OPINION

European Consumer Consultative Group

Opinion on the Commission's proposal for a regulation on a Common European Sales Law COM(2011) 635 final

Adopted on 30th March 2012 by ECCG Plenary

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I. Background and EU policy context

The European Commission perceives diverging rules of national contract laws as a significant barrier to the development of the Internal Market. It is also claimed that the harmonisation of consumer rights has reached its limits and new legislatives techniques should therefore be explored[1].

In July 2010, the European Commission consulted[2] on different policy options for future progress in the field of European contract law, despite the fact it had already indicated its preference for an "optional instrument"[3].

On January 28 2011, the ECCG submitted its opinion on the Commission's Green Paper on 'Policy options for progress towards a European contract law for businesses and consumers'[4]. Its members questioned the need for such an instrument and concluded that an optional regime would be an inappropriate legislative technique for the regulation of consumer rights in the EU.

Against this background, on October 11, 2011 the European Commission adopted the proposal introducing an optional contract law[5] in the form of a 'second regime' in each Member State which the parties can choose to regulate their rights and obligations under the contract. The proposed regulation covers consumer contracts (business-to-consumer or b2c) and purely commercial contracts provided that one party is an SME (business-to-business or b2b).

1 Vice-President Viviane Reding, 'The Next Steps Towards a European Contract Law for Businesses and Consumers' SPEECH/11/411, 03 June 2011
2 COM(2010)348 final, 1 July 2010
3 COM (2010)245, 19 May 2010
4 http://ec.europa.eu/consumers/empowerment/docs/eccg_opinion_green_paper_20110201.pdf. See also minutes of the 28th January 2011 ECCG Meeting: http://ec.europa.eu/consumers/empowerment/minutes/minutes_28012011_en.pdf
5 Com(2012)635 final

The proposal is comprised of two parts, first the 'chapeau' rules which set out the scope and functioning of the second regime and secondly Annex I which includes the substantive contract law provisions.

II. General remarks

1. Lack of evidence

ECCG members believe that the European Commission has not proven its economic case in the Impact Assessment accompanying the proposal. On the contrary, existing data reveals that neither businesses, in particular SMEs, nor consumers do diverging national contract law rules represent a significant obstacle to cross-border trade.

Consumers are mostly reluctant to shop in other Member States for reasons unrelated to the remaining differences in national consumer legislations. In fact, the major factor affecting consumers' decision to buy in other Member States is the lack of efficient means of redress. For example, last year 62% of online consumers did not buy across a border because they were afraid of fraud, 59% did not know what to do if problems arose and 49% were worried about delivery[6].

The recent legislative proposals on Alternative Dispute Resolution[7] and Online Dispute Resolution[8] are a step towards the improvement of consumers' conditions in the Internal Market and therefore the ECCG members welcome them. However, in regulating substantive consumer law, the approach adopted by the European Commission in the CESL proposal is deeply regrettable, as further explained below.

From the perspective of business, contract law does not seem to be a major problem in cross-border, business-to-consumer trade. This is mainly because the existing legal framework on the applicable law to those kinds of contracts (Article 6(2) of the Rome I regulation) already allows businesses to make a choice of law in their favour. In addition, the high degree of harmonisation of EU consumer law achieved over the last 25 years in the field of consumer contract law, especially with the recently adopted Consumer Rights Directive, which fully harmonises key areas of distance, online contracts, makes the CESL redundant for business-to-consumer contracts.

2. EU competence and compliance with the principles of subsidiarity and proportionality

2.1. Inappropriate legal basis

The ECCG members note that the proposal aims to create an entirely new legal system which would co-exist alongside national legislation. In the past, harmonisation of consumer law has been achieved via directives on the basis of Article 114 of the Treaty on the Functioning of the European Union (formerly Article 95). The European Commission now proposes CESL to be based on the same legal basis although it is not a case of approximations of laws.

[6] Consumer Market Scoreboard, 5th Edition.
[7] COM(2011) 793/2, 29 November 2011.
[8] COM(2011) 794/2, 29 November 2011.

In light of the ECJ decision on the European Co-operative Society (see ECJ C-436/03), it appears more than doubtful that Article 114 TFEU can serve as the legal basis for the creation of "parallel regulatory instruments" in areas currently within the sphere of competence of Member States. The only legal basis which is conceivable here is Article 352 TFEU (ex. Article 308 TEC) which gives the Union the competence to adopt measures completing national legal provisions.

This incorrect choice of legal base has been pointed out by several national parliaments in the context of examining the proposal in their review processes on the principles of subsidiarity and proportionality[9]. This is the case in the reasoned opinions of the House of Commons of the United Kingdom[10], the reasoned opinion by the Bundesrat of the Republic of Austria[11], the reasoned opinion of the German Bundestag[12], the reasoned opinion the Belgian Senate[13] and the Belgian Chamber of Representatives[14] and also in the initiative report of the French National Assembly[15].

2.1. Non-compliance with the principles of subsidiarity and proportionality

The Protocol on the application of the principles of subsidiarity and proportionality (annexed to the Treaty of Lisbon) foresees an early warning system where each national parliament can issue a reasoned opinion concerning non-compliance of an EU draft legislative act with the subsidiarity principle, within a period of 8 weeks of its adoption. In the framework of this review process, four national parliaments issued a reasoned opinion concluding non-compliance with both principles: the House of Commons of the United Kingdom, the Bundesrat of the Republic of Austria, the German Bundestag and the Belgian Senate.

Appropriately, they considered among others, that "*the proposal places different legal regimes in competition with one another, whereas it ought to have the aim of combating the adverse consequences of the existence of different legal regimes or at least mitigate them*[16]" and that "*instead of creating an optional instrument, effort should be made to promote confidence-building measures at the European level in order to help eliminate the real obstacles impeding cross-border transactions*"[17]. These concerns are shared by ECCG members (see developments below).

Consequently, the ECCG calls on European legislators to re-examine the compliance of this proposal with the principles set out in the treaties as well as the appropriateness of the chosen legal base.

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[9] http://www.ipex.eu/IPEXL-WEB/dossier/document.do?code=COM&year=2011&number=0635

[10] Reasoned opinion by the House of Commons of the United Kingdom, CM – PE478.503v01-00

[11] Reasoned opinion by the Bundesrat of the Republic of Austria, CM – PE478.418v01-00

[12] Reasoned opinion by the Bundestag of the Federal Republic of Germany, CM – PE478.528v01-00

[13] Reasoned opinion by the Belgian Senate, CM – PE478.715v01-00

[14] Reasoned opinion by the Belgian Chamber of Representatives, Doc. Parl., Ch. Repr. 2011-12, nr. 53-1978/001, http://www.dekamer.be/FLWB/pdf/53/1978/53K1978001.pdf.

[15] Rapport d'information par la Commission des affaires européennes de l'Assemblée nationale, nr. 4061, http://www.assemblee-nationale.fr/13/europe/rap-info/i4061.asp

[16] Extract of the conclusion of the reasoned opinion issued by the Belgian Senate

[17] Extract of the conclusion of Reasoned opinion issued the Bundesrat of the Republic of Austria

3. A dual regulation will complicate the legal environment

The addition of a second regime applicable to b2c cross-border contracts will significantly complicate the application and use of the law both by consumers and businesses, as well as enforcement activities by administrative and judicial bodies.

It is a paradox that the Commission justified the proposal for a directive on consumer rights by indicating that "it avoids a dual regime which would have created further fragmentation and distortions of competition between businesses trading only domestically and those trading both domestically and cross-border"[18] while the currently proposed regulation is specifically designed to increase differences of laws governing domestic and cross-border transactions.

Furthermore, the proposal addresses in the same instrument, two contractual relationships (business-to-business and business-to-consumer) which are essentially different. To date, little EU harmonisation of substantive law exists in commercial contracts, however in the field of consumer transactions the EU has built a large *acquis* over the last three decades.

ECCG members are concerned that the optional instrument will have an adverse effect on the consumer confidence in the Internal Market. The resulting dual legal system of contract law will lead to more confusion for the market players, especially consumers, who would have to deal with two regimes (CESL and national law) and will be faced with a situation in which different rules might apply to the same product. Consumers will have to bear in mind how, and under which circumstances, they bought the product in order to know which rules apply. This will be especially apparent if Member States do not allow traders to use the CESL domestically.

4. There is no real choice for the consumer

Despite the fact application of the CESL is subject to certain formal requirements set out in Articles 8 and 9 of the proposal, it is clear that it is up to the trader to decide whether to offer the optional regime to consumers or not. It must be said very clearly: the consumer would not have the choice between the national specific legal regime he is used to and the CESL. It would always be up to the trader to decide whether or not to offer his products under the old or the new regime. Consumers are then left with the sole choice of buying or not from a trader who decides to apply the CESL – see specific comments below.

5. Risk of lowering consumer protection standards

The current rules of conflict of laws are a well-established safety net for consumers who engage in cross-border purchases within the European Union. If we follow the reasoning of the proposed regulation, an optional instrument would potentially circumvent application of the rules of Private International Law, in particular Article 6 of the Rome I Regulation, which provides for a specific and protective regime for consumer contracts. This change would be highly intrusive as it would overrule long established legal principles of Private International Law and replace the mandatory consumer protection rules in 27 Member States. It is obvious that an optional instrument, even if it consists of a very high level of

[18] COM(2008) 614/3, p. 8

consumer protection, is unlikely to provide the best protection on all subjects in all national laws. In order to be accepted by business, it will likely provide only for a 'medium' or 'average' level of protection. Therefore, it may lead rapidly to a 'race to the bottom' and social dumping[19].

ECCG members observe that the level of consumer protection offered in the CESL has not met the high standards of national legislations on many issues and in particular with regard to unfair contract terms.

Furthermore, the ECCG members consider that 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 could be agreed by the EU legislator precisely because they did not preclude better standards.

6. Competition with national legislation

ECCG members are concerned that the CESL be extended to purely domestic contracts in order to "simplify the regulatory environment". Indeed, if national consumer legislation is more protective than the "optional system" then it may be put aside for domestic transactions as a consequence of competition between the two concurrent systems of rules. Furthermore, even if domestic contracts are outside of the scope of the optional instrument, the various Member States may be forced to adapt their national consumer legislation in order to allow local traders to compete with cross-border traders in their own national market as suggested in the option left to Member States in Article 13 of the proposal.

7. Optional instruments, the new legislative technique for the regulation of consumer rights?

The work programme of the European Commission for 2012 outlines that the Commission has decided to legislate in the field of insurance services law by way of an optional instrument for "*facilitating the cross-border trade in certain financial products (in particular insurance) by developing European contract law rules in the area of financial services*"[20]. However, the sale of "European financial products" as alternatives to products fulfilling the requirements of national laws is likely to create divergences -in relation to mandatory safeguards established in the national legislation - and would thus create a breach the systems of protection of consumers in those countries. It appears obvious that the simplified character of such an optional instrument risks the European instrument providing less protection of consumers than the provisions in national laws of countries with a high level of consumer protection.

[19] J. Rutgers, 'An Optional Instrument and Social Dumping', European Review of Contract Law (2006): 199–212.
Green Paper, p. 12.

[20] Commission Work Programme 2012, COM(2011) 777 final, vol. 2, . 28 (EN): "Title : European contract law instrument in the area of insurance services / European contract law instrument in the area of insurance services".

III. Specific problems identified in the proposed Articles of the draft regulation

1. Preclusion of national consumer law

The CESL proposal aims to make Article 6(2) of the Rome I regulation redundant. Recital 10 of the proposal stipulates that the choice of the optional instrument does not amount to a choice of law in the sense of the Rome I regulation, but is only a choice within the national law between the two sets of rules: the CESL, which qualifies as a national law and the traditional, national law. The CESL is thus designed as a 'second regime', which becomes national law in each Member State and therefore would render, according to Recital 12, the rules of Rome I of 'no practical importance' for the issues covered by the Common European Sales Law.

ECCG members consider that it is unlikely that the choice of the 'national' CESL can preclude the application of national mandatory consumer protection rules that offer a higher level of protection than CESL in the areas governed by the "second" regime.

The agreement on the application of the CESL (Article 8) is (in many cases) a preliminary renunciation by the consumer of the better protection granted under Article 6(2) Rome I regulation. However, ECCG members doubt whether such an agreement would be valid under the unfair contract term legislation of the national law applicable of most of the European Member States.

2. Optional nature of the CESL

The optional character is a fundamental flaws of this legislative technique applied for the regulation of consumer rights. Even if the level of consumer protection is higher than national legislations, consumers will not necessary benefit from it as businesses will decide whether or not to offer the CESL, thereby making in consequence national laws 'optional' as well. This situation puts essential principles of consumer protection at risk.

The Commission's press release on the occasion of the publication of the proposal reads: "*If traders offer their products on the basis of the Common European Sales Law, consumers would have the option of choosing a user-friendly European contract with a high level of protection with just one click of a mouse*". However, this statement is ambiguous as it will be ONLY up to the trader to decide whether or not to offer his products/services under the national legislation or the CESL.

ECCG members assert that this problem becomes more evident in relation to digital content contracts. The proposal includes rules on the selling of digital content (such as music, video, software etc. bought online in digital form). The current EU consumer law *acquis* does either not cover these kinds of products, for example in relation to legal guarantees or is not specific enough to address particular problems. Despite the fact the new Consumer Rights Directive will provide some improvement in this field, national legislations are currently not clear enough and not updated, which leads to legal uncertainty and consumer detriment.

3. Agreement on the use of the CESL

ECCG members observe that in business-to-consumer contracts the agreement on the use of the CESL is subject to two formal requirements established in Articles 8 and 9 of the chapeau of the proposal:

- First, it is necessary that the consumer agrees on the application of the optional regime in a separate statement from the one indicating the agreement to conclude the contract. According to Recital 23 the aim of this provision is to ensure that the consumer provides an informed choice;

- Secondly, the trader shall draw the consumer's attention to the intended application of the CESL by providing the consumer with the notice of Annex II (Article 9(1)) in which the main consumer rights under the optional instrument are described.

As stressed in its previous opinion, ECCG members consider it not possible for the average consumer to make an informed choice between the application of two sets of contract law. The information notice provided in the Annex II is trivial and cannot at all ensure that consumers are aware of their rights under the optional regime, nor would a hyperlink on the trader's website making the CESL available free of charge as indicated in Article 9(2).

Consumers agreeing to the application of the CESL will be unaware of the rights they might be giving away under their national legislations. It concerns not only the provisions specifically dedicated to consumers, but also "common" private law rules more beneficial to the weaker party of the contractual relationship.

4. Scope of the application of the CESL

4.1. Territorial scope

Article 4 of the proposal establishes that the CESL may be used for cross-border contracts (without prejudice to the option given to Member States in Article 13 to extend its application to domestic contracts). In order to establish the cross-border nature of the contract, paragraph 3 indicates that for business-to-consumer contracts it is enough if *"either the **address indicated by the consumer**, the **delivery address** of the goods or the **billing address** are located in a country other than the country of the trader's habitual residence"* and *"at least one of these countries is a Member State".*

ECCG members observe that this provision introduces a new concept of business-to-consumer, cross-border contracts which deviates from the traditional elements used to establish the cross-border nature of a contractual relationship.

4.2. Material scope

According to Article 5 of the proposal, the CESL would cover sales contracts; contracts for the supply of digital content and related service contracts.

Consumer sales law is one of most developed areas of the *acquis communautaire.* Over the last 25 years, all the relevant areas of daily business-to-consumer practices have been harmonised by providing solid consumer protection legislation across Europe. In addition, the recently adopted Consumer Rights Directive fully harmonises key elements of distance selling (thus including online contracts). Consequently, after its transposition by Member States, differences among national consumer laws most relevant to online contracts will be limited mainly to two areas, but which were already harmonised as minimum standards: legal guarantees and unfair contract terms.

The inclusion of digital content is a clear example of the structural problems of the proposal. The current legal uncertainly in Member States on questions related to digital products (e.g. music files, movies, software) shows that there is a clear case for further EU harmonisation in this field.

The Consumer Rights Directive, which covers only some elements (for example, pre-contractual information in relation to the application of protective measures and interoperability), started this harmonisation process, but has stopped half-way from providing consumers with a solid legal background for these kind of products. Consequently, an legislative initiative in the form of a directive is necessary to cover the remaining contractual aspects related to digital products (mainly legal guarantees and unfair contract terms) so all consumers can be equally protected.

The main problem with addressing these aspects in the proposal for a CESL is that it would leave it to the digital content provider to decide whether or not to offer such rules to consumers: what consumers need is a solid legal basis applicable to all traders and contracts and all products - not depending on an opt-in basis.

ECCG members are strongly convinced that an optional CESL is not the right instrument to deal with contractual aspects of digital consumer products. The European Commission should instead propose a new directive which would complement the CRD by providing, *inter alia*, specific rules in the field of legal guarantees and unfair contract terms for digital products.

The proposal covers also services which are related to the sales of goods such as installation and maintenance. This is an area that has not been harmonised at European level and consequently national laws differ.

The proposal provides for the same remedies as in sales contracts in case of non-performance of a related service (Article 155), but subject to the trader's 'right to cure' -with the exception of termination in case of incorrect installation (Article 101).

In the CESL the 'right to cure' always applies (with the exception of incorrect installation) where there is a case of non-performance of a related service. This would be more detrimental to the consumer compared to national laws were such a right is more restricted or conditioned.

In addition, the mandatory nature of some provisions of Part V, Chapter 15, relevant to b2c contracts is unclear, for example article 152 on the obligation to warn of unexpected or uneconomic costs, which could be derogated by the trader in the general contract terms.

4.3. Personal scope

The proposal has adopted in Article 2(f) the traditional narrow definition of consumer of the *acquis*: *"consumer means any natural person who is acting for proposes which are outside that person's trade, business, craft or profession."*

This definition does not take into account that the CRD indicates in Recital 17 that the protection granted in the directive can be extended to so-called 'dual purpose contracts' (a contract which is concluded for purposes partly for private and partly for professional purposes)[21]. If the definition is adopted as it stands it would create incoherence between the CRD and the CESL as parties who are considered consumers within the CRD might not benefit from consumer law protection if the CESL is chosen.

IV. Conclusion and recommendations

ECCG members are opposed to the adoption of this proposal for a regulation which aims to introduce an alternative contract law regime for sale transactions between a professional and a consumer or in a b2b context.

ECCG members are convinced that there is no need to change the way to legislate and call the European institutions to build up and modernise EU consumer contract law by robust and binding legislation which can be a mix of minimum and full harmonisation, but not in the form of an optional instrument.

Rapporteur for this ECCG opinion: Gilles de Halleux (Belgium ECCG's delegate, Test-Achats).

[21] *"(17) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, if the contract is concluded for purposes partly within and partly outside the person's trade (dual purpose contracts) and the trade purpose is so limited as not to be predominant in the overall context of the supply, that person should also be considered as a consumer."*.