Position Paper

UEAPME[1] position on the feasibility study of the Expert Group on European Contract Law

Executive Summary

- The **Think Small First principle** needs to be respected all the way through the European Contract Law.
- **For the acceptance of an optional instrument, it is of utmost relevance to entrepreneurs that the assured choice of the optional instrument is retained for business.** An obligation for entrepreneur to offer the European contract law via a "blue button" would run against this requirement.
- It is important to create a regulatory framework that ensures a **proper balance** between a good level of consumer protection and competitiveness of enterprises. Such balance has not been archived in the current version of the feasibility study.
- The **clarity of language** needs to be significantly improved so that also non-lawyers can read and understand the text.
- It is important to **reduce legal uncertainty** by eliminating as many uncertain legal terms as possible and substituting them by clear and precise legal language

Introduction

UEAPME appreciated the possibility to participate in the consultation of the feasibility study (hereinafter 'expert text'). However, we regret that the consultation period of only 2 months for such a comprehensive project was far too short to provide a thorough analysis.

UEAPME is in favour of measures that promote cross-border trade, increase competition on the internal market and thereby increase the possibility to take further advantage of the single market. However, throughout a European contract law harmonisation process respect must be shown to the autonomy of contracting parties, the tradition of doing business in different member states as well as the autonomy of each member state within this area.

A self-contained contract law for both businesses and consumers is a very complex and delicate task to carry through. UEAPME is not convinced of the potential benefits of such a huge process[2].

[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

[2] Please see UEAPME's position paper on the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses: http://ueapme.com/IMG/pdf/110128_pp_Eur_Contract_Law.pdf

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

This conviction had been confirmed by the consultation on the Green Paper on policy options for a European Contract Law, the Commission conducted to consult interested stakeholders on the future character of this proposal. It is astonishing that the results of this consultation haven't been comprehensively taken into account by the European Commission because most of the responses had been critical towards the general need of a European Contract Law.

However, the question whether such a legal regulation is needed at all and whether the future addressees of such a contract law deem the new regulations as helpful or even necessary do not seem to play a role in the Commission's action. Yet, dealing with these fundamental questions would be absolutely necessary.

New regulation can only be useful, if it is geared to the needs of those who are affected. The European Contract Law doesn't fulfil this condition. Such a legislation which does no longer get through to people and enterprises, risks to lose acceptance by the addressees and can finally deepen the loss of acceptance and confidence in the European Unions' legislation in general.

According to the green paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses "*no less than 61 % of all initiated cross-border orders fail to succeed, due to the fact that businesses do not want to deliver in the country of residence of the consumer. At this moment only 8% of the European consumers purchase goods or services online in another member state of the EU". To tackle this problem, the Commission established an Expert group in April 2010 with the assignment to analyse existing proposals for a unified European contract law, existing instruments of law on the international level, and to create an easy to understand body of rules, based on those existing proposals and instruments*".

In May 2011 the Expert Group published its feasibility study, in the form of 189 articles that could form the basis for a European Contract law. In the following pages, we would like to provide some comments on these articles.

We want to state once again that for the acceptance of an optional instrument, it is of utmost relevance to entrepreneurs that the assured choice of the optional instrument is retained for business. An obligation for entrepreneur to offer the European contract law via a "blue button" would run against this requirement.

As the European Commission stated the study of consumer protection is at a very high level. In order to find an instrument that will find acceptance by companies as well as consumers, it would be important to create a regulatory framework that ensures a **proper balance** between a good level of consumer protection and competitiveness of enterprises. An excessively high level of consumer protection is also contrary to the goal of eliminating and avoiding unnecessary burdens on SMEs, as for instance laid down in the Council Conclusions on "Think Small First - A Small Business Act for Europe" adopted by the Competitiveness Council on 1 December 2008.

In our opinion some of the proposed rules will not provide increased protection for consumers they are only a burden on company's business dealings. As an example we would like to mention the sensitive and expensive withdrawals from a contract; this cost driver is a significant problem especially for SMEs. Furthermore, entrepreneurs are obliged to provide far-reaching information to consumers, as a sanction if not properly informed the consumer will have a right of withdrawal up to six-(twelve) months. The advantage for the consumer of this flood of information and whether the consumer still wants to take up such a quantity of information remains questionable. However, it is certain extremely high costs and risks arise for businesses from this administrative burden.

For companies without an own legal department it would be recommended to take detailed legal advice before using the European Contract law otherwise the risks would be enormous. Businesses should be extensively advised about all information requirements, standard terms should be developed containing all information and

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

disclosure duties, as otherwise enormous economic costs and risks would threaten businesses by possibly impending termination of the contract and damages claims. In addition trainings for legal practitioners, representative SME and consumer organisations throughout Europe would be needed. Whether these high economic costs are proportionate to the added value for the consumer remains questionable.

UEAPME has repeatedly pointed out that there are other real and major obstacles that currently prevent consumers and SMEs from the benefits of the Internal Market, e.g., difficulties for small businesses to access national markets due to administrative barriers, differences in tax regimes, cultural barriers such as language, digital literacy, low level of broadband penetration, territorial limitations of intellectual property laws, no or difficult access to means of e-payment. In addition, many consumers simply prefer local shops. All these situations will not be solved by a European contract law.

General provisions

Article 2 (10): definition of "good faith and fair dealing"

The definition of "good faith and fair dealing" requires amendment. It is defined as a standard of conduct "characterised by honesty, loyalty and consideration for the interests of the other party.....". It is suggested that the reference to "loyalty" is omitted and the word "openness" is substituted instead.

Article 2 (12): 'loss' means economic and non-economic loss: non-economic loss includes pain and suffering, impairment of the quality of life and loss of enjoyment

The definition of 'loss' is far too broad as a general definition, because it includes non-economic loss. The articles of the expert text however mainly deal with contract-law, which concerns most of all economic loss. Therefore we would urge to include only economic loss in the definition of 'loss', and add non-economic loss only in the appropriate articles.

We also want to state explicitly that only one fault-based claim for damages is acceptable. The free proof of the lack of culpability should always be possible. It is absolutely surprising that "loss of enjoyment" is included in the conceptual Definition of "loss"). There would be serious legal uncertainty with the concept of liability for "loss of enjoyment", the measurement of such "damage" is actually impossible. In special cases of many jurisdictions, such as to violations of the body, health or freedom claimed you can find compensation for moral damages. We only know the term "loss of enjoyment" from the Package Travel Directive. Even the local practice shows how difficult it is to assess the intangible damage to a wealth of opportunities dispute is hereby opened the floodgates. For enterprises it is difficult or impossible to carry out financial assessments. In general we reject a substitute for moral damages to the proposed concept of "loss of enjoyment".

Article 20 (5): Distance contracts: further information and other requirements

There should be a time limit on the time in which the consumer is to give the information required by paragraph 1 and by articles 15(1) and (2) and 17(1)(c).

Pre-contractual information in B2C-contracts

Article 23: Duty to disclose information about goods and services in contracts between businesses

Article 23(1) is too vague. Paragraph 1 does not need to be embellished by the list in paragraph 2. If it was necessary to make clear that the concept of "good faith and fair dealing" would have to be considered in the actual circumstances of the case, this could be stated in paragraph 1. After the word "which" in the penultimate line the following words: "in all the circumstances of the particular case" can be inserted.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

The expert text includes a wide range of informational duties that a business has to fulfil before a contract with a consumer can be concluded. Article 25 also provides for two new sanctions a consumer can invoke in case these informational duties are not met:

- the other party will have a right to damages (article 25 (2)) ;
- where the failure to give information leads the other party reasonably to believe that the business is undertaking an obligation that the business had not intended, the other party will have the right to enforce that obligation (article 25 (1)).

Contents of the informational duties

Some of these informational duties are very normal (like for instance the additional charges the consumer must pay, the duration of the contract, the conditions for termination, etc.). Other information however is quite burdensome: the existence and the conditions for after-sale customer assistance, after-sale services, complaints handling policy, the possibility of out of court dispute resolution. While this can be commercially interesting for a business to supply, it should be the decision of the business whether or not it provides this specific information. We need to keep in mind that in most SMEs complaint handling and dispute resolutions for example are done in an rather informal way without any formalised procedures.

The same goes for the information requirements regarding the right of withdrawal (article18): a business has to inform the consumer not only that he/she has a right to withdraw (which is normal), but also has to provide information about the conditions, time limit and procedures for exercising this right, as well as the standard withdrawal form set out in Annex I (B).

Article 17 (2) states that in distance and off premises contracts, the business also has to include the existence of consumers' rights in respect of non-conformity. The purpose of this expert text was to deliver a transparent document that would be easily accessible, also for consumers. Since the European Contract law will be a public document, there is no reason to oblige the business to repeat these rights in its pre-contractual information.

In the end the business will have to provide so much information that any contract or offer will become unreadable for a consumer. This will only create less legal certainty for a consumer, instead of more. Therefore, the requirements of informational duties should be reduced to an appropriate level. The Think Small First principle has not been taken into account by this provision.

Applicability of the informational duties in distance and off – premises contracts

Article 14 (3c) says that the informational duties provided in article 14 on distance and off premises contracts, do not apply to contracts with a value of up to 15 euro. This means *a contrario*, that for a contract of 16 euro, a business has to inform the consumer about the possibility of out – of – court dispute settlements, the existence of after sale consumer assistance, etc. We think this is a burdensome and unnecessary measure. The limit of 15 euro is ridiculously low. The Think Small First principle has not been taken into account by this provision.

Moreover, the business in all types of contracts has to hand over pre-contractual information to the consumer and the business also bears the burden of proof that it has provided the required information. In practice this could become very difficult for a business, certainly for contracts of smaller value. It is not reasonable to ask a business to provide for all the required information in case of contracts of small value, for instance contracts of 50 euro as it is in the CRD (article 21).

Sanctions if the informational duties are not met

First of all, all the traditional sanctions are included in the expert text (article 25, 3). This means that the lack of required information can lead to the termination of the contract, on the basis of fraud or mistake.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Secondly, article 25 provides a new rule stating that where the failure to give information leads the consumer reasonably to believe that the business is undertaking an obligation that the business had not intended, the consumer will have the right to enforce that obligation (article 25 (1)).

Thirdly, article 25 provides a second new rule, stating that in case of failure to provide the required information the other party has a right to damages.

Finally, some specific sanctions are connected to the right of withdrawal.

In our opinion the sanctions for not meeting the information duties are too extensive and not proportional. They are also too uncertain and, therefore, onerous for businesses.

Article 38: Conflicting standard terms

This rule is too vague, because it is not clear how conflicting provisions need to be dealt with. We suggest that in case of conflicting standard terms, the terms of the offerer should prevail.

Right of withdrawal in distance and off premises contracts

Article 43: Extension to 6 (or even 12) months

Furthermore, in case the business fails to mention one of the following elements:

- the main characteristics of the goods;
- the price including taxes, and any additional cost;
- identity of the business, address and other contact-data, address and identity of any other business on whose behalf the business is acting;
- the conditions, time limit and procedures for exercising the right of withdrawal as well as the form in Annex I (B) of the CFR and – if the consumer can exercise the right of withdrawal after having made a request for the provision of services to begin during the withdrawal period – that the consumer would be liable to pay the business reasonable costs

the withdrawal period is extended to six months. Due to the recently approved Consumer Rights Directive the withdrawal period was even extended up to twelve months!

Both - six or twelve months - are an irrationally long period which runs counter to the Think Small First principle. There is absolutely no reasonable justification for a consumer to have such a long withdrawal period in case one of these elements is missing, certainly since the consumer already has other, more realistic sanctions at its disposal:

- the consumer has the right not to pay any costs that were not mentioned in advance (article 15 (3));
- the consumer can recur to the new sanctions of article 25;
- if the business fails to mention the conditions, time limit and procedures for exercising the right of withdrawal or the form in Annex I (B) of the expert text, or – if the consumer can exercise the right of withdrawal after having made a request for the provision of services to begin during the withdrawal period – that the consumer would be liable to pay the business reasonable costs, then
    - the consumer can only be liable for any diminished value that resulted from handling the goods in any way other than what is necessary to ascertain the nature and functioning of the goods (article 43 (7));
    - the consumer cannot be liable to pay for any ancillary services that were started, even if they started on his demand (article 43 (10))!

Effects of the right of withdrawal

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

More in general, the consumer does not have to pay any compensation for the use of the goods during the period of withdrawal (article 43 (8)). Pursuant to article 43 (5) the consumer is also not liable for any costs other than the direct costs of returning the goods after withdrawal. This paragraph should be made subject to paragraph (7) where the consumer is liable for any diminished value of the goods where the goods were not handled properly. Article 43 (7) is not acceptable because the consumer has no liability for diminished value where the business has failed to provide information about the right to withdraw. This could mean that a very high value item could be rendered valueless because of poor handling by the consumer and the business would be without any remedy whatsoever. The above point also applies (article 43 (10)) where services have been provided during the withdrawal period and the business has failed to provide the information about the right to withdraw in accordance with article 18 (1). Again a very high value of service could have been performed leaving the business without any remedy whatsoever.

On top of all this, the business has to reimburse all payments made by the consumer without undue delay, and no later than 14 days from the day on which the business receives the notice of withdrawal. This means that the business cannot even wait until the goods are back in its possession, or in other words, that the business has to reimburse the consumer without the possibility to check the condition the returned goods are in.

It needs to be ensured that the trader may withhold the reimbursement for the goods in cases of withdrawal until he has received the goods back. Only in these situations he has the opportunity to check whether the goods have been returned in good shape and not been damaged while in the possession of the consumer.

Conclusion

The expert text provides for a very wide right of withdrawal. All the informational duties, the sanctions if they are not met, as well as the effects of the right of withdrawal together makes it virtually impossible for a business to provide distance or off-premises contracts. Certainly e-commerce, which is the most used form of cross-border purchases by consumers, will certainly not become more attractive for businesses, because the Think Small First principle has not been taken into account. Nevertheless, it was exactly the intention of the Commission to encourage cross-border transactions. It is not understandable why, bearing this intention in mind, the expert text provides for rules that will take away any intention of businesses to provide cross- border transactions.

Defects in consent

Article 48 (1): Unfair exploitation

Having “urgent needs”, being “improvident”, “ignorant” or “inexperienced” should not be a justification for avoiding a contract. The duty of “good faith and fair dealing” should cover many of the situations envisaged in paragraph 1. Paragraph 1 should, therefore, be omitted and, consequently, the rest of article 48.

While this situation is not likely to occur very often, we would like to point out that in most cases, a party that was the victim of unfair exploitation will have lost any confidence in the other party. Therefore, any further cooperation between the two will most likely give rise to more problems and confrontations. For that reason, we do not understand why the only sanction provided for this kind of situations, is the adaptation of the contract to ‘what would probably have been agreed’. This is simply charter for contract-breakers.

Interpretation

Article 56 (2): General rules on interpretation of contracts

The reference to a party being expected to have been aware of the meaning placed by the other on a particular expression should be removed from paragraph 2 since it adds unnecessary uncertainty.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Article 62: Interpretation in favour of consumers

- Under the current article 5 of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, a clause is, in case of doubt, interpreted in favour of the consumer only if that clause was not individually negotiated.
- Under the expert text-proposal, in case of doubt preference will be given to the interpretation that is most favourable to consumers even in case of individually negotiated terms.

We would urge that the interpretation in favour of the consumer would only be retained in case of non-individually negotiated terms.

Article 66: Implied terms

According to article 66, where it is necessary to provide for a matter which is not regulated by the agreement of the parties, any usage or practice or any rule of law, an additional term may be implied.

This needs clarification: the expert text counts 189 articles, which is by far not enough to provide a coherent European civil law regime. For many questions, gaps will be encountered (for example: when does the transition of property take place: at the moment of the agreement upon the essential elements of the contract, at the time of the passing of the risk, at the time of the official signing of the contract, etc.?). For these kinds of matters parties will most likely need to refer to national contract law. However, if article 66 means that any national judge can add an implied term to a contract; this could lead to a lot of unforeseen judicial problem-solving. For certain small issues, this can be welcomed, but for more important issues, there should at least be a legal basis foreseen in the expert text. Otherwise, where would a judge need to look for inspiration for the implied term? International treaties such as the Vienna Convention, the UNIDROIT - principles, the case - law of the ECJ, or national law?

Article 5 (4) and (5): Terms not individually negotiated

In a B2C contract, the business bears the burden of proof of proving that a term supplied by the business has been individually negotiated.

Article 68: Merger clauses

In the expert text, merger clauses have no effect whatsoever in B2C – contracts (article 68, (3)). So even if in a B2C-contract a period of negotiations has taken place, a merger clause will not have any effect. This is unacceptable (For example: B2C contracts sale of property, etc.). In long negotiation processes, parties should be able to contain all agreements in one contract.

Unfair contract terms and default options

Article 80: Duty of transparency in contracts not individually negotiated

We suggest that the reference to the words “comprehensible way” should be removed since they inject uncertainty through being subjective. In any event the duty of “good faith and fair dealing” could apply if the terms were not understood.

Article 81(2): Meaning of ‘unfair’

We do not agree that the consumer can still challenge the term under paragraph 1 if it has been the subject of negotiation between the consumer and the business. To apply this rule could encourage fraud on the part of the consumer. Thus, if a consumer had freely negotiated a term with the business and declared that he was satisfied at the time, paragraph 1 would give him an excuse to override this earlier confirmation.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Article 82: Factors to be taken into account in assessing unfairness

We suggest that the reference to "comprehensible" in the second line is removed. Because of its subjectivity it adds great uncertainty to business. Business people will not necessarily be aware whether or not a particular consumer found the term to be comprehensible.

Article 83: terms which are always unfair

A term that makes the initial contract period, or any renewal period, of a contract for the protracted provision of goods or services, longer than one year, is always unfair, unless the consumer may terminate at any moment with a termination period of no longer than one month (article 83(h)).

Apart from the fact that no justification is given as to why a contract with a length of more than one year is automatically defined as unfair. for certain business it is practically impossible to realise (for example businesses that provide the building and maintaining of a website). A contract to build a website for example requires large investments on the part of the business at the beginning of the contract. If the contract can then only be concluded for maximum one year, this would mean that these contracts will become far more expensive, since the business will have to make sure that it gets a return for this investment in that year.

Article 86: terms not sufficiently drawn to the other party's attention and article 87: surprising terms included in standard terms

We suggest the deletion of both articles as they violate the principle of party equality. In case of non deletion the reference to "surprising" in the first line, which is a non juridical term, should be changed to "onerous".

Obligations and remedies of the parties to a sales contract

Article 92: Change of circumstances

Where there is an exceptional change in circumstances we believe that the aggrieved party should have the option of terminating the contract or adapting it in negotiation with the other party. Paragraph 2 should be amended to reflect this. However we do not accept the need for paragraphs (3) and (4). If the parties cannot agree on adapting the contract that should be the end of the matter; the aggrieved party can then opt to terminate it. Courts should not be asked to write the parties' contracts for them.

Delivery

Article 98: time of delivery

We suggest that this is re-worded as follows:
"Where the time of delivery cannot be otherwise determined, goods must be delivered within a reasonable time after conclusion of the contract having regard to the nature of the goods and the terms of the contract."

Article 100: Goods not accepted by the buyer

Article 100 states that the seller needs to take reasonable steps to protect and preserve goods of which the buyer failed to take delivery of. Though the seller is entitled to be reimbursed for any costs made, for this protection, he is only discharged of his obligations to deliver if he deposits the goods with a third party, or if he sells the goods to a third person, after notice to the buyer, and on the express condition that he pays the net proceedings to the buyer.

This is a very difficult article. We do not see the reasoning behind this article. If a buyer fails to collect the goods on the agreed date, it is logical to assume that a seller informs the buyer of this, and asks him to take delivery

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

within a reasonable, but short time. In the meantime, the seller has indeed an obligation to preserve and protect the goods, and he may ask for any costs this preservation demanded.

However we do not see why the seller could only be discharged of his obligation to deliver if he deposits the goods with a third party, or if he pays the net proceeds to the buyer. We think the logical approach would be to delete paragraph 2 of article 100, or to replace it with the rule, that if the buyer does not come to take delivery of the goods on the date the seller set forth in his notice, the seller may consider the contract to be terminated. An exception on this rule should be made for goods that were made on specific instructions from the buyer. In this case, the buyer should have an obligation to pay and take delivery of the goods.

Article 104: incorrect installation

A caveat should be attached to article 104. It should not apply where there is a temporary non-conformity in the installation. This could arise where the parties anticipated that the seller would return to carry out any testing or commissioning to ensure that the installation was functioning properly and, if not, to make any necessary adjustment.

Buyer's remedies

Article 108(1): Overview of buyer's remedies

Before the buyer exercises his rights listed in paragraph (1) he should be required to notify the seller of the extent and nature of the non-performance of the obligation. Such notification is a fundamental principle is most legal systems.

Article 108(3):

The buyer's rights should be subject to the seller's right to cure unless the non-performance was so fundamental that the buyer would have no confidence in the seller's ability to effectively cure.

Article 110: Right to cure

Question 4 on page 8 of the Feasibility Study asks whether article 110 is acceptable insofar as it gives the seller, subject to certain conditions, a right to effectively cure. We agree that this is appropriate.

Article 113: Return of replaced item

We believe that buyer should be liable to pay for any damage to the replaced item in the period prior to replacement.

Non-performance

Non-conformity of the goods

- Article 107 states that in consumer sales contracts, any non-conformity which becomes apparent within six months of the time when the risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the non-conformity. The possibility for the seller to prove that the non-conformity did not exist at that time should be included.

- Article 124: the professional buyer loses his right to terminate the contract in case of non-conformity, if he does not give notice of this non-conformity within two years after the goods were handed over to him. This needs to be clarified: now it can be read as if this article applies, even if the defects to the product are still hidden at that time, which obviously cannot be the case.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

- The requirements of examination and notification (articles 123 and 124) do not apply for the consumer! This rule is burdening the businesses disproportionately, without any reasonable justification.

- The consumer does not have to give notice of termination within a reasonable period of time (article 121)! This rule is burdening the businesses disproportionately, without any reasonable justification.

Remedies in case of non-performance

General rules: in case of a non- performance, the buyer may[3]:

ask for performance

- Under article 111 (3) (performance may always be asked, unless it would be disproportionate), a consumer always has the choice between repair and replacement, unless one of the choices would be disproportionate (article112). If the business in a B2C – contract has not completed repair or replacement within one month, the consumer may resort to other remedies, except withholding it's own performance.

withhold it's own performance

- For as long as his reasonable belief that the seller will not perform, continues.

Terminate the contract

- if the non – performance is fundamental in B2B-contracts (article 115, 1);
- if the non-performance is not insignificant (B2C) (article 115, 2);
- In case the non – performance is not fundamental: if the buyer gives the seller a fixed amount of time to perform;
- In case of anticipated non-performance (article 117);
- In case of inadequate assurance of performance (article 118);
- There must always be a notice to the seller in order to exercise this right. This notice has to be given within a reasonable time, unless the buyer is a consumer.

Reduce the price

- In a proportionate way.

Claim damages and interests (article 108, 1, e)

All of this means that if the buyer is a consumer (article 108, 3):

- the consumer's rights are not subject to the seller's right to cure;
- the requirements of examination and notification (articles 123 and 124) do not apply for the consumer;
- the consumer can terminate a contract in case of significant non-performance, while a business can only terminate in case of fundamental non-performance (article 115)
- Consumers do not have to give notice of termination within a reasonable period of time (article 121)!

These rules are burdening the businesses disproportionately, without any reasonable justification.

Passing of risk

Article 145 is worded in the same way as article 23 of the CRD – proposal, by providing that the risk passes on to the buyer only after he takes physical possession of the goods.

3 Article 108 CFR - proposal

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

However, the expert text introduces an extra "protection" on consumers, stating that this rule even applies in distance or off –premises contracts if the consumer fails to take over the goods and this non-performance is not excused (article 145 (2)). This is not realistic: if a consumer has to take delivery of the goods, and does not fulfil this obligation, there is no reason why the business would still have to carry the risk.

Services contracts

The services regulated in chapter 5 which are related to sales contracts (related services), open up the principal applicability of the Contract Law to almost all services. The reason is the wording of article 150 which is too broadly defined. According to this article, chapter 5 applies to all services which are offered by a seller and are related to a sales contract. However, the concerned services are only subordinated annex services and should be in the major focus. The sales contract with its major obligations shall stay of paramount importance in the contractual relations of the parties.

Therefore, it is essential that the services aspect is only a subordinated contractual obligation. Otherwise, a clear distinction between sales and services contracts would not be possible, especially if a transfer of ownership is included. A distinction between sales and services contracts is a complex issue. To ensure legal clarity it would be better to resign the codification of related services.

The service provider's obligation to warn the customer that the service would cost more than the value of the goods after the service has been provided (article 156) is too onerous. The service provider may not know the value of the goods and, furthermore, it may only become apparent during the course of the service that it would – ultimately – cost more than the value of the goods.

According to article 162 the customer may at any time give notice to the service provider that performance, or further performance, if the service is no longer required.

Would it not be more feasible if the customer has to give the service provider a notice of this in advance, as is usual in contracts?

Prescription

We would also like to underline that articles 182 and 183 imply extremely long prescription periods, between 3 to 30 years. In our view it is far too long and absolutely inacceptable. In particular the prescription period for remedies in case of lack of conformity has to be brought in line with the existing sale of goods –Directive (1999/44) both with regard to the length and the start of the period. The proposed starting point of the "short" prescription period would lead to tremendous legal uncertainty. The prescription period should therefore run from the time of delivery as provided in the sale of goods-Directive.

Articles that are binding only in B2C[4]

Article 23: In B2B contracts the supplier only has a duty to provide information concerning the main characteristics of the goods.

This is very different from the three pages of informational duties that are foreseen in B2C contracts. Consumers therefore need to be informed about practically every aspect of the contract, while a business only needs to be informed about the main characteristics.

[4] WKÖ and ZDH agree only with the comments on the articles 107, 110 (8), 115, 123 and 124.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Article 24 (2): A party who supplies information needs to take reasonable care that the information supplied is correct and is not misleading. In a B2C contract this cannot be derogated from.

Although a party who gives incorrect information might not be in compliance with his duty of good faith and fair dealing, we see no reason why only in B2C contracts parties cannot derogate from this article.

Article 25: Remedies for breach of information duties

This should be extended to business to business contracts.

Article 26 (7) Where a contract is concluded by electronic means, the business must make available to the other party technical means for identifying and correcting input errors.

Although this article foresees that businesses and consumers can withdraw from a contract that was concluded without these guarantees, the additional right to damages can be excluded for businesses. We do not see why this right to damages should be treated differently for consumers and businesses.

Article 39: Unsolicited goods

Where a business supplies unsolicited goods or services to a consumer, no contract arises.
Why is there no like-wise rule for businesses?

Article 54 (2): In B2C-contract, parties may not exclude or restrict remedies for mistake.

Why only in B2C?

Article 67 (4): Terms derived from certain pre-contractual statements

In B2C contracts parties may not derogate from this article that states that statements made by the business or third parties, prior to the conclusion of the contract, can become terms of the contract under the modalities foreseen in this article.

Article 85(1): Meaning of 'unfair' in contracts between businesses

We suggest that paragraph (1)(c) is re-drafted as follows:
"it is of such a nature that its use is contrary to good faith and fair dealing."

The reference to gross deviation from good commercial practice does not add anything to the concept of "good faith and fair dealing". A party could have acted in accordance with good commercial practice but not in accordance with "good faith and fair dealing".

Article 107: In a consumer sales contract, any nonconformity which becomes apparent within six months of the time when the risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the non-conformity.

There should be a possibility for the business to prove that the nonconformity did not exist at the time when the risk passes. And in any way, if this article is maintained, there is no reason to provide it in B2C-relations only.

Article 109: Limits of derogation from consumer's remedies for non-conformity

This article should also apply to business to business contracts.

Article 110 (8): The right to cure in case of a non-conformity does not apply in B2C-contracts.

Why is there no possibility for a business to try to fix an honest mistake towards a consumer?

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Article 113 (3): Where a non-conformity is remedied by a replacement, the buyer is not liable to pay for the use made of the replaced item, and the seller needs to take back the replaced item.

In B2C – contracts, parties cannot derogate from the effects of this article. Why only B2C?

Article 115: A buyer may terminate the contract in case of fundamental non-performance. In case of B2C-contracts, the consumer may terminate the contract in case of any non-performance, unless the non-performance is insignificant. (cfr also article 159)

We do not see why such a difference in B2C versus B2B contracts would be included.

Article 116: In case of a delay in performance, the buyer may provide a notice giving the seller an additional period of time in which the seller may perform. After that period of time, the buyer may terminate the contract.

This article may not be derogated from in B2C contracts. We do not see why this rule only applies in B2C-contracts.

Articles 123 and 124: In B2B-contracts the buyer is expected to examine the goods within as short a period of time as possible, and give the seller notice in case a non-conformity is discovered.

We do not see why this duty is not foreseen for consumers as well.

Article 152 (4) and (5): Where in a contract between a business and a consumer the service includes installation of the goods, the installation must be such that the installed good conform to the contract as required by article 4. (5) In B2C contracts, parties may not derogate from the effects of this article that further provides that the service provider needs to make sure that the service is performed with care and skill.

This should be a universal obligation, and not only an obligation in B2C-contracts.

Article 154: A service provider may entrust performance to another person, but remains responsible for performance. In B2C-contracts, parties may not derogate from this effect.

There is absolutely no reason why a business may exclude its liability for performance by a third party that he chose, in B2B-contracts.

Article 189 (4): Parties may regulate prescription, but this article foresees limits. In B2C contracts, parties may not go beyond these limits. In B2B parties may do so.

We urge that also in B2B-contracts, parties may not go lower than one year, as foreseen by this article.

Late payment

Article 171 reiterates the provisions of the Late Payments Directive. However this article includes a new provision that is only applicable in B2C - contracts. This new provision states that:

- a consumer can only be asked for interest, if his non-performance is not excused (while in B2B - contracts, no such rule is mentioned);
- interest does not start to run until 30 days after the creditor has given notice to the debtor.

This means that in practice, a consumer only has to pay interest after 30 days. Even if an invoice stipulates that it serves as a notice, the business will still have to wait 30 days before it can ask interest, even if the invoice states that the amount due, is to be paid within 20 days for example. We suggest sticking with the original text of the late payment directive to prevent various legal interpretations.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Congruency between expert text and CRD

Some problems are solved as well in the expert text as in the CRD, but they are worded differently. It is absolutely preferable that the same problems are regulated exactly the same in both instruments. To give some examples:

- art 67 expert text and art 24 (4) CRD: terms made by third parties;
- definition of 'off-premises contracts' should be exactly the same as in the CRD [5];
- same goes for definition of 'distance contracts' (article 2 (8) expert text versus article 2 (6) CRD).

While we understand that the expert text needs to be in congruence with the CRD, we would urge that the wordings would be the exact same. The same goes for the rules on late payments: since there already is a Late Payments Directive, we would urge that the rules embodied in that Directive would be copied, or that the expert text would simply refer to the directive.

Conclusion

The initial purpose of the drafting of the expert text was to stimulate cross-border transactions by strengthening the legal certainty and lowering the costs for businesses and consumers, thereby strengthening their faith in the internal market.

On the basis of the 189 articles that are provided here, it is very doubtful that businesses, especially the smaller SME's will be inclined to use a European instrument that would be based on this feasibility study. The balance between the protection of consumers and the protection of businesses, that is absolutely vital for an optional instrument to be successful, is absolutely lacking. The very wide right of withdrawal, the informational duties and the (new) sanctions these duties are not respected, the possibility for the consumer to terminate the contract even in case of a significant non-conformity (instead of a fundamental), the fact that the consumer's rights are not subject to the seller's right to cure, the fact that the requirements of examination and notification (articles 123 and 124) do not apply for the consumer, the fact that the consumer can terminate a contract in case of significant non-performance, while a business can only terminate in case of fundamental non-performance (article 115, the fact that a consumer does not have to give notice of termination within a reasonable period of time (article 121).

Of course this balance is largely determined by the outcome of the negotiations on the Consumer Rights Directive, but the level of consumer protection should be levelled at what is decided in those negotiations. These negotiations already seem to result in a disproportionate protection of consumers. Any further protection in the expert text will make this instrument absolutely unattractive for businesses. We would urge the Commission to strive for a real balance, as is demanded by the 'Think Small First' principle.

****

Brussels, July 2011

For further information on this position paper, please contact:

Sabine Erkens
Legal Affairs Advisor
s.erkens@ueapme.com

5 (which is not the case at the moment: cfr article 2 (13)and (2) contract law versus article 2 (8)and (9) CRD)

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com