

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

By email

Thank you for inviting us to respond to the call for evidence. I enclose our response on the form as requested.

Background to OFT interest in European consumer and contract legislation

The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.

The OFT is responsible for enforcing specific consumer protection legislation primarily under the Enterprise Act 2002, using a range of enforcement tools (see <http://www.offt.gov.uk/about-the-offt/legal-powers/legal/enterprise-act/part8/>). We have a keen interest in the development of consumer protection legislation at European level in order to support our future enforcement role. The OFT is a key stakeholder for the Department of Business Skills and Enterprise (BIS) in relation to the proposal for the Consumer Rights Directive (CRD).

Nijole Zemaitaitis
Consumer Policy
Office of Fair Trading

3 December 2010

Call for Evidence and Views on the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses

List of questions for response

We would welcome responses to the following questions set out in this Call for Evidence and Views. Please email your completed form to:

andrew.lee@justice.gsi.gov.uk.

Question 1. Does the current regulation of contract law, and, in particular, any divergence of laws at national level, present problems or not?

If problems are present, how significant or otherwise are they?

How can any problems be quantified, and who is affected by them?

Comments:

As the UK national consumer authority we have the following data relating to the number of recorded complaints or enquiries from consumers arising from cross border transactions. Unfortunately the figures give no indication of the extent to which divergence of laws deters consumers from purchasing across borders.

From the OFT's complaints and advisory service, Consumer Direct,¹ we are aware of 41 complaints about cross border purchases by consumers during 2009. The average total number of complaints received by CD during a year is 850,000.² The majority of recorded cross border complaints relate to services used when consumers are on holiday (holiday clubs, car hire, air travel,

¹ www.consumerdirect.gov.uk/

² Although the figures provided above appear proportionately small compared to other complaint categories, it should be borne in mind that the number of cross border transactions are also proportionately lower.

timeshare, accommodation etc). Some complaints have also been recorded for pharmaceuticals, lotteries and the theatre.³

The OFT is also the Single Liaison Office (SLO) for the European Consumer Protection Co-operation Regulation (CPC). The CPC provides a pan-European network of public consumer protection enforcement bodies with enforcement powers to help tackle cross border detriment. As the SLO, the OFT provides co-ordination of the CPC within the UK and under its designation as a Competent Authority can take action against traders based in the UK who harm the collective interests of consumers in other Member States. In 2009 the OFT received 39 requests for assistance from consumer enforcement bodies in other member states and requested assistance from other member states on 33 occasions.

The OFT itself has completed 2 cross border cases under its Enterprise Act powers :

- Dutch court grants OFT injunction against Best Sales BV, stopping them from sending misleading prize draw mailings to UK consumers:
www.offt.gov.uk/news-and-updates/press/2008/86-08 (July 2008)
- Commercial court in Brussels ruled in favour of OFT, preventing D Duchesne SA from sending misleading mailings to UK consumers:
www.offt.gov.uk/news-and-updates/press/2004/208-04 (December 2004)

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?

Option 1: Publication of the Results of the Expert Group

Option 2: An official 'toolbox' for the legislator

2(a) via a Commission act; or

2(b) via inter-institutional agreement

Option 3: Commission Recommendation on European Contract Law

³ Given the very small numbers of complaints recorded, these figures should be used with caution.

3(a) via encouragement for Member States to replace national laws with the European Union instrument; or

3(b) via encouragement to Member States to incorporate the European Union instrument as an optional regime

Option 4: Regulation setting up an optional Instrument of European Contract Law

Option 5: Directive on European Contract Law

Option 6: Regulation establishing a European Contract Law

Option 7: Regulation establishing a European Civil Code

It would be helpful if your response could address all the points raised in the Green Paper and discuss the relative merits of the options (e.g. the relative merits of choosing a soft law option from a hard law one; the balance of argument between an optional legal instrument and a mandatory one, etc.). If you wish to declare a preferred option from amongst these (or suggest other ideas) then please do so. As with all aspects in this exercise, please cite and reference any available evidence to support your submission. In particular if costs and impacts are presented as determinative factors in your option appraisal please include / reference any evidence for those.

Comments:

Our preference from the options set out in the Green Paper at this time would be for Option 1 - Publication of the Results of the Expert Group.

The draft CFR is an impressive and wide-ranging academic work and is a particularly valuable reference document when read alongside the underlying analysis of the laws that exist in different member states.

However, we do not believe that it is appropriate that it should form an official tool box for the legislator. It would be too rigid and could have unintended consequences for drafting future legislation - for example, in respect of definitions and remedies.

It is noteworthy that the drafters of the Consumer Rights Directive (CRD) proposal indicated that they had used the then draft CFR as an authoritative but non-binding statement. The CFR was followed when it was assessed to be sensible but departed from when it was felt to be inappropriate. Given this evidence from a limited trial, we feel it would be unwise to adopt it now as an

official toolbox to cover future legislation covering a broader area.

We agree that there should be consistency across future Community legislation where appropriate, particularly in relation to common definitions. We are supportive of a longer term aim to provide guidance for EU legislative drafters to use when preparing legislation. Our preference here would be in the form of a voluntary toolbox which would allow for the flexibility to address specific issues in the preparation of legislation.

Our interpretation of what is proposed by options 3, 5, 6 and 7 is for a replacement of national contract laws through various stages of compulsion. The impact of these options on the UK and other MS have not yet been assessed. We are concerned that significant decisions may be made on the future of contract law even before the final Draft CFR has been published and fully considered or any reliable and informative cost benefit analysis performed. We are not convinced that these proposals will offer benefits proportionate to the significant time and costs needed to bring them about beyond those that may be achieved from the review of the acquis, the proposed CRD, and the other existing European Legislation such as conflict of law rules for example under Article 6 of the Rome I Regulation.

An 'optional' regime as proposed under Option 4 could prove difficult in practice to provide clarity for consumers. Along with consumers from other MS, many consumers in the UK are unaware or unsure of their consumer rights under their national legislation. Adding an additional 'optional' system which the consumer would then need to choose, is unlikely to increase consumers' confidence in purchasing cross border unless such a regime is explained at the time of each transactional decision and provides significantly higher consumer protection levels which are readily apparent.

Question 3. Should any future work / response cover any or all of:

- business-to-business contracts?
- business-to-consumer contracts?
- on-line transactions?

What are the specific points that lead you to conclude this?

Should any solution attempt to regulate both cross-border and domestic contracts or approach those separately / differently?

What would be the priority needs to be addressed for each of these groups and how might that be done? What would be the key features of any solution and why?

Comments:

The current EU legislation in the consumer protection field covers both domestic and cross border transactions and we find it difficult to perceive what advantages there could be to consumers if principles in this field were developed which affected cross border transactions only. The current conflict of law rules give consumers who do wish to venture into the internal market the comfort needed in many situations.

We see no benefit in omitting online transactions from any instrument or dealing with them separately. Developing a separate instrument could create further consumer confusion as to consumer rights, particularly if those rights differed depending on whether the contract was domestic or cross border.

Question 4. What should be the preferred 'material scope' of any instrument? In particular should it:

- (a) have a narrow or a broad scope (see paragraphs 4.3.1 & 2 of the Green Paper)?
- (b) cover all or only specific types of contracts – which ones and why (paragraph 4.3.3)?
- (c) if a code is created should it also cover any other issues and what might those be (see paragraph 4.3.4 of the Green Paper which specifically mentions tort, unjustified enrichment and the benevolent intervention in another's affairs as possibilities here)?

Comments:

Subject to our preference for the instrument to be in the form of voluntary

guidance only (See Q 2) we believe that the scope should be narrow. All our comments above on the complexities and costs of pursuing such an exercise would be amplified by pursuing a wider scope.

If European Contract Law is developed it is in our view essential that it should cover contracts for both the sale of goods and the supply of services. Sale of goods and services contracts should be included in order to cover the most common form of consumer contracts.

Question 5. Are there any other matters not covered in the Commission's Green Paper or this Call for Evidence which you think should be addressed in this exercise and any following work?

What are those issues and why should they be covered here?

Comments:

We supported the European Commission's initiative to review the consumer acquis with the aim of providing increased clarity and certainty for consumers when purchasing across borders. The review of the acquis is of course a much more limited project than the proposal on European Contract Law. Even so, obtaining agreement on the CRD proposal has been protracted and difficult. The initial aim to achieve maximum harmonisation is gradually being seen to be inappropriate because of the different starting positions of the individual member states. This illustrates the scale of the challenges in negotiating even a relatively narrow platform of harmonised law in respect of consumer contract rights.

One further point on the vulnerability of consumer protection law during harmonisation. We note that the Commission refers on several occasions for the need to ensure that any European Contract Law must offer a high level of consumer protection. This was also stated in relation to the proposed CRD. However, during the discussion of that directive we have been concerned that longstanding UK key consumer protection provisions, such as the consumer's right to reject faulty goods and the length of liability periods, have been under threat from the maximum harmonisation approach, and we have therefore welcomed recent indications of greater flexibility on key areas within the CRD.

About you

Please use this section to tell us about yourself

Full name	Nijole Zemaitaitis
Job title or capacity in which you are responding to this Call for Evidence and Views (e.g. member of the public, etc.)	Consumer Policy
Date	3 December 2010
Company name/organisation (if applicable):	Office of Fair Trading
Address	Fleetbank House 2-6 Salisbury Square
	London
Postcode	EC4Y 8JX
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.
