eurofinas

SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Response to the European Commission's consultation on European Contract Law

Results of the feasibility study carried out by the Expert Group on European contract law

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Eurofinas AISBL
Boulevard Louis Schmidt 87
B-1040 Brussels

RPM Bruxelles 0408.299.625

ABOUT EUROFINAS

Eurofinas, the European Federation of Finance House Associations, is the voice of consumer credit providers in the EU. As a Federation, Eurofinas brings together associations throughout Europe that represent finance houses, specialised banks, captive finance companies of car, equipment, etc. manufacturers and universal banks. The scope of products covered by Eurofinas members includes all forms of consumer credit products such as personal loans, linked credit, credit cards and store cards. Consumer credit facilitates access to assets and services as diverse as cars, studies, furniture, electronic appliances, etc. It is estimated that together Eurofinas members financed over 324 billion euros worth of new loans during 2010 with outstandings reaching 824 billion euros at the end of the year.

For further information about this Eurofinas consultation response, please contact: a.giraud@eurofinas.org

INTRODUCTORY OBSERVATIONS

Eurofinas welcomes the opportunity to comment on the *publication of the results of the feasibility study carried out by the Expert Group on European contract law.*

As highlighted by the Federation in its response to the European Commission's public consultation on *policy options for progress towards a European contract law for consumers and businesses* (1), Eurofinas supports the Commission's view that cross-border transactions within the European Union should be facilitated for businesses and consumers to take advantage of the Single Market.

However, Eurofinas does not believe that the harmonisation of contract law will actually influence *per se* the decision of a local lending institution to trade on a direct cross-border basis.

In the field of consumer credit, a major step towards a high level of consumer protection across the EU and harmonisation of key contractual elements was achieved with the adoption of Directive 2008/48/EC on credit agreements for consumers.

Eurofinas doubts that European actors will manage to reach political consensus on a general fully harmonised European contract law.

We agree with the Commission's proposal to establish a tool-box for use by the European institutions in the process of drafting new legislative proposals or revising existing measures. However, it is difficult to gauge the real value of such proposal without knowing how exactly it would be used. Further explanations of and consultation on this proposal would therefore be needed.

An optional instrument of European contract law could also be considered. The latter should however be restricted to cross-border transactions only. In all cases, businesses should remain free to adapt part or all of their contracts for cross-border transactions.

Eurofinas opposes any further action at this stage.

The document in hand provides the Federation's responses to a selection of the Commission's questions on the feasibility study as well as several observations on unfair contract terms.

1 See http://www.eurofinas.org/uploads/documents/positions/110131%20_Contract%20Law_.pdf

1. On the one hand, a European contract law instrument should cover most of the problems which could appear in contractual practice. On the other hand, the instrument should also be user-friendly and therefore as concise as possible. To which extent does the text developed by the Expert Group meet these objectives? To which extent could it be improved?

We believe that several substantive rules of the proposed document could be improved (see below).

2. For consumer contracts, Article 81 extends the unfairness control of business-to consumer contract terms, to terms which are individually negotiated (as opposed to covering only non-individually negotiated terms as in the existing EU legislation). Do you think this is appropriate?

Eurofinas opposes the extension of the unfairness control of business-to consumer contract terms, to terms which are individually negotiated. This would contradict the current practice in most Member States and the European acquis.

We believe that such provision would discourage businesses from allowing any negotiation at all and therefore ultimately impact consumers.

3. Article 92 foresees an exceptional possibility to alter a contract due to change of circumstances. Do you think that this provision represents real added-value, especially in consumer contracts? Do you think that the procedure which leads to the alteration of a contract is appropriate?

No comments.

4. According to Article 110, in business-to-business contracts, the seller of a faulty product has in principle a right to cure the defect. Do you consider this rule appropriate?

No comments.

5. Article 177 determines that a buyer who avoids or terminates a contract is, as a matter of principle, liable if the goods to be returned have been destroyed in the meantime. Article 178 also includes an obligation for the buyer to pay for the use of the goods to be returned. However, this obligation only exists under certain, restricted circumstances. Thus the risk of destruction of the goods is placed on the buyer and the risk of depreciation mainly on the seller. Do you consider these rules appropriate, especially in business-to-consumer transactions?

No comments.

6. Article 172 contains specific rules for consumers who are late with payments. In particular, the consumer is obliged to pay interest for late payment only 30 days after receipt of a notice informing him about this obligation and the interest rate. The interest rate is set at the average commercial bank short-term lending rate to prime borrowers. Do you think these rules are appropriate?

Eurofinas opposes this provision as we believe there is no justification for allowing a defaulting consumer 30+ days interest free breach.

The financial cost of any breach of payments differs from trader to trader. Such aspect should therefore be taken into account. For example, non-prime borrowing small businesses may be funding their trade at interest rates several percentage points above what is proposed to be chargeable.

In case of breach of payment, the cost for the trader traditionally increases; the proposed Article 172 would prohibit *de jure* the trader from getting any compensation. We firmly believe that such provision cannot be applied to financial services contracts.

7. The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?

a) If you consider it should, do you then believe that the rules on pre-contractual information in Article 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)?

b) If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs)?

c) If you consider it should, do you then think that the general rule on passing of risk in Article 145 could be appropriate? Or do you think it may be necessary to include specific rules, for instance to ensure that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content. Do you think that the notion of 'obtaining control of digital content' would be sufficiently clear?

No comments.

FURTHER OBSERVATIONS

Unfair Terms

As regards unfair terms in consumer contracts, the Federation strongly opposes the dichotomy provided by Articles 83 and 84 of the feasibility study distinguishing between terms considered unfair in all circumstances and terms presumed to be unfair.

The Federation believes that a "black list" approach is neither necessary nor desirable. One cannot rule out the possibility that the terms listed under Article 83 might be fair in very particular circumstances. In addition, the Federation is particularly concerned about the potential bureaucratic weight linked to the review of unfair terms. A list of terms presumed to be unfair is adequately protective without removing judicial discretion and therefore flexibility to adapt to all types of sales/services contracts and traders practices. Needless to insist on the fact that elements contained in Articles 83 and 84 of the feasibility study are not contract terms as such but categories of terms which are *de facto* subject to interpretation.

In parallel, Eurofinas wishes to highlight that the inclusion of several terms in Articles 83 and 84 are inconsistent with European wide accepted practices in the financial services sector.

In this context, the Federation urges the European Commission to ensure that the European approach towards contract terms is flexible enough to adapt to all types of contracts and circumstances.

Eurofinas reiterates its strong opposition to the inclusion of negotiated terms into the "unfairness test". We also firmly oppose Article 87 which introduces the concept of "surprising terms" into unfair terms provisions. "Surprising terms" is all but a legal concept and will obviously be subject to diverging sector-specific interpretations across Europe.

SUGGESTIONS FOR AMENDMENTS

Article 83 – Terms which are always unfair

b) exclude or limit the liability of the business for any loss or damage to the consumer caused deliberately or as a result of gross negligence;

We suggest the following alternative wording: "exclude or limit the liability of the business for any **direct and reasonably foreseeable loss** or damage to the consumer caused deliberately ~~or as a result of gross negligence~~".

Traders cannot be liable for all losses or damage to the consumer. Liability exclusions or limitations should remain possible with the exception of direct and reasonably foreseeable loss or damage to the consumer.

We believe that "negligence" should be kept out from article 83, potentially introduced in article 84, as it must be assessed on a case by case basis.

h) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods or services longer than one year, unless the consumer may terminate at all times with a termination period of no more than one month;

A credit contract, a renting contract or a consumer lease agreement will very often have an initial contract period of more than one year. Though consumers may terminate the contract at any time, a reasonable notice period may be required. This provision therefore does not suit the characteristics of financial services contracts.

(j) grant the business a shorter notice period to terminate than the one required of the consumer;

Such term could be fair under certain specific circumstances. For example, where a lender has committed to a particular funding mechanism by agreement with the customer and which requires a lead time to unwind at acceptable cost.

We therefore suggest that this term is moved under Article 84.

Article 84 – Terms which are presumed to be unfair

(d) permit a business to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;

This proposal does not sit with the mechanics of any kind of finance contract.

(f) entitle a business to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer, or entitle a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contract;

The second half of this provision may jeopardise early settlement compensation. Again, the proposal does not fit financial services.

(g) enable a business to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;

We suggest the following alternative wording: "enable a business to terminate a contract of indeterminate duration without reasonable notice, except **on grounds which are specified in the contract** ~~where there are serious grounds for doing so~~".

This wording provides more legal certainty both for businesses and consumers.

m) allow a business to transfer its rights and obligations under the contract without the consumer's lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;

We suggest the following alternative wording: "allow a business to transfer its rights and obligations under the contract without the consumer's **consent, unless the transfer is not likely to negatively affect the consumer's interests** ~~lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer~~".

The current wording proposal could jeopardize lending institutions securitization measures. Systematic consent would prevent the proper reconstruction of any business whether through debt sales, business sales or mergers/take-overs. It would also create huge administrative difficulties and extra cost in the context of the normal bulk assignments of credit books affected for financing purposes.

(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;

This proposal does not sit with the mechanics of any kind of finance contract. We warn against a high risk of litigation in relation to the interpretation of such provision. We believe that financial services contracts should be excluded from this provision.

v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration.

We believe that such provision should be read in light of existing sectoral regulatory provisions related to settlement/termination fees.