EMOTA
The European eCommerce & Omni-Channel Trade Association

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Position Paper

EMOTA Response to the consultation on the Expert Group's Feasibility Study on a European contract law for consumers and businesses

EMOTA[1]'s main goal is to assist policy makers in removing any barriers to cross-border trade. EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions. We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

A. General comment:

EMOTA, the European Multi-channel and Online Trade Association, welcomes the opportunity to comment on the Feasibility Study on a European contract law.

As set out in our written position on the Green Paper COM(2010)348 final, we agree with the European Commission's view that an instrument of European Contract Law could be a solution to the problem of legal fragmentation, both in B2C and B2B relationships. However, it is unlikely to unleash the whole distance selling potential of cross-border business, as there are other impediments such as the differences in languages, social and cultural conditions and tax rules. But distance sellers confirm that the fragmented legal environment entails additional transaction costs and legal uncertainty when it comes to sales into other EU countries.

Our members therefore looked with great interest into the Expert Group's deliverable, as far as the short period of 2 months granted for responses allowed. Actually, it is hardly possible for European umbrella federations such as EMOTA to discuss the impact of 189 contract law articles, available only in English, and coordinate the responses of 20 markets[2] with different legal systems (and languages) properly within 2 months. The scope is too broad for this short time frame and we consider the haste quite inappropriate compared to the importance of the issue at stake.

B. On the 7 precise questions asked by the European Commission in the introduction to the Study:

1. User-friendliness and coverage:

[1] EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96

[2] EMOTA has members in 20 countries, among which 17 from the EEA; members' list in Annex

EMOTA was among those respondents cited by the European Commission that favoured a user-friendly text. However, it should be added that it is not easy to define the user-friendliness of a legal instrument. The European Commission says "a text that…would be user-friendly both in its language and structure so it could be understood and used by businesses and consumers who would not necessarily be specialists in the area of contract law".
As regards the language, it should be reminded that even though the use of English is very widespread in- and outside Europe, it is not the native language for the vast majority of European citizens. What they may find difficult to understand (so, user-unfriendly) in an English text may not be difficult to understand for a native speaker. But even though the rather technical content of the Feasibility Study was available in other language versions, the difficulty remains to reconcile "easy-to-understand" with a wording that leaves a minimum of gaps and room for misinterpretation that courts would have to solve. All jurists are familiar with this issue.

Regarding the "easy-to-handle", we are conscious of the fact that a European contract law instrument cannot correspond to the structure of the 27 national laws which differ among themselves. So, it is unavoidable that a user may not find a provision where s/he would expect it to be placed according to his/her national law.

It is therefore important that users are offered ways of becoming familiar with the optional European rules and get a possibility to compare them with their national rules, e.g. via comparative tables.

With the aforesaid in mind, it may be preferable to limit the scope of a European contract law instrument.

2. Extend of the unfairness control to individually negotiated terms (Art.81):

EMOTA believes that this extension is not appropriate. There is no point in negotiating a term if the consumer afterwards can challenge it as unfair. Distance sellers must be able to trust in the validity of the terms they negotiate with their clients. The unfairness control should be limited to non-negotiated standard terms, as it is the case in many Member States.

The definition of standard terms is already very broad as it covers all the conditions established by the trader which are relevant for the contract. The extension would also go beyond the terms which article 83 declares to be always unfair. All rules would be affected and the factors „whether the term has been individually negotiated" or „standard terms" would be void (e.g. in articles 80, 82, 86, 87).

We do also wonder in this context which requirements are needed in online trade for fulfilling the required "bringing to the consumer's attention" [86 (2)]. Apparently the rule only applies to written contracts. Does a clear allusion to the standard terms during the ordering process suffice (alongside possibilities to download and print), or must we assume that ticking boxes does no longer suffice for the inclusion of standard terms? In addition, article 87 envisages that surprising terms must be expressly accepted. We wonder about what is meant by this rule: is a separate confirmation needed, or does ticking on a corresponding box suffice?

We should also stress that article 88 leaves unclear whether the consumer can always ask for recovery of additional payments, even if s/he expressly consented.

3. Contract alteration due to change of circumstances (Art. 92):

Assuming that such rule refers to extreme cases outside the sphere of influence of the parties, such as a sudden astronomical exchange rate change or unexpected heavy changes in the market price of a good, such rule requiring the parties to enter into negotiations makes sense. It may be redundant because in extreme cases the parties probably will in all cases try to negotiate an adaptation to the contract, but it does not do any harm as black letter rule either. In B2B relationships, it can be assumed that the parties will include corresponding clauses in their contracts.

4. Right to cure in B2B relationships (Art. 110):

According to article 108 (3) (a) and 110 (8), the seller is denied the right to cure in B2C relationships. Article 110 grants the consumer a general right to choose including a right to immediate contract termination. Giving a notice to the business is only envisaged in article 116 in case of delayed performance.

The rule is different for B2B-contracts and this leads to an improper imbalance. In addition, it should be reminded that in the interest of the pacta sunt servanda principle, many legal systems establish a gradation of rights. The consumer should not have the possibility to terminate a contract based on an insignificant and curable defect, where in reality s/he wants to terminate for other reasons.

It is also unclear whether in such case the business is entitled to compensation according to article 178 (1) (c) If not, the buyer would not have to compensate for the effective time of use and s/he would get an unjustified pecuniary advantage. In particular in areas where technology is an important factor, such as consumer electronics, the renewal rate means a value loss that can hardly be compensated by payment for use which already means an advantage to the consumer. This is contrary to warranty law that aims at putting the parties, in case of contract termination, in the same position as they were had the contract never been concluded. This is not compatible with a betterment of one party. For the same reasons, it is not understandable why a diminution of value should be free of charge.

In this context we also wonder about the conditions for a right to damages caused by defectiveness of a product or non-performance (article 163). The conditions – in particular fault by the business, and the extent – are not precisely indicated. This may lead to legal uncertainty. It is not clear how a right to damages can be calculated based on a „current price“, as established by article 169, without a covering purchase and any proof, and it is contrary to the general right to damages rules.

5. Risk sharing in case of contract avoidance or termination (Art. 177, 178)

Yes, we do consider these rules appropriate. The seller should not have to bear the benefit of use before contract termination.

6. Appropriateness of late payment rule (Art. 172)

The rule establishing that the consumer needs to be notified 30 days in advance of his obligation to pay interests before the period starts to run is inappropriate. Consumers can be expected to know when payments are due. There is no further protection needed than the one already granted by the

extensive information duties. In fact this rule would mean that traders have to pre-finance consumer sales up to 30 days.

7. Questions regarding digital content

Digital content is complicated and should be dealt with separately.

C. Comments on the Scope:

We welcome the fact that the Feasibility Study covers all types of transactions, and that certain specific provisions apply only to business-to-business and business-to-consumer contracts thereby avoiding confusion in either circumstance.

We do however wonder about the modalities for choosing the Optional Instrument.

D. Comments on specific provisions concerning distance selling/ecommerce:

We are conscious of the fact that the parts of particular concern to distance sellers, such as the ones on information duties and the right of withdrawal, are taken over from the Consumer Rights Directive. They were not discussed by the Expert Group.

Nevertheless, it seems important to us to draw attention to the following points:

Information duties

- The wording of article 20 (5) „explicitly confirmed the information" leaves doubts about whether a „button solution" is sufficient or whether more is needed.
- According to article 26 (5), the business must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance, as is the case in existing legislation. Article 6 provides that where a business has failed to comply with this, there is a right to withdraw, even in B2B relationships. We do believe that this is totally inappropriate considering that there is no enhanced protection required in B2B contracts. It leads to a preferential treatment of the buyer in all contractual relationships and such approach will make the Optional Instrument quite unattractive for businesses.
- According to article 20 (7), the business must give to the consumer, after conclusion of the distance contract and at the latest at the time of delivery, an additional „confirmation of the contract concluded" as well as all the pre-contractual information on a durable medium. This includes essential parts such as the complete standard terms and the information on the right to withdraw. In case transmission by e-mail is not feasible, for instance because the client has no e-mail address, such transmission on paper is an increased cost for many online traders.

Right of withdrawal

- The exclusion of hygienically sensitive products from the right to withdraw [article 26 (3a)] is linked to the condition that they were sealed by the trader and unsealed by the consumer. This is too restrictive. With regards to hygienically sensitive products, the mere unwrapping should suffice for the exclusion of the right to return. Depending on what is considered a seal, it may

also be questionable from an environmental aspect whether it is reasonable to force traders to seal each and every product so as to make it qualify for the exemption.

- In the list of goods which cannot be returned after unsealing (CDs, DVDs..), we miss books. Distance sellers should not become free libraries.
- The short 14 days' period for reimbursement according to article 43 (2) is difficult to respect for traders.
- The provision that the trader should have to reimburse all payments received from the consumer upon receipt of evidence that the goods have been shipped back [article 43 (3)] does not allow the trader to check whether the returned goods are fit for resale or whether their value has been diminished by improper or excessive testing.
- The additional 14 days' period granted to consumers for returning what they do not want to keep means that in fact, consumers will have the possibility to keep goods 28 days in their possession. This is by far too long and increases the risk of abuse of the right to withdraw as well as the risk that goods are returned that can no longer be resold as new. This is the more so as article 40 (8) says the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period. The withdrawal period is not there for the consumer to use the goods, but, as said in the previous paragraph, to ascertain their functioning and nature. As recital 31 of the Consumer Rights Directive rightly says, the consumer should only handle and inspect goods in the same manner as he would be allowed to do in a shop. This excludes use.

We hope this input is helpful and remain at the Commission services' disposal for any further questions in this regard.

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