EUROPEAN CONTRACT LAW IMPACT ASSESSMENT

Text of the letter addressed to Mrs. Paraskevi Michou, Director at DG Justice

Contact: Ursula Pachl – consumercontracts@beuc.eu
Ref.: X/2011/080 - 06/07/2011

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

30 March 2011

Dear Mrs. Michou,

Subject: European Contract Law impact assessment

Referring back to our recent conversation, please find below some points raised in the panel discussion on European Contract Law at the European Consumer Day in Budapest on 18 March 2011:

In the panel in Budapest, the Commission stated that business have to carry high costs because of the fragmentation of consumer contract law in the EU. Mr Stein illustrated this by referring to 15.000 EUR that SMEs would have to spend on legal advice per member state.

This figure that the Commission quoted is from the UK Federation of Small Businesses (FSB)[1]. It is based on the stakeholders own assumptions, namely that 1) the business has to use a specific set of "country specific terms and conditions with annexes" when selling to a consumer in another country (for each country a separate set), 2) that these have to be translated and 3) that a software developer has to "rewrite the website "in order to automatically present the respective contract terms in the respective language.

We strongly question the ability of these data to provide valid input to conclusions in relation to real business costs and to real business practice. We furthermore consider that the legal assumption on which these data are based is partially wrong (legal impact of Rome I, see below). It is worrying that the Commission uses this data to support its arguments as if this data were generally valid, without any critical assessment of their accuracy and representativeness.

BEUC has repeatedly raised the problem that no reliable data are available in relation to firstly the reasons why business do not offer cross-border and that secondly available data are often based on not fully accurate perceptions of the legal situation. However, the Commission continues to use this data as evidence for its arguments without any differentiation as to its validity.

When the Commission presented data of a business panel to the European Parliament's IMCO committee on 10th February 2011, Mr. Staudenmayer informed the members of Parliament that 7 out of 10 obstacles for business in cross-border trade are linked to contract law. The Commission mentioned that the data were not representative. However, it was entirely omitted that – according to the summary available on the I-net - **only 7% of the respondents indicated that their main customers were consumers**. It appears therefore that these figures are not only non-representative but that this obvious selection bias does not allow to draw accurate conclusions for b to c transactions from these data. Unfortunately MEPs were left with the perception that these figures are relevant for all transactions in the same way, be it b to b or b to c.

[1] UK Federation of Small Businesses, FSB response to the consultation on the Commission Green Paper on EU contract law, January 2011, page 3 and FSB position paper on Rome I, page 3

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

We have stressed the problem of using these data in a non –specific manner to the Commission in the sounding board meeting of 22 March, but our concern was rejected.

The impact of the Rome I regulation

Unfortunately, the interpretation of article 6(2) of Rome I regulation has not been clarified in the final version of the Terms of Reference of the Impact Assessment for the European contract law instrument. BEUC had drawn the Commission's attention to this problem (see the comments submitted by BEUC on the Terms of Reference, e-mail attached). It is in our view exaggerated that the Commission, in its Terms of Reference, describes the impact Art. 6 of the Rome I regulation with the following words:

> *"However, for businesses, Article 6 of Rome I means that if they wish to sell across borders they must abide by the different consumer protection rules in every country where they direct their activity, irrespective of whether a choice of law is made or not. Thus, businesses wishing to engage in cross-border trade will face additional legal costs, at several stages (development of contracts, negotiation, performance, conflict resolution)".*

This statement in our opinion tells only about half of the reality. If the trader does not choose the applicable law (including his own), then indeed he will have to face the full impact of the law of the consumer's country of habitual residence under the conditions of Art. 6 (1) Rome-I. On the other hand, if a valid choice of law has been made, the professional can contract under his own law. Indeed Rome I does NOT oblige traders to a priori adjust their contract terms to the law of the consumers home country. Only if BETTER protection is provided in the law of the consumer's country in comparison to the choice of law/contract terms, and only of the trader directed his activity to the consumers' country and litigation is pending, ROME I Article 6 comes into play.

It is essential that any assessment of potential transaction costs is based on the right legal understanding. If this is not the case, the assessment will simply be wrong. Any questions asked to business about transaction costs and any calculation about such costs must be based on the accurate, more nuanced meaning and impact of the legal situation.

We highlight this because unfortunately often business or business organisations have a wrong understanding of the legal situation: For example the FSB (the organisation that provided the figure of 15.000 €, see above) in the response to the Commission's Green Paper on European contract law states: "Article 6 of Rome I regulation means that contracts are subject to the rules in the country where the consumer lives. If a business wants to engage in e-Commerce, *it has no freedom of choice* over which law is applied in cross-border B2C contracts."[2] Obviously this legal assessment of the impact of Rome I is simply wrong. It does not take into account that the trader can perfectly well choose the law applicable to a consumer contract.

[2] Please refer to page 4 of the UK FSB response to the consultation on the Commission Green paper on European contract law

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

We would like to stress that since the interpretation of the Rome I provision is often not clear for business who believe that they are obliged to comply with 27 different legal systems when offering their products cross-border but on the other hand represents a key factor and main basis for the Impact Assessment in b to c transactions, it is essential to provide a full and clear picture of the meaning and the impact of the relevant provisions. The Green paper and the Terms of reference do not meet this requirement.

BEUC has raised these concerns in writing to the Commission already in December 2010 (e-mail sent 21 December 2011, see attached), but our concerns were not taken into account.

Questionnaires of surveys for the Impact assessment

Consumer organisations questionnaires

In relation to the questionnaire addressed to Consumer Organisations in the frame of the Impact Assessment, our members who were invited to respond to the questions were irritated by the fact that the whole questionnaire is based on the assumption that there are big problems related to contract law differences for consumers[3]. The fact that the consumer survey does not firstly try to seek answers if at all contract law differences are relevant for consumers or not, but that this is anticipated as already proven is astonishing. We consider that submitting the interviews to this assumption is not appropriate for a study that seeks to determine if diverging rules of contract law could represent obstacles to cross-border trade for consumers.

In addition, the second part of the questionnaire (Impact of differences in contract law on cross-border trade) seeks responses on the content of a potential European contract law instrument.

It appears that instead of trying to understand and put into question current assumptions on consumer cross-border shopping patterns, the Commission's questionnaires only seek confirmatory evidence.

BEUC has raised these concerns and our members' problems with the survey in the Sounding Board meeting of 22 March, but our concerns were rejected.

I hope that that the explanations above are useful in order to understand BEUC's and our members' concerns as expressed in Budapest about the quality and credibility of data in relation to the European contract law initiative.

Finally, I would like to bring to your attention that in a recent Eurobarometer survey (Flash Eurobarometer n° 300, March 2011, graph 19 a), **79 % of traders** say that if the provisions of the laws regulating transactions with consumers were the same throughout the 27 Member States, this would have **no or only little effect** on their cross-border activity (up from 74% in 2008). We hope that these important data will be taken into account by the Commission. Clearly, the

[3] First question of the consumer questionnaire: *What aspects of contract law create the biggest problem and costs for consumers who want to buy something across border?*

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

legislative initiative that is being prepared risks having no or little positive effect on cross border consumer sales while on the other hand cutting off access to national consumer protection standards and increasing market fragmentation.

I would be glad to discuss this further with you or to provide any additional information or explanation you might require.

Yours sincerely,

Ursula Pachl
Deputy Director General

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