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on European contract law and the revision of the acquis: State of play and the notion of consumer

Committee on the Internal Market and Consumer Protection

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1. State of play

On 23 April 2005 the European Parliament adopted a report on "European contract law and the revision of the acquis: the way forward" (2005/2022(INI) A6-0055/2006).

The rapporteur was Mr. Lehne from the JURI Committee and the draftsman Ms. Wallis from the IMCO Committee, working in an enhanced cooperation. As mentioned in the report, an internal Parliament's Working Group was set up consisting of Members from both Committees in order to follow the work of the European Commission on this matter. The Working Group has agreed with the European Commission to give each other the status of an observer, so that Parliament's representatives could be present at the CFR workshops, whereas Commission's representatives at the Working Groups' meetings.

The work of the Working Group should be prepared by a Project Team, consisting of administrators from the Secretariats of both Committees, Policy Departments, Political Groups and the Legal Service. It is planned to have meetings of the Project Team (as preparatory meetings) and the Working Group once a month until the end of this year. At every meeting one specific topic should be discussed. The first issues having been covered in April were "notion of consumer and professional" and "structure of the common frame of reference". The meetings on 23 and 31 Mai will deal with "unfair terms".

The text below intends to stimulate the discussion on the notion of consumer in the European Parliament. It mainly refers to a Position paper of the Study Group on a European Civil Code with the title "The Notion of Consumer and professional and some related questions".

2. The notion of consumer

Protection of the weaker party in a contractual relationship has always been an issue. During the 1960's the first legal acts were enacted in different parts of Europe with the main purpose of protecting this weaker party, the consumer. At the same time the EC started to pay some attention to these protection issues. Since this period, the EC and later the European Union has become a prominent developer of consumer protection rules. It is not an exaggeration to say that this development constitutes a prominent part of the harmonisation process regarding private law in Europe.

a.) The notion of "Consumer" in EC-Directives, the 1980 Rome Convention and the CISG

There are several EC-Directives that define the term "Consumer". The wording differs somewhat in the different directives. The starting point has been the definition in the door-to-door selling directive, where the consumer is defined as "a natural person who, ..., is acting for purposes which can be regarded as outside his trade or profession"(Art.2)¹. An identical definition can be found in Art. 1(2) in the consumer credit directive². In the unfair contract terms directive³, the consumer is defined as "a natural person who, ..., is acting for purposes which are outside his trade, business or profession" (art. 2(b)). The same definition is given in

¹ Council Directive 85/577/EEC.

² Council Directive 87/02/EEC, amended in Council Directive 90/88/EEC.

³ Council Directive 93/13/EEC.

Art. 2(2) in the distance contracts directive¹, in Art. 1(2)(a) in the consumer sales directive² and in Art. 2(d) in the directive on distance marketing of financial services³. The only difference between this definition and the one in the door-to-door selling directive and the consumer credit directive is that the unfair contract terms directive and the distance contracts directive are also applicable when the person is acting outside his "business".

Some of the rules in the 1980 Rome Convention on the Law Applicable to Contractual Obligations are only applicable to consumer contracts. According to Art. 5, the rules providing a consumer protection are applicable to a contract "the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession" or a contract "for the provision of credit for that object". This definition is similar to the definitions in the consumer directives.

However, it is quite different from the definition in the Convention on the International Sale of Goods (CISG). Art. 2(a) CISG states that the convention is not applicable to sales of goods "bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".

b.) The Consumer definition

It is, from the definitions given in the directives and the conventions, evident that at least four features are decisive for the content of a consumer definition. It has to be decided:

- aa. whether the consumer has to be a natural person or if the notion "consumer" should also cover legal persons being in similar situations as a natural person,
- bb. if the transaction or act should be defined positively as being made for personal use or negatively as being made outside the person's trade, business or profession,
- cc. whether a transaction with mixed purposes should fall within the consumer protection sphere or not, and
- dd. if the purpose must be known or ought to have been known to the other party.

aa. Natural versus legal persons

According to the EC Directives the consumer should be a natural person. Nevertheless, the directives offer the possibility that protection could be given also to others than natural persons. In fact, this possibility to broaden the scope when implementing directives has been used in some member States. However, from the point of view of the Study Group on a European Civil Code, a standard definition, being built upon the existing legislation ought to include only natural persons. Where there is a need of protecting also small business or other non-natural persons, there are other possible ways of solving the problem.

bb. The purpose of the act or transaction

There are, in principle, two ways of describing the purpose of a natural person's act. The purpose could either be that the natural person acts for personal, family or household use (i.e.

¹ Directive 97/7/EC

² Directive 99/44/EC. See also Art. 2(e) Directive on Electronic Commerce 2000/31/EC, where the consumer is defined as "any natural person who is acting for purposes which are outside his or her trade, business or profession".

³ Directive 2002/65/EC

a positive description) or that he acts for purposes which are outside his trade, business or profession (i.e. a negative description). Both models have been used in national legislation and international conventions. In most cases both ways of describing the purpose will lead to the same result.

However, in some cases the different descriptions will lead to different results.

An example is when the natural person concludes a contract of sale in his own name and where the purpose is that the good should be used by a non-profit organization of which the person is a member. In this case the purpose is outside the buyer's trade, business or profession, but the transaction has not been made for personal, family or household use. The person would therefore be protected when applying the negative description, but not when applying the positive description.

All EC Directives have chosen the negative description of the purpose. For the Study Group this seems to be a reasonable solution as natural persons being worthy of protection are protected also in borderline cases. The decisive factor ought to be whether or not the natural person is acting outside the professional sphere, in which case he has – within the limits of good faith and fair dealing etc. - to take the risk himself on how he regulates his rights and obligations.

cc. Mixed purposes

In much national legislation, notably the Nordic countries, the consumer definition includes transactions or acts being made *mainly* for a purpose within the private sphere or *mainly* outside the person's trade, business or profession. However, no such wording is included in the consumer definitions in the EC Directives, in the 1980 Rome Convention or in the CISG.

According to statements made by the Commission and the EU Council when the door-to-door selling directive and the unfair contract terms directive were to be implemented, the directives were applicable even if the natural person acted partly for business purposes, as long as the main purpose of the act was outside the trade, business or profession. Even if statements such as these are of minor value for the interpretation of a legal act, there seems to be the prevailing view among European scholars that the consumer definition covers also such mixed transactions or acts.

Although Art. 2(a) CISG expresses a different view¹, the main reason for including cases where the consumer has acted to a greater extent for private purposes in the standard definition is that the natural person, as long as he is not acting to a greater extent within his professional sphere, should be protected as a consumer as the reasons for protecting consumers as such are equally valid in this case. The approach chosen here is therefore that a transaction should be regarded as a consumer transaction if the natural person has acted *primarily* outside his trade, business or profession².

dd. Objective versus subjective approach

A complicated question is whether the consumer definition contains or should contain a requirement that the purpose of the consumer with the transaction or act – either personal or outside business etc. - should be apparent for the professional as a requirement for the consumer protection rules to apply or if it is enough that the consumer had such a purpose

¹ See e.g. Schlechtriem, in Schlechtriem & Schwenzler (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd (Eng.) ed. 2005, p. 44

² Cf. Howells & Wilhelmson, 1997, p. 3

with the transaction regardless of the knowledge of the professional.

Within the EU, national legislations differ considerably in the answer to this question. Even within most legal systems the answers are different depending upon what the regulations deal with. The same is true with regard to different European Directives. At present, no Directive explicitly deals with this problem.

However, according to statements made in protocols by the Commission and the EU Council in answering questions from Member States being in the process of implementing the door-to-door selling directive and the consumer credit directive, a transaction where the professional did not nor should have known that the transaction was made mainly outside the natural persons trade, business or profession should not be regarded as a consumer transaction (subjective approach).

According to Art. 2(a) CISG, the Convention is not applicable when the natural person has bought the goods for personal, family or household use “unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use”. Accordingly, the CISG has chosen the objective approach.

The approach making the applicability dependent upon the knowledge of the professional has the advantage of giving the professional a chance to make a risk analysis before deciding upon the price and before the conclusion of the contract. On the other hand, the other approach has the advantage of protecting the consumer – presumably not knowing about the rules – as soon as his or her purpose with the transaction or act is outside his or hers business, trade or profession. As a choice has to be made for a standard definition one might adopt the more consumer friendly view that the rules protecting consumers should be applicable regardless of whether the professional had knowledge of the consumer’s purposes with the transaction.

ee. As a result the Study Group proposes the following definition:

"Consumer" means any natural person who is acting primarily for purposes which are not related to his or hers trade, business or profession.

c). The workshop on 21 June 2005

On 21 June 2005 a workshop with the title "The Notion of Consumer and Professional" took place. After consulting the researchers and experts on the above raised questions the Commission drew the following conclusions:

aa. There was general agreement that only natural persons should fall within the definition of consumer, although some other legal persons (i.e. charitable institutions, small businesses) may deserve correspondent protection in some circumstances.

bb. The researchers should devote further attention to the possibility of considering those mixed purposes transactions which are only partly outside the professional sphere as consumer transactions. In particular, regard should be had to the fact that most Member States already extend the scope of consumer protection rules to cover such cases.

cc. The researchers should further clarify the reasons justifying the apparent mismatch between the proposed definitions of consumer and professional.

dd. Finally, it was necessary to acknowledge that no definitions can be water-tight and that borderline cases will have to be dealt with by national courts and possibly the ECJ.

The researchers agreed to elaborate practical examples in order to illustrate the operation of the envisaged rules, with particular reference to the concepts which attracted most attention (e.g. “primary purpose”).