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on the Proposal for a directive on Consumer Rights - COM(2008)614/3 -
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Committee on the Internal Market and Consumer Protection

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United in diversity

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The Commission Proposal and its Objectives

The European Commission's Proposal for a Directive on Consumer Rights brings together four existing pieces of Community legislation¹ into a single legislative instrument. The Proposal is the result of a review of the consumer acquis launched in 2004 to simplify and complete the existing regulatory framework on consumer protection. It was tabled on 8 October 2008 following a consultation process and an impact assessment, and proposes that the new Directive should apply the principle of full harmonisation.

The twin objectives of the Proposal are to ensure that consumers across all EU 27 Member States have confidence in a high degree of consumer protection, and that businesses of all sizes are able to provide their goods and services free from unnecessary legal obstacles, to consumers across the 27 Member States of the Union. In its resolution on the review of the consumer acquis², the European Parliament confirmed the two objectives of enhancing consumer confidence and reducing business reluctance to trade across borders.

Legal fragmentation is a deterrent for both consumers and businesses when considering whether to engage in cross-border trade. Consumers often complain that they are denied the possibility of fully benefiting from the Internal Market (in particular when shopping on-line) since sellers operating out of one Member State are often reluctant to abide by different rules when entering a new marketplace³ and sellers are also reluctant to running the risk of being sued in another Member State. This situation could further deteriorate with the implementation of the Brussels I and Rome I Regulations and any related ensuing decisions taken by the European Court of Justice, which would likely make the conditions for offering goods across EU Member State borders even more difficult⁴.

While most Committee Members acknowledge that the legal fragmentation issue must be tackled, the general view is that the full harmonisation approach proposed by the European Commission is in fact not feasible at this stage given the nature and the scope of the Proposal. In accordance with the European Parliament's Resolution on the review of the consumer acquis, and, as already stated in the IMCO working document of 2009, Committee Members prefer a targeted full harmonisation approach, limited therefore to specific aspects of certain contracts, whilst maintaining high levels of consumer protection.⁵

¹ Directives on Unfair contract terms (93/13/EC), Sales and Guarantees (99/44/EC), Distance Selling (97/7/EC) and Doorstep selling (85/577/EC)

² Report on the Green Paper on the Review of the Consumer Acquis/ Ag-0281/2007, report presented by Béatrice Patrie

³ A IMCO hearing has shown that businesses have to pay unreasonable costs: 20 000 €/year/national market, only for legal compliance costs

⁴ Case Alphenhof vs. Heller (C-144/09 – 24/04/2009, Hearing at the ECJ on 16.03.10) and Case Pammer vs. Reederei Karl Schlüter (C-585/08 – 24.12.2008)

⁵ Working document on the Proposal for a directive on Consumer Rights - IMCO/6/68476 presented by Arlene McCarthy

Preparatory work of the Committee

1. Consultation of stakeholders

The IMCO Committee organised two public hearings¹ on the proposal during which it became apparent that Consumer organisations were concerned about a potential lowering in consumer protection levels following full harmonisation, arguing that some Member States may have to give up specific national provisions. Businesses on the other hand underlined the current legal fragmentation and welcomed the targeted full harmonisation approach proposed by Committee Members as the correct answer. They indicated their willingness to accept additional consumer protection measures provided that these were proportionate, balanced and harmonised throughout the EU.

2. Exchange of views with National Parliaments

The Committee also held two hearings with National Parliaments² in accordance with the new mechanisms established by the Lisbon Treaty.

Reflections on the Proposal

- Chapter I – Subject matter, definitions and scope

The definitions in Article 2 delimit the scope of application of the Proposal as a whole, as well as the scope of its different chapters and provisions. Whether or not a given contract is subject to harmonised rules depends largely on the wording of the definitions. Attention will have to be paid to the interaction between these definitions, Article 4, and the rest of the text.

Certain definitions will have to be reworded in order to ensure that the right rules apply to the right contracts to ensure that consumers are protected when it matters, and, that traders are not burdened with unnecessary restrictions. A number of definitions are not satisfactory from a legal point of view and should be improved for the sake of consistency and legal certainty.

There is a growing consensus among Committee Members that definitions should be subject to targeted full harmonisation. However, one has to bear in mind that harmonised definitions would have a very limited impact on the Internal Market if the respective consumer protection rules were not simultaneously subject to targeted full harmonisation. Harmonised definitions are only a means to an end, which is the removal of barriers to the internal market, and not an end in itself.

In order to maximize benefits for the Internal Market, an analysis is required on whether it is possible to apply the harmonised definitions of the Proposal to the rest of the consumer acquis

¹ 2nd March 2009, 29th September 2009

² 26th January 2009, 23rd February 2010

(i.e. timeshare and consumer credit contracts).

A significant number of Committee Members and stakeholders consider that Article 3 is confusing and request clarification. Indeed, this article fails to give a clear overview of the scope of the different Chapters since it has to be read in conjunction with a number of other provisions of the Proposal (in particular Articles 2, 8, 20, 21 and 30). For example, Chapter III applies to off-premises mortgage contracts (mortgages are not covered by the consumer credit directive) but, due to multiple cross-references, this is not immediately clear. The confusion is compounded by the fact that Article 3 also regulates the relationship of certain chapters / provisions with existing Community legislation. Article 3 will need to be shortened and simplified. The scope of each chapter or the interaction with other Community rules will have to be dealt with chapter by chapter and, if necessary, provision by provision. This will probably entail a complete overhaul of the Proposal's structure.

Article 4 on full harmonisation is contentious because of the broad variety of contracts covered by the Proposal and the level of consumer protection proposed by the European Commission. A number of Committee Members reject this approach and call for targeted full harmonisation (limited to certain aspects of certain contracts, whilst ensuring a high level of consumer protection).

Article 4 will require clarification on how targeted full harmonisation should apply to contracts which are only partly covered by the Proposal (e.g. service contracts excluded from the scope of Chapter IV but covered by Chapters II, in certain cases III, and V). Logically, contracts excluded from the scope of a given chapter but however covered in the scope of other chapters should be exclusively subject to targeted full harmonisation concerning the aspects regulated in these other chapters. For contracts excluded from the scope of a given chapter, Member States should be free to regulate as they please the aspects dealt with by that chapter.

With a targeted full harmonisation approach, barriers to the Internal Market will only be removed step by step, which is not entirely satisfactory. One should therefore not exclude the use of a mutual recognition clause for areas that are not covered by the Proposal, as already suggested by the European Parliament during the discussions on the review of the consumer acquis.

The discussions in Committee allowed making some progress on the conditions for the use of targeted full harmonisation in the Proposal. Despite divergences of opinion on the appropriate level of consumer protection at which targeted full harmonisation should be achieved, most Committee Members and stakeholders agree that targeted full harmonisation should neither significantly reduce consumer protection in the Member States nor systematically bring EU rules into alignment with the most restrictive / protective national legislation. The general consensus is furthermore that harmonised rules should be precise, clear and future-proof and that their impact on national legal systems should be thoroughly assessed.

- Chapter II – Consumer Information

It is broadly accepted among Committee Members and stakeholders that consumers need to be adequately informed before concluding a contract and that this is a key aspect of consumer protection.

The general information requirements contained in Chapter II are not new in Community law (a mix taken from the distance selling and unfair commercial practices Directives) and, as such, not really controversial, although a number of Committee Members and stakeholders regret that quantity is often preferred to quality for consumer information.

However, due to the nature of the Proposal and the broad variety of contracts it covers, there is a general feeling that the general information requirements of Chapter II have a much greater impact on national legal systems than previous Community measures. A thorough assessment of the legal and practical implications of Chapter II will need to be conducted. A one size fits all approach for information requirements certainly has merits for standard sales or service contracts, but it is unsuitable to special contracts (e.g. immovable property contracts or contracts relating to financial, health, social or transport services).

Finally, the issue of the interaction between Chapter II and provisions concerning information requirements contained in Community law will need to be addressed. Here, the Proposal only provides that it is without prejudice to the services Directive and to the e-commerce Directive. For information requirements in Community legislation, a *lex generalis / lex specialis* clause, similar to the one which can be found in the unfair commercial practices Directive, would offer more legal certainty.

- Chapter III – Consumer Information and withdrawal rights for distance and off-premises contracts

Discussions in the Committee show that Chapter III, which sets clear rules for information requirements and right of withdrawal for distance and off-premises contracts, is relatively consensual.

A significant number of Committee Members and stakeholders agree in principle that it makes no sense to have different rules governing the withdrawal period (starting point, length, calculation method, expiration, consequences, etc.) in each Member State. It is widely believed that the Proposal is a good opportunity to put an end to confusion and to remove the Internal Market's barriers created by the current patchwork of differing rules. Some Committee Members consider however that certain national specificities cannot be replaced by other effective consumer protection tools.

The attention of the Committee has been drawn to certain aspects of Chapter III which could reduce consumer protection in certain Member States (in particular regarding cases where consumer information has been omitted). Interestingly, there was also some criticism of Chapter III for being unreasonably consumer friendly. Certain Committee Members and stakeholders believe for example that the scope of distance and off-premises rules is too broad and that formal requirements and withdrawal rules are too restrictive, in particular for off-

premises contracts.

There is general consensus that Chapter III will have to be amended in order to achieve a fair balance between the interests of consumers and distance / off-premises traders. The list of exceptions in Article 19 will have to be kept short and simple. It is essential that the right rules apply to the right contract, i.e. that consumers are protected when it matters and that traders are not burdened with unnecessary restrictions. Concretely, any business-to-consumer contract concluded on electronic platforms (such as eBay) will and must be subject to all consumer protection rules. Consumers may have to bear the sending costs only if the value of the goods does not exceed 50 €. Additionally a solution will have to be found for craftsmen who routinely provide services to consumers off-premises or conclude distance contracts. A certain degree of flexibility will have to be introduced as far as the starting point of the withdrawal period is concerned: as a general rule, this should be at the time of the delivery of the goods, but more practical solutions are required for certain business models.

In order to facilitate communication between traders and consumers, other improvements will likely have to be made. A specimen text containing all the relevant withdrawal information could for example be introduced. This text could simply be "copied and pasted" by traders throughout the EU.

- Chapter IV – Other consumer rights specific to sales contracts

Many concerns have been expressed in Committee about the impact of Chapter IV on consumer protection in the Member States. Several Committee Members and stakeholders criticize the European Commission for harmonising the legal guarantee for a lack of conformity on the basis of the minimum standards established by the sale of goods Directive, without regard to national specificities. The general understanding among a number of Committee Members and stakeholders is indeed that the Proposal, if adopted as it stands, would oblige certain Member States to renounce long-standing consumer rights. The European Commission admitted this, albeit implicitly, in an explanatory note circulated to the Committee in September 2009. However, the attention of the Committee has been drawn to the fact that certain of these long-standing rights are not always effective and therefore can rarely be enforced in courts.

Two issues have been raised time and again in the course of Committee discussions: on the one hand the hierarchy of remedies available to the consumer in case of a lack of conformity, on the other hand, the length of the trader's liability period in case of a lack of conformity.

As far as the hierarchy of remedies is concerned, the problems are twofold. Firstly, in a limited number of Member States, all remedies (repair, replacement, price reduction and contract rescission) are available to the consumer in case of a lack of conformity. Secondly, in Ireland and in the UK, the consumer has the right to reject the goods (i.e. rescind the contract) immediately if he can prove the lack of conformity (the consumer does not benefit from a reversal of the burden of proof under the right to reject regime). It is clear that such rules would not be compatible with the harmonised hierarchy of remedies established by Article 26 of the Proposal.

Concerning the length of the trader's liability period in cases of a lack of conformity, the problems are numerous. A number of Member States have set a longer liability period (in certain countries, it applies to all products, in others, only to building materials and in one Member State, it is only relevant for durable goods). In Finland and in the Netherlands, the trader's liability period basically depends on the expected lifespan of the product (to be decided by the judge on a case by case basis). Finally, in Belgium, France and Luxembourg, traders can be held liable if a hidden (major) defect is discovered by the consumer after the initial period of 2 years (subject to a limitation period – rather short in France, longer in Belgium) and if the consumer can prove that the defect in question already existed at the moment of delivery (the consumer does not benefit from a reversal of the burden of proof under the “vices cachés” regime). It is clear that such rules would not be compatible with the harmonised liability period of 2 years starting from delivery set by Article 28 of the Proposal.

Other issues have been raised in the course of Committee discussions, for example the choice of remedies and the notification of a lack of conformity. A significant number of Committee Members believe that the European Commission's proposal to allow the trader to choose between repair and replacement (when a lack of conformity is first notified by the consumer) should be reviewed. The general opinion is also that the consumer should not be obliged to notify the lack of conformity to the trader within two months. The Proposal will have to be modified accordingly.

As far as the provisions regulating the delivery of goods and the transfer of risk are concerned, their impact on national legal orders and the way they are likely to be applied in practice will have to be thoroughly assessed.

All these discussions show that Chapter IV can only be subject to targeted full harmonisation if it is possible to agree on a common guarantee regime which offers to all European consumers a level of protection comparable to the one they enjoy today. In order to achieve this, existing consumer rights in the different Member States will have to be examined under the aspect of their effectiveness for the consumer (i.e. whether or not they can be easily enforced in the courts). In this context, particular attention will be given to the burden of proof.

- Chapter V – Consumer rights concerning contract terms

The various exchanges of views showed that many Committee Members and stakeholders are sceptical as regards Chapter V.

Admittedly, most Committee Members and stakeholders seem to agree with the aim of harmonising the general clause on unfair contract terms, while insisting that further assessment is needed. But it is widely believed that black and grey lists of unfair contract terms should not be harmonised at this stage in order to avoid negative consequences (deletion of terms from existing national lists, reduction of the level of legal certainty triggering a litigation wave throughout the EU, lack of flexibility etc.). There is consensus that Member States could keep their own lists of unfair contract terms provided they are consistent with the general clause and Internal Market rules.

It should however be possible to ban a limited number of unfair contract terms at EU level and guarantee that Member States cannot maintain or adopt diverging national provisions in this relatively narrowly harmonised field. In the light of the principle of full democratic control of the European Parliament, the Commission's proposal to ban additional unfair terms through Comitology seems at this point not to constitute the preferred approach. The new provisions regarding Comitology in the Lisbon Treaty have to be assessed carefully before deciding on this matter.

Conclusion

In accordance with the Treaty and given the fact that the Council has not made sufficient progress, the Committee will continue to work solely on the basis of the Commission's Proposal.

In the context of the discussion on consumer protection in the EU, it is of the utmost importance to improve the efficiency of existing consumer rights, i.e. make sure that such rights are clear and simple, well-known by consumers, traders or civil servants and, as a consequence, properly enforced: Awareness is crucial.

Targeted full harmonisation will most certainly increase consumer protection throughout the EU. However, a significant amount of work will be needed to identify, case by case, which rules need to be harmonised to ensure the functioning of the Internal Market whilst maintaining a high level of consumer protection.

In this context, it is essential to ensure an appropriate level of consistency between the Proposal, the Common Frame of Reference and the remainder of the consumer acquis. It is commendable that during the last hearing of national parliaments the Commission has repeated its willingness to carefully listen to the Parliament and to work in a very open-minded manner.

Finally, an additional analysis will be made in order to prove that the future consumer rights Directive truly allows all stakeholders to benefit from the Internal Market. The European Parliament is the co-legislator and must take full responsibility for the consequences of this Directive.