

OPINION

European Consumer Consultative Group

Opinion of the ECCG on the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final)

"DISCLAIMER - The European Consumer Consultative Group (ECCG) is a consultative group set up by the European Commission, entrusted to represent the interests of consumers at the Commission and to give opinions on issues relating to the conception and implementation of policy and action on the subject of protection and information of consumers. The opinion of the ECCG does not reflect the opinion of the Commission or one of its Services."

CONTEXT

- The ECCG discussed the Commission Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (hereafter "the Green Paper") at its meeting on the 23 November 2010.
- Following the discussions on the 23rd November 2010, an ECCG sub-group was created and instructed to prepare an ECCG Opinion in response to the European Commission's Green Paper. The ECCG sub-group met on the 7th December 2010 to discuss the issues and draw up the ECCG Opinion.
- The Commission lead services will take into account the ECCG Opinion when preparing their feedback statement on the Green Paper.

OPINION

1. Preliminary considerations about the limits of the ongoing consultation process

1.1. Lack of credibility of the current consultation process

- Has not the Commission already taken the decision?

Whilst the Commission emphasises in the Green paper that no decision has been taken in relation to the options proposed in the consultation, too many factors indicate that the Commission has already made their decision. One factor is the announcement of the Commission in their communication on the "Digital Agenda for Europe 2010"¹ that it plans to propose an "optional instrument" that will be applicable to business-to-consumer contracts. In addition, the Commission work program clearly includes plans to prepare a legal instrument on European Contract Law by the end of 2011². Another indicator is the appointment of an expert group to prepare a set of 150 rules to form the basis of the planned optional instrument before the current consultation was even launched.

ECCG members are concerned that the Commission has commenced this project on the basis of academic opinion rather than by collating evidence and initiating a constructive dialogue with stakeholders (including consumers' and business' representatives) to establish that a problem exists.

¹ 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

² Commission Work Programme for 2011, Brussels, 27.10.2010, COM(2010) 623 final

- Why are we proceeding with an invasive project on European contract law when discussions around the Consumer Rights directive have not even come to an end?

It seems inappropriate to commence a new project that deviates from the usual procedures for of consumer legislation (EU Directives) when the proposal for a Consumer Rights directive is still under discussion at Council and European Parliament level.

- How can stakeholders make an informed choice if full details of the options proposed are not made clear?

Fundamental elements of the options in the consultation remain unclear and clarification is crucial if they are to be properly evaluated by the ECCG. These concerns are particularly true for “option 4” for which many questions remain unanswered, as detailed below.

1.2. No evidence of an existing need for change and no impact assessment

- Is national legislation on contract law a real barrier to the development of the Internal Market?

The Green Paper makes the assumption that the current divergence between laws on contract and private international law cause problems for business and consumers in cross-border trade and that this is a key barrier to a smooth functioning of the internal market³. However, the Commission have not yet provided any convincing evidence or data to show that cross-border trade is hindered by the differences between national consumer protection rules. Furthermore, there is no evidence to show that a so called “European contract law” would increase consumer confidence in cross-border transactions.

ECCG members are not convinced that differences in legal regimes represent a key barrier to cross border trade. Consumers are mostly reluctant to shop in other Member States for reasons unrelated to the fragmentation of consumer legislation. In fact, the major factors that influence a consumers decision on whether to buy in another Member State are identified as being: cultural barriers such as language⁴, preference for physical shops, demographic composition of the population⁵, digital literacy, limited access to broadband⁶, reliability on unknown traders, lack of choice of payment methods and discriminatory charges between the methods offered, security problems, privacy, after sale services, complaint handling, enforcement and redress.

For the ECCG there is no evidence that existing divergences in national consumer protection rules create significant internal market barriers and/or discourage cross border trade. Any policy choice in the field of contract law should be based on clear evidence that it will provide clear and tangible benefits to consumers.

³ Green Paper on policy options, p. 2 and p. 4.

⁴ 82% of the websites evaluated by the Commission during its mystery shopping exercise were only available in one language, YouGovPsychonomics, *Mystery Shopping Evaluation of Cross-Border E-commerce in the EU, Final Report*, October 2009, p. 22

⁵ 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

⁶ Currently, fourteen Members States are below the EU27 Member State average of household broadband access. In those countries, less than 50% of the population has access to broadband: European Commission, Commission staff working document, Europe’s Digital Competitiveness Report, Vol. I, SEC (2010) 627, p. 29

1.3. Incompatibility with the principles of subsidiarity and proportionality

- Is there a legal justification for such an invasive project?

There is no legal basis for the introduction of a contractual instrument as the Commission has not yet proved a need for it and the changes proposed to substantive private law are not relevant for the internal market. Since there are doubts about whether there is a case for change the European Union would be at risk of exceeding its powers if they started to regulate those areas of contract law. These concerns are relevant for the following options proposed in the Green Paper: “Option 4” (optional instrument), “Option 5” (Directive on European Contract Law), “Option 6” (Regulation establishing a European Contract Law), and “Option 7” (Regulation establishing a European Civil Code).

2. Opinion on the options and sub-options identified in the Green Paper

ECCG members would like to re-emphasise that our underlying opinion is that there is no evidence of a problem for cross-border trade associated with the differences between national laws. Accordingly, any comments made by ECCG members in the following sections should not be taken as an endorsement of the need for change in the area of contract law.

As “Option 4” seems to be preferred by the Commission, we have scrutinised that option in greater detail and provided our comments in a dedicated subdivision marked as 2.1. All other options have been considered in less detail and can be found in a separate subdivision marked as 2.2.

2.1. ECCG’s concerns about the proposal of an optional instrument (“option 4”) for consumer contracts (as preferred by the Commission)

ECCG members have focused their analysis in this section on the so called “optional instrument” (*Option 4 of point 4.1. on legal nature of the instrument*) that aims to cover business to consumer transactions and other areas of law that govern relations between non professional individuals (*question 4.2.2 on scope of application*).

- What is an “optional instrument” ?

The “optional instrument” is not sufficiently defined in the Green Paper and could be interpreted in many different ways. From reviewing the Green paper, the available minutes of the expert group on European contract law and other oral explanations provided by the Commission, we understand that the optional instrument will be an alternative to the national contract laws within Member States and a self-standing set of contract law rules that can be chosen by the parties to regulate their contracts for transactions on products or services⁷. Those products or services would be subject to a legal regime which is different to any of the 27 national legal systems and would bypass the application of the mandatory Member States’ consumer protection provisions guaranteed by article 6 of the Rome I Regulation.

2.1.1. Unanswered questions

Many fundamental questions remain unanswered and those answers are crucial in order for ECCG members to properly evaluate the proposal for an “*optional instrument for business to consumer transactions*”.

- 1) It is unclear who will have the choice between the national rules applicable according to Rome I and the optional instrument. If the trader can choose to offer its products either

⁷ Green Paper on policy options, p. 9

according to Rome I or under the optional instrument it would be Hobson's choice as realistically the consumer would not be offered the set of rules with the higher protection standard. But even if, in theory, this choice could be given to the consumer, in practise, this choice will be the choice of the business because a consumer will be unable to make an informed choice between the two regimes. There is a very high risk that the consumer will be deprived of the benefit of rights or standards existing in their own national law under the optional instrument.

- 2) It is unclear whether the optional instrument would only be applicable to cross border transactions or whether it would also apply to purely domestic contracts. If the latter, the introduction of the optional instrument would be tantamount to full harmonisation through the back-door and this is not supported by ECCG members.
- 3) It is unclear which level of protection the optional instrument will provide. The level of protection in the current acquis is not sufficient (as shown by the discussion around the proposal for a consumer rights directive) and it is therefore ineffective to use this as a starting point. Stakeholders need concrete information about the level of protection that will be provided to the weaker party in the optional instrument before this option can be properly assessed.
- 4) It is unacceptable for the Commission not to define the material scope of the planned optional instrument in this Green paper. Discussions taking place within the Expert Group and the Sounding Board indicate that an initial EC initiative would cover contracts for the sale of goods but it is very likely to be extended to other type of contracts.

2.1.2. ECCG Concerns

1) No EC competence for an autonomous set of rules

ECCG members believe that the optional instrument proposal is perceived positively by the European Commission (DG JUST) because it will circumvent the difficulties related to full harmonisation of consumer laws by creating an autonomous set of regulation at European level.

ECCG Members do not share this optimism and believe that this method is not compatible with the principles of subsidiarity and proportionality. There is no EC competence to impose a set of rules that is an alternative to national legislation. Replacing national laws, particularly domestic contracts, with a single set of rules is not a proportionate measure to deal with the obstacles to trade in the internal market.

2) No clear added value for consumers and a clear adverse affect on the confidence of consumers

ECCG members are concerned that the optional instrument will have an adverse affect on the confidence of consumers. At present EU consumers are probably in the majority of cross-border online purchases protected by the rules of their home country and have an understanding of the rules that are important to them. If a consumer is forced to consider two sets of rules it will be very difficult to explain (and have them understand) the advantages and disadvantages between the two sets of rules. Making changes to well-established consumer legislation will further complicate the legal landscape for the consumer and could lead to a loss of confidence in shopping not only cross-border but also in their own country. It is possible that introducing an optional instrument that removes (or weakens) mandatory rights will damage consumer confidence in shopping cross border entirely because they no longer trust the system.

3) Risk of lowering the level of consumer protection

If we follow the reasoning of the Green paper, an optional instrument would potentially put aside all the Rules of Private International Law including Article 6 of the Rome I Regulation, which provides for a specific more protective regime for consumer contracts⁸. This change will be highly intrusive as it will overrule long established legal principles of Private International Law and replace the mandatory consumer protection rules in all 27 Member States. It is obvious that an optional instrument, even if it contains consumer protection of a very high level, 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 dumping⁹.

4) Risk of deterioration of the weaker party's position

As already discussed earlier in this response, even if the choice of rules could be given to one or both of the parties (consumer or trader), in practise this choice will be one of the business because the consumer will not be able to make a well-informed choice between two set of rules. Therefore the risk is very high that the consumer will be deprived of the benefit of mandatory provisions or standards regulated by his national laws if an optional instrument is introduced. This will imply a serious threat to those national legislations that seek to protect the weaker party.

5) Risk that the optional instrument will be extended to domestic contracts

Even if an “optional instrument” could encourage business to engage in cross-border transactions, ECCG members are concerned that the Commission may then extend the optional instrument to domestic contracts in order to “simplify the regulatory environment”¹⁰. 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.

6) Risk of proliferation of optional instruments

If an “optional instrument” was adopted by the European institutions there is a serious risk that further optional instruments would be adopted in other areas in the future (e.g. services, insurances, sales of particular products, lease of private property, etc.). This would inevitably lead to confusion among consumers in relation to their rights and create considerable legal difficulties for the future.

⁸ For memory, the Rome I Regulation (Regulation (EC) 593/2008 “Rome I”) limits the ‘choice of law’ by the parties when:

- a better protection granted in the legislation of the country of the consumer’s habitual residence regarding consumer contracts [article 6(2)];
- in a general way, by the overriding mandatory provisions (article 9);
- and when the public policy of the forum is at stake (article 21).

⁹ J. Rutgers, ‘An Optional Instrument and Social Dumping’, *European Review of Contract Law* (2006): 199–212.

¹⁰ Green Paper, p. 12.

2.2. Other options put forward by the Green paper

In order to respond comprehensively to the consultation on the Green Paper, the ECCG has provided a response to each of the options presented in the Green Paper, as follows :

2.1 Options 1 and 2

ECCG members welcome the idea of publishing the results of the expert group on the website of the Commission. The use of a “toolbox” as a source of inspiration for legislators in the EU is also welcomed by the ECCG as it would lead – in the longer term – to more harmonised European contract laws that guarantee greater consistency and improved rights without the risks associated from precipitous and over-ambitious major projects.

2.2 Option 3: Commission Recommendation on European Contract Law

The Green paper suggests 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 proposes two alternatives: either such dispositions are incorporated replacing national legislation (option 3 a) or are adopted as an optional regime (option 3 b).

ECCG members are not opposed to the first alternative (option 3 a). However, ECCG members are strongly opposed to the second alternative (option 3.b). The result would be the same as option 4. The incorporation as an “optional regime” could not be beneficial from a consumers’ point of view as the emergence of two regimes would overcomplicate consumer law and have an adverse effect on consumer confidence (see ECCG’s concerns above on point 2.1).

2.3 Option 5

ECCG members are in favour of further harmonisation of national contract law on the basis of minimum common standards with a high level of consumer protection in respect to business-to-consumers contracts.

2.4 Option 6

ECCG members do not favour “a regulation (in the area of B2C) establishing a European Contract Law that could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party”. This is not compatible with the principles of subsidiarity and proportionality.

2.5 Option 7

An extensive instrument such as a European Civil Code is far too intrusive and is not compatible with the principles of subsidiarity and proportionality. ECCG members are firmly opposed to this option for B2C consumer contracts and contracts between individuals. There is a significant risk that the uniform standard of this instrument would decrease consumer protection in many countries.

2.6. An instrument tailor-made for the online world?

ECCG members believe that it is not appropriate to have a regime tailor-made for the online world. This will create disparities in consumers’ rights based on the method of purchase which is not acceptable to ECCG members. The ECCG favours a uniform system of consumer protection regardless of whether the purchase is made online or offline.

3. Conclusions and recommendations

ECCG members are opposed to the establishment of an “optional instrument” (option 4) or a “regulation” (option 6) that aims to govern relations between professionals and consumers and relations between non professional individuals. We favour harmonisation of national contract law on the basis of minimum common standards with a high level of consumer protection (option 5).

Due the fact that the current consultation is unsatisfactory and lacks sufficient detail ECCG members ask the Commission to stop the process and carry out the following:

- 1) Undertake new groundwork on the real problems;
- 2) Discuss realistic alternatives;
- 3) Investigate the impact of each initiative based on an impact assessment that considers the real needs of the internal market for consumers and businesses;
- 4) Launch a second consultation based on the results of the expert group and the sounding board.

Rapporteurs for this ECCG opinion: Gilles de Halleux (Belgium) & Jutta Gurkmann (Germany)

Dissenting opinion:

The Luxembourg member disagrees with the request to stop the process while agreeing that the Commission haste to table a legislative proposal should be opposed. The member agrees to oppose Option 4 and wishes to examine the following realistic alternative: elaborate a Commission Recommendation with a double aim:

- (a) serve as a toolbox for agreeing European Model Contracts between business and consumer representatives;
- (b) leave it to each member State to turn this Recommendation into a national law exclusively applicable to cross-border trade.