

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/014
30 September 2002
Brussels

WORKING GROUP ON CONSUMER PROTECTION

**EEA EFTA COMMENTS ON THE FOLLOW-UP COMMUNICATION TO THE
GREEN PAPER ON EU CONSUMER PROTECTION COM (2002) 289 FINAL**

EXECUTIVE SUMMARY

The EEA EFTA States welcome the follow-up Communication to the Green Paper on EU Consumer Protection and reiterate their support for a reform on the basis of a framework directive on fair commercial practices. The opinion is still that a "mixed approach" should be pursued, and that the wider concept of "fair commercial practices" should apply instead of the narrower concept of "misleading practices". The general clause should establish a high level of protection in order to increase consumer confidence. The EEA EFTA States believe that the scope should be limited to apply to consumers' economic interests and that "taste, decency and public morality aspects" should not be included. The four elements listed in the Communication seem relevant and an appropriate basis for further discussions on the substantiation of the general clause. The EEA EFTA States find the concept of consumer detriment test interesting i.a. in relation to assessment of practices directed at vulnerable groups, such as children. The EEA EFTA States consider the issue of enforcement and enforcement co-operation important. The issues raised concerning enforcement further underline the need for elaborating the general clause through one or more forms for guidance. A comitology procedure is an interesting option that should be studied in this regard.

I INTRODUCTION

1. The EEA EFTA States welcome the follow-up Communication to the Green Paper on EU Consumer Protection, which provides another opportunity to forward comments during the preparation stage for a framework directive on fair commercial practices.¹ We would like to express our satisfaction with the consultation process, which confirms the Commission's declared intention of involving all interested parties.

¹ EEA EFTA Comments on the Green Paper on European Union Consumer Protection COM (2001) 531 were submitted to the Commission in January 2002 (4/CR/W/012).

2. The EEA EFTA States are pleased to observe the Commission's active will to take part in national hearings and thus contributing to raising the interest of the general public. They appreciate greatly the participation of the Commission at the public hearing on 29 August 2002 in Norway, with representatives of trade and industry, consumer associations, academic circles, different ministries and enforcement authorities. It represented a major contribution to the discussion and stimulated stakeholders to take part in the process.

3. Although the discussions on the matter have evolved considerably with the new Communication, the EEA EFTA Comments should still be considered to be of a preliminary nature. The numerous issues involved in this exercise are very much interrelated, and the final solution to one aspect (e.g. scope) may have implications for other issues (e.g. specification of categories and elements). The EEA EFTA Comments should, therefore, be viewed as reflections rather than conclusions.

4. The comments below will refer, in particular, to the discussions in the Communication part III, "Next steps" and the elements drawn up in "Annex I". It should be noted that the EEA EFTA States have different legislative and enforcement systems in this field. Norway has adopted an act on marketing practices, which is enforced by the Consumer Ombudsman ("the Nordic model"). A number of examples and experiences in the following text refer to Norway, which has a system with obvious parallels to the system envisaged in the Green Paper and the Follow-up Communication. In Liechtenstein, consumer protection is addressed by two legislative instruments: the act against unfair competition and the new act on consumer protection of which entry into force is foreseen in spring 2003. While the act against unfair competition is mainly based on the concept of "misleading practices" the new consumer protection act also includes the wider concept of "fair commercial practices". In Iceland, the provisions for marketing practices are contained in the Icelandic Competition Law. A Consumer Ombudsman has not been established and the enforcement of these provisions is entrusted to the Competition Authority, the Competition Council and the Competition Appeals Committee.

II THE NEED FOR REFORM

5. As stated in the EEA EFTA Comments on the Green Paper, EEA EFTA States support further harmonisation in this area through a framework directive on fair commercial practices. It remains however somewhat uncertain to what degree differing legislation in the EEA States represents a major barrier to trade. The lack of consumer 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. It seems, furthermore, uncertain to what degree national requirements for fair practices represent a significant obstacle to cross-border marketing. The EEA EFTA States therefore welcome the impact assessment mentioned in the document, which should provide valuable input for considerations not least concerning the scope of the framework directive.

III APPROACH

6. The EEA EFTA States are still of the opinion that the “mixed approach” should be pursued regardless of whether general rules in the end will apply to a larger or smaller number of aspects of fairness (e.g. “duty to disclose”, “undue influence” and “misleading”), and regardless of how and to what degree the general clause will be specified

IV HIGH LEVEL OF PROTECTION

7. The EEA EFTA States fully support the expressed aim of a high level of consumer protection and recognise that further consultation is needed on the required level of harmonisation. At this stage, it still seems premature to present concrete proposals or criteria for what should be “the required level”. This must be a multi-step exercise, in which the survey of existing national legislation and practices should represent a vital first step. A number of EEA States, which have general clauses or other forms for prescriptions of fairness, have practices that should represent a high and consistent level of consumer protection. A general European clause representing a significantly lower level than what has been established over the years at a national level would be difficult to accept and implement.

V MUTUAL RECOGNITION

8. The Communication sets out, without further elaboration, that the framework directive should be based on the principles of mutual recognition and control by country of origin. As the general clause is supposed to represent total harmonisation within the scope covered by the framework directive, it is unclear what “*mutual recognition*” should mean. It should be clarified if it refers to enforcement authorities and/or legislation, and to what effect.

VI CONTROL BY THE COUNTRY OF ORIGIN AND OTHER ENFORCEMENT ISSUES

9. The document on enforcement co-operation² envisages a system wherein the enforcement authorities of the country of effect (where the practices have effect on consumers) will seek assistance from the enforcement authorities of the country from which the practices originate. The EEA EFTA States understand that this is what is referred to in the Communication as the principle of “control by the country of origin”, while the enforcement authority of the country of effect will have the day-to-day surveillance and assessment of practices on its market. The enforcement agency of the country of effect will regularly have the overview of the marketing campaigns and activities on its territory, and become aware of infringements. It will have the

² Enforcement co-operation in Consumer Protection: A discussion document presented at the expert meeting on 16 and 17 September 2002.

competence for assessing the marketing, and for establishing consistent standards and practices. The enforcement agencies of the country of origin will normally not have an overview over the marketing activities their professionals carry out abroad. Neither will they have the same insight into the market of the country of effect, nor the same inducement to intervene.

10. Trans-border cases will regularly be dealt with under the principles and procedures laid down in the injunctions directive³. However, enforcement in the area of marketing practices raises particular concerns and may require other or supplementary procedures. Some of these concerns are outlined below:

(i) Some marketing practices, as provided for in the Nordic legislation, are of a kind that requires immediate action to bring it to a cessation. It will hardly be realistic to aim for a mechanism of similar efficiency in trans-border cases. However, particular consideration should be given to the issue of co-operation procedures in cases where quick action is needed to avoid serious detriment to consumers;

(ii) Trans-border enforcement may be complicated by discrepancies between enforcement authorities of the States involved. This may relate to the assessment - as to the fairness of a certain practice itself, or as to the proportionality test (whether the effect of the practice requires action) - or to the priority given and efficiency in handling. Under the procedures foreseen in the injunction directive, the enforcement authorities of the country of effect may under certain circumstances have a case brought before the courts/appropriate administrative bodies of the country of origin. Discrepancies of assessment may in the end bring a matter before the European Court of Justice or the EFTA Court. Such procedures are, however, lengthy and demanding, and not always suited for application to the dynamic field of marketing practices.

11. These concerns indicate a clear need for instruments to facilitate a more flexible and speedy handling of cases. A pro-active approach could be established through a forum for enforcement authorities where disputes, discrepancies and other complication issues should be discussed with a view to establishing "softer" solutions preferably built on a consensus principle.

12. As for the efficient functioning of such co-operation, the EEA EFTA States would like to point out one other particular issue of major importance. Different national rules of secrecy and of revealing information from cases before the enforcement authorities have created problems under the IMSN. It will certainly be even more so under a European scheme for enforcement co-operation. Finding a way of solving this problem is crucial. Even if there will not be a European standard solution on how enforcement is to be carried out, the EEA EFTA States believe that establishing a contact point in each country is a good starting point, which might encourage new solutions for national enforcement as the experience with EEJ-Net, in which Norway and Iceland are participating, has demonstrated.

³ EP/Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.06.1998, p.51).

VII FLEXIBILITY - BALANCE BETWEEN LEGAL CERTAINTY AND ADAPTABILITY TO MARKET CIRCUMSTANCES

13. A main point of the concept of a “mixed approach” is a general clause on fair commercial practices, which by its indicative and flexible nature, enables enforcement authorities, courts or others to determine the content of the rule when it is applied in concrete cases that are being examined.

14. Two basic characteristics of the general clause in the Nordic legislation are its wide and general scope and its indicative nature. The practice may be adapted not only to the variety and changes in the marketing and in marketing practices, but also to the changes in general apprehension of fairness. This has made it possible for the clause to function and be operational for 30 years. This should be noted in particular against the background of current immense development in the market for goods and services, communication techniques, technology, sales forms, and the socio-economic, political and cultural environment.

15. Introducing a general clause at a *multi-national* level entails obvious complications. On the one hand, it is vital to promote a common understanding and practice between EEA countries as to the content of “fair commercial practices”. On the other hand, the content should be dynamic and adjust to changes in the commercial environment.

16. The Communication states the need to ensure that questions of interpretation are kept to a minimum. The EEA EFTA States would also underline the vital importance of a high degree of common understanding and interpretation of the legislation for marketing practices, within the scope that is harmonised. At this stage it is hard to form strong opinions on ways and means to achieve this crucial and ambitious goal. An Annex to the directive with an indicative, non-exhaustive list and/or guidelines could prove efficient and appropriate instruments in this respect. A comitology procedure as indicated by the Commission is an interesting option that should be elaborated.

17. Developing and clarifying the notion of fair commercial practices must, furthermore, be a permanent issue. The need for a systematic discussion between enforcement authorities was discussed under point VI above. The Green Paper introduced the idea of a system based on a regulatory committee with a mandate to update a list on practical guidance. The involvement of enforcement authorities and the relation between them should be duly considered in this respect.

VIII SCOPE/FAIRNESS CATEGORIES

18. The latter considerations have impacts also for the scope of the general clause. The EEA EFTA States support the principle stated in the Communication that the scope of the legislation should be based on the wider concept of “fair commercial practices” and not only on the narrower concept of “misleading practices”. The question remains, however, how wide the scope should be.

19 There seem to be considerable discrepancies in national legislation to the degree that national requirements have been established. This may concern forms for regulation, the drafting of the prescription or the notion, the scope, and practice/traditions for what is considered “unfair”.

20. The Commission has indicated that it considers leaving out of the scope assessment of fair commercial practices linked to "taste, decency and public morality aspects". This notion has not been elaborated further, and should be clarified. However, the EEA EFTA States take it that these are aspects other than those that relate directly to consumers' economic interests (e.g. undue pressure, inertia selling, misleading advertising, and lack of vital information). It might refer to i.a. practices that are prejudicial to human dignity, offensive/discriminating on the grounds of race, sex, age, nationality or religion, encourage dangerous behaviour or violence, abuse and social insecurity.

21. The Norwegian legislation on marketing practices has a wide scope, under which "taste, decency and public morality aspects" have been developed as a natural part of the practice. The EEA EFTA States are aware that other EEA States have legislation that includes provisions on some specific aspects of this kind.

22. There are, however, probably substantial differences in legislation and interpretation as concerns "taste, decency and public morality aspects", and they may touch sensitive issues. Assessment of what is acceptable in this respect will vary for cultural, social and religious reasons. In some respects, there may be arguments to allow that differences for political and cultural reasons in assessing fairness should be maintained. It may in general be easier to reach consensus on criteria for e.g. undue influence and price information, than for what is offensive to ideological and religious beliefs. Problems of different assessments can be reduced if the harmonised area is limited to “rational elements” (e.g. information about price and contract terms).

23. The EEA EFTA States consider, against this background, that the scope should be limited to apply to consumers' economic interests. To harmonise, at this stage, also "taste, decency and public morality aspects" would be over-ambitious.

IX ELEMENTS AND ELABORATION OF THE ELEMENTS

24. It is stated that "the general clause would have to be substantiated by an exhaustive number of specific rules (the "fairness and unfairness categories") along with an indication of some possible common elements. The four elements listed in the Communication seem relevant and an appropriate basis for further elaboration and discussion. The national experiences and practices should represent an additional basis for further deliberations.

25. The second element (information) presented may serve as an example for reflection when drawing up the categories and elements. As stated in the Communication, there is an obvious need to establish, on a European level, at least legislation prescribing a duty to disclose information. The duty should be general and thus apply to any kind of products and methods for marketing and sales. The

Communication sets out (p. 17) a number of non-exhaustive aspects that could be required. It should be considered to supplement the list not only by other specific requirements, but also by the duty to give other information the consumer might expect to receive (in order to make his/her decision on entering into the contract). This would leave room for flexibility and development of common standards, i.e. for certain contracts by cooperation between authorities in different EEA States.

26. There are obviously different options as to how to draft the general clause, in particular if the scope is limited. The elements that can be agreed on as categories of unfairness could be envisaged either as a general clause with a limited scope dealing with only certain aspects of unfairness, or a directive on “certain aspects of fair commercial practices”. These are technical issues that will have to be dealt with once the desired scope of the legislation has been further clarified.

27. Once the scope is determined, flexibility can be established through requirements in line with the one referred to in point 25 (“other information that the consumer might expect to receive in order to make a well-founded decision”). Information required will vary according to the complexity of the contract/product, and new means of communication may lead to revised understanding of what should be required.

X CORE ELEMENTS/CONSUMER DETRIMENT TEST

28. In the Annex I to the Communication, it is indicated that the general clause could consist of two elements, the unfairness of the commercial practice and a “consumer detriment test”. The reference of the test is indicated to be a standard of the average consumer. Furthermore, it is expressed that criteria could be adjusted accordingly when the business consciously directs its activities to a specific vulnerable group of consumers such as children.

29. The EEA EFTA States find this a very interesting approach and a vital principle for the application of the future general clause. It clearly has parallels in the Nordic enforcement practice, in which characteristics of the consumers that are targeted by a certain marketing activity are taken duly into consideration when the fairness of the activity is assessed. This applies, under the circumstances, to any vulnerable group, of which children represent one of the more obvious. It is essential that this principle be explicitly established for the general clause of the framework directive.

XI CODES OF CONDUCT, NON-BINDING GUIDANCE AND STAKEHOLDER PARTICIPATION

30. Codes of conduct clearly have a potential for supplementing or elaborating standards for fair commercial practices. However, there are obvious reservations as to the democratic legitimacy, as well as to the consistency between standards and the role that voluntary standards can play in achieving a harmonised concept of fair commercial practices. The criteria drawn up for development of codes of conduct in the

Communication (para 29, page 10) seem somewhat vague and confusing, and it is hard to see how these criteria can help establish a consistent notion and practice.

31. Until the basic features of the framework directive have been clarified, it is problematic to take a position on the role of codes of conduct under the general clause. The Norwegian experiences indicate that there are limitations in this respect at the national level. It could be fruitful to discuss the role of self-regulation and codes of conduct under a harmonised clause more thoroughly after basic features of this and of the enforcement co-operation systems have been established.

XII IMPACTS FOR OTHER CONSUMER PROTECTION DIRECTIVES

32. An aim in itself with the framework directive is to simplify the process of drafting consumer protection legislation, as well as simplifying existing directives. An obvious complication when it comes to the simplification of directives is that they have a minimum clause. In this respect, the Communication states that: *"It is not politically realistic to expect the Member States to abandon the minimum clauses in existing consumer protection directives without addressing the underlying differences of approach to consumer protection in Member States. There is however some scope for repealing certain provisions of existing consumer protection directives and incorporating them into the framework directive."*

33 The EEA EFTA States support this statement and would point out that a reduction in the level of consumer protection is not desirable in the European Economic Area. The EEA EFTA States feel assured that certain provisions in existing directives can be incorporated into a framework directive without major complications, and that this will represent a more appropriate and flexible approach. A "mixed approach" can be suitable also in respect to substituting specific requirements of sector directives by the general clause: general information/marketing requirements can be taken care of by the clause, while some particular requirements should be maintained in the sector directives.

XIII RELATION TO PROPOSAL FOR EP/COUNCIL REGULATION ON SALES PROMOTION IN THE INTERNAL MARKET

34. The EEA EFTA States are aware that the proposal for EP/Council Regulation concerning sales promotions in the Internal Market⁴ is under discussion within the Council and the European Parliament. In the opinion of the EEA EFTA States, the follow-up of the proposal for a Regulation should still await the outcome of the debate on the general framework in order to obtain a coherent approach.

⁴ Communication from the Commission on sales promotion in the Internal Market: Proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market COM (2001) 546 final

XIV POINT OF INFORMATION: A NORDIC REPORT OF POSSIBLE INTEREST

35. A Nordic study has resulted in a report on "*Harmonisation of EU Marketing Law - Analysis of advantages and disadvantages regarding regulating of marketing law in EU*". It contains, apart from a concrete proposal, an analysis as well as factual information on national legislation in the field. It may be found at the following address: <http://www.norden.org/konsum/sk/rapporteur.asp?lang=1>