



The Consumer Voice in Europe

# Amending the CESL proposal

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# Structure of intervention

- 1) Is the reduced **scope to cover only distance selling contracts** a positive step ?
- 2) What is the impact of the proposed alternative amendments **aiming at the reduction of consumer rights** ?
- 3) What is the impact of the amendments to **digital content contracts** and the attempt to include **cloud computing** ?
- 4) Does CESL as amended **fulfill it's objectives** to promote consumer and business cross-border e-commerce?
- 5) **Conclusions**

# 1) The amended scope – or how to increase fragmentation - part 1

A DUAL system for **on-line and off-line contracts would** create

- **Duplication** of the EU consumer right directive
- Fundamentally **different rights** for on-line versus off-line contracts on issues not justified by selling method
- **Undermining of consumer confidence** in cross-border on-line shopping
- **Discrimination against** consumers who do not want or cannot shop cross border on-line (for example regarding digital content contracts)
- **Regulatory costs** for business who sell offline and on-line which might have four different standard contracts ( for off line, for on-line with Cesl , for on-line cross-border without Cesl and for on-line domestic contracts)
- **Increased Complexity and legal uncertainty** in cross-border e-commerce instead of fostering it
- **Competitive distortions** between businesses trading on-line domestically and those trading on-line cross-border and those trading off-line

# 1) The new scope - Is an « EU on-line consumer sales law » necessary?

## - Part 2

- The major relevant elements of a b to c on-line contract are covered already by EU law ;
- The consumer sales directive should be modernised and include digital content ( see in green) ;
- An « On-line CESL » for b to c is not necessary;

|  |   |   |
|--|---|---|
| Part I<br>Introductory provisions  | General principles of contract law air dealing, freedom of contract etc | Not necessary   |
| Part II<br>Making a binding contract   | Pre-contractual information   | Dir 2011/38 CRDir   |
|  | Conclusion of contracts   | Dir 2000/ E-commerce Dir  |
|  | Right to withdrawal   | Dir 2011/38 CRDir   |
|  | Avoidance of contracts from mistake, fraud, unfair exploitation         | Directive 2011/38 partially covered /not necessary  |
| Part III<br>Assessing what is in a contract                                      | Interpretation, Content and effect                                      | Not necessary   |
|  | Unfairness  | Dir 1993/13 Unfair Terms  |
| Part IV<br>Obligations and remedies of the parties to a sales contracts          |   | Dir 1999/44 (partially covered: further harmonisation plus inclusion of digital content needed) |
| Part V<br>Obligations and remedies of the parties to a related service contracts |   | Not very relevant , not necessary for cross-border  |
| Part VI<br>Damages and interest  |   | Not necessary for cross-border e-commerce   |
| Part VII<br>Restitution  |   | Dir 2011/38 CRD dir<br>Dir 1999/44 Consumer Sales dir.  |
| Part VIII<br>Prescription  |   | Dir 1999/44 Consumer sales (partially)<br>Not necessary for cross-border e-commerce             |
| Appendix 1   | Model form on withdrawal  | Dir. 2011/38 CRDir  |

## 2) Amendments to reduce consumer rights - part 1

3 alternatives proposed on the right to terminate

**Option 1:** Establish the seller's right to cure after 6 months (AM 143):

**Result:** Reduction of rights of EU consumer acquis as regards choice of remedies and in several Member States

**Option 2:** No right to termination if consumer doesn't notify (AM 150):

**Result:** reduction of rights in several Member States

Confusion for consumers in relation to national rules on duty to notify ( many MS do not have it for remedies / some differently )

Option 2 is least damaging in terms of consumer protection

**Option 3 :** Consumers' obligation to pay for use (AM 183):

**Result:** Significant worsening of rights of EU consumer acquis and at national level

## 2) Amendments to reduce consumer rights - part 2

### **Option 1 & 2** ( reduced right of termination)

in combination with

- amendment 185 ( business right to claim damage for deterioration) and
- Art 174 ( business right to claim payment for use if termination not equitable)

### **Option 3** (business right to claim payment for use in all cases)

In combination with

- amendment 185 ( business right to claim damage for deterioration)

RESULT:

**JURI draft : right to termination is no right in practice because of formal and economic barriers**

## 3) Amendments on digital content and cloud computing – Part 1

1) Remedies for « non-monetary » digital content (Am. 145)

Introduction of remedies is **welcome**

2) Restitution of digital content (Am. 175)

**Problematic** for example: if defective , consumer cannot return bc must be sealed ; for non-tangible medium: depends on seller's arrangements, not on the need of consumer;

3) Inclusion of cloud computing as a « related service » (Am 41)

**Great legal uncertainty**

How CESL covers cloud computing and what forms are entirely unclear;

## 3) Amendments on digital content and cloud computing – part 2

CESL as proposed /amended by JURI draft **on digital content** is overall laudable BUT **in practice**

**will not solve** consumer problems because

- 1) Its optional nature: Business selling digital content on-line will not use CESL and thus consumer will not benefit
- 2) CESL does nothing to clarify what is unfair in contract terms for the use of digital content
- 3) Confusing rules on cloud computing create legal uncertainty

RESULT: CESL will delay legal reform for many years and deprive European consumers of the necessary rights in relation to digital content –

**The EU has an obligation to protect ALL consumers , not only those selected by business**



## 4) CESL as amended - objectives better attained ?

BEUC's reasons why we do not support an optional sales law remain valid in view of the new scope.

- No need: most concerned stakeholders agree, supported by evidence; 40 % of consumers buy already cross-border on-line
- No real “choice” for consumers
- Confusion for consumers and SMEs
- Increased legal uncertainty and complexity for SMEs and consumers
- Consumers worse off under CESL compared to national law in certain fields
- CESL blocks necessary improvements and modernisation of consumer law
- A dual regime on-line/off-line creates more fragmentation
- Better alternatives are at hand

## 5) Conclusions

- JURI draft report doesn't address BEUC's concerns
- An **impact assessment** is needed for the proposed new scope; impact on on-line sales has not been evaluated
- Instead of CESL, we need to address the **real key barriers to cross-border trade**, i.e. tax regimes,, copyright regimes, payment tools, delivery of parcels, business perceptions;
- Alternative tools, such as model contracts linked to ODR, should be developed;
- **"Mixed" harmonisation** via directives is a valid regulatory tool – review 1999/44 sales directive to modernise and include digital content

**Thank you for your attention.**

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Consumer Contracts Team

BEUC/X/118/2011 Analysis of the Commission's impact assessment

BEUC/X/14/2012 Position on the pCESL

BEUC/X/23/2012 Proposal for an EU model contract

BEUC/X/55/2012 The CESL chapter on unfair contract terms



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