Speaking Notes

Public Hearing of the JURI Committee on the draft report for a Common European Sales Law (CESL)

Dora Szentpaly-Kleis, Brussels, 19 March 2013

I. Opening remarks

- **UEAPME,** the representative European SME Association, incorporates around 80 member organisations from 34 countries consisting of national cross-sectorial SME federations, European branch federations and other associate members. We represent more 12 million enterprises that employ 55 million people across Europe.

- UEAPME welcomes the draft report of the JURI Committee and supports discussing its content with the EP in order to gain more clarity on this instrument. In order to contribute to the discussions in a constructive way, UEAPME is constantly updating its position paper on CESL (the latest version is from 2012, which also takes the working document of the JURI Committee into account: http://ueapme.com/IMG/pdf/UEAPME_pp_CESL_Nov_2012.pdf).

- The remarks presented in this public hearing are based on the input of UEAPME members.

II. General remarks regarding the main points which are highlighted in the explanatory statement of the draft report

- UEAPME welcomes that the draft report maintains the applicability of CESL to B2B contracts.

- Limitation of the scope to "distance contracts". We welcome the statement that the "draft report seeks to open up a debate on this" issue. UEAPME has been stating from the beginning of the procedure that a limitation might have advantages but also disadvantages.

  Advantages of the limitation:
  - The exercise of CESL is to be considered as a very new one at European level, it could be tested in a way first only to distance contracts which would in practise mean mainly to internet sales.
  - When it comes to cross-border sales activities, most of them take indeed place via distance contracts.

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Disadvantages:

- A limitation of the scope could lead to legal fragmentation. From a SME point of view, using different instruments for distance contracts and for face-to-face business activities could cause confusion and administrative burden. SMEs are often using distance contracts as a kind of complementary activity to their face-to-face business activities. UEAPME does believe that in case the CESL would be adopted with a limited scope, **model contracts** will even have a more significant role. These could ensure an easier accessibility and applicability – if these model contracts are drafted with the appropriate involvement of the relevant stakeholders.
- Link to the Consumer Rights Directive (CRD)[1]: the elements of the CRD on distance contracts have an important role because of their fully harmonised character. In order to avoid any kind of confusion for SMEs, it is important that the already fully harmonised parts from the CRD will be taken over as such without any modification. UEAPME does believe that this is a very important condition in order to make the CESL a workable instrument.

- Remedies: We recognise that the draft report intends to consider the concerns of businesses with respect to this point. The efforts to come up with a solution and alternatives confirm this. SME point of view on the 3 proposed alternatives. However, some ambiguities remain:

  - The **first solution** introduces *"a deadline of 6 months after the risk has passed to the buyer. After this period expired the buyer would have to accept a cure"*: 6 month is rather too long. The seller's right to cure should be always the first remedy (unless it is impossible or reasonably not feasible).

  - The **second solution** states that "*the consumer has to give notice of termination within a reasonable time after he first become aware of non-performance. After this right would be lost, the consumer could make use of "only" replacement or repair*". UEAPME has concerns about what is to be understood under "reasonable time". If a period of 2 years, for example, would be considered as reasonable, this would be unacceptable. As said before, even a period of 6 months of free choice of remedies is too long and is unacceptable from the SME point of view.

  - The **third option** would be that "*the consumer has to pay for the use in those cases where he terminates the contract".* This is not a solution for SMEs. UEAPME would advice the Parliament not to follow this approach. This case leads to far too many uncertainties and questions: who will calculate the payment? And the most problematic point, what should an SME do if the consumer refuses the payment? Our experiences show that the SME will not go to the court to claim the payment. We already have serious difficulties to enforce payments and for this reason we strictly reject this solution.

[1]Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/Ec of the European Parliament and Council

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In general, we think that the first two solutions could be a solid ground for discussions but there is still improvement needed. The right to cure for the seller is a significant point. This should be provided unless this would be impossible or reasonably not feasibly. UEAPME still believes that the best solution is to follow the approach of the Sales of Goods Directive[2].

- The amendments on good faith and fair dealing will indeed bring more clarity in the related provisions.

III. Specific remarks

- Amendments which are welcomed (the list is not exhaustive):
  - AM 58: it is logic that parties can agree to expand the use of CESL to other linked contracts or mixed-purposed contracts. Otherwise it would be very complex to oversee the legal implications (since one part of the contract would be regulated by CESL, while other parts would be regulated by other law). Still, clarification are needed:
    - Can every linked contract be governed by CESL?
    - What is meant with *"those elements are divisible and their price can be apportioned"* – is it possible to make this distinction?
  - AM 66, 77, 135, 142
  - AM 117: not only a good clarification, but provides for precedence of terms and conditions over usages and practices
  - AM 127: examples of how to "present contract terms in a way which is suitable to attract the attention of the consumer" should be made in the guidance notes.
  - AM 171 the clarification as regards cost of restitution is to be welcomed

- Amendments which need modification:
  - AM 68: does it mean that the trader must expressly exclude the use of CESL, as the CESL's pre-contractual regime would otherwise apply? Traders having a website but not indenting to use (or even not knowing the existence of) the CESL should not have any obligations out of this.
  - AM 94: this amendment clearly facilitates the avoidance of a contract for mistakes.
  - AM 89: is it sufficient to attach the accepted offer to an email or should the content be incorporated in the acknowledging mail itself? The second case would cause extra administrative burdens for SMEs.
  - AM 92: in B2C cases the offer is to be considered as sufficiently clear if it contains an object, quantity or duration and a price. UEAPME is wondering why this should be only the case in B2C and not also in B2B cases?
  - AM 123: the originally proposed article 74 would have applied for both B2C and B2B cases. UEAPME believes that the mentioned justification that the freedom of contract shouldn't be over limited is not a valid one in this case and calls for the reintroduction of B2B contracts.

[2] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

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- AM 128: UEAPME has been highlighting from the beginning that the exercise of CESL can't be seen as a separate exercise and it will have affects to other legislations as well. The same can be said if we talk about the limitation of the scope for the time being. This amendment might work in internet sales with the simple use of a check-box. But if in a later stage the CESL would be made applicable to other contracts than distance contracts, as well, this amendment might pose serious troubles for SMEs.
- AM 150**:** the notice of termination has to be given within a reasonable time from when the right arose. In the original proposal of the Commission in article 199.1 is foreseen that the moment the buyer could have been expected to know of the non-performance could also be a starting point. The AM 150 limits this possibility only to B2B cases. There is absolutely no reason why this should be the case. When a consumer should reasonably have become aware of the non-performance, but doesn't act on it, he should be punished. This is part of the picture of a responsible consumer. Not only businesses have responsibilities, but also consumers.
- AM 153: it should be clarified what "reasonable excuse" means in order to ensure legal certainty.
- AM 191: why only in B2B cases?

IV. **Further aspects not touched by the draft report, but changes which would be necessary to establish an instrument boosting cross-border SME business activities and establishing a right balance for both parties:**

- Strict liability regime of the CESL. Article 159 introduces the right to claim damages for loss. Non-conformity with the contract can be considered as the most common case of non-performance. Article 159 with article 88 on excused non-performance results a liability independent from fault. In practise only cases of force majeur will be excluded. "Contractual product liability by the trader" has not been taken into account. Liability should always depend of fault. Traders should not be liable for consequential damages caused by non-confirming products, if the trader didn't cause the non-conformity (e.g. cases of defects in the production). Also extensive control duties for intermediary traders have to be avoided regarding the seller's obligation to ensure conformity with the contract.

- Article 45.3 ensures the consumer that he can withdraw from the contract after having used the goods to an extent more than "necessary to establish the nature, characteristics and the functioning of the goods". UEAPME calls for the introduction of recital 47 of the Consumer Rights Directive. This states and clarifies that "in order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he would be allowed to do it in a shop".

- Article 57 on the choice of remedy in chapter 5, defects in the contract: the choice of remedies is still unlimited. Free choice between avoidance for mistake and remedies in case of non-conformity with the contract is established by this article. UEAPME calls for changes: remedies of Chapter 11 should apply exclusively.

- The lists of those contract terms which are presumed to be unfair or are always unfair according to article 84 and article 85, are still too extensive.

- All other UEAPME remarks of the last position paper from 9 November 2012 (http://ueapme.com/IMG/pdf/UEAPME_pp_CESL_Nov_2012.pdf) which have not been taken into account until now are still valid.

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