E U R O P E A N E C O N O M I C A R E A

S T A N D I N G C O M M I T T E E
O F T H E E F T A S T A T E S

Ref. 1089882

12 March 2009

SUBCOMMITTEE IV
ON FLANKING AND HORIZONTAL POLICIES

EEA EFTA Comment
on the
Proposal for a Directive
of the European Parliament and of the Council
on Consumer Rights (COM (2008) 614)

EXECUTIVE SUMMARY

The EEA EFTA States, Iceland, Liechtenstein, and Norway, have studied with great interest the Commission's proposal for a Directive on Consumer Rights, COM (2008) 614, and appreciate the opportunity to comment on the draft Directive. The main views of the EEA EFTA States are the following:

- Firstly, the EEA EFTA States would like to stress that they favour a minimum harmonisation approach, but believe that the question of harmonisation should be considered on a case by case basis.

- Secondly, the EEA EFTA States would like to address the relation between the proposed Directive and general contract law. The EEA EFTA States are of the opinion that some provisions in the proposal call for clarification, namely the provisions on general information requirements, the sales of goods in mixed purpose contracts, consumer sales and intermediaries.

- Thirdly, the EEA EFTA States raise questions about specific provisions in the proposal. The EEA EFTA States are of the opinion that consumer protection should be enhanced when it comes to the right of withdrawal, both in general and in particular in relation to "telephone sales" and "off-premises contracts". The EEA EFTA States also suggest that a longer time limit for complaints should be introduced in the new proposal, or

that Member States should be given the ability to introduce or maintain longer time limits. Furthermore, the consumer should be given the possibility to choose between either repair or replacement in the case of lack of conformity. The EEA EFTA States would like to invite the EU to consider redrafting the general principles concerning contract terms in a broader manner. Lastly, the EEA EFTA States invite the EU to consider a more extensive and coherent action in the field of digital products.

1. PREFACE

1. The EEA EFTA States have already taken great interest in the Commission's work in this area. The EEA EFTA States took the opportunity to comment on key issues raised in the Commission's Green Paper on the Review of the Consumer Acquis, (COM (2006) 744). As the proposed Directive raises several different questions, the EEA EFTA States will focus below on two questions of a general nature, namely the degree of harmonisation and the relationship between the proposed Directive and general contract law, and further will address some specific issues. The EEA EFTA States reserve the right to provide national comments on the other issues raised by the proposal.

2. DEGREE OF HARMONISATION

2. The Directives subject to review are based on minimum harmonisation, as they contain clauses allowing Member States to maintain or introduce a higher level of consumer protection than provided for by the Directives.

3. However, the traditional minimum harmonisation approach is now substituted with a full harmonisation approach in the proposed Directive. The Commission seems to take the view that different rules resulting from minimum harmonisation have a negative impact on the Internal Market – both for businesses (increased compliance costs) and consumers (undermined confidence in the Internal Market).

4. The EEA EFTA States will point out that low cross-border activity may depend on a great variety of factors, some of a linguistic and cultural nature, others related to various risks stemming from the distance involved in cross border trading, for example, of additional costs, complications in the case of non-delivery and default, reduced possibilities to complain and obtain redress etc. Thus, the EU – when considering the need for Community action – should bear in mind that harmonisation of legislation will not in itself necessarily make businesses or consumers opt for cross-border transactions. It may thus be questioned whether the alleged need for a shift from minimum to full harmonisation is sufficiently underpinned. In the public consultations undertaken in some of the EEA EFTA States, several consumer organisations have argued that the market analyses, upon which the Commission's view on

the level of harmonisation seems to be based, seem insufficient to justify a shift from minimum to full harmonisation.

5. As for the question of harmonisation, the public consultations undertaken in some of the EEA EFTA States, show that representatives from consumer organisations favour a minimum harmonisation approach, whilst representatives from business organisations favour a full harmonisation approach. The EEA EFTA States will point out that the minimum harmonisation approach has a number of advantages. This approach gives leeway for national development and refinement of (consumer) contract law, and may also lead to a certain regulatory competition between Member States. The minimum harmonisation approach also makes it easy to respond rapidly to market developments by issuing new national legislation. A minimum harmonisation approach seems in line with the principle of subsidiarity. Thus, a major concern for the EEA EFTA States is that a total harmonisation approach could lead to a stagnation of contract law. Also, a total harmonisation approach, without the necessary provisions to respond at national and European level to an ever changing business environment and evolution in contracts, will most likely result in a situation where certain consumer contracts will simply fall outside the scope of total harmonisation. Another concern is that the reviewing process of Community legislation is too slow to be able to adapt rapidly enough to changing circumstances and market developments. It would also probably be more difficult for Member States to reach agreement on EC legislation based on total harmonisation. Thus, a shift to total harmonisation as a general principle should be reconsidered. Furthermore it should be supplemented with a provision which is flexible in its nature and can be used in order to deal with unforeseen situations at the time of the adoption of a piece of European legislation.

6. The EEA EFTA States will emphasise that a high level of consumer protection should be one of several guiding principles for a future Directive. Several countries already have a high level of consumer protection in the areas covered by the proposed Directive. Full harmonisation may lead to weaker consumer protection in these countries, and one should therefore consider the possibility for Member States to maintain already existing legislation protecting consumers. In any case, in striking the right balance between consumer protection and harmonisation, the EEA EFTA States would urge the EU to carefully examine for which questions there might be a need for full harmonisation and in which issues a minimum approach would seem sufficient. A guiding principle may be to examine whether the differing rules constitute a barrier for cross-border trade without substantially increasing consumer protection.

7. Thus, while maintaining a preference for the minimum harmonisation approach, which ensures flexibility to adapt to the continuously changing contractual environment of consumers, the EEA EFTA States believe that the question of harmonisation cannot be answered entirely in general, as it should to some extent be decided on a case-by-case basis. It is an important objective to ensure as little fragmentation of the consumer acquis as possible.

This will result in greater consumer confidence, in a better functioning of the business to consumer Internal Market, and an increased interest for cross-borders trading. In the consultations undertaken in some of the EEA EFTA States, representatives from consumer organisations have argued that a possibility would be to limit the scope of the fully harmonised rules to Internet trade. The EEA EFTA States are not in favour of such a solution, as specific sales rules on Internet sales as opposed to other sales, would lead to a more fragmented legal framework. Harmonisation of the rules regarding the right of withdrawal only could however be an option.

8. As regards the principle of full harmonisation, the EEA EFTA States will stress that the principle will only apply within the area harmonised by the Directive. Outside the harmonised area, Member States are free to maintain or introduce legislation. Thus, the determination of the harmonised area is in any case of vital importance. If a future Directive is based on the principle of full harmonisation, clear guidance must be given on this matter. For instance, it is not entirely clear from the wording of the proposal what the implications would be, if a fully harmonised Directive sets out certain rules on sanctions of breach of contract. In such a case, it is not clear whether the Member States are restricted from applying other alternative sanctions to a breach of contract in the implementing legislation.

9. In order to summarise, the EEA EFTA States maintain a preference for the minimum harmonisation approach, which will ensure flexibility in order to adapt to new situations which may occur in the field of consumer contractual rights. However, they believe that the question of harmonisation cannot be answered entirely in general, as it should to some extent be decided on a case-by-case basis. If full harmonisation is pursued, the determination of the harmonised area is of vital importance, and clear guidance must be given in a future Directive. This is crucial in order to obtain legal certainty, both for businesses and for consumers.

3. RELATIONSHIP BETWEEN THE PROPOSED DIRECTIVE AND GENERAL CONTRACT LAW

10. The EEA EFTA States believe that the proposed Directive brings about the question of how it relates to the general contract law, which is applicable in the Member States. Various aspects of this relationship ought to be clarified in a future Directive.

11. First, the EEA EFTA States notice that the proposed Directive, in chapter II, establishes general information requirements applicable prior to the conclusion of any sales or service contract. We prefer this provision not to provide an exhaustive list of all possible information requirements prior to the conclusion of a contract. Furthermore, we assume that the provision does not regulate the extent to which any information, which is or is not given, is to be taken into account when determining whether the goods or services are in conformity with the contract. If this is not the correct understanding of this

provision, we suggest a redrafting of the proposal so that it does not interfere with the concept of conformity with contracts in national contract law. Similarly, we assume that the provision does not regulate the consequences of any information or lack of information, on the validity of the contract in question. This interpretation seems to be confirmed in article 6, paragraph 2 of the proposed Directive. Moreover, we believe that the alternative understanding of the proposal would imply a non-proportional intervention in national contract law of the Member States. Based on this, the EEA EFTA States would appreciate a clarification of the above-mentioned relationship to general contract law in a future Directive.

12. Secondly, the EEA EFTA States notice that chapter IV of the proposed Directive provides rules applicable to the sale of goods in any mixed-purpose contract having as its object both goods and services, cf. Article 21, paragraph 1, and Article 2, paragraph 3. This seems to be the case regardless of how inferior the goods-element is compared to the service-element of the contract. However, current national contract law in some Member States could require, as is the case in some of the EEA EFTA States, that for a mixed-purpose contract to be labelled a sales contract and subjected to national sales law, the service-element must not amount to a predominant part of the contract. It would thus seem more reflective of national legal tradition and better in line with what seems to be an intuitive understanding of what constitutes a sales contract, if a future Directive required for a mixed-purpose contract to be labelled a sales contract, so that the services-element does not amount to a predominant part of the contract.

13. Thirdly, as the EEA EFTA States understand it, chapter IV of the proposed Directive does not cover contracts of sale of property, construction of property or craft services not including any sales element, cf. Article 21, paragraph 1 and Article 2, paragraphs 3 and 4. The EEA EFTA States thus would encourage clarification of the above-mentioned in a future directive. As regards mixed-purpose contracts, we refer to the above-mentioned.

14. Fourthly, the regulation of consumer sales in the proposed Directive, chapter IV, Article 22, paragraph 2, if fully harmonised, brings about the question of whether the Directive implies an exhaustive regulation of remedies for breach of contract due to failure to deliver the goods. Should this be the case, this would seem to exclude the possibility for Member States to provide additional remedies, such as the right of detention in future payments and termination of the contract. The EEA EFTA States understand that this provision is not to be interpreted in this way, and that the Directive does not purport any exhaustive regulation of remedies of breach of contract. The wording of Article 22, paragraph 2 and Article 26 does not indicate such an understanding. Moreover, there is indeed a practical need for Member States to provide additional remedies other than the ones designated in the mentioned articles. Article 26 brings about a similar question as to whether the Directive purports an exhaustive regulation of remedies for lack of conformity of the goods. We would also prefer that this provision is not exhaustive. The EEA EFTA States would thus appreciate if a future

Directive would clarify that it does not purport any exhaustive regulation of remedies of breach of contract.

15. Fifthly and finally, the proposed Directive contains certain provisions with regard to intermediaries. However, the EEA EFTA States have noted that the proposal provides for only a fragmented regulation of the role of intermediaries. We also note that intermediaries are more coherently addressed in the academic draft Common Frame of Reference of European Contract Law (CFR). Thus, the EEA EFTA States suggest that the role of intermediaries is better left out of any future Directive, awaiting a more substantive and coherent treatment in the forthcoming EU-CFR.

4. SPECIFIC ISSUES

16. The EEA EFTA States would also like to take the opportunity to address some of the more specific issues arising from the proposed Directive.

17. As for the definitions of the proposal, the definition of service contracts in Article 2, paragraph 5, is unclear, in particular regarding services provided by public authorities. Furthermore the term “leisure services” used in Article 20 is vague and should be subject to a clear definition.

18. With regard to off-premises contracts and various types of distance contracts, cf. chapter III of the proposed Directive, it is the view of the EEA EFTA States, that in determining the adequate level of consumer protection, it is necessary to distinguish between different sales methods of this kind. In the proposal this is reflected in the rules giving the consumer additional information rights and a right of withdrawal for distance contracts and off-premises contracts. For some issues, a distinction is also made between these two types of contracts, with a higher level of protection afforded to consumers entering into off-premises contracts.

19. Generally off-premises sales are considered more aggressive with more pressure to enter into a contract being put on the consumer, since it is a face to face situation and the consumer is often taken by surprise, on the street or at home. For distance selling the situation is often the opposite, since the consumer actively seeks the sales situation by studying a mail order catalogue or logging on to an Internet site. Additional rights for both types of contract seem appropriate.

20. However, it is the opinion of the EEA EFTA States that one particular type of distance selling merits a higher level of consumer protection compared to other forms of distance selling, namely “telephone sales”, also known as “cold calling”. This can briefly be described as a contract which is concluded as a result of an unsolicited telephone call from the seller to the consumer. In these cases the consumer is often caught by surprise and not prepared for a sale situation, as is the case also in off-premises sales. Consumer organisations and enforcement authorities report of problems with

aggressive sales techniques and pressure on the consumer to conclude a contract.

21. Although the Unfair Commercial Practices Directive intends to curb aggressive practices, additional measures are needed to ensure an adequate level of consumer protection for "telephone sales". Affording the consumer a right of withdrawal is one such instrument, a requirement for written confirmation of the contract could be another.

22. For "telephone sales" a formal requirement should be introduced in the Directive.

23. Consumer organisations and enforcement authorities report of many disputes based on a disagreement between the consumer and the seller regarding not only whether a contract was concluded or not, but also regarding the content of the contract. In a typical case the consumer has perceived that he has accepted to receive further information, whereas the seller claims that the consumer has accepted to buy a good or a service.

24. For off-premises contracts, Article 10.2 in the proposal sets out that the contract is only valid if an order form has been signed, and where it is not on paper, the consumer receives a copy of the order form on another durable medium. Under Article 10.3 no other formal requirements may be imposed by Member States. Article 11 on formal requirements for distance contracts does not have such a requirement, but sets out that the consumer shall receive written information after the conclusion of the contract. Also in this provision it is clearly stated in Article 11.5 that Member States shall not impose any other formal requirements.

25. For "telephone sales" a similar rule should be introduced. Hence the contract should only be valid if the consumer confirms, after the telephone call, in writing, his intention to conclude a contract. The arrangements would not necessarily be bureaucratic or complex, since confirmation could be done electronically by text message, by e-mail or by fax. The seller should be responsible for documentation of such a confirmation, if requested. An exemption could possibly be made for certain contracts where it is deemed desirable not to add administrative requirements for conclusion of contract.

26. The proposal affords the consumer a right of withdrawal for certain contracts. Due to the different nature of various sales situations, a distinction should be made between different types of sales, in order to get a reasonably balanced set of rules. The proposal does indeed distinguish between distance contracts and off-premises contracts. For the latter a number of rules are more favourable to the consumer.

27. As indicated above, "telephone sales" is more comparable with off-premises sales than with other types of distance selling and hence additional consumer protection should be afforded. This could be done by applying the rules prescribed for off-premises contracts also to "telephone sales".

28. Furthermore, the EEA EFTA States are of the opinion that consumer protection for telephone sales and off-premises contracts should be enhanced compared to the proposal. This should be done in two aspects in particular: the consumer should be reimbursed before having to return the goods and the consumer should not bear any cost, not even the cost of returning the goods.

29. In general the EEA EFTA States would like to see a higher level of consumer protection for the rules on right of withdrawal. Some of the exemptions should be reconsidered and more attention should be paid to the practical implication of the rules. For instance, the rule regarding the return of goods in Article 17 does not work well in the cases where the trader delivers the goods to the consumer, for example a large piece of furniture or firewood, using his own transportation. The consumer should be able to have the goods returned to the trader in the same way, which would mean that the trader would collect them. In order for the rules on right of withdrawal to work in practice, it is important that exercising this right is a feasible option for the consumer.

30. As the EEA EFTA States understand it, Article 28, paragraphs 1 and 2 of the Directive provides for a time limit for complaints of two years. If fully harmonised, this would seem to imply that Member States are not allowed to introduce or maintain a longer time limit for complaints. In some of the EEA EFTA States the current time limit for complaints is two years, but it is five years if the goods in question are meant to last considerably longer than two years. In the public national consultations representatives from consumer organisations strongly argue that a reduction of the time limit for complaints from five to two years would cause a significant and harmful reduction in consumer protection. Furthermore, it is argued, that such a reduction could have a possible negative impact on the environment, as manufacturers would have less incentive to produce goods of high, durable quality. The EEA EFTA States share these concerns, and suggest that the EU in a future Directive provides a longer time limit for complaints as described above, or alternatively gives Member States the ability to introduce or maintain longer time limits for complaints. However, the EEA EFTA States assume that the proposal for a time limit for complaints does not interfere with the possibility for Member States to introduce or maintain general rules and principles of prescription.

31. The proposed Directive, Article 26, paragraph 2, gives the trader the right to choose between remedying the lack of conformity by either repair or replacement of the goods. This is contrary to the current situation in the EU, where this choice is given to the consumer. The right for the consumer to choose between repair or replacement however depends on the feasibility of the chosen means of remedy and should not cause the seller unreasonable expenses. In the public consultations, representatives from consumer organisations have argued that the consumer's right to choose the means of remedying constitutes an important consumer protection provision. The EEA EFTA States thus suggest that the EU in a future Directive grants the

consumer the right to choose between either repair or replacement of the goods under the conditions set out above.

32. As far as the EEA EFTA States are able to see, the proposed Directive does not grant the consumer any right to claim substitute goods in the case of a remedy for a lack of conformity by either repair or replacement of the goods. If fully harmonised, this would seem to imply that Member States are not allowed to introduce or maintain such a right in their national sales law. In some of the EEA EFTA States the current sales law gives the consumer a right to claim substitute goods at the expense of the seller, 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. In the public consultations representatives from consumer organisations have argued that such a right constitutes an important and practical consumer protection provision. The EEA EFTA States endorse this view, and suggest that the EU in a future Directive provides a right for the consumer to claim substitute goods in the case of a remedy for a lack of conformity by either repair or replacement of the goods on conditions as described above.

33. The general principles concerning contract terms, Article 32, paragraphs 2 and 3, and the lists of contract terms contained in annexes II and III of the proposed Directive, provide a concept for an unfairness test of contract terms, which seems to be more confined and less flexible than the general test currently used in some of the EEA EFTA States. To give a specific example, the general clause on unreasonable contract terms between contracting parties currently in force in Norway is contained in the Act of Agreements section 36, cf. section 37. The clause provides that when deciding whether a contract or a contract term is to be deemed unreasonable or not, not only the contents of the agreement, the contracting parties involved and the circumstances attending the conclusion of the contract, but also the circumstances which appear later and all other circumstances are to be taken into consideration. Also, there is no exclusion with regard to the main subject matter of the contract or the adequacy of the remuneration foreseen for the trader's main contractual obligation. Thus current general clauses seem to provide a broader test of unfairness, compared to the one proposed in the Directive. Moreover, the current clause does not contain any list of contract terms, which in all circumstances are deemed unfair or are presumed to be unfair. Thus current general clauses seem to provide more flexibility when assessing the (un) fairness of a specific contract or a specific contract term, compared to the unfairness test proposed in the Directive.

34. The experiences of the EEA EFTA States show that a broad and flexible unfairness test has many advantages, foremost because the test is suitable for application in a wide variety of contractual circumstances and gives the necessary latitude to reach reasonable results depending on the specific circumstances of each case. Based on these experiences, the EEA EFTA States invite the EU to consider redrafting the general principles

concerning contract terms, including the unfairness test as set out in Article 32, paragraphs 2 and 3, and the lists contained in annexes II and III of the proposed Directive, in a broader manner and avoiding the use of predetermined lists of contract terms.

35. If the proposed Directive is to be fully harmonised, it may be questioned whether the threshold for regarding a contract term as unfair is raised, compared with the current general clause in some of the EEA EFTA States. If so, this would be inappropriate. The EEA EFTA States would thus suggest that the EU consider removing the specific conditions for a contract term to be regarded as unfair, as contained in Article 32, paragraph 1 of the proposal, in particular the condition "significant imbalance". The term "unfair" would as such provide a threshold for assessing contract terms. Moreover, the assessment of a contract term would be made subject to the criteria set out in paragraphs 2 and 3 of the Article. The exact threshold for assessing the (un) fairness of contract terms would have to be elaborated in case law.

36. The EEA EFTA States would also like to take the opportunity to invite the EU to consider a more extensive and coherent Community action in the field of digital products. The rapid development of new digital products, music downloads etc., seems to require action at Community level.