BEUC The European Consumer Organisation

The Consumer Voice in Europe

Unfair Contract Terms in Business-to-Consumer contracts in the proposed Common European Sales Law

BEUC's viewpoint[1]

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Executive SUMMARY

The Commission's proposal for a Common European Sales Law aims to introduce an "optional" sales law regime for consumer contracts. BEUC, the European consumer organisation, is not in favour of this new regulatory approach as it would duplicate existing EU law, weaken the position of consumers in cross-border contracts by precluding the application of higher protection standards in many national laws, particularly in the field of unfair contract terms, thereby reducing consumer confidence and undermining legal certainty. The proposed 'optional' EU law would also bring to a halt what has been to date a highly successful development of an EU consumer law *acquis*, thereby preventing European consumers benefiting from the necessary modern and solid legal framework. This report illustrates the main flaws of the proposed CESL in the specific field of unfair contract terms.

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KEY FINDINGS

- The pCESL would duplicate significant portions of EU consumer law, including unfair contract terms rules. A second optional layer of EU consumer law regulating exactly the same fields of law as the first would create confusion, incoherence and legal uncertainty for all market players.
- The 2011 Consumer Rights Directive has not been taken into account in the European Commission's impact assessment for the pCESL, which constitutes a major flaw in the justification for this instrument.
- BEUC and its membership are unconvinced of a proven need to change the traditional, successfully employed, regulatory tools in the field of consumer law, including those on unfair contract terms. The EU should continue to build upon and modernise EU consumer contract law by robust and binding legislation. This should be a mix of minimum and full harmonisation in accordance with certain criteria, but not, by any means, 'optional'. In addition, model contracts for consumer sales could promote cross-border transactions in a more effective and less intrusive manner than optional law.
- The provisions on unfair contract terms of the pCESL fall short of many national standards of consumer protection, and consequently the pCESL would reduce protection and undermine consumer confidence across the EU. Furthermore, important issues long identified in this field of law as being in need of improvement have not been addressed.
- The current situation of legal uncertainty around digital products is causing detriment to consumers, particularly in relation to unfair contract terms. More legal certainty and modern consumer protection is needed at EU level. The pCESL includes modern rules in this field – but these will only be applicable if businesses consider the CESL to be advantageous for them, and therefore choose it. This illustrates the key flaw of optional regulation and the risk of hindering necessary developments to the detriment of all consumers.

1. INTRODUCTION

In October 2011, the European Commission published a proposal for a regulation on a Common European Sales Law (hereafter 'pCESL') which covers business-to-consumer contracts.

In this paper, BEUC sets out its concerns in relation to the pCESL's provisions on unfair contract terms in consumer contracts by commenting on the specific provisions of Chapter 8, Sections 1 and 2 of the proposed regulation's Annex I. In order to contextualise our approach, we first provide an overview of more general consumer concerns on the Commission's proposal and on some of the provisions included in the so-called 'chapeau' of the regulation, which refers to the *modus operandi* of the Common European Sales Law.

When discussing the unfair contract terms chapter in Annex I of the proposed regulation, it is essential to take into account the functioning of the proposed regulation in order to understand the impact it would have on individual consumers in the fields it covers, including unfair contract terms.

1.1. General comments in relation to the introduction of an "optional regime" for EU consumer law including for unfair contract terms legislation

BEUC and its members consider an 'optional' contract law regime, in parallel to existing national consumer law, to be an inappropriate way forward for the regulation of consumer rights and in particular for unfair contract terms. This is for the following reasons:

- The proposal does not correspond to the needs of the main market players in the European Union, namely consumers and SMEs. The Impact Assessment accompanying the CESL proposal did not take into account the Consumer Rights Directive, which fully harmonises the main aspects of e-Commerce consumer contracts. In particular, it failed to prove that the differences between national consumer contract laws, which remain unharmonised or not fully harmonised after the entry into force of the CRD, are essential barriers to trade justifying the introduction of the pCESL. The field of unfair contract term laws is already harmonised to a minimum standard by the 1993 Directive on Unfair Contract Terms.

- The pCESL will significantly complicate the legal environment in the EU. European consumers would be faced by a situation in which different rules and therefore different levels of protection apply to the same product. For example, contract terms which would be unfair under national law could be deemed fair if the pCESL is chosen by the trader as the applicable law.

- The Consumer Rights Directive, which will be transposed by the Member States by the autumn of 2013, provides for maximum harmonisation of the majority of relevant elements in online contracts. This means the European Commission's main target of facilitating cross-border business-to-consumer (b2c) contracts has already been dealt with in terms of the approximation of laws. Unfair contract terms are not covered in a comprehensive way by this Directive, but any problems could be overcome by making available a 'toolbox' on unfair terms to decision-makers and businesses.

- An optional contract law regime applicable to consumer contracts would give traders the possibility to decide which level of consumer protection consumers would benefit from by choosing to apply either the pCESL or a 'normal', national law on the basis of their own commercial interests. This is unacceptable in any field of consumer law, including unfair contract terms.

- The level of protection in the pCESL does not match the higher standards of numerous Member States, particularly in relation to national laws on unfair contract terms. This paper provides an overview of the main examples which illustrate how the pCESL would deprive consumers in many countries of the better protection granted by their national laws.

- The pCESL includes rules for digital content products, but they will only be applicable if businesses consider it to be advantageous for them. This is another example of the major flaw due to the 'optional' nature of the proposal.

1.2. Comments on the "chapeau" of the pCESL in relation to unfair contract terms

In this context, comments on some of the most relevant provisions in the "chapeau" of the pCESL are listed below:

- **Objective and subject-matter** (article 1): The proposal states that traders can rely on a single set of rules when operating across borders under the CESL. This objective is unachievable with the proposed Regulation, due to the rules on conflicts of laws which remain applicable to any consumer contracts which were to be concluded under the pCESL and secondly because the scope of the proposed CESL does not and cannot include all relevant elements. For example, in relation to unfair contract terms, consumers might be entitled to a higher level of protection in their domestic law (this is the case in many Member States), in case the Rome I regulation applies, despite agreement to use the pCESL. This issue of conflict with Rome I is not clearly regulated in the pCESL and would create major legal uncertainty.

- Personal, material and territorial **scope of application** (article 2 on definitions and articles 4-6): Due to the draft scope of application, the proposal would be regulating exactly the same subject matter twice, namely that already covered by the Consumer Rights Directive[2]. Secondly, the proposal not only overlaps with existing EU consumer law to a large degree, but deviates from this *acquis* on essential points, for example in the definition of the term "consumer". Consequently, BEUC considers it inappropriate to introduce a **second layer of EU legislation for issues already regulated,** as this would lead to divergences in precisely the same fields of EU law and thus increase legal complexity and uncertainty. In relation to unfair contract terms, the 1993 Directive on Unfair Contract Terms would remain in force, but the pCESL would introduce a parallel system in the very same field of law.

- The **optional nature** of the pCESL: According to article 3 "the parties may agree that the Common European Sales Law governs their cross-border contracts (…)". However, as indicated in the following paragraph, such an agreement raises fundamental questions in relation to the scrutiny of the "fairness" of the agreement under national unfair contract term legislation, given its preclusive effect on the better mandatory protection in the consumer's home country.

- **Agreement on the use** of the pCESL (articles 8 and 9): Application of the pCESL is subject to specific formal requirements which do not ensure meaningful consent by the consumer to the application of the pCESL. First, the information notice included in Annex II of the proposal only provides information related to certain elements of the pCESL, but does not allow consumers to understand the practical implications of this new regime - particularly where better standards of protection are set aside. For example, with unfair contract terms Annex II of the proposed regulation only informs the consumer that "trader's standard contract terms which are unfair are not legally binding...". Secondly, BEUC believes a consumer's agreement to renounce better mandatory protection applicable under the Rome I Regulation[3] could be judged 'unfair' on the basis of the 1993 Unfair Contract Terms Directive[4] and the request to agree to this as an unfair practice according to the 2005 Unfair Commercial Practices Directive[5].

- **Consequences of the use of the CESL** (article 11) and **interplay with Private International Law rules** (Rome I Regulation[6]): According to the proposal, once there is agreement to apply the CESL, its rules will preclude national, mandatory consumer contract law. BEUC considers this concept to be not practicable:

First, it is incompatible with the rationale of another piece of EU law, namely article 6(2) of the Rome I Regulation which aims to guarantee the application of higher standards of consumer protection. Secondly, on a technical level, in the case of a choice of law by the trader, an agreement to use the CESL could preclude better protection available under the parallel national law. However, if article 6(2) of the Rome I Regulation was to apply, the agreement to use the CESL could in our opinion not preclude the better protection under the consumer's domestic law. This is because the equivalence test of article 6, paragraph 2 of the Rome I Regulation - which continues to apply according to the proposed Regulation's recital 12 - must not be exercised between the two countries' CESLs, but instead between the CESL (of the law chosen by the trader) and the consumer's national law.

1.3. Level of consumer protection in relation to unfair contract terms

Regarding the level of consumer protection, the European Commission highlights its opinion that it is very high, thereby proving trustworthy for consumers[7]. BEUC does not agree with this.

Our on-going comparative analysis of Annex I and national laws shows that the CESL provides a variable level of protection, depending on which element of law is concerned and what level of protection is provided in the respective national law. In each country analysis, very different results can be found, particularly with regard to unfair contract terms.

Furthermore, BEUC underlines that an "overall" perspective on the level of protection on the proposed text in Annex I is an inappropriate approach in seeking an accurate evaluation. This approach risks the consequences of a dilution and/or reduction of important national consumer standards. For example, the fact that some important elements of the text provide for a relatively high level of consumer protection, while the protective provisions against unfair contract terms are lower than many national standards must not lead to the conclusion that the "overall" level of protection is good enough. Protection against unfair contract terms is *the* safety net for consumers in nearly all contractual situations and thus is of key importance.

The level of protection must not be assessed in relation to the minimum harmonisation standards of the consumer *acquis*, but in relation to national laws. The minimum harmonisation directives were agreed by EU legislators precisely because they did not preclude better protection levels in national laws.

Particularly on unfair contract terms, the assessment provided in the next section shows that the proposed text would significantly undermine national standards.

Before the European Parliament begins discussions on Annex I of the CESL, it should consider the functioning and impact of the proposed regime. Furthermore, the Commission should submit a comprehensive regulatory analysis on all aspects of the pCESL applicable to consumer contracts. We understand that the Commission's Expert Group on European contract Law has already assessed the proposed text twice, but we believe third party expertise is necessary. BEUC is ready to support such an analysis with all the expertise of our member organisations.

1.4. The future of the consumer acquis in relation to unfair contract terms

Of equal importance, the future of the consumer *acquis* remains uncertain. Contrary to the field of to business-to-business (b2b) contracts, the EU has over the last three decades built a large *acquis* in the field of consumer contracts. The Consumer Rights Directive[8] fully harmonises the key elements of distance (i.e. online) consumer contracts (e.g. pre-contractual information and formal requirements, the right of withdrawal, the passing of risk, means of payments, delivery, etc.) but does not include rules on legal guarantees and unfair contract terms, leaving these two areas regulated by minimum harmonisation Directives.

The relationship between the pCESL and the consumer *acquis* is problematic. In its Communication accompanying the proposal, the European Commission stated that the pCESL and EU consumer law will be developed in tandem[9]. According to article 15 of the proposal, the European Commission will submit a report five years after the application of the CESL, however there is no indication as to how future consumer legislation will be related to the CESL (if at all) and how coherence between traditional (i.e. "non –optional") and optional legislation can be ensured. The proposal integrated most provisions of the CRD, but some important deviations can be identified. How will a homogeneous interpretation of the CRD and the CESL be ensured? What happens if the consumer *acquis* is updated? Will the pCESL be updated too? If the pCESL is amended, will the respective consumer law Directives be amended also?

BEUC has produced a preliminary position paper on the proposal[10] with more detailed comments on each of the above-mentioned concerns.

2. SPECIFIC COMMENTS ON THE PROVISIONS OF CHAPTER 8, SECTIONS 1 AND 2 PCESL

2.1. General Provisions on unfair terms in consumer contracts

The fundamental issue of the optional regime for the 'unfairness test', and the definition of 'unfairness', namely the general clause, is regulated in Section 1 (General provisions) of chapter 8 and more specifically for consumer contracts in Section 2 (Unfair contract terms in contracts between a trader and a consumer), articles 82 and 83 of the pCESL.

Below we provide comments on the main flaws of the proposed text,

Article 79 – Effects of unfair contract terms

Article 79 of the pCESL follows the approach of article 6(1) of the 1993 Unfair Contract Terms Directive in the sense that the contract terms declared unfair shall not be binding on the consumer and the contract shall continue to bind the parties if it can be sustained without the unfair term(s).

The CJEU recently referred to the interpretation of article 6(1) of the 1993 Unfair Contract Terms Directive, confirming the minimum harmonisation character of that provision. It did so by indicating that although the national court cannot declare a contract void based on the reasoning that it would be more advantageous for the consumer, *"that directive does not, however, preclude a Member State from providing, in compliance with European Union Law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer"*[11].

Contrary to this recent judgement, the pCESL would not allow for a flexible approach in favour of the consumer regarding the effect of unfair terms on the entire contract: for example according to German and Finnish national law the contract as a whole can be declared void if this solution would be more advantageous for the consumer[12]. Under the pCESL this will not be possible.

Article 80 – Exclusions from the unfairness test

Article 80(2) of the pCESL, like article 4(2) of the 1993 Unfair Contract Terms Directive, excludes control of the main subject matter of the contract and the adequacy of the price from the unfairness test.

This exclusion is a central flaw in the level of protection of the Commission proposal, as scrutinising the (un)fairness of the main subject matter or the price is possible in many European countries (AT, DK, GR, LV, LU, SI, ES, SE).

In addition, recent European and national court cases demonstrate that exclusion of the unfairness control on these aspects of the contract leaves consumers without the necessary and expected protection: The CJEU in *Caja de Ahorro*[13] confirmed the minimum harmonisation character of the rules of the 1993 Directive, while the UK Supreme Court in a recent case[14] demonstrated the problems with excluding price clauses in the banking sector from an unfairness test and the need for better consumer protection in this respect.

Article 82 – Duty of transparency in contract terms not individually negotiated

The proposal excludes individually negotiated terms from the unfairness control. Contrary to this limitation on consumer protection, it is allowed in approximately 10 Member States (BE, CZ, DK, FI, FR, LV, LU, MT, SE, SI).

Furthermore, the mere disclosure of information as established in article 80(2) *in fine* - the fact that the relevant contract terms are drafted and communicated in plain, intelligible language - should not be used to prevent the judge from assessing the main subject matter of the contract or the appropriateness of the price. Transparency and fairness of the contractual conditions are two different things, requiring different legislative treatment. The fact that a term including the obligations of the parties is supplied in a transparent manner does not make such a term 'fair'.

Article 83 – Meaning of "unfair" in contracts between a trader and a consumer

According to article 83 of the pCESL, 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, contrary to good faith and fair dealing. However, in some countries the definition of 'unfairness' is more flexible, leading to better protection of consumers. For example, only 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 a significant imbalance without mentioning the additional requirement of being contrary to good faith (BE, DK, GR, FR, LU, LT, SK).

Additionally, the requirement of 'significant' in article 3(1) of the 1993 Unfair Contract Terms Directive has not been transposed by some national legislation e.g. in Germany[15], while it has been dismissed by national courts such as the Norwegian Supreme Court's declaration that in Norwegian law prohibiting unfair contract terms, a 'substantial imbalance' is not required for a term to be considered unfair.[16]

Regarding the criteria for the unfairness test, according to the pCESL *"the circumstances prevailing during the conclusion of the contract"* have to be taken into account. However the unfairness of the term should be assessed by referring to the circumstances occurring before, during and after the conclusion of the contract. Article 83 of the pCESL only refers to the circumstances prevailing during the conclusion of the contract. Thus, in Nordic countries such as DK and SE where a more flexible approach is applied, a clear reduction of rights would be the consequence of the proposed CESL.

2.2. Lists of unfair terms

Regarding the lists of unfair terms in Article 84 and Article 85 pCESL, although they are long compared to the legislation of some countries, they are not complete or do not meet the stricter requirements of some other national clauses, be it because the standards are higher in national law or be it because the proposed introduction of two categories of unfair clauses, namely a black (always unfair) and a grey ("only" presumed to be unfair) list of unfair clauses poses problems.

Below we list some examples; however, the European Commission should provide for a full regulatory impact assessment of the pCESL in relation to national law. A comparison to EU law only is of no relevance, as EU law on unfair terms is based on minimum harmonisation and thus must not be seen as a benchmark for its real impact on European consumers and the protection they benefit from.

Firstly, some national legislation (e.g. AT, ES, GR) has only one list of terms for business-to-consumer contracts which are always unfair (black). In the CESL proposal many of those terms are not in the category "always unfair" but they are included in the grey list of Article 85. This puts the consumer in a worse position compared to their national law as the trader can claim and assert that the clause is fair, while, if included in the black list, no defence is possible.

For example, several clauses of the grey list of the pCESL are always considered unfair under French law. This is the case for the clauses named in article 85 a), b), f), i), j), k), l) and v) of the pCESL.

Secondly, important clauses which exist at national level are missing in the proposal, and the content of clauses is not as strict as in some Member States, which can be of essential importance:

In Austria, certain black listed clauses which are highly relevant in practice, such as those regarding the automatic prolongation of a contract or price increases after conclusion of the contract, are much stricter (more protective) than the version in the pCESL (for example Article 85 lit k), h), j) and n)). A significant reduction of protection would be the consequence of use of the pCESL. This is also the case with Belgian law, which includes clauses[17] which are not included in article 85 of the pCESL.

2.3. Unfair contract terms in digital content contracts

The recently adopted Consumer Rights Directive[18] provides some improvements in the area of digital content products, for example via the inclusion of provisions on pre-contractual information requirements. Traders providing digital content are now required to inform consumers about the application of technical protection measures affecting the functionality of digital content and the interoperability between hardware and software[19]. However, important areas of contract law, such as legal guarantees and unfair contract terms, have not been adapted to digital content products. This leads to legal uncertainty and consumer detriment.

This is also recognised in recital 17 of the pCESL[20]. A recent study[21] published by the European Commission on consumer experiences in the purchase of digital content products estimates the consumer detriment within the EU to be €63 billion per year.

The Commission's proposal includes digital content contracts within its material scope[22], dedicating specific provisions in different areas to these types of products. On one hand, it duplicates the rules included in the CRD on pre-contractual information (Article 13(h) and (i) CESL) and the right of withdrawal (article 40 pCESL), while on the other hand it stipulates new rules like applying the conformity test to digital content contracts (article 99 pCESL).

The obvious problem with this approach, especially in the field of legal guarantees, is that due to the optional character of the pCESL, online businesses offering digital products would be allowed to decide whether or not to use the clearer rules of the pCESL.

Regarding unfair contract terms, consumer detriment has been found in the use of contractual restrictions which support and justify to some extent the application of DRM and Technical Protection Measures, which prevent consumers from exercising their privileges granted under copyright law.

For example, the most frequent restrictions include: the restriction of 'personal use' which prevents consumers from acting out any other use, copy or communication; the prevention from making private copies of the content; restrictions related to the playability of the content on certain devices (interoperability); territorial restrictions; bundling clauses requiring the consumer to purchase additional content or hardware as a condition to the purchase of a content; etc.

The University of Amsterdam in a study[23] sought by the European Commission, made several suggestions on substantive provisions for the regulation of the rights and obligations of parties to a consumer digital content contract. In particular, it was suggested to introduce a presumption of unfairness for contract terms that deviate from the copyright exceptions and limitations to the detriment of consumers, e.g. not allowing for the private copying of a work.

Similarly, in the context of the CRD, BEUC suggested the inclusion of specific provisions on unfair contract terms in digital content contracts when it comes to terms which restrict the permitted use of digital products under copyright law[24].

The CESL proposal, although it makes the unfairness test applicable to digital content contract terms, regrettably does not make reference to the problem of unfair limitations of copyright exceptions when it comes to digital content consumer contracts.

BEUC believes the *acquis* should continue to be updated and developed in the field of digital products, in particular on legal guarantees and unfair contract terms. This should not be done via an "optional regime" as the pCESL but by way of solid legislation applicable to all consumer contracts and thus to the benefit of all European consumers.

3. ALTERNATIVE SOLUTIONS

BEUC believes that there is no need for a new instrument on consumer sales law, as the 2011 Consumer Rights Directive, the 1999 Sales Directive and the 1993 Unfair Contract Terms Directive already provide a solid EU legal framework. The Commission should focus on updating the consumer *acquis* by improving the identified problems and helping consumers to face the challenges of the digital economy. In relation to digital content products, the CRD is a starting point, but a concrete proposal on digital content consumer products – one which includes rules on legal guarantees and contract terms - is needed.

As CRD will be transposed by the Member States already next year, a new assessment about any potential problems with differences of national consumer contract law in cross-border trade should be made in about 3 years.

Furthermore, European model contract(s) for consumer e-commerce transactions should be recommended as a matter of priority, which would be a better, less intrusive, less costly and faster solution than an entire new EU sales law instrument. BEUC has made a first proposal for an EU model contract and calls on the EU institution to support such initiatives.

Moreover, the European Commission's report on the application of the Rome I Regulation on the law applicable to contractual obligations, which is due in 2013 and will include an evaluation on the application of Article 6 concerning consumer contracts should be awaited. In the meantime, the EU should focus on measures as listed in the Commission's new 2012 e-commerce strategy (improve broadband access, enable better enforcement of consumer law, promote reliable and efficient payment and delivery systems and so on) to promote consumer e-commerce.

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