

Hearing
on
“Review of the European consumer law acquis”

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Intervention

Mapping the future for European consumers

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I would like to thank the chair for inviting BEUC to testify before this esteemed committee today.

BEUC – representing approximately 40 European Consumer organizations - welcomes the revision of the consumer law acquis and the new consumer policy strategy 2007-2013. We welcome in particular that consumers are recognised as drivers of the economy who need to be empowered and protected.

The revision of the consumer law acquis should accordingly focus on the essentials: the commitment to a high level of consumer protection throughout the EU, effectively implemented and properly enforced.

Yet, we are not convinced that these results can be achieved by insisting on having the exact same rules everywhere.

This session focuses on the different approaches to the review of the consumer acquis.

The questions related to the vertical instrument, the application of such an instrument and full harmonization are utterly interlinked. The answers are of deep significance and will map the future of European consumer protection policy.

Both questions and answers must therefore be scrutinized with care to achieve a sensible and balanced approach and the best possible outcome for consumers and businesses in Europe.

This balance is not one that merely aims at a potential or feasible compromise between vested interests. Rather, equilibrium must be sought among opposing concepts and theories to promote the consumer interest:

- Is the consumer interest better served through wider consumer choice in a deregulated (or re-regulated) European market or is the consumer interest better served by the retention of national rules sensitive to local patterns of consumer protection?

- Is competition and consumer welfare best achieved by competition of trade through uniformity or through regulatory competition of cultural diversity?
- Can advantages of community intervention only be safeguarded where national competences in the relevant field are ruled out or should there be scope for diversity that is responsive to local legal traditions and cultures?
- Can we achieve a sufficient degree of commonality through harmonization without adopting a common private law?

Are we trying to fit a square peg into a round hole?

The program of legislative harmonization that the Commission has put forward in the Green Paper is mainly dealing with private law issues.

This naturally raises questions that go beyond mutual recognition of standards and marketing techniques to safeguard the treaty freedoms and raises distinct legal questions.

Of course one could look at this revision and the envisioned horizontal instrument as only an intermediary step towards a common frame of reference in the near future, towards an optional regime in the mid-term and a European civil code in the long run.

But the broader the scope of harmonisation in the context of this revision, the more pressing the question becomes whether harmonising measures are covered by competences conferred on the EC by the Treaty.

Against this background, I will try to give a brief outline of our answer to question 1 to 3 of the Green Paper.

THE BEST APPROACH TO THE REVIEW OF THE CONSUMER LEGISLATION

In order to revise the consumer protection provisions, in principle a vertical (Option 1) or a mixed approach can be chosen (Option 2). More important than that is however to identify what is currently missing from the scope of the acquis to achieve a high consumer protection, in particular in response to perceived obstacles to cross-border trade and new technology developments.

Both options could be used to improve the quality and coherency of the scope of the directives (the current legislative acquis is marked by odd inconsistencies and by a general absence of common definitions). Yet, done vertically - it may bear the risk that this aim would be abandoned in future legislative processes.

A horizontal instrument would offer the possibility to bundle important consumer rights and communicate them to the consumer effectively. One of the practical problems of consumer protection is that consumers are rather unaware of their rights – which also differ according to the contract type. A horizontal or unified instrument that contains common and easy to understand consumer rights could contribute to increase the level of knowledge among citizens and thereby increase the effectiveness of the European acquis.

On the other hand, unification shouldn't be envisioned at all costs. Objective and justified differences should be maintained and the lowering of protection both at European and national level be avoided.

Sine que non for a horizontal approach (Option 2) is the maintenance of the minimum harmonisation principle without a country of origin principle. The question of the applicable law must continue to follow the country of destination principles laid down in the Rome Convention on the Law Applicable to Contractual Obligations (Rome 1980).

In specific fields however, one set of common rules could be envisioned. This is the case for the withdrawal period, the method of calculation and its consequences. Other questions such as the definition of the consumer and the trader could be easily harmonised.

However, if the legislator would extend the horizontal instrument to new cross themes such as a general fairness clause, remedies or damages in case of breach of contract, it would be necessary to abandon the idea of a definitive regulation but use the approved method of minimum harmonisation in conjunction with the principle of country of destination to avoid compromising existing national standards.

SCOPE OF A HORIZONTAL INSTRUMENT

In principal, the horizontal instrument should be applicable to all contracts, both cross-border and national (Option 1).

It is already difficult for consumers to understand one legal order; it would become entirely impossible if parallel systems existed. One should only depart from this endeavour if the European regime would demonstrate a level of consumer protection that is considered too low so that a limitation on cross-border contracts would be the only possible

way to introduce or maintain on national level a higher standard of consumer protection.

Option 2 (cross-border contracts only) or option 3 (distance contracts only whether they are concluded cross-border or domestically) would not be appropriate if the horizontal instrument entailed rules that could be applied in the same or a similar way on national contracts or contract other than distance selling, for example rules dealing with guarantees, burden of proof or standard terms. For the sake of legal certainty there should be no differing rules for cross-border or distance selling contracts in comparison to all other consumer contracts.

A horizontal instrument that only applied to cross-border cases would be inconsistent with the principle of destination and would lead to a fragmentation of laws for the consumer and thereby entail a counterproductive accentuation of borders instead of fostering the internal market.

We are on the other hand open to discuss the development of an optional instrument that could be chosen on a voluntary basis by the trader. The voluntariness of such an instrument would justify a very high consumer protection and in consequence a deviation from existing conflict of law rules.

DEGREE OF HARMONISATION

The Commission seems to believe that the existing minimum harmonisation approach is not appropriate any longer for both legal and economic reasons.

LEGAL REASONS FOR FULL HARMONISATION

Harmonization under Article 95 – so the Commission - prohibits scope for Member States to set higher standards than the community norm.

[Such an interpretation is backed by existing case law that pre-empts the possibility to set stricter rules, for example in the context of comparative advertising or product liability.]

The Commission argues that the model of ‘minimum harmonisation’ is incompatible with the Court’s assertion in the *Tobacco Advertising* ruling. According to *Tobacco Advertising* an act of legislative harmonization must factually contribute to eliminating obstacles to the free movement of goods or to the freedom to provide services or to removing appreciable distortion of competition in order to be validly based on article 95 EC. Minimum harmonisation in this interpretation would mean that higher consumer protection would be applicable to domestic traders alone.

This interpretation however stands against the Court’s assumption that a minimum clause in a harmonisation measure allows scope for persisting barriers to inter-state trade provided the stricter national measures is shown to be justified according to standards recognized by EC law governing free movement. As the Court in *Tobacco Advertising* did not discuss the issue of maximum versus minimum harmonisation as such, there is no definite clear answer regarding the validity of minimum harmonisation - pending further judicial elaboration of the matter.

Even if we would follow the argumentation line of the Commission, one could wonder how much could be achieved through full harmonisation. Full harmonisation can only comprise the specifically regulated areas in question. It follows from there that other question than those regulated

in the specific instrument would not be harmonised and resolved according to conflict of law rules.

Conflict with national complex private law could also arise.

[An example is delivery in distance selling contracts: pursuant to article 7 of the distance selling directive, delivery is due within 30 days - pursuant to German civil law, the obligation to deliver is due immediately. Consumer - as well as all other debtors - are better off according to national German law than pursuant to the Directive. Full harmonisation in the consumer protection field would lead to weakening of B2C contracts compared to B2B transactions.]

As stated, we agree that a uniform rule in specific cases is of great advantage – as it is the case for the annual percentage rate in the consumer credit proposal. Beyond these specific cases, full harmonisation does not bring the legal certainty that the Commission suggests. The appeal of the minimum harmonisation principle remains valid in the area of consumer policy, not least because it avoids the risk that Community measures may suppress long-established and well-developed national initiatives.

ECONOMIC REASONS FOR FULL HARMONISATION

According to the Commission minimum harmonisation has led to fragmentation of laws and therefore to transaction costs. Businesses should not be put off by the risk of being exposed to laws other than those found in their own legal system to deliver benefits of the internal market to consumers. In consequence, no national rules should be more protective than European laws to decrease transaction costs related to the lack of legal information about the content of applicable laws.

However, empirical evidence of the costs associated with legal diversity and how these costs relate to costs occurring due to other barriers such as diverse jurisdictions, costs related to language barriers, cost related to fiscal regulation etc remains unclear.

Also, will these perceived benefits of economic integration outweigh costs that flow from disallowing local sensitivity to particular regulatory needs?

Last but not least, it should be noted that this fragmentation of national laws based on minimum harmonization is of course more perceptible when the level of protection in a given directive remained fairly low.

[One of the examples of a low level of protection is the consumer credit directive of '87 (87/102/EEC): almost all countries went beyond the level of protection in transposing the directive. In contrast: more coherent transposition has been achieved when implementing the sales and guarantees directive 1999/44/EC.]

One could see the level of fragmentation as an indicator on the quality of a community measure; or in other words the higher the protection of consumers in a given directive the less perceptible will difference in national implementation be - ergo, the lower the need for full harmonization to avoid trade barriers.

The first major piece of EU consumer legislation to incorporate a maximum harmonisation clause was the Unfair Commercial Practices Directive (UCPD) of May 2005. This prohibits Member States from maintaining measures more protective of consumers in the area each occupies, subject to a temporary exclusion in some circumstances for a period of six years from 12 June 2007. The current process of implementing the unfair commercial practice directive will only tell in

time what the unintended consequences of maximum harmonization are going to be. We should be vigilant and await an assessment of the impact of this directive before applying such an unforgivable policy option to all consumer legislation. Does the directive cover all unfair practices? Only those practices defined as unfair by the Directive are prohibited! What is the relation to laws providing for specific controls? Will they have to be abandoned?

MINIMUM HARMONISATION WITH COUNTRY OF ORIGIN PRINCIPLE

The Commission proposes as the only alternate option to use the country of origin principle instead of maximum harmonization to reassure traders that they need only be concerned with the rules of the state in which they are established.

Option 2 is of course in contradiction to a common principle that the weaker party should receive protection in contractual relations. The introduction of the country of origin principle is at odds with a high level of consumer protection and would lead to a race to the bottom in consumer protection as a low level of consumer protection would become an important factor in attracting businesses. It would merely reverse the protection given to consumers by conflict of law rules but would hardly lead to any more legal certainty.

This is also the Commission own view as a recent proposal currently in the legislative process confirms (I cite from the proorposal): “There are two possible solutions to prevent this hybrid situation – full application of the law applicable to the professional or the law applicable to the consumer – only the latter would be truly compatible with the high level of protection for the consumer demanded by the Treaty. It also seems fair in economic terms: a consumer will make cross-border purchases only

occasionally whereas most traders operating across borders will be able to spread the cost of learning about one or more legal systems over a large range of transactions” (COM(2005)650).

IN CONCLUSION:

Full or minimum harmonisation must be answered with regard to specific content.

Consumer organisations believe the revision should concentrate on:

- Identifying substantial deficits and gaps – we should identify what is currently missing from the scope of the acquis to achieve a high consumer protection, in particular in light of technical developments and changed market behaviours
- Improving the quality and coherency of the scope of the directives (the current legislative acquis is marked by odd inconsistencies and by a general absence of common definitions)
- Horizontal instrument could be used to achieve goal 1 and 2 provided this would remain minimum harmonisation and country of destination (if the protection is sufficiently high - fragmentation will not occur)
- In exceptional and narrowly defined areas – a change to full harmonization can be envisioned. It is a prerequisite that such harmonisation is only acceptable if national consumer protection would not be undermined thereby.

Thank you very much for your attention. END