EUROPEAN CONTRACT LAW – INFORMAL JUSTICE AND HOME AFFAIRS COUNCIL MEETING

18 AND 19 JULY 2011

(Letter sent to the Permanent Representations to the EU, on 12 July 2011)

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Ref.: X/2011/083 - 13/07/11

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EC register for interest representatives: identification number 9505781573-45

Dear Attaché,

I am writing on behalf of BEUC in relation to the discussion on European contract law due to take place on the 18th - 19th July at the informal meeting with the Ministers of Justice in Poland.

The European Commission has announced it will adopt a legislative proposal for an "optional instrument" for European contract law in October 2011. This instrument would operate alongside national laws but - when "chosen" – would override national mandatory consumer protection rules.

BEUC and its member organisations are strongly opposed to this initiative, as a parallel EU law system would bring about confusion instead of simplification for consumers and bears the risk of a reduction of national consumer protection standards. Should new fields such as that for digital content be included, it would be at the trader's discretion whether modern rules with clearer consumer rights would apply or not. This is not acceptable from a consumer policy point of view.

We explain our major concerns below.

Lack of evidence

BEUC has not been convinced that an optional instrument for b to c contracts is needed. To date, the Commission has not provided any evidence or data as to why an optional instrument is necessary and how it would eliminate *real* barriers to the Internal Market.

In the Polish presidency programme, reference is made to a Commission study which showed that around 60% of online cross-border transactions in the EU fail. However, we wish to underline that this study does not indicate the reasons why these contracts failed and why businesses decided not to sell. As SMEs themselves state, differences in national (consumer) contract laws are not an important barrier to trade. On the contrary, recent statistics reveal that 79% of traders say that harmonised contract rules would make little or no difference to their cross-border sales (Eurobarometer 300, March 2011).

Moreover, according to the Commission's recently published Consumer Conditions 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. Clearly, contract law differences are not the reason for low consumer confidence.

The recently finalised Consumer Rights Directive **fully** harmonises the **key areas** of online and doorstep selling. Thus, **an optional instrument to promote cross-border b to c transactions is simply redundant**. The Commission should instead consider alternative options which are less costly, less intrusive and more proportionate than an optional instrument.

In this context, we would like to inform you that we will soon submit a proposal for a **European Model Contract linked to an online dispute resolution** procedure, which would be 'ready-to-use' for business and inspire consumer confidence as it would be supported by Europe's consumer organisations.

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The optional instrument will bring more confusion for consumers and SMEs and risks to reduce national protection standards

The introduction of a "second regime" for contract law would increase legal uncertainty and create confusion not only for consumers, but also for SMEs. A complex, additional layer of legislation would not achieve its stated aim of easing cross-border transactions for businesses and consumers, but instead increase their complexity for many years to come.

European consumers will be faced with a situation in which different rules apply to the same products (or services?). They will have to bear in mind how and under which conditions they have bought something, in order to know which rules apply. This is not the clear and solid legal framework that European consumers need and want.

If Member States would be given the choice to apply the optional instrument not only to cross-border, but also to domestic contracts, this would create even more disorder for consumers and would not be acceptable at all.

The level of consumer protection

The Commission underlines that the level of consumer protection in their proposal will be high and we acknowledge that the Commission's expert group's feasibility study recommends a high level of consumer protection, but we have no guarantee that the final piece of legislation will contain these protections. We hold concerns that in order to make the instrument attractive to business, a rather 'average' level of protection would be the result. We understand that business organisations have already raised concerns that the expert group's proposal is not attractive for them because of a too high level of protection. This clearly illustrates the unsolvable dilemma.

Moreover, if new areas such as digital content were to be included with hopefully clearer and better rules for consumers in comparison to the current situation, it will be at the discretion of the trader of digital content products to apply these rules or not.

No choice for consumers

The optional instrument is **not genuinely 'optional'** for consumers. We understand that the Commission intends not to give consumers the choice of whether to contract under the optional instrument or under normally applicable law, but rather only to the trader. Consumers consequently can only "choose" not to contract. This will lead to a fragmentation of the Internal Market, as traders can cherry pick the countries to which they will sell with the optional instrument or the normally applicable conflict of law rules. Furthermore, even if traders were obliged to inform consumers about the content of the optional instrument it is clearly impossible for a consumer to make an informed choice between different legal regimes.

Thank you for taking our concerns into account during your deliberations next week.

Yours sincerely,

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Deputy Director General

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