

TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESS ?

Public consultation on the Commission's
Green paper on European contract law

BEUC's response

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SUMMARY

The European Commission perceives diverging rules of national contract law as a barrier to the development of the Internal Market and therefore consults on ways to how to achieve further harmonisation. Before launching the current consultation, in its Communication on a "Digital Agenda", the Commission already announced that an optional instrument for business-to-consumer contracts would be proposed. Hence the pending consultation is not credible and we deplore that the Commission does not respect its obligation to undertake wide and transparent consultation before it takes a decision (Art 12 TEU).

BEUC considers that the introduction of an optional instrument for business-to-consumer contracts would lead to a series of disadvantages for EU consumers. The completion of the Single Market should not be pursued on the back of consumers. Other policy options, which are surprisingly not included in the Green paper, such as model contracts combined with an on-line alternative dispute resolution system should be considered. Such an approach could lead to a genuine win-win situation both for business and consumers.

BEUC's fundamental concerns in relation to the Commission's intention to establish an optional instrument for business-to-consumer contracts are summarised below:

- 1) There is **no clear evidence** and data as to why an optional instrument is necessary and if it would indeed lead to the results aimed for by the Commission. The significance of the impact of the divergence of contract laws at national level on cross-border trade and competition has never been properly assessed. From a consumers' perspective, these differences are not an essential factor and are not relevant in relation to other problems that impede consumers' confidence in cross-border shopping.
 - Evidence that the differences in legal regimes represent a key barrier to cross border trade is lacking;
 - There is a potential for more cross-border trade but the Commission's believe that a harmonisation of contract law will significantly change this situation is an overestimation because:
 - o Not all consumer markets lend themselves to cross border trade;
 - o Consumers are deterred from shopping cross border for reasons which are not related to contract law but practical difficulties with delivery, fears of the lack of cross-border complaints and redress mechanism, languages etc.
 - o Many businesses have an incentive to maintain territorial distinctions e.g. due to intellectual property rights, different pricing opportunities and reduced inter-company competition.
 - o Not all consumers want to shop cross-border because they prefer to shop in their own country¹.

¹ According to a survey by our UK member Which? of December 2010 which is attached to Which ?'s response to this consultation

- 2) **Abolition of well-established EU consumer protection principles:** The optional instrument would replace national mandatory consumer protection rules and overrule the consumer specific regime of Private International Law (Rome I Regulation): under current rules for cross-border contracts, consumers can either rely on the protection granted by the consumer's home country or benefit from them in case they would be better protected by their own law than by the traders choice of law. This fundamental principle of EC legislation would be abandoned through the optional instrument. The Commission's thinking is moreover apparently partially based on a misreading of the Rome I regulation². We call on the Commission to rectify its understanding of the Rome I regulation first, before taking any further steps.
- 3) **No "true" opt-in for consumers:** The optional instrument is not what it pretends to be – it is not genuinely "optional" for consumers: the entire concept of an "optional" tool in business to consumer contracts disregards the inequality of bargaining power and the reality of pre-formulated standard contracts in consumer relations. Indeed there is no choice between the parties in b to c contracts as the trader imposes the contract terms and conditions. Even if traders were obliged to offer the consumer a choice between the optional instrument and the "normally" applicable law it is clearly impossible for consumers to make an informed choice between different contract laws. Instead of increasing consumers' confidence, the optional instrument would generate uncertainty and confusion.
- 4) Logically, the introduction of a second regime for contract law would **increase legal uncertainty and create confusion** not only for consumers, but also for SMEs. Confusion would be even worse if the optional regime would not only apply to cross-border contracts, but also to domestic contracts. Depending on the trader's preferences, consumers would then be faced with two different sets of laws in their own country. As a further consequence, national consumer protection law would no longer be relevant. As a result, full harmonisation of consumer contract law – but on a much broader scale than in the originally proposed consumer rights directive – would finally be injected into Member States national law through the backdoor.
- 5) Finally, it is clear that the **level of consumer protection** in the optional instrument would need to be set at an **average level** compared to the current standards in place in the Member States. The dilemma is obvious: An optional instrument based on a truly high level of consumer protection, taking into account best practices of the Member States, would not be interesting for business. It would make the optional instrument unattractive for those, for which it is mainly designed. Yet, if the level of protection would be average, consumers of many Member States would lose out and the use of the optional instrument would be detrimental for them³.

² See below in B 1° b) and fn 25.

³ This has been already been acknowledged by a member of the Commission's expert group at the EP workshop on 27 October, see footnote No 22.

Against this background, BEUC concludes that the policy choice for an optional instrument would place the Single Market at the service of enterprises ahead of the protection of consumers' interests. Our analysis shows that from a consumer perspective there are no evident advantages of an optional instrument but significant disadvantages.

What the Commission should do:

- review the premature announcement that a legislative instrument on European contract law will be adopted by the end of 2011;
- await and take into account the results of the proposed consumer rights directive, which will considerably further harmonise the key areas of consumer contract law;
- provide clear evidence that different legal regimes are a key regulatory barrier and that a harmonised regime will almost certainly lead to more cross border trade and clear tangible advantages for consumers;
- initiate a study to identify the mandatory rules that currently apply for consumers when shopping domestically or cross border so there is a clear understanding of what is at stake;
- consider additional options (which are not provided for within the options of the Green paper) such as the introduction of European model contracts, which could facilitate cross-border trade for business while at the same time not being intrusive and detrimental to consumer protection; BEUC will submit a proposal for European model contract linked to an on-line ADR system and will present it to the Commission soon
- put more emphasis and efforts into making progress on other, more important problems in relation to cross-border transactions as listed above and in the Commission's communication on e-commerce⁴ and BEUC's proposals in its recent position paper on e-commerce.

⁴ COM(2009) 557 final, 22 October 2009.

CONTENTS

I. THE GREEN PAPER ON POLICY OPTIONS FOR A EUROPEAN CONTRACT LAW

II. BEUC'S RESPONSE

- A) The Commission's economic case - Is national legislation on contract law a real barrier to the development of the Internal Market?
- B) BEUC's concerns on an optional instrument for consumer contracts:
 - 1) The optional instrument and existing rules of Private International Law: the loss of mandatory protective rules in Member States
 - 2) The final choice of the instrument
 - 3) Application of the optional instrument to cross-border and/or to domestic contracts
 - 4) The level of consumer protection
 - 5) The impact on future consumer policy and legislation
 - 6) Is the DCFR an adequate basis for a user-friendly instrument?
 - 7) Legal basis
 - 8) Compliance with the principles of Subsidiarity and Proportionality
- C) BEUC's assessment on the other policy options of the Green Paper

III. BEUC'S PROPOSAL: THE "EIGHTH OPTION" – MODEL CONTRACTS LINKED TO ADR

I. THE GREEN PAPER ON POLICY OPTIONS FOR A EUROPEAN CONTRACT LAW

The Green Paper identifies the differences between national contract laws - which partially exist due to the “minimum harmonisation” clauses in the current consumer *acquis* - as one of the most significant obstacles to cross-border trade.

According to the Commission, diverging rules on contract law increase costs for business when offering their products cross-border and decrease consumers’ confidence to purchase products in other Member States, both factors resulting in a limitation on the development of the Internal Market⁵.

In order to tackle this perceived barrier the European Commission in October 2008 issued a proposal for a Directive on Consumer Rights⁶ applying full harmonisation to all major parts of current EU consumer contract legislation and some additional aspects of contract law. More than 2 years later, the proposed directive is still before its first reading in the European Parliament and in the Council of ministers. At this stage, the results of the legislators’ deliberations cannot be anticipated, however, the Council of ministers of the EU preliminarily indicated to dramatically reduce the scope of the proposed directive, which would according to the Council only apply to distance selling and off-business premises contracts. This is a clear indicator that political agreement on a common level of protection that suits all member states is not achievable in core aspects of consumer contract law.

Despite the ongoing negotiations on the proposed consumer rights directive, the Commission has launched the current consultation on policy options for a European contract law initiative which addresses three questions: the legal nature of any initiative on European Contract Law, its scope of application (b2b, b2c, domestic, cross border) and the material scope.

Before launching the current consultation, the Commission by a decision of April 2010 set up an Expert Group on European Contract Law to assist in the preparation of a set of rules based on the Draft Common Frame of Reference (hereafter DCFR)⁷.

Consultation on a decision already taken?

The credibility of the current public consultation is low. Even before the current consultation was launched, the Commission had already announced its plans to propose an optional instrument applicable to business-to-consumer contracts in its communication on the “Digital Agenda for Europe 2010”⁸.

⁵ Green Paper on policy options, p.2 and Explanatory Memorandum, Proposal for a Directive on Consumer Rights.

⁶ COM (2008) 614 final, 8 October 2008.

⁷ Decision (EC) 233/2010 of 26 April, 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law.

⁸ In the Digital Agenda 2010, the European Commission “[proposed] by 2012 an optional contract law instrument complementing the Consumer Rights Directive to overcome the fragmentation of contract law, in particular as regards the online environment”, COM (2010) 245, 19 May 2010.

Furthermore and according to the Commission's own statements, the expert group⁹ has been tasked to undertake a "feasibility study" for an optional instrument for b to b and b to c contracts.

How can the College fulfil its Treaty obligation to consult widely on policy issues and ensure a democratic and transparent process where all stakeholders have the opportunity to present their arguments, if on the other hand, Commissioners have already made up their mind and have invested and continue to invest considerable resources to advance only one of the apparently still pending policy options?

Due to this deplorable situation, BEUC will focus mainly on option IV - the optional instrument- as this clearly is the option aimed at by the Commission.

III. BEUC'S RESPONSE

A) The Commission's economic case - Is national legislation on contract law a real barrier to cross-border trade?

To date, the European Commission has not provided any convincing evidence to prove that differences in national contract laws increase costs when businesses offer their products cross-border. The Commission in order to justify its intentions frequently refers to the incredible figure of 61% of cross-border consumer orders¹⁰. However, this figure does not provide for any explanation as to *why* traders refused to serve the consumer. The report does not give any basis whatsoever for the conclusion that the existing legal diversity is the reason why traders do not accept to sell to consumers in a foreign country. Consequently, the conclusion of the Commission, that diverging rules of contract law will increase cross-border sales, is not a valid deduction of the report.

On the contrary, according to the Commission's Eurobarometer (2008, no.224), 74% of traders said that harmonised laws would make little or no difference to their cross-border activities¹¹ and in addition, academic literature has also considered that if transactional costs exist, they would be quickly depreciated¹².

From the consumers' point of view, there are other major factors which explain why consumers do not or cannot buy in other Member States including cultural barriers

⁹ See fn 13.

¹⁰ YouGovPsychonomics, *Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, Final Report*, October 2009, available at http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf [online: 06 January 2010]

¹¹ Flash Eurobarometer (2008, no.224), Business attitudes towards cross-border sales and consumer protection - Analytical report, p. 37 available at: http://ec.europa.eu/public_opinion/flash/fl_224_en.pdf [online: 06 January 2010]

¹² V. HEUZE, "De la compétence de la loi du pays d'origine en matière contractuelle ou l'anti-droit européen" in *Le droit international privé : esprit et méthodes : mélanges en l'honneur de Paul Lagarde*, Dalloz 2004, p. 393-398

such as language, preference for physical shops, demographic composition of the population¹³ digital literacy, limited access to broadband¹⁴, reliability on online traders, lack of choice of means of payment and discriminatory charges between the means offered, security problems, privacy, post-sale services, complaint handling, intellectual property rights territorial limitations, business anti-competitive practices etc¹⁵. A recent survey by our UK member organisation Which? clearly indicates that apart from consumers' wish to shop in their own country instead from abroad, the main reason why UK consumers have not bought from an EU company is that if something goes wrong they are worried about not getting an exchange/ refund¹⁶.

The European Commission has not made its case for its economic theory and should firstly take into consideration and make progress on other areas related to cross-border purchasing (in particular e-commerce), which by contrast have been clearly identified as creating considerable difficulties for both consumers and business, before starting an initiative in the field of contract law that most likely would have a negative impact on consumer protection standards.

B) BEUC's concerns on an optional instrument for consumer contracts

What is an optional instrument?

Applying full harmonisation as a regulatory technique to all key aspects of consumer contract law as suggested by the Commission in 2008 is not possible at this stage. This has been clearly shown by the negotiations of the Council and the Parliament on the proposed Consumer Rights Directive. Against this background it seems that now the adoption of an optional instrument for b to c contracts is suggested as the new solution to tackle the perceived barrier of "legal fragmentation".

However, the "optional instrument" is not at all sufficiently defined in the Commission's Green paper and could mean different things in different forms of appearance.

There has been a lot of discussion including public statements by the Commission¹⁷ about this "optional instrument" without giving any clear idea on how in reality this instrument would function and what its practical impact would be on consumers:

The Green paper together with the minutes of the expert group on European contract law and the oral explanations provided by the Commission to the key stakeholder group on EU contract law, allow deducing the following: The optional instrument would

¹³ In 2008, 47% of individual between 25 and 34 years old have ordered goods or services online in the last year, whereas the corresponding figure for individuals between 55 and 64 years old is 20%, Commission staff working document, Report on cross-border e-commerce in the EU, SEC (2009) 283 final, p. 11

¹⁴ Currently, 14 Members States are below the EU27 average of household broadband access. In those countries, less than 50% of the population has access to broadband: European Commission staff working document, Europe's Digital Competitiveness Report, Vol. I, SEC (2010) 627, p. 29

¹⁵ For a detailed analysis of these concerns, refer to BEUC response to the public consultation on e-commerce (ref: X/078/2010 - 8/11/2010) and BEUC Reflection Paper on E-commerce (ref: X/030/2010 - 06/05/10) available at www.beuc.eu

¹⁶ The Which ? survey of December 2010 will be attached to Which ?'s response to this consultation;

¹⁷ COM (2010) 245, 19 May 2010.

be a **self-standing** set of rules conceived **to fully replace national contract law** (a so-called “second regime”).

On crucial elements the Commission ***has not yet disclosed its intentions namely in relation to:***

- The types of contracts targeted (national, cross-border etc);
- The nature of the products and services covered (material, digital, intellectual);
- The party to the contract that chooses the application of the OI
- The contractual obligations targeted by harmonisation;
- Its relation to other legal instruments (Directives, national mandatory law, private international law).

Main concerns

In general

It is essential that any new regulatory or non regulatory tool in the field of consumer policy is guided by certain principles *and that there is a clear added value for consumers*. These principles should be discussed with all stakeholders, including consumer representatives in order to provide for a balanced interest approach. So far, such a discussion has not taken place and we call on the Commission to launch a debate when the results of this consultation are available.

Specific comments

1) The optional instrument and existing rules of Private International Law: the loss of mandatory protective rules in Member States

The Commission in its Green Paper indicated that the optional instrument would be adopted as a “2nd regime”¹⁸ in each Member State, thus providing parties with two regimes of domestic contract law¹⁹.

Although the ‘choice of law’ by the parties functions as the general rule in the so called Rome I Regulation²⁰, such freedom is limited when it comes to consumer contracts by the better protection granted in the legislation of the country of the consumer’s habitual residence (article 6(2))²¹ and, in a general way, by the overriding mandatory provisions (article 9) and the public policy (article 21) of the forum.

¹⁸ The optional instrument is often been referred to, without distinction, as a 28th regime. It is important to highlight that both terms imply different consequences in relation to the application of the rules of Private International Law: If the optional instrument is conceived as a **28th regime**, it could be treated as a ‘foreign law’ by national courts and in consequence it would not override national mandatory rules since the application of Private International Law would not be limited. In contrast, a **2nd regime** would imply, as expressed in the opinion published by the European Economic and Social Committee in May 2010¹⁸, that it would be incorporated into national legislation and that the optional instrument would coexist alongside domestic contract law in each Member State. This means that the optional instrument would be part of the national legislation and consequently the rules of Private International Law would no be longer applicable.

¹⁹ Green Paper on policy options, p. 9.

²⁰ Regulation (EC) 593/2008 “Rome I”.

²¹ According to this provision the trader is allow to make a choice of law but such a choice should not prevent the application of better standards of protection granted by the country of the consumer’s

By an optional instrument that overrides Private International Law, consumers would/could be prevented from using the protection granted by the Member States of their habitual residence, which could signify a loss of rights and a decrease in the existing level of protection.

In the following paragraphs the three relevant articles of the Rome I regulation are analysed with special focus on the protection of consumers as a policy developed by national legislators.

a) National mandatory consumer protection rules

According to article 6 of Rome I regulation consumers cannot be prevented from the better protection afforded to them by mandatory provisions of the country where they have their habitual residence. This rule applies if one of the two conditions of article 6(1) is met: either the professional pursues his activities in the consumer's country of habitual residence or such activities are directed to that country or to several countries including that one.

Consequently, it can be assumed that in most of the typical cross-border on-line transactions, consumers can currently benefit from the protection granted to them in their home country.

The optional instrument is intended²² to escape from the application of these rules by being 'self-standing' with no reference to any national law necessary.²³ This is problematic as obviously in many countries the mandatory rules might be more protective than the rules in the optional instrument.

It is indeed unlikely that an optional instrument, compared to all Member State's legislation, will provide a high enough level of protection that would suffice for the needs and expectations of European consumers. Hence, the optional instrument will inevitably lead to loss of protection on at least some subjects.²⁴

b) Business can choose the law that applies to a consumer contract: The misunderstanding of Rome I in relation to consumer contracts:

The Commission's explanations of the impact of Art 6 of the Rome I regulation seems exaggerated and do not provide the whole picture: the Commission apparently

habitual residence. As an example, Amazon, a company established in Luxembourg, operates through 4 websites (amazon.co.uk / .it / .fr / .de) applying the Luxembourgish law to the contract terms of all the platforms without taking into account the protective rules of the targeted Member States.

²² See footnote 25 of the Greenpaper.

²³ Green paper on policy options, p. 9.

²⁴ "(...) Member States generally having a high level of consumer protection not only are unlikely to have much to gain but, on balance, would almost certainly stand to lose some protection when opting into a self-standing optional instrument." M. HESSELINK, "An optional instrument on EU contract law: could it increase legal certainty and foster cross-border trade?", note prepared for the *Workshop on an Optional Instrument for EU Contract Law* held by the JURI committee at the European Parliament the 27th of October 2010, available at :

<http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483> [online: 06 January 2010]

believes that the consumer's country law needs to be fully respected in cross-border contracts²⁵. In reality, business very often and in line with Art 6 of the Rome I regulation chooses its own country's law as the law applicable.

Business can indeed make a valid choice of law and for example make the law of its own country the basis of the contract. Only in case of litigation the judge would have to assess firstly if the business targeted the consumer's country and if yes, whether the rules in question are equivalent to the consumer's country rules in terms of protection. Only if the consumer was targeted and if the chosen law is not equivalent in comparison to the rule(s) of the consumer's national law, these more protective rules would have to be taken into account.

This important fact is not at all reflected in the Commission's Green paper nor in its Terms of Reference for a study for the currently ongoing impact assessment²⁶. It can be feared that the results of the impact assessment could be based on a wrong description of the impact on (potential) cross border traders of Art 6 para graph 2 Rome I.

A lot could be achieved already if the Commission together with national business organisations would undertake an awareness campaign for SMEs about the real impact of the Rome I regulation, the appropriate way to insert choice of law clauses if desirable to their cross-border contracts with consumers and the dimension of any risks left in this context. As far as we know, such an initiative has never been envisaged.

b) Overriding mandatory provisions

According to article 9 of the Rome I regulation, overriding provisions are *provisions the respect for which is regarded as crucial by a country for safeguarding its public interests (...)*.

Since it is not clear what the difference is between these rules and the mandatory provisions referred to in article 6, a court can always apply consumer legislation or certain consumers' rights as overriding mandatory provisions²⁷. Article 9 of Rome I does not exclude its application to these kinds of contracts beside the existence of article 6 as a *lex specialis*²⁸

²⁵ Green Paper page 5: according to the Commission the impact of Art. 6 is such that business – even if they make a choice of law – have to comply with 26 other laws: “For businesses this rule (Art. 6) means that when they sell across borders, the contracts that they conclude with consumers are subject to the different rules in force in the countries in which these consumers are resident, irrespective of whether a choice of law is made or not. Businesses wishing to engage in such cross-border trade may face high legal costs when their contracts are subject to foreign consumer law. In extreme cases, some businesses may even refuse to sell across borders and thus potential customers of that company may be locked in their national markets and be deprived of the enhanced choice and lower prices offered by the internal market. This may be particular in e-commerce transactions...”

²⁶ Submitted to the Sounding Board of stakeholders on the 20th of December 2010.

²⁷ V. MARQUETTE, “Le Règlement “Rome I” sur la loi applicable aux contrats internationaux”, *Revue de Droit Commercial Belge*, N° 6, 2009, p. 531.

²⁸ A-L. CALVO CARAVACA and J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, vol II, Granada, Comares, 2008, p. 569.

For example, the *Cour de cassation française*²⁹ in 2006 decided that *lois de police* should prevail in case mandatory consumer rules remain inapplicable if the conditions of article 5 of the Rome Convention (now article 6, Rome I Regulation) are not met. In other words, under certain circumstances when consumer protective rules constitute at the same time overriding mandatory provisions (*loi de police*) those rules could be always applied³⁰.

c) *Public policy*

The third limitation to the application of a foreign law is the public policy (*ordre public*) of the forum established in article 16 of Rome I Regulation. It functions as an exception to protect the principles and values that are essential to the society in a certain place and time.

Different conceptions of public policy exist among Member States as it is an issue linked to the relation between the State, the market, and civil society or the family³¹. Each one represents the values of a society expressed in their own legal tradition which do not necessary correspond to those from other Member States.

For example, in France there is a distinction between *ordre public classique* and *ordre public contemporain/économique de protection*. The first applies to protect fundamental values of the French State and the second to protect the weaker party in a contractual relationship³² which demonstrates that the French *ordre public* can be invoked in the protection of individual interests.

In the UK, the public policy applied to contracts is more focused on the protection of general interests (i.e. object of the contract if contrary to common law or legislation, good governance, etc.) while in Italy, it is possible to find a distinction between public policy that concerns family relations and the one which concerns economic relationships.³³

Since the content of the public policy differs from country to country and from time to time, as equally recognised by the Court of Justice of the European Union (CJEU)³⁴, it

²⁹ Court de Cassation Française, Decision N° 855 of 23 May 2006.

³⁰ Other interpretations can be found in Germany where in the 80's and early 90's some courts ruled in favour of the application of German consumer law to contracts concluded by active consumers in other Member State: during their holidays in the Canary Islands, German tourists were contacted by Spanish salesmen and induced to buy expensive woollen bed linen, a purchase they soon regretted. The sellers had seen to it that the purchase were governed by Spanish law, which had not yet implemented the Doorstep Sales Directive and which did not give the purchasers the right to cancel the contract. However in most cases were applied the German law that had implemented the Directive and thereby accepted that the buyers had called off the contract (O. LANDO and P. NIELSEN, "The Rome I Regulation", *Common Market Law Review* N° 45, 2008, p. 1724).

Recently the German Federal Court of Justice (der Bundesgerichtshof) considered that a national consumer protection rules which goes beyond the minimum binding harmonisation of an EU directive cannot be invoke as an international overriding provision (BGH, NJW 2006, 762, 764 quoted in Urteil Xa ZR 19/8 of 9 July 2009 Air Baltic).

³¹ J. W. RUTGERS, "The DCFR, Public Policy, Mandatory Rules, and the Welfare State in A. SOMMA, *op. cit.* p. 123.

³² *Idem.*

³³ *Idem.*

³⁴ Case C-36/02, CJEU 14/10/2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*.

is very unlikely that one self-standing instrument on contract law will comply with the public policy of all Member States.

Conclusions:

- The fact that the Commission openly aims at preventing consumers from having access to the safety-net provided by Art 6 Rome I regulation is in its own reason enough to oppose to the optional instrument.³⁵
- The idea of a self standing instrument is hardly realistic and would lead to legal uncertainty: Since the difference between the mandatory rules of article 6 and those of article 9 of the Rome I Regulation is not clearly established, a national court could apply consumer legislation through both provisions as they do not exclude each other. It would be very difficult for a self-standing optional instrument to fulfil the criteria of all Member States on overriding mandatory provisions and public policy, legal concepts which have not been harmonised at EU level. A new field of uncertainty would be introduced to consumer protection legislation.

2) The choice of the instrument

The *raison d'être* of consumer protection legislation is the fact that, in a contract between a business and a consumer because of the fundamental imbalance in bargaining power, there is no choice on behalf of the consumer as to the content of contract, but rather an imposition of the contract terms by the trader. B to C contracts are typically contracts of "adhesion", as opposed to the typical b to b contract, which is supposed to be a result of the negotiations between both parties.

The concept of an optional instrument overlooks that in a typical b to c contract, a consumer has no choice as to the content of the contract. A genuine option for the consumer does not exist.

a) First scenario: the consumer's choice

This idea of the application of the optional instrument through a 'blue button' was developed by academia³⁶. This concept mainly was referred to in relation to online shops. The trader would display on his website a blue flag as an icon which also says "Sale under EU law". If the client, be it a consumer or not, clicks on this 'blue button', the optional instrument would become the law applicable to the transaction concluded between the two parties.³⁷

It is however not clear **between which regimes the consumer is supposed to choose**. This is because under the Rome I Regulation, consumer contracts can be subject to different laws as the trader can impose in the contract terms the application

³⁵ Green Paper on policy options, p.9.

³⁶ H. SCHULTE-NÖLKE, "EC law on the formation of the contract - from the Common Frame of Reference to the "blue button", *European Review of Contract Law*, 2007, p.332.

³⁷ H. SCHULTE-NÖLKE, "The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws", in C. TWIGG-FLESNER (ed.), *European Union Private Law*, Cambridge, Cambridge University Press, 2010, p. 142.

of national law other than the one from the country where the consumer has his habitual residence (article 6(1)), without prejudice to mandatory rules granted by this last legislation which offer a better protection (article 6(2)).

This approach totally neglects the real situation in which consumer transactions are concluded: **THE CONSUMER SIMPLY CANNOT CHOOSE**. On the one hand, when pushing the blue button, he is not aware that he chooses between different legal provisions, but on the other, and more fundamentally, an informed and meaningful decision between two systems of contract law is not possible for a consumer, even not for the savviest one³⁸.

Finally, the scenario according to which the trader would offer a price reduction if the consumer chooses the optional instrument is not acceptable in this context. BEUC is opposed to a potential trade-off between consumer's rights and cheaper prices. Such a development is not tolerable from a consumer policy point of view.

b) Second scenario: the trader's choice

Following the Commission's understanding of the functioning of the Internal Market, it would be but logical to give the trader the right to impose (or not) the optional instrument. Only by allowing the trader to choose, would the objective be achieved that business need to deal with one legal regime only. There is however a risk that some traders could choose according to the circumstances: they would apply those laws (either national regimes or the optional instrument) which suit them better. If traders intend to sell to a country with consumer protection standards higher than the optional instrument, they would impose to contract under the optional instrument and thereby cut consumers off from their national protection standards. But if the country they target has potentially lower standards, the trader could avoid the use of the optional instrument as he is better off by using the law of the consumer's country.

Conclusions:

- Even if the consumer would have the choice, it is not possible to imagine how he or she will be well-informed about the features of this regime in order to compare it with the protective rules of the Member State of his or her habitual residence.
- The optional instrument implies the risk of business' "cherry picking": Business would be put in the driving seat to decide which level of protection the consumer is allowed to enjoy.

³⁸ H. MUIR and R. SEFTON-GREEN indicate that "the idea of the blue button will be politically attractive to only for those who are in favour of lowering standards of protection for the weaker party. Of course the blue button could be politically attractive in terms of visibility; the Common Frame of Reference would be thus a transparent instrument for businesses and consumer alike. However, (...) it should be clear that the blue button proposal is a mere figment of imagination. Consumers cannot choose the Common Frame of reference, non-state law, or to prevail over the mandatory provisions of the law of their home country." H. MUIR WATT and R. SEFTON-GREEN, "Fitting the frame: an optional instrument, party choice and mandatory/default rules" in H-W. Micklitz and F. Cafaggi, *European Private Law after the Common Frame of Reference*, Cheltenham, Edward Elgar Publishing Limited, 2010, p.216.

Obviously this is not what European consumers expect from the Internal Market.

3) Application of the optional instrument to cross-border and/or to domestic contracts

According to the Commission, the optional instrument could be applicable only to cross-border contracts or it could even be applicable to domestic contracts as well thereby replacing national (consumer) law. This latter option would make, in practice, national consumer protection legislation redundant and lead to full harmonisation of consumer legislation through the backdoor.

Even if the optional instrument is only applicable to cross border situations, there is a risk that traders will seek to have the same rules apply to domestic contracts. They might then press governments to allow the use of the optional instrument in a national context. If traders have the right to choose whether the optional instrument applies or not, national consumer legislation would essentially be no longer necessary.

The application of the optional instrument to domestic cases implies that consumers will be obliged to conclude the contract under a regime completely alien to them and therefore prevented from the protection granted by their own national laws.

In addition, the situation described in the previous paragraph could be strongly questioned from the point of view of the principles of Proportionality and Subsidiarity of article 5 of the Treaty on European Union. The application of the optional instrument to pure domestic contracts would not be related to the objectives of the Union when establishing the Internal Market.

4) The level of consumer protection

The level of consumer protection in the optional instrument depends on different factors, including the result of the negotiations on the Consumer Rights Directive as it would – according to the Commission - literally incorporate those provisions which will be fully harmonised.

It is certain that an optional instrument would lead to a loss or reduction of rights for consumers in many Member States.

This is because if the parties (should be read: the trader) choose to apply the optional instrument, the maximum level of protection would be the level of protection this regime provides for.

Moreover, the experience with the pending Consumer Rights Directive and its ongoing negotiations between stakeholders, show how difficult it is to fully harmonise contract law and at the same time grant a very high level of protection for consumers.

Conclusions:

- The application of the optional instrument would prevent consumers from higher protection granted by Member States causing the same effect as under a full harmonisation approach.
- There is an inherent dilemma in the concept of the optional instrument, namely that it would have to be attractive for business - which means that the level of protection cannot be very high - whilst at the same time inspire confidence in consumers - which would require a genuinely high level of protection. Both demands cannot be reconciled.

5) The impact on future consumer policy and legislation

Apart from the four concerns issued above, there are other problems related to the adoption of an optional instrument that would make difficult its application to business-to-consumer contracts. The following questions have to be asked:

- What is the Commission's vision and strategy on the future development of the consumer legislation acquis and how does this relate to the optional instrument/CFR?
- The missing link: how does the optional instrument relate to the proposed consumer rights directive?

 **The link between the OI and the proposed Consumer Rights Directive**

According to the Commission's explanations the fully harmonised parts of the proposed consumer rights directive will be directly transferred into the optional instrument. Those parts of the consumer rights directive, which will not be fully harmonised, might be included in the optional instrument either by taking over the minimum level that the respective directives established or maybe by going beyond these minimum protection standards.

 **The dynamics between the national consumer protection rules and the OI**

Call for a thorough impact assessment

Relating to those mandatory rules of national law, which are currently not harmonised at all, the Commission does not give any explanations. What are these rules? What is their level of protection?

BEUC has called on the Commission to undertake a study in order to identify which national mandatory rules exist that are not covered by the Community acquis BUT would be precluded in case the optional instrument would be applied³⁹.

Obviously such information would be necessary to inform the drafting of an optional instrument. The European Commission should very carefully assess and be transparent

³⁹ BEUC's letter to the Commission's, Director General Françoise Le Bail, DG Justice, October 2010, (ref.: X/2010/088 - 31/01/2011) available at www.beuc.eu

about what would be the practical impact on the existing rights of EU consumers, before any decision to adopt such an instrument is taken.

It has been said very often that the optional instrument will not affect national law and is therefore the least intrusive instrument to achieve further harmonisation. However, what counts for European consumers is not whether the national legislator can avoid a further adaptation of national civil law. What counts is what rights they will have under a specific contract in a specific situation.

The optional instrument will do nothing less than decide what right the consumer will have under a specific contract. It is therefore as intrusive as a fully harmonising directive or as a regulation. Any euphemism relating to the “optional”, “non-intrusive”, “light” or “smart” character of this instrument should be questioned.

If the Commission intends to let the trader drive out national mandatory rules of consumer protection, it should provide for a detailed impact assessment, setting out clearly country by country, what rules are at stake and would be replaced (or not) if the optional instrument is applied.

How to update consumer legislation after the OI ?

Another important question is how the Commission envisages the necessary updating and further development of the consumer acquis itself which is currently minimum harmonised and will partially remain minimum harmonised, even after the adoption of the proposed consumer rights directive.

This question is particularly pertinent given the recent statement by the Commission that it intends to include specific rules on digital content products into the optional instrument. This is alarming as in contrast, the Commission has not included specific rules on digital products in the proposed consumer rights directive and have, so far, been opposed to an introduction of such rules in the pending first reading negotiations.

Will future consumer “law” only be optional, leaving it in the hands of the traders, whether they make use of such rules or not? Will traders decide on the level of protection that the consumer is offered?

6) Is the DCFR an adequate basis for a user-friendly instrument?

BEUC considers that the DCFR (Draft Common Frame of Reference) - which is currently used as the basis for developing a draft optional instrument by the Commission’s expert group - can hardly be used as a basis for a consumer –friendly initiative. While undoubtedly I presents the valuable work carried out by many of the most distinguished academics, it is obvious that the provisions of the DCFR are more focused on Civil Law than Consumer Law⁴⁰.

This is not devoid of consequences since the grounds and objectives of these two branches of Private Law are different. The general theory of Civil Law is based on the principle of ‘freedom of contract’ when in Consumer Law this principle is strongly

⁴⁰ See BEUC’s comments on the Green Paper “Review of the Consumer Acquis” (COM (2006) 744 final), “Mapping the future of Europe’s consumers...”, p.41 (ref.: x/030/2007 - 21/05/07) available at www.beuc.eu

limited in the protection of the weaker party of the relation characterised by the lack of bargaining power⁴¹.

In addition to this, the DCFR has incorporated a big part of the existing EC consumer *acquis* which consists mostly of minimum harmonisation Directives. These provisions have been designed by European legislators as minimum standard rules to be improved by national legislators while maintaining or introducing a better consumer protection. Consequently, in many instances the optional instrument could convert the minimum harmonisation into maximum harmonisation⁴² leading into what has been qualified as “social dumping”⁴³.

As explained above, the optional instrument would go beyond the existing *acquis* including aspects of consumer law developed at national level and which have not been explored by the DCFR. This implies that the impact of the optional instrument in relation to national consumer law not covered by the consumer *acquis* is unknown by the European Commission.

7) Legal basis

Another crucial question raised by academics and stakeholders is the issue of the legal basis for an optional instrument on contract law. The options considered for its legal basis include articles 81, 114, and 352 TFEU.

- *Article 81 TFEU*: Judicial cooperation in civil matters with cross-border implications. The purpose of this article is to promote the compatibility of the rules applicable in Member States on conflicts of laws and jurisdiction. The measures adopted under this approach include regulations of Private International Law such as Brussels I and II Regulations concerning jurisdiction matters and Rome I and II Regulations for the applicable law. As the optional instrument would incorporate provisions of material law. Article 81 does not seem to be adequate for its legal basis.

- *Article 114 TFEU*: This article is designed to “adopt the measures for the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market”. To see whether this article could function as the legal basis for an optional instrument it is necessary to analyse if it would effectively constitute a measure for the approximation of laws. The Court of Justice has established that the co-existence of a legal instrument cannot be considered an approximation of laws.⁴⁴

⁴¹ For more information or examples refer to BEUC’s comments on the work carried out by the Expert Group available at www.beuc.eu

⁴² H. MUIR WATT and R. SEFTON-GREEN, *op. cit.*, p.210.

⁴³ Social dumping is understood as a situation of reduced social protection caused *inter alia* by the lack of balance between freedom of contract and social justice or fairness and the impossibility to apply strengthened protective rules beyond the EC *acquis*: J. W. RUTGERS, “An optional instrument and Social Dumping”, *European Review of Contract Law*, 2006

⁴⁴ Case C-436/03, *European Parliament v. Council of the European Union*, CJEU, 02/05/2006. In the adoption of the legal basis for the regulation that established the European Cooperative Society (SCE) the court pointed out that “the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms.”

According to the option provided by the Green Paper, an optional instrument “would be conceived as a 2nd regime in each Member State” providing the parties with an option between two regimes of domestic contract law⁴⁵. This situation cannot be considered as approximation of law under the terms of article 114 TFEU and consequently it cannot function as a legal basis for an optional instrument on contract law.

- *Article 352*: This article allows the Union to adopt under certain conditions measures for which the Treaty does not provide enough powers. Such conditions refer, on one hand to the procedure to be followed and, on the other hand, to the purpose of the measures which must attain one of the objectives set out in the Treaties. As mentioned previously, all the measures adopted by the Union must comply with the principle of proportionality and in this case an optional instrument on contract law would exceed the objective of the development of the internal market since many of its provisions might not be related to it⁴⁶.

8) Compliance with the principles of Subsidiarity and Proportionality

Due to the principles of subsidiarity and proportionality the European Union only has the power to take any measure insofar as the power is attributed by the Treaty and as long as the Union does not go beyond what is necessary to achieve the objectives set up in the Treaties. Since the optional instrument would cover many issues of substantive private law that are not relevant to the Internal Market, the European Union would probably exceed its powers when regulating these parts of contract law.

C) BEUC’s assessment on the other policy options of the Green Paper

Option 1: Publication of the results of the Expert Group

BEUC welcomes this option since the publication of the outcome of the Expert Group could be useful in order to provide for an open debate on the elements of coherence and uniformity to future EU legislation (for example, by adopting the same definitions, rules on interpretation, etc) and would also encourage a common approach between national regimes on contract law. However, firstly it would be necessary to assess the outcome of the work of the Expert Group (because it is mainly based on the DCFR, which is in a first instance a project on Civil Law rather than on consumer legislation). Therefore it remains to be seen whether it could serve also in the field of consume legislation.

Option 2: An official “toolbox” for the legislator

As said in relation to option 1, a toolbox would be useful to adopt coherent and uniform rules at EU level concerning aspects of contract law as long as it is considered as a general Private Law project and not a Consumer Law initiative. The Green Paper mentions that if a toolbox is adopted as an interinstitutional

⁴⁵ In the same sense, the European Economic and Social Committee has stated that the optional instrument would not override national law, but rather would provide an alternative by leaving its application to the discretion of the parties to the contract (see point 3.11)

⁴⁶ M. HESSELINK, J. W. RUTGERS and T. DE BOOYS, “The legal basis for an optional instrument on European contract law” *Centre for the Study of European Contract Law, Working Paper Series*, N° 2007/04, p. 65

agreement, legislators should make consistent reference to its provision when drafting and negotiating legislative proposals bearing on European Contract Law. However, EU legislators should not be obliged to follow its provisions in case aspects of consumer legislation are not sufficiently dealt with.

Option 3: Commission Recommendation on European Contract Law

The Green Paper indicates that the Commission could address a Recommendation to Member States aiming at the incorporation of the outcome of the Expert Group's work into national laws on a voluntary basis. The Commission also proposes two alternatives: either such provisions are incorporated replacing national legislation or are adopted as an optional regime.

Regarding the first alternative the effect would not be different as in the first option because Member States would maintain their discretion when incorporating the rules set up in the Recommendation. However, the second alternative - the incorporation as an optional regime - would not be beneficial from a consumers' point of view as the result would be the same as under option 4 (Optional Instrument): consumers would be confronted with two regimes of contract law with different levels of protection. As indicated previously, BEUC cannot support this option.

Option 4: Optional Instrument

See analysis *at supra*

Option 5: Directive on European Contract Law

BEUC sees some value in option 5, the adoption of a Directive on European Contract Law establishing minimum common standards. Such an approach would give enough flexibility to Member States to incorporate rules on contract law in compliance with their legal traditions and with the possibility to maintain and introduce protective measures for consumers.

The Green Paper points out that this solution might not be able to deliver the necessary legal certainty for businesses that want to offer their products cross-border. On the contrary, BEUC considers that by establishing a common approach on contract law combined with a data base available online with the provisions that diverge from country to country (i.e. a comparative table with the main elements which are relevant for certain contract types) an approximation of law and a facilitation of cross-border transactions could be achieved.

Option 6: Regulation establishing a European Contract Law

It is clear that adopting a regulation establishing a European Contract Law that could replace national legislation is not feasible nor politically desirable. BEUC is not in favour of this option.

Option 7: Regulation establishing a European Civil Code

As indicated in relation to the previous option 6, a European civil code is not a realistic solution at this stage due to the restrictive and stringent character of a code which would not fit the diversity of civil law concepts of Member States.

IV. BEUC'S PROPOSAL: THE "EIGHTH OPTION"

BEUC would like to open a discussion on an additional option for facilitating cross-border activities, by developing a useful tool for both business and consumers without preventing the latter from the protection afforded by national legislation (in the rare cases left for which this could be necessary).

This "eight option" (in relation to the seven options presented by the Commission in the Green paper) would be based on European standard contracts linked to an ADR (Alternative Dispute Resolution) system, carried out on-line.

European standard contracts

Adopted in a form of a "soft law", the standard contracts could be drafted – as a first pilot project - for distance selling of goods including the rights and obligation of the parties with the aim of providing business with a clear set of rules (advantage for business: ready made contract to use) that would be at a truly high level of protection (advantage for consumers: very good level of protection, but no cut-off from protection afforded by their home country rules in (the rare) case that this would be better for the consumer and there would be litigation).

Such an initiative also fits into the Commission's plan to come forward with a legislative proposal on ADR including on-line dispute resolution by the end of 2011. The use of the model contract would require business' adherence to an ADR body which would deal with cross-border complaints.

The introduction of such a system would create a win-win situation for both parties, consumers and business: It would provide business with a practical and in most cases ready to use instrument - which could be translated into all languages - albeit offering a very good level of protection to consumers. The high level of protection in this model contract would be chosen according to its equivalence with Member States current legislation. Consequently the risk of other rules of national law having to be taken into account of in case of litigation according to the Rome I regulation would be very low.

Secondly, due to the obligatory combination with an ODR system, potential problems between consumers and business could be solved quickly, easily and cheaply. For business, the fact that an efficient ODR system would resolve potential disputes means that the risk of business to be sued in a foreign country (the consumer country of residence according to the Brussels I regulation) becomes insignificantly low.

BEUC is currently working on this proposal and will present it within the next few weeks.

END