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**SUBCOMMITTEE IV**
**ON FLANKING AND HORIZONTAL POLICIES**

**EEA EFTA Comment on**
**the Green Paper on the Review of the Consumer Acquis**
( COM (2006) 744)

## I. Preface

The EEA EFTA states have studied with great interest the Green Paper on the Review of the Consumer Acquis (COM (2006) 744). They welcome the Commission's initiative to examine whether a review of the directives in question is necessary. This is an important task, as new market developments, new technology and consumer interests may imply that the directives no longer meet the requirements of today. For instance would the development of new digital products – music downloads etc – seem to require action at Community level.

The EEA EFTA states have already taken great interest in the Commission's work in this area – amongst others by participating in the Member State's expert groups. The EEA EFTA states welcome the opportunity to comment on the various issues raised in the Green Paper. As the Green Paper raises several different questions, cf. the issues for consultations in annex 1, the EEA EFTA states will focus below on the three key questions: general legislative approach, scope of a horizontal instrument and degree of harmonisation. The EEA EFTA states reserve the right to complement this EEA EFTA Comment with national comments on the other issues raised in the Green Paper.

### 1. General legislative approach

The EEA EFTA states agree with the Commission that the current vertical approach has given rise to a somewhat fragmented regulatory regime. The relation between the different directives is in some respects unclear, and the terminology and definitions seem to vary.

Thus, the EEA EFTA states welcome a review of the Acquis to secure a coherent and consistent regulatory regime. They emphasise, however, that such a review must also take into account other Community legislation concerning consumer protection. The Green Paper is limited to eight directives, but the aim to secure a coherent and consistent regime should not in itself be limited to those directives. For instance, the definition of a "consumer" is also relevant to other Community legislation.

Securing a coherent and consistent regime could be done within the current vertical approach. However, the EEA EFTA states find that there might be justifications for going one step further – and consider the possibilities for a more mixed approach, combining a framework instrument regulating horizontal issues relevant to existing sector directives. However, examining the eight directives subject to the review, the commonalities are few, apart from some definitions (consumer and professional), cf. part 4 of the EC Consumer Law Compendium - Comparative Analysis – edited by Prof. Dr. Hans Schulte-Nölke. Thus, the need for such a horizontal instrument can be questioned.

If the idea of such an instrument is to be pursued, the EEA EFTA states agree with the Commission that the provisions of the directive of unfair terms in consumer contracts could form part of the instrument, as this directive applies to all consumer contracts. The Commission's approach is that the consumer sales directive should also be included in the horizontal instrument. However, the consumer sales directive is by its nature a vertical instrument. Thus, in the view of the EEA EFTA states it can be questioned whether it is appropriate to include this directive in a possible horizontal instrument. At the same time, consumer sales contracts are common and broad contracts. The EEA EFTA states thus believe that the consumer sales directive may be a natural starting point for prospective considerations on a directive with a broader scope.

However, the scope suggested for a possible horizontal instrument is not clear. Read in connection with other issues for consultation, a very broad scope is implied. *Firstly*, the Commission raises the question of the possible introduction of a general clause of good faith and fair dealing in the horizontal instrument. According to the Commission's own interpretation, such a clause "would allow the courts to fill gaps in the legislation by developing complementary rights and obligations". *Secondly*, the Commission raises the question of whether a general set of remedies available to consumers should be introduced for all consumer contracts. It is not clear whether the term "all consumer contracts" is to be understood literally or whether it means contracts falling under the scope of the (eight) directives subject to the review. The Commission should clarify this. Even with the latter and narrower interpretation, the scope seems to be very wide, cf. that the distance selling directive applies to the supply of goods and services in general (financial services excluded). Thus, taken as a whole, the Green Paper may appear to outline or introduce a general *consumer contracts directive*. This seems to go far beyond a horizontal instrument regulating the commonalities of the current directives. The EEA EFTA states believe that the idea of a general consumer contracts directive is somewhat premature. They would at this point like to draw the attention to the ongoing work on a Common Frame of Reference (the "CFR"). The CFR will – as far as the EEA EFTA states have understood – represent a systematic contractual tool-kit for the future

contractual legislation at Community level and, independently of this, also for inspiration for national legislators. Henceforth, they believe that it is of importance to take into account the CFR before considering the introduction of such a far-reaching instrument as may have been foreseen in the Green Paper.

The scope of a possible horizontal instrument is, moreover, unclear with respect to other Community legislation. If a horizontal instrument is to define the concepts of "consumer" and "professional", these definitions will apply to the eight directives. However, it is not clear whether these definitions will also apply for instance when it comes to the directive on distance marketing of financial services.

In order to summarise, the EEA EFTA states agree with the Commission that there might be reasons for a shift from the current vertical approach to a mixed approach, combining a framework instrument regulating horizontal issues relevant to existing sector directives. However, the scope and content of a possible horizontal instrument is not clear, but a general consumer contracts directive seems to be outlined. The EEA EFTA states believe that the idea of a general consumer contracts directive is somewhat premature.

## 2. Possible scope of a horizontal instrument

If a horizontal instrument is pursued, the EEA EFTA states favour option 1, meaning that the instrument will apply to both domestic and cross-border transactions. This option represents a simple and foreseeable regulatory environment for both businesses and consumers.

However, from the wording in the Green Paper it is not in all respects clear what is meant by an instrument applicable for "all" consumer contracts. The EEA EFTA states take it that this refers to the (eight) directives subject to the review and not consumer contracts in general. This should, however, be clarified by the Commission.

## 3. Degree of harmonisation

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.

However, the traditional minimum harmonisation approach now seems to be questioned when it comes to the review and to possible future legislative initiatives. The Commission may seem to take the view that different rules resulting from minimum harmonisation may have a negative impact on the internal market – both for businesses (regulatory fragmentation) and consumers (lack of confidence). Although not made clear in the Green Paper, one may raise the question whether the minimum harmonisation approach is also rejected on grounds of (alleged lack of) internal market competence.

The EEA EFTA states acknowledge that different rules – in some respects – may constitute a barrier for cross border activity. However, as the Commission evidently

appreciates, the low cross-border activity depends on a great variety of factors (cultural, historical or linguistic). Thus, the Commission – when considering the need for community action – should bear in mind that harmonisation of legislation not necessarily will make businesses or consumers opt for cross-border transactions. It may be questioned whether the alleged need for a shift from minimum to total harmonisation is sufficiently underpinned.

When it comes to the question of harmonisation, representatives from consumer organisations tend to favour a minimum harmonisation approach, whilst representatives from business organisations tend to favour a total harmonisation approach. The EEA EFTA states will point out that the minimum harmonisation approach has a number of advantages. This approach gives a leeway for national development and refinement of (consumer) contract law, and may also lead to a certain regulatory competition. 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 will lead to a stagnation of contract law. Another concern is that the process of review 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 needs to be carefully considered.

The EEA EFTA states will emphasise that a high level of consumer protection should be one of several guiding principles for any prospective legal initiative. Several countries already have a high level of consumer protection in the areas covered by the Green Paper. Total 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 Commission carefully to examine in which areas or questions there might be a need for total harmonisation and in which areas a minimum approach will be more appropriate. A guiding principle may be to examine whether the differing rules constitute a barrier for cross border trade without substantially increasing consumer protection.

Thus, while maintaining a preference for the minimum harmonisation approach, 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. When it comes to the different alternatives presented by the Commission, the EEA EFTA states would like to make some more specific comments:

As a starting point, the concept of <u>total harmonisation</u> is easily understandable, meaning that no Member State may apply stricter rules than those laid down at Community level. However, the principle of total harmonisation 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 of vital

importance. If the Commission decides to pursue total harmonisation, clear guidance must be given on this matter. For instance, it is not clear what will be the implications of having definitions that are totally harmonised. If the notion of "consumer" is defined in a certain way, it is not clear whether the Member States are restricted from applying a broader concept in the implementing legislation – for instance by extending the protection to those other than consumers.

Option 2 takes minimum harmonisation as a starting point. However, according to the Commission this approach is to be complemented with either the principle of mutual recognition or the country of origin principle. It is not made clear whether the Commission regards these principles as equivalent. In the view of the EEA EFTA states, the principles cannot be considered to be equivalent – at least not in the way mutual recognition has traditionally been understood. In any respect option 2 seems to imply that the approach is something different from today's approach of minimum harmonisation.

The concept of minimum harmonisation and the principle of mutual recognition is not clear and does not seem to be well founded in this area. The principle of mutual recognition is well known in community law. The principle implies that a product that is lawfully marketed (and sold) in one Member State in principle must be able to be marketed (and sold) in other Member States, without being subject to additional control. In EC jurisprudence, the subject-matters of mutual recognition seem to be products or services. The Commission's proposal in the Green Paper seems to imply that the subject-matter in question of mutual recognition is to be the *legislation* in another Member State. It can be questioned whether the principle of mutual recognition may be applied in this area.

However, the principle is neither automatic nor absolute in its application. As the Commission emphasises, Member States may impose their own stricter requirements on businesses established in other Member States as far as this does not create unjustified restrictions on the free movement of goods or on the freedom to provide services. It is not clear what the situation will be if a Member State's requirement is considered an unjust restriction, i.e. whether this has implications for determining the applicable law. To take the example of consumer sales and the burden of proof, i.e. the presumption that lack of conformity which becomes apparent within six months from delivery shall be presumed to have existed at the time of delivery: A company established in country A sells goods to consumers in country B. Country B has extended the time period for burden of proof from six to twelve months. For the sake of argument, this extension is considered an unjust restriction. Country A has not gone further than the directive's minimum harmonisation. In such a case the principle of mutual recognition seems to imply that country B has to "recognise" the six months burden of proof period in country A, meaning that the shorter burden of proof period will be the period applicable. However it is unclear how this relates to the rules of international private law, cf. below. It also seems unclear how this relates to the question of applicable law under the regulation of consumer protection cooperation.

The alternative of minimum harmonisation combined with the country of origin principle also seems unclear and not well founded. Compared with the principle of mutual recognition, the principle of country of origin – as a legislative technique – seems to be more far-reaching, as the host Member State does not retain the possibility to impose stricter requirements on businesses established in other Member States.

The principle will *de facto* determine the applicable law within the area harmonised, as a business is subject only to the requirements in the Member State where the business is established. However, the relation to the rules of international private law does not appear to have been thoroughly considered, as these rules may determine that the applicable law is the law in the states where the consumer is resident. Thus, the principle of country of origin may seem to imply that a contractual relationship will be subject to two different applicable laws.

In order to summarise, the EEA EFTA states maintain a preference for the minimum harmonisation approach. 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 total harmonisation is pursued, the determination of the harmonised area is of vital importance, and clear guidance must be given. The concept of minimum harmonisation and the principle of mutual recognition or the country of origin principle is not clear, and seems to raise a number of questions, amongst others when it comes to the relationship with international private law.

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