

# EUROPEAN ECONOMIC AREA

## STANDING COMMITTEE OF THE EFTA STATES

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### SUBCOMMITTEE IV ON FLANKING AND HORIZONTAL POLICIES

#### EEA EFTA Comment on the Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights ([COM \(2008\) 614](#)) by the European Parliament's Committee on the Internal Market and Consumer Protection

#### 1. PREFACE

The EEA EFTA States, Iceland, Liechtenstein, and Norway, have studied with great interest the Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614) by the Rapporteur Dr Andreas Schwab for the Committee on the Internal Market and Consumer Protection, and appreciate the opportunity to comment on the draft Directive. In some of the EEA EFTA States, the draft report has been subject to a public consultation involving different stakeholders.

The EEA EFTA States would like to draw the Parliament's attention to their comments provided on the Green Paper on the Review of the Consumer Acquis in 2007 and on the Commission's proposal for a Consumer Rights Directive (COM (2008) 614) in March 2009.

The main views of the EEA EFTA States are the following:

- Firstly, the EEA EFTA States still favour a minimum harmonisation approach, but believe that the question of harmonisation should be considered on a case by case basis. The proposed Article 4 on harmonisation should thus be revised to allow such an approach.
- Secondly, the EEA EFTA States welcome the pragmatic approach to the degree of harmonisation outlined in the Rapporteur's report and recognise the efforts to make key articles in the proposal more flexible. The Rapporteur's proposal gives the Member States more leeway to go further in consumer protection than was foreseen in the Commission's proposal. The EEA EFTA States view these

proposals as improvements in comparison to the Commission's proposal. However, the possibility to derogate from the Directive is still very limited. We are also concerned that the conditions to derogate from the Directive seem too strict in some cases.

- Thirdly, the EEA EFTA States consider a minimum harmonisation approach to be especially important regarding chapter IV of the proposal and of paramount importance as regards chapter V of the proposal.
- Lastly, the EEA EFTA States would like to point out that the proposed Directive still needs a clarification regarding the relationship between the proposal and the general contract law of the Member States.

## **2. SPECIFIC ISSUES**

### **2.1. Unfair contract terms**

1. The EEA EFTA States recognise that bringing together a text for chapter V of the proposal which is acceptable for most of the Member States, is a difficult task. Due to the significant impact on general contract law and the different traditions of enforcement in relation to unfair contract terms in the Member States, the EEA EFTA States believe that it is paramount that chapter V of the proposal is based on a minimum harmonisation approach and coherent with the current Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

### **2.2. The scope of the proposal and general contract law**

2. The EEA EFTA States believe that the proposal is still unclear regarding the relationship between the proposal and the general contract law of the Member States. Legal uncertainty in this respect is contradictory to the purpose of the proposal, which is to strengthen the confidence of both consumers and businesses in the internal market. Thus, the relationship between the proposal and the general contract law of the Member States should be formulated in a clear manner in the proposal in order to provide legal certainty. In the view of the EEA EFTA States, both the preamble and Article 3 regarding the scope of the proposal should clearly state that the proposal shall not affect national law in the area of general contract law, insofar as this is not harmonised in the proposed Directive. Such a clear regulation would provide the Member States with the flexibility to maintain or introduce legislation which is necessary to ensure that the consumer may achieve the rights set out in the proposal.

### **2.3. General information requirements and general contract law**

3. The EEA EFTA States would like to draw attention to the relationship between the general information requirements in Article 5 and the principles of good faith and fair dealing. Although this Article mentions the principle of good faith, it is somewhat unclear if this is only applicable when a trader fulfils the obligation of specific information requirements set out in Article 5, or if the principle is applicable in a

broader sense, irrespective of the obligation that may be placed upon the trader in accordance with Article 5. The principle of good faith and fair dealing is a general principle of contract law, and will thus apply regardless of the specific information requirements.

4. Furthermore, the proposal is somewhat unclear on the relationship between the proposal and other legislative provisions of the Union which regulate special contracts, especially for cases where the latter provisions leave certain elements to be regulated by the Member States. This is the case, for example, with the Consumer Credit Directive (CCD). Some Member States have to a certain degree extended the scope of the CCD regulation to be applicable also to consumer credit contracts outside the scope of the CCD. The proposed Consumer Rights Directive, as amended by rapporteur Schwab, will cause legal fragmentation in those Member States. Representatives from the financial service sector in one of the EEA EFTA States have raised concerns regarding this effect of the rapporteur's proposal. The EEA EFTA States thus believe that financial services should as such be excluded from the scope of chapter II of the proposal.
5. In the view of the EEA EFTA States, Article 5 paragraph 3c of the proposal may create some confusion, since it does not state anything other than what already follows from the Service Directive Article 22 paragraph 5. Article 5 paragraph 3c should thus be removed from the proposal.

#### **2.4. Sales contracts**

6. A minimum harmonisation approach is preferable to the chapter concerning other consumer rights specific to sales contracts (chapter IV). The EEA EFTA States would like to take the opportunity to comment on some of the proposed regulations concerning sales contracts. It should be taken into consideration that supplementary regulation will in any case be necessary in national law to ensure that key aspects of consumer sales contracts regulated by the proposal can be effectively used by consumer and traders. To this end, it is important that, as mentioned in point 2 above, the proposal clearly states the relationship between the proposal and the general contract law of the Member States.
7. The EEA EFTA States note that mixed-purpose contracts are deleted from the text of chapter IV, but it still remains unclear how a mixed-purpose contract will be affected by the proposal. The EEA EFTA States recall their previous statement of March 2009 where it was stated that for a mixed-purpose contract to be labelled a sales contract, the service should not amount to a predominant part of the contract.
8. The proposal has been amended by the rapporteur to allow the consumer to choose between repair and replacement of goods in Article 26 paragraph 2. The EEA EFTA States welcome this improvement. The EEA EFTA States recall their previous statement of March 2009 where it was suggested that the EU in a future directive should provide a right for the consumer to claim substitute goods in the case of a remedy for lack of conformity by either repair or replacement of the goods. Such a claim should be at the expense of the trader, provided that the remedying of the goods

deprives the consumer of the goods for more than one week, and that such a claim is deemed reasonable, considering the consumer's need for the goods and the expenses and inconvenience conferred upon the seller. The EEA EFTA States would once more suggest that a future directive provides the consumer with such a right.

9. The EEA EFTA States have studied Article 28 and 46a of the rapporteur's proposal with interest, and the EEA EFTA States welcome the more flexible approach to the time limit and burden of proof reflected in the rapporteur's proposal. In the national consultations in the EEA EFTA States, concerns have been expressed regarding the proportionality test of Article 28 paragraph 5a (confer Article 46a paragraph 2). In some of the EEA EFTA States, the general time limit is two years in accordance with Article 28 paragraph 1 of the proposal. However, there is also a longer time limit of five years, for certain consumer goods, namely those that are meant to last considerably longer than two years, provided that the lack of conformity existed at the time the risk passed to the consumer. This is essential to protect a consumer when there exists a lack of conformity for which the trader bears the risk, and the consumer goods are meant to last considerably longer than two years. In Norway and Iceland this right has proved to be commercially practicable and has also been sanctioned by the Supreme Court of Norway in cases involving certain consumer goods. The fact that the right is granted in commercial transactions and sanctioned by the courts proves that this time limit for consumer protection is effective. Moreover, the fact that the longer time limit of five years is applicable only to certain consumer goods, namely those who are meant to last considerably longer than two years, confirms that the rule is proportionate. Hence, the EEA EFTA States consider that this longer time limit, as described, may be maintained without infringing the proposal in Article 28 and 46a. If so, the EEA EFTA States support the more flexible approach suggested by the rapporteur for Article 28 and 46a of the proposal. In points 19 to 22 below the EEA EFTA States have made some general comments regarding Article 46a of the proposal, which should be read without prejudice to the section here.

## **2.5. Right of withdrawal**

10. The EEA EFTA States support the strengthened consumer protection regarding the right of withdrawal in the new draft. They consider the prolonged withdrawal period of one year, when the trader has not given the correct information (ref. art. 13), and the fourteen day limit for the trader to reimburse payment (ref. art. 16), as improvements. The EEA EFTA States also welcome the proposal that the trader shall pay the costs of return if the price of the goods to be returned is more than EUR 50. Such a regulation seems practical and suitable for the strengthening of consumer confidence in the market.
11. The EEA EFTA states still have, however, some concerns and proposals regarding the right of withdrawal and the information requirements:
12. Off-premises sales and unsolicited telephone sales will in general appear as more aggressive than other forms of sale, as the consumer is taken by surprise and is unprepared for a sales situation which he/she has not actively initiated. In order to reduce the negative effects in this respect, the EEA EFTA States would like to propose

an amendment in the provision of reimbursement. According to Article 16 paragraph 2, the trader may withhold the reimbursement until he has received or collected the goods. For off-premises sales and telephone sales, the EEA EFTA States propose that the risk of reimbursement is reversed so that the consumer may retain the goods until he or she has received reimbursement and an amount corresponding to the cost of return from the trader. Such an amendment will reduce the consumers' risk in these sales situations.

13. The EEA EFTA States would also suggest a strengthening of the trader's obligation to provide information in cases where the sales medium allows limited space and time to display the information. According to Article 11 paragraph 3, the trader shall only provide information regarding the main characteristics of the product and the total price referred to in Article 5 paragraph 1 (a) to (c) prior to the conclusion of a contract. However, it is also important for the consumer to receive information about the duration of the contract and the minimum duration of the consumers obligations, Article 5 paragraph 1 (g) and (h), in order to make an informed decision to purchase. For instance, for a consumer who is considering buying a telephone subscription, the minimum subscription period is of vital importance when considering the offer. The EEA EFTA States therefore propose to include (g) and (h) in Article 5 paragraph 1 in the information requirements in Article 11 paragraph 3.
14. The EEA EFTA States have concerns regarding the practicability of Article 17 paragraph 2. According to this Article, the consumer is liable for the diminished value of the product, but still has the right to withdrawal if he has used and damaged the product. It may, however, be complicated to assess the reduced value of the product in each case. The proposal may therefore lead to many conflicts between traders and consumers. The EEA EFTA States would point out that an alternative could be that the withdrawal right does not apply if goods cannot be returned in approximately the same amount and condition and that the diminished value is due to negligence or insufficient care from the consumer.

## **2.6. Written confirmation of "telephone sales"**

15. The EEA EFTA States believe that consumer protection should be further strengthened for unsolicited telephone sales.
16. The EEA EFTA States suggest introducing a formal requirement in the Directive, to the effect that the consumer is committed only after giving his/her written confirmation. In other words, the contract should not be valid until the consumer has given his written consent to enter into the contact (consent by e-mail and SMS should be considered as 'written' consent).
17. In one of the EEA EFTA States (Norway), such a requirement has been introduced in the legislation since 2009 with great success. The introduction of the requirement has led to a significant decrease in consumer complaints regarding 'telephone sales'. This applies both to numerous disputes on whether a contract had been concluded during the conversation, and disputes concerning the content of the verbal contract.

18. A requirement of written confirmation of telephone sales could be inserted in Article 11. In any case, the EEA EFTA States stress that the Directive should allow Member States to retain or introduce such a requirement in their legislation.

## **2.7. Reporting requirement and mutual evaluation**

19. Article 46a sets up a procedure of reporting and evaluation of any diverging provisions that are allowed according to the Directive. Article 46a paragraph 2 requires that Member States justify why diverging provisions are proportionate and effective.
  20. As stated above, the EEA EFTA States prefer a minimum harmonisation approach. The reason for this is mainly to be able to uphold or introduce a higher level of consumer protection and to be able to respond quickly to new developments in the market. In order to ensure this, the EEA EFTA States would also prefer that it is left to each Member State to decide whether diverging rules are justified. This would permit necessary flexibility and counteract unnecessary bureaucracy.
  21. The EEA EFTA States would also like to make some specific comments regarding the proposed effectiveness test. There seems to be some uncertainty regarding the relevant criteria of the assessment, for example, to what extent the criteria concerning “commercial practicability” and “concluded court proceedings” both must be satisfied. At the current stage, the different language versions seem to provide different options for interpretation. The EEA EFTA States are therefore not certain which consequences the Article will have for the legislation in the different Member States.
  22. Usually, it takes some time to determine whether new legislation has had the intended effect, and it is in particular uncertain when and if it will be interpreted in court proceedings. “The effectiveness test” seems to be more suitable for assessing long established legislation. The EEA EFTA States would also like to point out that forms for justification other than consumer protection, for example environmental reasons, should be a relevant justification for having a diverging provision in national law.
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