate for consumer contracts. In the Consumer Rights Directive, the rule for the liability of the consumer in case of use of the goods during the withdrawal period must be taken into account.

"The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.

Moreover, in case the trader has not been informed about the right of withdrawal, he is not liable.

The consumer shall in any event not be liable for diminished value of the goods where the trader has failed to provide notice of the right of withdrawal in accordance with point (e) of Article 9(1)."

This principle should be the minimum standard for any rule of liability of consumers.

Moreover, point 3 of paragraph 1 should be clarified: the term "inequitable" does not ensure that consumers would not have to pay for a normal "use" of a defective product. If the restitution is due to a termination for non-conformity, the consumer cannot be obliged to pay for the use of a good which did not serve its purpose.

Question 6:

6. Article 172 contains specific rules for consumers who are late with payments. In particular, the consumer is obliged to pay interest for late payment only 30 days after receipt of a notice informing him about this obligation and the interest rate. The interest rate is set at the average commercial bank short-term lending rate to prime borrowers. Do you think these rules are appropriate?

On first examination this rule would not appear to be problematic.

Question 7:

7. The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?

BEUC has provided the Commission with evidence and legal research[7] which clearly shows, that the current legal uncertainty on questions related to digital products works against consumers' interests and therefore that EU harmonisation is necessary.

As the Consumer Rights Directive covers only a few of the elements in need of harmonisation, an additional legislative initiative in the form of a Directive is necessary to cover the specific aspect of contractual issues related to digital goods.

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[7] BEUC position paper, 'Digital Products. How to include them in the proposed Consumer Rights Directive' based on the study commissioned to Professor Peter Rott (Ref: X/060/2010 - 06/09/10) and BEUC proposal for amendments (Ref.: X/072/2010 - 05/10/2010) available at www.beuc.eu.

We strongly underline that the instrument needed is not an optional instrument, that would leave it to the trader who sells digital products to apply such rules, but what consumers need is a solid legal basis, applicable to all traders and contracts and all products - not depending on an opt-in or opt-out basis.

Traders providing digital products (music files, movies, software etc.) will simply prefer to apply less protective rules and consequently decide to continue applying national laws as long as they do not provide specific rules for digital products. The European Commission should therefore consider proposing a new Directive which would complement the Consumer Rights Directive by providing specific rules for digital products.

Question 7a)

> a. If you consider it should, do you then believe that the rules on pre-contractual information in Article 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)?

The recently adopted Consumer Rights Directive already includes specific provisions on information requirements which apply to digital goods (in the Council document's version of 15, June 2011: Article 9(1)(ff) and (fg).

Question 7b)

> b. If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs)?

BEUC's detailed position on this question was submitted to the Commission more than one year ago. Please refer to BEUC's position paper 'Digital Products. How to include them in the proposed Consumer Rights Directive' and BEUC's proposed amendments to the proposal on a Directive for consumer rights (BEUC X/2011/060 und BEUC/X/2011/060, attached to this response).

Question 7c)

> c. If you consider it should, do you then think that the general rule on passing of risk in Article 145 could be appropriate? Or do you think it may be necessary to include specific rules, for instance to ensure that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content. Do you think that the notion of 'obtaining control of digital content' would be sufficiently clear?

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BEUC considers that the principles of the rules on passing the risk of the Consumer Rights Directive should apply.

## III. ADDITIONAL REMARKS

Related services

As BEUC pointed out in the Sounding Board at the time the chapter on related services was discussed, the Commission should first carry out an assessment of the existing mandatory provisions in the Member States regulating b to c service contracts. Nonetheless, we submit below some comments related to the proposed text by the expert group.

Regarding price information, this chapter should contain a specific rule in addition to Article 15 obliging the trader to inform consumers against repairs which he expects to be costly in relation to the value of the repaired item. There should also be previewed a sanction for breaches of these information requirements: the seller/provider should not be entitled to demand payment for the service.

BEUC does not agree with the solution adopted in Article 157(3) which places the risk of destroyed or lost goods on the consumer. The consumer should not be obliged to pay for a work or material that is lost or destroyed, as long as he or she has not caused the loss.

If the service is performed by a third party not party to the contractual relationship between the seller and the buyer (sub-contractor), he or she should be jointly responsible with the seller and the consumer should be entitled to claim remedies from the third party in addition.

Joint liability of a third party e.g. the producer

Because the Commission did not to date unveil its plans as regards the link between the optional instrument and private international law rules, it is unclear how rules on joint liability, for example for credit providers or for producers in cases of non-conformity of a good (and for other earlier links in the sales chain), would be affected or not.

These rules must be made part of any new set of rules, otherwise many essential consumer safeguards would be lost.

Alternatively, the Commission should make it clear that joint liability rules are outside the scope of the optional instrument and would therefore remain intact at the national level and remain applicable also in a situation where a consumer contracted under the optional instrument.

END



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