BEUC'S COMMENTS ON THE EUROPEAN COMMISSION'S IMPACT ASSESSMENT FOR THE PROPOSAL OF A COMMON EUROPEAN SALES LAW

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Ref.: X/2011/118 - 22/11/2011

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EC register for interest representatives: identification number 9505781573-45

BEUC's comments on the Commissions' Impact Assessment for the proposal of a Common European Sales Law

In October 2011, the European Commission adopted its proposal for a Regulation on a 'Common European Sales Law' (hereafter CESL).

The Commission's Impact Assessment for the proposed regulation is unconvincing. BEUC believes that the Commission has neither delivered clear evidence showing this instrument is necessary for the further development of the Single Market, nor that it would bring about the claimed benefits for consumers and business.

Basic premises of the Impact Assessment are dubious, major actual issues are omitted and the economic growth argument has not been proven. Moreover, the main stakeholders who according to the Commission should benefit from the proposal - namely consumers and small and medium sized enterprises represented at European level by BEUC and UEAPME - both stand against the proposal.

Given the fact that core questions in relation to the Commission's policy choice remain unanswered, BEUC urges EU legislators in conjunction with national Parliaments to consider the concerns we raise below, ask the Commission to answer these questions and re-consider the foundations of its proposal.

We regret that several decision-makers, including Members of the European Parliament, wish to halt discussions on the need for this instrument. They call to move fast urgently. This is not the right approach.

Considering the fundamental questions listed below remain unanswered, BEUC calls on the EU legislators not to rush into any debate or decision limited to the content of the proposed regulation, but to consider:

1) The Commission claims that traders who sell across borders have to spend large sums of money (approx. €10,000) on legal advice in order to adapt to each EU country's national laws.

Do traders spend this money in reality? The Eurobarometer clearly indicates that traders do not spend money on this.

1.1. The assumption does not concur with reality.

The basic premise for the proposed regulation is that traders spend these significant sums of money, namely around €10.000, for lawyers' advice to adapt to each EU country's national consumer laws[1], yet the Commission's evidence is not at all clear. In fact, the Flash Eurobarometer 321 accompanying the proposal indicates it to be actually wrong:

45% of all traders who answered (those involved in cross-border sales) said contract law had no impact at all on their decision to sell across borders. Clearly, these traders did not spend €10,000 per country.

[1] European Commission's Impact Assessment, page 12

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Another 37% said that contract law had minimal or some impact, but not significant. Consequently 82% of traders say that contract law has no great impact upon their decision to sell across borders[2].

It is not very likely that these 82% of traders spent €10,000 per country on legal advisory service fees.

Why would a trader spend tens of thousands of euro on legal advice on differences of contract law? Why would that be necessary? If traders truly want to know foreign contract law in detail, this could be provided on a much cheaper basis via a trade association, or possibly the Commission?

1.3. The actual cost of business due to different consumer laws has not been assessed.

The Commission did not consider in the Impact Assessment what is obvious: traders have not been asked how much they have actually spent on lawyers in contract law matters. Instead, they were only asked to estimate how much they would save in "transaction costs" (for example legal fees, research and translation of foreign law) if an Optional Instrument was available.

More than half of traders selling only business-to-consumer (b2c) answered that they do not know what these costs are and the rest would appear to have guessed.

Therefore we call on legislators to provide more evidence, based on the missing issues as set out above and in particular to ask traders about their actual costs.

1.3. Does a legal obligation for businesses to adapt to 26 other Member States' consumer laws exist?

Under the existing EU legislation of Private International Law (hereafter, PIL) on the applicable law to contractual obligations (Rome I Regulation[3]), business can already validly choose the law they wish to use for a cross-border contract with a consumer. In practice, the choice is most commonly in favour of their own country of residence. **There is no legal obligation for business to adapt their contract terms *a priori* to the legislation of the country where the consumer has his or her habitual residence**. It seems that only in case of litigation and if the mandatory rules of the country of the consumer's habitual residence would provide for better protection of the consumer than the law of the contract, a business would be confronted with a foreign consumer law.

Consequently, a trader who sells across the EU is not obliged to adapt in advance the contract terms to the different consumer legislations of other Member States. This does not mean that BEUC is in favour of the current situation, but it shows the Commission only presents a portion of the actual situation.

[2] Flash Eurobarometer 321, European contract law in consumer transactions, page 20

[3] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)

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BEUC has written[4] to the Commission several times asking for an explanation for its legal opinion and for an explanation of the Commission's presentation of the consequences of Article 6 of the Rome Regulation, but we did not receive a response.

2) What is the link between so-called "opportunity costs" and economic growth? What are the factors which would make it plausible that the potential for new cross-border sales of 26 to 180 billion euro per year will result on top of existing sales, and not merely replace it?

The Commission states that currently 'lost' trade costs the EU economy 26 to 180 billion euro each year (so-called "opportunity costs")[5]. This amount is an estimate of how much more cross-border sales would be undertaken by companies under a Common European Sales Law regime.

But what is the link between these opportunity costs and economic growth? What are the reasons to believe that this new trade potential will come *on top of* existing sales, instead of simply *replacing* existing sales?

3) How big are the differences between national consumer legislation in those areas which matter for distance selling contracts?

The recently adopted Consumer Rights Directive[6] fully harmonises key elements of distance selling, including online contracts (e.g. pre-contractual information, formalities, the right of withdrawal, delivery terms, the passing of risk). This Directive will be implemented by autumn 2013. After its transposition into national law, differences among national consumer contract laws will be limited to mainly two areas, which have already been harmonised by minimum level: legal guarantees[7] and unfair contract terms[8].

Most of the issues which would be covered by the CESL but fall outside the scope of the consumer *acquis* are not very relevant to daily practice in consumer contractual civil law, such as interpretation of consumer contracts and damages for non-performance.

This is a fundamental aspect which has not been properly considered in the Impact Assessment.

The Commission should evaluate the necessity for a European Common Sales Law for business-to-consumer contracts in light of the newly adopted Directive on consumer rights.

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[4] letter addressed to Mrs. Paraskevi Michou, Director at DG Justice, on 30 March 2011 (Ref.: X/2011/080 - 06/07/2011)

[5] Commission's Impact Assessment, Annex V, page 2

[6] Directive 2011/83/EU

[7] Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

[8] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

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4) What are the real reasons why businesses refuse to sell to consumers in other countries?

The European Commission states that differences among contract laws are a significant barrier for cross-border trade and consequently prevent consumers from the benefits of e-commerce:

"E-commerce facilitates the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established. However, when consumers try to place orders with businesses from another Member State, they are faced with the business practice of refusal to see which is often due to differences in contract law"[9]

BEUC considers this assumption to be contrary to yje Commission's own findings. The recently published Flash Eurobarometer 321 accompanying the Commission's proposal shows that **nearly 90% of traders have never refused to sell to foreign consumers because of differences in consumer contract law rules of other EU countries**.[10] In addition, the same study reveals that for 80% of traders, contract law related barriers do not deter them from conducting cross-border sales.[11]

Moreover, it is important to make a clear distinction between b2b (business to business) and b2c (business to consumer) cross-border trade: in consumer contractual relationships, businesses already benefit from a broad *acquis* of harmonised substantive consumer law and conflict of law rules.

Instead of introducing such a complex piece of legislation as the CESL, a lot could be achieved if awareness raising campaigns were organised for businesses, especially SMEs, as to the real consequences of existing provisions of the applicable law in cross-border situations, the appropriate way to insert a choice of law clause to cross-border, business-to-consumer contracts and the dimension of any risk left in this context (e.g. the risk of being sued by consumers in a foreign country and the possible eventual application of better standards of consumer protection).

5) Do SMEs need the Common European Sales Law to expand activities to other Member States?

The European Commission states in its proposal that *"differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SMEs, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market".*

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[9] COM(2011) 365 final, 11 October 2011, Explanatory memorandum, p.4

[10] Flash Eurobarometer 321, 'European contract law in consumer transactions', October 2011, pages 29 and 83

[11] Idem, pages 29 and 82

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As stressed in a second[12] joint letter of BEUC and UEAPME, the European Association of Craft, Small and Medium-Sized Enterprises, sent to the Permanent Representatives of the Member States in October 2011, **an Optional Instrument will not provide added value to consumers or SMEs in the Internal Market and will not encourage firms and consumers to take advantage of the Internal Market, but rather lead to confusion and additional complications for all market players.[13]**

The main problems that SMEs face when going cross-border are not related to differences in contract law ,but rather to other real and major barriers such as administrative barriers for small businesses to access national markets, differences in tax regimes, language problems or consumers' preferences for local shops.

This is also supported by the results of a recent Flash Eurobarometer (No 300) in which **nearly 80% of traders said that harmonised consumer law in the EU would make "little or no difference to their cross-border trade**"[14].

According to the Impact Assessment, only 7% of companies perceived "the need to adapt and comply with different consumer protection rules in foreign contract law" as having a large impact on their decision to sell across borders to consumers from other EU countries[15].

If some SMEs have the perception that differences in national contract laws prevent them from offering their products to consumers located in other Member States, it is often because they are not sufficiently informed as to the legislative background applicable to cross-border b2c contracts.

Existing data reveals a clear need for businesses to be trained not only on the legal framework applicable to cross-border b2c contracts, but also on awareness of legal obligations towards consumers in their own countries: 82% of retailers felt that they were well informed about legal obligations arising from consumer legislation in force in their country, but only 26% knew the exact period during which consumers have the right to return a defective product and among those using distance sales channel, 27% could correctly state the length of the cooling-off period for distance sales in their country[16].

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[12] The first joint letter expressing our common concerns with European Notaries (CNUE) towards this initiative was sent on 1 June 2011 to the European Parliament in view of the plenary vote on the own initiative report of the Legal Affairs Committee (rapporteur MEP Wallis, ALDE, UK) on a European contract law for consumer and businesses. The three organisations stated **"an optional instrument for consumer contracts will not provide added value - neither to consumers nor SMEs - but will rather have a negative impact on the development of the internal market and on consumer and SME confidence to engage in cross-border transactions."** (*An 'optional instrument' is not what consumers and SMEs need*' with UEAPME & CNUE, (Ref.: X/2011/086 - 15/07/11), available at www.beuc.eu)

[13] *Common European Sales Law - Justice and Home Affairs Council Meeting, 28 October 2011*, joint letter with UEAPME sent to Permanent Representatives of the Member States on 25 October 2011, available at www.beuc.eu

[14] Flash Eurobarometer No 300, 'Retailers' attitudes towards cross-border trade and consumer protection', page 124.

[15] Commission Staff Working Paper, Impact Assessment accompanying the proposal, p.13, footnote 55 referring to Flash Eurobarometer No 321, 'European contract law in consumer transactions', October 2011, page 62.

[16] Flash Eurobarometer No 300, 'Retailers' attitudes towards cross-border trade and consumer protection', March 2011, pages 32-38

This lack of awareness will not be solved by the CESL. On the contrary, by adding another layer of complex legislation, SMEs will have to invest more resources to learn about their obligations under the proposed optional regime while they are not even fully aware of the consumer legislation in their own countries.

Finally, when businesses were asked about the likelihood of using the Common European Sales law[17] it was not indicated that in many issues they will still need to refer to national legislations (see for example Recital 27 of the proposal which lists issues outside the scope of the CESL, and for which national laws consequently apply). This omission has a fundamental impact on the responses, because businesses might have believed that they can rely on ONE single set of rules, when under the Commission's proposal this is not the case. Furthermore, the real situation of the proposal is even more complex than the current system under the Rome I Regulation, because if businesses decide to apply the CESL they would have to take into account not only those rules, but also the national laws on issues not covered by the European instrument while under Article 6(2) of Rome I, businesses can in fact rely on one legal system by making a choice of law.

6) Do consumers not buy cross-border because they are uncertain about their rights?

The European Commission contends *"because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic markets".*

However, from the consumer point of view the existing data reveals that **the main issues preventing them from buying cross-border are not contract law related barriers, but rather linked to the lack of effective means of redress: the main question for consumers is: "What can I and to whom do I turn if things go wrong?"** This is again confirmed by the Commission's most recent Consumer Scoreboard data: last year 62% of consumers did not buy online across a border because they were afraid of fraud, they did not know what to do if problems arose (59%) or they were worried about delivery (49%)[18].

In addition, one of the most prominent reasons why consumers do not buy goods from other countries apart from the aforementioned barriers is because they feel no need to buy goods from abroad as they can find what they need locally.[19]

The European Commission highlights that 44% of Europeans say they do not buy abroad because they are uncertain about their rights.[20] The evidence for this finding (quoted in the Commission's Memo of 11 October, published in Eurobarometer 299a only on 22 November 2011) does not show what kind of rights

[17] *e.g. Question 5: If you were able to choose, for ALL your cross- border sales to consumers from other EU countries one single European contract law, how likely would it be that you would use it?*

[18] Consumer Market Scoreboard, 5th Edition.

[19] Eurobarometer Qualitative Studies, 'Obstacles citizens face in the Internal Market', September 2011, page 37.

[20] European Commission's MEMO/11/680 "An optional Common European Sales Law: Frequently asked questions"

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consumers referred to. According to our experience, consumers mostly worry about their right to get redress, but not so much about substantive rules.

In the context of BEUC's concerns about the validity of the Impact Assessment, the result of Eurobarometer 299a are an important element: in relation to the question whether consumers would be more willing to buy under uniform European rules the survey indicated that either uniform European rules or the law of the seller would apply[21].

However, in the businesses' questionnaire used for the Commission's Impact Assessment the underlying assumption is that traders need to adapt their contract terms to the legislation of the consumer[22] (see also *ut supra* point 1.3) while in the consumers' questionnaire consumers were asked to answer based on the premise that the legislation of the trader would apply to their cross-border transactions[23].

The Commission's evidence is consequently based on answers from business and consumers prompted by contradictory assumptions.

7) Does the proposed Regulation provide for a high level of consumer protection and will this give consumers the confidence to buy products in other EU countries?

The Commission underlines that the proposal has a very high level of consumer protection and that there will be little or no reduction in comparison to existing national standards.

This point needs to be clarified. In fact, a large percentage of the proposed rules for consumer contracts come from the consumer *acquis*, and in particular from the recently adopted Consumer Rights Directive which fully harmonises the key elements of online consumer transactions .

Consequently, consumers do not need the CESL to be better protected in the areas already covered by the Consumer Rights Directive (CRD). Once the provisions of the CRD are transposed into national laws within the next two years this standard will apply all over Europe and in relation to online sales to consumers business will benefit from a very high standard of harmonisation in nearly all areas of consequence.

The only truly high level of protection in the proposed CESL text is the free choice of remedies in the case of a non-conforming product and the long period of the legal guarantee. However, this is an area which is harmonised already by a minimum standard, namely through the 1999 Consumer Sales Directive.

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[21] *It is noteworthy that even under this questionable assumption only 31 % of consumers said that they would be more willing to buy under uniform European rules and 29 % said that they would be even less willing to do so (Eurobarometer 299a question 7 page 12).*

[22] *e.g. Q2. What impact do the following potential obstacles have on your decision to sell across border to consumers from other EU countries? (…) the need to adapt and comply with different consumer protection rules in the foreign contract laws. (Flash Eurobarometer 299)*

[23] *e.g. Q7. Currently, when you purchase a good or a service from a seller/provider abroad, your transaction is likely to be governed by the law of the seller / provider. If in such transactions uniform European rules would be applicable irrespective of whether the seller / provider is established, would be more willing, equally willing or less willing to make such cross-border purchases? (Flash Eurobarometer 299a)*

8) Will consumers benefit from more choice and cheaper prices?

The Commission states that less cross-border sales result in fewer imports and less competition between traders which can lead to a more limited choice of products, at a higher price on the market.

However, as expressed above, the low level of cross-border transactions is not a consequence of differences in national contract laws, but rather other real and major obstacles such as difficulties for small business to access national markets due to administrative barriers and differences in tax regimes; cultural barriers such as language and digital literacy; low levels of broadband penetration; territorial discrimination of intellectual property laws; consumer difficulties to access redress; no or difficult access to means of e-payment.

Consequently, it is hard to see how the CESL will create an incentive to businesses to offer their products in other Member States and therefore bring more choices to consumers across Europe if all those named barriers continue to hinder cross-border e-commerce.

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