

26 November 2010

Andrew Lee
Ministry of Justice
6th Floor
102 Petty France
London SW1H 9AJ

Dear Andrew

The European Commission's green paper on policy options for progress towards a European Contract Law for consumers and businesses

Consumer Focus welcomes the opportunity to respond to the Ministry of Justice's consultation on the European Commission's green paper on European contract law. As an organisation whose role is to represent the consumer interest we will concentrate on the consumer issues raised by the Commission's proposals and business-to-consumer contracts.

***Question 1:** does the current regulation of contract law, and in particular divergence of laws at national level, present problems? If problems are present, how significant are they? How can any problems be quantified, and who is affected by them?*

It is our view that the emphasis the Commission places on the role of diverging rules of consumer contract law as a limiting factor in the development of cross border shopping is exaggerated. There are many other factors which explain why consumers do not buy in other Member States. These include: limited access to broadband (only half of European households have access)¹, cultural barriers such as language, preference for known brands and high street shopping, lack of choice of means of payment and payment security, concerns about post-sale customer service, complaints handling and redress, and concerns about privacy and security of personal data.

A recent Eurobarometer survey found that citizens rated language problems as the greatest barrier to purchasing financial services cross-border. The figure for language problems was 37%, followed by fraud risk (30%), incomprehensible (29%) or insufficient (26%) information and the

¹ European commission's Digital Competitiveness report, August 2009

extra costs involved (24%).² 82 per cent of the websites evaluated by the European Commission in its mystery shopping exercise were only available in one language.³

The same survey found that many websites did not provide complete information about the products, prices and their own businesses. The recent Consumer Focus mystery shopping survey conducted with the use of a mobile phone with consumer organisations from 11 countries found gaps in information disclosure about lines of responsibilities of traders in transaction chains, poor complaint handling and redress, and problems with payments.⁴

An Office of Fair Trading study of internet shopping found problems with deliveries as a key obstacle to cross-border trade cited by both traders and consumers.⁵ Research by Consumer Focus Scotland found delivery problems to be particularly acute in rural areas.⁶

The recent European Commission report on cross-border e-commerce found that 71% of consumers believed that it was harder to resolve problems when purchasing from providers located in other EU countries.⁷ Research commissioned by Consumer Focus Scotland found a high number of consumers did not know who to contact if they had a complaint about goods bought over the internet.⁸

Finally, a recent Consumer Focus survey on digital content shopping (scheduled for publication in December) found language and fears over payment security to be significant barriers to cross border shopping for UK consumers.

We do not believe that the case has been made for a further European initiative on consumer contract law.

² Special EB 298 (2008), consumer Protection in the Internal Market

³ Mystery Shopping Evaluation of Cross-border E-commerce, European Commission October 2009

⁴ Pocket Shopping – international consumer experiences of buying goods and services on their mobile phones, Consumer focus December 2009

⁵ Internet shopping: an OFT study, 2007

⁶ Parcel deliveries: current practice and possible solutions – a briefing from Consumer Focus Scotland, July 2010

⁷ See reference 3

⁸ Cause for complaint? How consumers deal with problems with goods and services in Scotland, June 2010

Question 2: *What are your views on the relative advantages and disadvantages of each of the options and sub-options identified in the Green Paper? In particular, which should be preferred and why?*

Although the Commission has issued this consultation outlining several possible options it had already announced its preference in the Digital Agenda published in May in which it states that it will “propose by 2012 an optional contract law instrument complementing the Consumer Rights Directive”. This raises questions about the credibility of the Commission’s consultation.

An optional instrument raises serious issues about the level of protection that would be available for consumers. If it is introduced as a second regime, as proposed in the green paper, consumers whose contracts are governed by the second regime would not be able to rely on the protection granted by their national law as is currently the case under Article 6 of the Rome 1 regulation which was adopted as recently as 2008. This is likely to lead to a loss of rights and a decrease in the level of protection.

The Commission proposes that the optional instrument would be chosen by both parties; but how realistic is this for consumers? Generally consumers’ choice is limited to acceptance of the terms in the traders contract or choosing not to purchase the goods or services offered at all. What “choice” would consumers really be offered? And how many consumers are likely to have sufficient knowledge of the two legal systems to make an informed choice? In reality it is likely to continue to be the choice of the trader. Indeed if this was not the case it is difficult to see why it would encourage more businesses to trade across borders as they would need to be familiar with the ‘optional instrument’ and national laws.

In the light of these issues we could not support option 4 (regulation setting up an optional instrument of European Contract Law), option 5 (another directive on (consumer) contract law), option 6 (regulation establishing a European Contract Law) or option 7 (regulation establishing a European Civil code). It is our view that it is premature to propose any legislative instrument when the Consumer Rights Directive has not yet completed its passage through the European legislative process and so has not been implemented in the Member States so its impact cannot be assessed.

If the Commission wish to proceed after the expert group has reported and its work has been published it should pursue a soft law approach. The only reasonable option would seem to be

Option 2, an official “toolbox” for legislators, which was the original intention of the Common Frame of Reference project.

Question 3: *Should any future work/response cover any or all of: business-to-business contracts, business-to-consumer contracts, on-line transactions? Should any solution attempt to regulate both cross-border and domestic contracts or approach those separately or differently?*

Question 4: *What should be the preferred “material scope” of any instrument?*

As stated above we do not believe that the Commission has made the case for a further European initiative on consumer contract law. We are concerned that the so-called optional instrument could turn into a large scale full harmonisation instrument which would put existing consumer protections at risk and hamper the further development of UK consumer law. If the Commission proceeds with this work we would suggest a narrow scope only covering business-to-business contracts and cross-border trade.

Yours sincerely

A handwritten signature in black ink that reads "Jill Johnstone". The signature is written in a cursive style with a horizontal line above the name.

Jill Johnstone
Director, International Policy Advocacy