

**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**

4/CR/W/012  
1 separate annex  
15 January 2002  
Brussels

**WORKING GROUP ON CONSUMER PROTECTION**

**EEA EFTA COMMENTS ON THE GREEN PAPER ON EUROPEAN UNION  
CONSUMER PROTECTION COM(2001)531**

**EXECUTIVE SUMMARY**

The EEA EFTA States are of the opinion that the Green Paper constitutes an important and substantive contribution to enhance and strengthen consumer confidence in the internal market. The EEA EFTA States look forward to taking an active part in the follow-up of the Green Paper and hope that the Commission will carefully consider their comments on a new European Union Consumer Protection Policy. The EEA EFTA States particularly stress the need for standards to be set at a high level, and for added protection of weaker consumer groups, such as children. Concerning the elaboration of a general framework for fair marketing practices, it is essential that systems eventually established allow for full and equal EEA EFTA participation. The EEA EFTA States find the idea of the establishment of general rules and overarching principles interesting. Key elements of general rules should be the duty to trade fairly, the duty to provide sufficient, relevant and not misleading information and a ban on deceptive marketing practices. General rules better stand the test of time, and their intent is less easily sidestepped by deviant practitioners. In order to give consumers better access to justice by redress, the work of the Commission on establishing and developing the EEJ-net is important and must be continued.

**I.     INTRODUCTION**

1.     The EEA EFTA States welcome the initiative itself as well as the early and thorough consultation through the Green Paper and the broad public hearing held by the Commission on 7 December 2001. To ensure a best possible result, and establish a broad platform for measures to follow up the initiative, openness and a thorough debate involving all interested parties is essential. The discussion of which approach to take, and how to develop it further, is still at an early stage. The EEA EFTA comments can merely be preliminary and present some immediate reflections.

## **II THE NEED FOR HARMONISATION**

2. The EEA EFTA States believe that increasing the trust of the consumer is vital for the development of cross-border trade in the EU and the EEA. They do, however, also believe that the lack of trust is not chiefly the result of a lack of coherence in the legal framework on marketing, but rather due to a general scepticism and inertia.

3. The need for further regulation in the area of consumer protection is acknowledged by the EEA EFTA States, and not least as marketing practices are concerned. In particular during the last years, the technical and regulatory development has initiated new marketing practices and furthered commercial integration and cross-border trade. For the legislative framework, it has been problematic to keep up with this development, and to establish an appropriate regulation and adequate consumer protection in an increasingly wider and more complicated market.

4. There are several areas where measures need to be taken, either because existing legislation is not in line with the development or because there is no legislation at all. In the Green Paper a number of examples are presented.

## **III THE FUTURE APPROACH – MAIN PRINCIPLES AND PRESUPPOSITIONS**

5. The ideal approach to addressing the need for further development of fair commercial practices should be a system that is democratic, flexible and simple, stands the test of time, gives certainty and coherence and facilitates effective enforcement.

6. It is the opinion of the EEA EFTA States that a mixed approach like the one outlined in the Green Paper is a good starting point, but it needs to be developed further and raises a number of concerns which are expressed below. To enhance consumer confidence it is necessary to uphold and increase the level of consumer protection. Taking care of consumer interests in the internal market is an aim in itself, which is duly established and expressed in Article 153 a of the Treaty. Furthermore, high and reliable standards should be expected to promote cross-border trade to a larger extent than low standards. It should be reminded that a high level of protection functions just as well as a lower one when it comes to ensuring equal terms of competition. There are obvious arguments for requirements to be high in order not to give advantage to competitors with low standards. If an overarching framework is chosen, it is important that it has a built-in dynamic that makes it possible to further develop the level of consumer protection and adapt it to the developments in the marketplace.

7. It is of importance that the framework gives room for added protection for weaker consumer groups, such as children. It is worth noting that the ICC general rules of advertising, Art. 13, emphasise this.

8. Another concern is the need for justified national deviations. For one thing, it is necessary to allow for cultural and social differences to be taken into account, and such differences will in themselves have an impact on the national interpretation of for example "fairness". Furthermore, the level of consumer protection differs in the Member States. Until a sufficiently high common level is reached, national deviations are a necessity, as reducing the level is not a realistic possibility, inter alia, as this would have strong negative effects for consumer confidence and thus for cross-border trade. For the same reasons, the EEA EFTA States would warn against a principle that all future EU consumer legislation shall represent total harmonisation.

9. It is the understanding of the EEA EFTA States that practices regulated by national contract law will not be covered by the initiative, leaving national laws, which invalidate a contract or establish rules on redress, unaffected. However, the proposed initiatives may affect the conditions upon which a contract is binding, the interpretation of contracts, the question of whether redress should be made based on actions or failure to act in the pre-contractual phase, and the question of whether a breach of contract is present according to national contract laws. Against this backdrop the EEA EFTA States would like to ask the Commission to pay due awareness to the contractual issues which may be affected by the initiative, and comments given on various approaches must be read as to not relate to issues that fall under national contract law. The EEA EFTA States' general attitude towards Community initiatives related to contract law were presented in the EEA EFTA Comments on the Communication from the Commission to the Council and the European Parliament on European Contract Law – COM (2001) 398 of 15 October last year.

10. A general framework for fair marketing practices will most likely be considered EEA-relevant and thus included in the EEA Agreement. For the further elaboration and consistent enforcement of a framework directive, it is vital that the systems eventually established allow for full and equal EEA EFTA participation. This so much more as the EEA EFTA States have a long tradition of consumer protection and great interest in the furthering of cross-border trade.

#### **IV THE MIXED APPROACH**

11. The EEA EFTA States find the idea of developing general, overarching principles interesting. The use of a general clause on good market behaviour and general principles on misleading marketing and insufficient guidance (information) is well known in the Nordic countries and the experience is that it works well. In one of the EFTA States, Norway, as well as in the other Nordic countries, the regulatory framework includes a general clause based on the principle of good market behaviour, which regulates both the business-to-consumer aspect as well as the business-to-business aspect. This functions well in all the countries. Key elements of general rules should be the duty to trade fairly, the duty to provide sufficient, relevant and not misleading information and a ban on misleading or deceptive marketing practices.

12. Rules based on general principles have shown to be an appropriate and efficient way of regulating marketing practices, especially in areas with rapid development as to products offered, sales methods or media used to communicate. General rules reduce the need for adopting new rules to deal with every new practice and problem, and stand the test of time better than more specific rules. For enforcement authorities such rules provide an excellent tool to counter attempts to act against the spirit of the law where there is no concrete regulation that exactly fits the actual case, but where there, never the less, is a clear case of trying to circumvent the law. They are also well suited to fill in the law when the business community is trying out new marketing approaches. In the Nordic countries, the business community frequently consults the national regulatory authority on the clause and thus makes the clause a flexible instrument for the regulator and a predictable statute for the business community. When it is deemed appropriate, more detailed principles on marketing practices concerning a certain area or certain sales methods are presented by the Ombudsman in the form of guidelines that are made available to all interested parties.

13. With a view to possible initiatives for future harmonisation of legislation in this field, a Nordic project under the Nordic Council of Ministers on “Harmonisation of Marketing Law in EU- Analysis of advantages and disadvantages regarding regulation of marketing in EU” has resulted in a thorough report. The conclusion of the report is a recommendation to establish a general clause at Community level, based on the Nordic model. An extract of the report that has been translated to English follows as an enclosure to this response. The EEA EFTA States deem the report to represent a valuable input to the further discussion on a general framework. The EEA EFTA States are, along with Nordic their counterparts, happy to place it at the Commission's disposal and possibly elaborate the issues further if so be wished.

14. A mixed approach as outlined in the Green Paper will raise a number of questions on how a more general framework is to be filled in and complemented in order to achieve harmonisation, coherence and, not at least, practical guidance. Some form of practical guidance will clearly be needed if the legislative approach finally chosen is of a general nature. The development of a non-binding practical guidance through an indicative list of general and sector-specific examples of commercial practices is welcomed by the EEA EFTA States. Likewise, stakeholder participation is found to be a natural attachment to the development of a practical guidance and the further elaboration of it. The EEA EFTA States also support the establishment of a system based on a regulatory committee with a mandate to update the list in order to prevent obsolescence. However, the EEA EFTA States would like to express their concern regarding possible lack of democratic legitimacy connected to this approach, and stress the need to pay due attention to this in the legal framework for participation. A model for establishing a system that involves Member States, enforcement authorities and stakeholders is outlined in a recent Nordic report. An extract from this report, presenting a “Four-level approach”, has been translated into English and follows as an enclosure to this response.

15. As to the role of co-regulation and self-regulation, a problem is that there is no clear, uniform understanding of these terms. The hearing showed that there are big differences as to the understanding of these terms. To business, self-regulation does not

involve any outside interference, whereas, to consumer representatives, self-regulation must clearly be subject to some kind of control mechanisms. It is therefore of utter importance to clarify these terms for further discussion. This makes it difficult to establish a definite position on these issues at this stage.

16. Self-and co-regulation may well prove to constitute a valuable part of the new regulatory regime. However, due procedural regulation must be in place in order to ensure the quality of the requirements elaborated through self and co-regulation.

17. From the Nordic systems with the Consumer Ombudsman institution, broad and positive experiences have arisen from the particular version of co-regulation established in the Nordic legislation. As this is based on the elaboration of general principles to be applied for certain branches or for certain communication forms etc., these should prove valuable for assessing various forms for co-regulation that may be appropriate under a general European framework. These are issues where a number of elements have to be further surveyed. This includes not least the question whether systems that have proved operative and efficient on a national level may be transposed to a European level. As a general principle, we would especially underline the need to ensure that both business and consumers are well represented in the process. Consumer participation will enhance the confidence of consumers, and thus their willingness to participate in cross-border trade.

18. The EEA EFTA States would also like to underline that to the degree that self-regulation is given a role, basic rights must be ensured by legislation and not left to self-regulation. In all events, self-regulation must be an instrument for elaborating and adapting the general principles of fair commercial practices, and not replace the general principles. In the further process, it should be considered whether and how self-regulation codes could consistently be part of a system based on general framework requirements.

## **V ENFORCEMENT**

19. It is important for the functioning of legislation relating to marketing practices that the regulatory framework is backed by a proper enforcement system. The enforcement system must be able to bring illegal practices to a halt and prevent similar actions in the future.

20. Even for attending to a European framework, it is obvious that the enforcement must be carried out on a national level. The Nordic countries, with the exception of Iceland, have for several decades had the Consumer Ombudsman institution. This is a government-funded administrative body with the responsibility to supervise marketing practices in the interest of the consumer, as stated in the consumer legislation. Chiefly the task is to seek to exert influence through informal contacts with business either before or after a marketing measure is enacted. If negotiations fail, the Ombudsman has the power to stop further marketing measures from being carried out and if necessary submit the case to the courts or to special administrative tribunals, depending on national legislation. This system is quick, cheap and flexible and has a high level of

standing among the general public as well as in the business community. These institutions also provide the necessary systematic approach to the various issues and questions that come up in the market place. This ensures legal certainty for consumers as well as for businesses.

21. Under a general framework for marketing practices, it will be absolutely vital for the national enforcement authorities to have a common forum on a European level to co-ordinate their efforts and practices, and to exchange information on the development in this field. This is important not only to facilitate cross-border enforcement, but also to shape the direction of European consumer protection. The latter can be obtained by giving such a forum a role in fleshing out the legislation by involving it in the elaboration of practical guidance (cf. comments above relating to the mixed approach).

## **VI COMMENTS ON RELATED ISSUES**

22. Unfair, misleading or deceptive marketing practices affect individual consumers. Therefore, rules and enforcement systems enabling market surveillance authorities to put a stop to illegal practices alone is not sufficient and the question of giving consumers access to justice by redress might also be considered. This is not only important to the individual consumer, but also to the standing of the EU among its citizens. The work of the Commission on establishing and developing the EEJ-net is important in this aspect and must be continued.

23. Another related issue, which has a clear connection to marketing practices, is the question of to what extent offers and claims put forward in advertising shall be considered legally binding. Some consumer protection directives contain rules that address this issue, and state that claims made in advertising form part of the contract. This should be an issue to be discussed on a general level.

24. In the light of the system drawn up in the Green Paper, it is neither fortunate nor consistent that the Commission simultaneously has issued a proposal for a regulation concerning sales promotions (COM (2001)546 final). This will for all practical purposes regulate an important aspect of consumer protection and marketing that should be discussed in connection with the other issues dealt with in the Green Paper. Furthermore, the approach of strict and inflexible regulation can hardly seem to be in line with the general and flexible approach of the Green Paper. It is our view that this regulation should be put on hold and not deliberated upon out without taking the consumer protection issues into consideration.

\* \* \* \* \*