

The review of the consumer acquis

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Overview

- Vertical / horizontal / mixed approach
- Degree of harmonization
- Timing

Vertical / horizontal / mixed approach

- Green paper sets out several options:
 - Vertical approach
 - Mixed approach (horizontal instrument combined with vertical action)
 - No legislative action

General idea of a horizontal instrument

- Arguments in favour:
 - Current diversity in definitions
 - Overlap of especially pre-contractual information requirements
 - Inconsistency in e.g. regulation of right of withdrawal

 - Number of issues can indeed easily be harmonized
 - Definition of consumer and professional
 - Technical definitions (durable medium, ...)

- Arguments against:
 - General principles are often (necessarily) vague
 - Harmonizing rules to come to an 'average' rule entails the danger of reducing consumer protection in certain fields
 - General rules may not be able to tackle specificities of certain areas

- => **Mix is necessary**
- => **Scope of the instrument, degree of harmonization and procedure for revision of the instrument will be of major importance**

Scope of a horizontal instrument

- Green paper
 - Broad coverage
 - Exclusively cross border contracts
 - Limited to distance shopping
- } **Legal fragmentation**
- Again: degree of harmonization will have important influence on the preferred option

Degree of harmonization

- Latest tendency in European consumer law: full harmonization
 - UCPD
 - Draft consumer credit directive
- Arguments against full harmonization
 - Reduction of level of consumer protection
 - No room for national experimentation (proved useful in the past)
 - No regulatory competition
 - Consumer expectations continue to differ in the different countries
 - Subsidiarity
 - Barriers to trade not always apparent

Degree of harmonization

- Arguments against full harmonization (continued)
 - Revision of Community instrument too slow to be able to adapt to changing circumstances
 - Major difficulties of delimitation (cf product liability directive, cf unfair commercial practices directive)
 - Full harmonization and contract law: possible spill over effects
 - The effects of some of the proposed measures (e.g. general contractual remedies) need to be studied carefully
 - Harmonization of specific aspects of contract law has unavoidable effects on other aspects of contract law
 - Harmonization of specific aspects of contract law has potential effects on property law
 - e.g. problem of the passing of risk is often linked to transfer of property – regulating one aspect (transfer of risk) may have disturbing effects on certain systems of national property law
 - Does full harmonization exist??
 - Seems only possible for detailed rules (\Leftrightarrow open norms)
 - Regulation may then be preferable instrument

Degree of harmonization

- Arguments in favour of full harmonization:
 - Advantages for businesses: reduced transaction costs
 - Consumer confidence?
- Combination of minimum harmonization and mutual recognition / country of origin principle
 - Adverse effects for the level of consumer protection
 - Effects of country of origin principle and relationship with international private law is too problematic and uncertain

Degree of harmonization

- Strong case **against** maximum harmonization as a general rule
- Full harmonization – to be limited to very specific issues
- **Clarity** needed on **degree of harmonization**
- **Clarity** needed on **scope of the instrument** – what issues have been dealt with
- Flexible instrument needed for adaptation of such instrument (cf. Lamfalussy approach)

Full / minimum harmonization and legal basis

- Article 95 EC is problematic as a legal basis
 - Consumer protection linked to the realization of the internal market
 - Tobacco cases seem to have as a consequence that full harmonization measures are more easily justified
- Article 153 EC needs to be amended so as to provide for a sufficient legal basis for consumer protection measures, independent of the realization of the internal market

Timing

- CFR process is ongoing
- Review of the consumer acquis not to be rushed so that maximum benefit from research is possible