



The Consumer Voice in Europe

Common European Sales Law – Exchange of views with the Council presidency on 25th November

Letter sent to the EP/ JURI Committee

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Contact: **Ursula Pahl and Agustin Reyna –**
consumercontracs@beuc.eu

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Dear member of the JURI committee,

In view of the exchange with the Lithuanian presidency on the proposal for a Common European Sales Law next week, we would like to provide you with an overview of consumer organisations major concerns in relation to the result of the JURI vote of 17th September 2013.

BEUC is very concerned about the position adopted by the JURI committee and its potential impact on European consumers. As set out below, **the report of the JURI committee would reduce consumer rights** on important aspects of national sales laws, particularly in the field of legal guarantees. Though the adopted report also includes several good changes, the simple fact that on important aspects national consumer rights would be undermined if CESL is used by business, is not acceptable from a consumer policy perspective.

Summary of our assessment of the negative impact of the JURI vote

1. Limitation of the scope to distance (including e-commerce) contracts

One of the most important changes instructed by the JURI committee is the limitation of the scope of application of the CESL to (cross-border) distance contracts (amendments 60, 61).

From the consumer's viewpoint, the limitation of the scope to cross-border distance contracts would create discrimination between consumers buying on-online cross-border and on-line domestically or in physical shops since they would face different rights for the same type of products. **This new concept would lead to increased fragmentation for the Single Market and would not be helpful for consumers nor businesses.**

Consumer associations and the e-commerce industry, the alleged beneficiaries of this instrument, agree that the proposed limitation of the scope would not bring any added value to consumers and businesses alike¹. On the contrary, an instrument limited to distance cross-border contracts would lead to further complication of the legal environment.

¹ Joint BEUC - Ecommerce Europe letter of 10 June: Joint call by consumers' organisations and e-commerce businesses to reject the Commission's proposal for a Common European Sales Law regulation, available at www.beuc.eu, Ref.: X/2013/036 - 10/06/2013.

Consumers would be faced with four different contractual scenarios:

- a) cross-border on-line (or distance) contracts under CESL;
- b) cross-border on-line (or distance) contracts under national law;
- c) domestic on-line (or distance) contracts under national law;
- d) off-line contracts under national law.

The following problems arise:

- 1) Such a proliferation of legal regimes would be confusing for consumers. **Fundamentally different rights** would be in place for online contracts concluded under CESL compared to contracts concluded under national law, for example as regards the consumers' remedies or limitation periods in case of a legal guarantee. Both rules however would be considered as mandatory, thus necessary to protect the weaker party of the contract. How can two different sets of mandatory EU and national laws co-exist? How can European citizens understand this?
- 2) Likewise SMEs would find it hard to adapt to the different rules. **Increase in regulatory costs for businesses** that sell off- and online would be the consequence. They would all need to understand and monitor both regimes (even if they do not use it) and some may have to offer several different standard contracts or have to determine on a case-by-case basis which standard contracts to apply to every individual transaction.
- 3) Duplication of EU law: This reduction in scope highlights even more that CESL would duplicate existing EU consumer law: the **2011 Consumer Rights Directive (CRD) was made mainly for e-commerce consumer contracts.** It has been copied by the proposed CESL to a big extent with the risk of creating inconsistencies between both texts and leading to diverging interpretations. In this sense, it should be recalled that the CESL shall be interpreted "autonomously and in accordance with its objectives and the principles underlying it"² while the CRD rules would be interpreted by the judge from a national perspective.

The JURI committee tried to bring the CESL in line with the CRD through different amendments (e.g. definition of consumer in amendments 5 and 32) but there are still elements regulated differently in both instruments such as certain aspects of digital content (see below in point 6).

- 4) Discrimination: What is even more worrying is that a dual regime would, in certain cases, create discrimination against consumers who do not want or cannot shop online. Consumers purchasing digital products in a shop or under national laws would not benefit from those modern rules. The same can be said for traders who do not do on-line trade or do not do it cross-border. This creates **competitive distortions** between businesses trading only online domestically and those trading both online domestically and cross-border.

² Article 4(1), Annex I, CESL.

2. JURI vote: reduction of consumer rights in certain countries

The JURI report has introduced several amendments to the articles on consumer remedies, in particular on the right to terminate the contract. These amendments reduce the level of consumer protection of the Commission's proposal resulting in a lower level of protection compared to several national regimes:

- Inclusion of the duty to notify lack of conformity within two months otherwise the consumer loses his/her right to terminate the contract (amendment 201). This obligation does not exist in those Member States which provide for the termination of the contract in the first layer of remedies (United Kingdom) or where there is no hierarchy of remedies (Greece, Lithuania). Thus, CESL would add an additional burden on the consumer who wants to terminate the contract in case of non-performance of the trader's obligations.
- Consumers are not allowed to terminate the contract in case of insignificant defects (article 114 CESL). This could have a negative impact for consumers in Czech Republic, Estonia, Portugal and the United Kingdom.
- Consumers are not entitled to terminate the contract as a first remedy if the defective product has been personalised for the consumer (amendment 192). This restriction does not exist in the United Kingdom and Greece.
- Consumers have to bear the costs of returning any faulty goods upon termination of the contract (amendment 226). This obligation does not exist in the 1999 Consumer Sales Directive or in most Member States when termination occurs because the repair or replacement is not possible. This would be equally against the ECJ case-law, in particular leading cases *Weber-Putz*³ and *Quelle*⁴.
- The right to terminate the contract is limited in case of partial non-performance as established in article 117(3). Such a restriction does not exist in the UK. (the JURI report confirmed the commission's proposal in this respect).
- Traders would be entitled to deduce from the reimbursement not only the payment for use as already foreseen in the CESL proposal (article 174), but also sum to compensate any diminished value for the use the consumer gave to the defective product (amendment 240, 241). In most countries such a possibility does not exist *per se* or it is considered in very restricted cases and on a case-by-case assessment (e.g. via the application of general principles like reasonableness and fairness, what could lead to better results for consumers).

³ Joint cases C-65/09 and C-87/09.

⁴ C-404/06.

The JURI committee has reduced the long prescription period from 10 to 6 years (amendment 249). This would have negative consequences from two perspectives:

- Firstly, in relation to the remedies for lack of conformity, the six year limitation period could be less advantageous for consumers from Finland and the Netherlands where there is guarantee period is linked to the expected life-span of the product
- Secondly, regarding other rights covered by the CESL proposal such as damages or avoidance, national legislations provide for longer prescription periods. This would be the case of Austria (30 years); France, Greece and Portugal (20 years); Belgium (10 years).

Additionally, the JURI committee added a rule indicating that the prescription takes effect when either of the two prescription periods (2 or 6 years) has expired (amendment 250). This new reference creates uncertainty and might lead to the interpretation that the consumer's rights in case he / she has "become, or could be expected to become aware"⁵ of the relevant event (e.g. lack of conformity or ground for avoidance) would expire already at the end of the two years period, with a negative impact in many countries.

In the light of the selected points of concern as set out above, we would ask you to re-consider your approach and - instead of supporting an optional sales law - continue the good work on true harmonisation of EU consumer law to the benefit of *all* EU consumers, while creating at the same time a level playing field for businesses operating across the borders.

Thank you very much for taking our concerns into account when deciding on this issue in the future.

Yours faithfully,

Ursula Pachi
Deputy Director General

Agustin Reyna
Legal Officer

⁵ Article 180(1) on commencement, Annex I, CESL.