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(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion of the Economic and Social Committee on the 'Green Paper on European Union Consumer Protection'

(COM(2001) 531 final)

(2002/C 125/01)

On 4 October 2001 the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the 'Green Paper on European Union Consumer Protection'.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 1 March 2002. The rapporteur was Mrs Davison.

At its 389th Plenary Session (meeting of 20 March 2002), the Economic and Social Committee adopted the following opinion by 52 votes to three with one abstention.

1. Introduction

1.1. On 2 October 2001, the European Commission adopted a Green Paper on European Union Consumer Protection. Its purpose is to launch an extensive public consultation on the future direction of EU consumer protection in the area of commercial practices, and particularly on options to improve the functioning of the business-to-consumers (B2C) Internal Market. The area of consumer protection covered here is the regulation of consumer economic interests in marketing, advertising, payment and after sales service excluding health and safety matters and other connected concerns in marketing.

1.2. The Green Paper follows an analysis made by Commission services that shows that existing EU rules on consumer protection are not up to the challenge posed by a rapidly changing marketplace. Partly as a result of confusion over which national consumer protection rules apply and the limited scope of EU consumer protection legislation, consumers lack the confidence to participate directly in cross-border transactions, and businesses, especially small and

medium-sized enterprises, hesitate to offer their goods and services EU-wide. Today, the 'consumer internal market' has not achieved its potential nor matched the development of the internal market in business-to-business development.

1.3. The Commission acknowledges that this situation is not new. However it sees a case for further action to complete the consumer internal market now, due to the introduction of the Euro, E-commerce, enlargement, the recognition at political level of the need to enhance the consumer dimension of the internal market, and the need to bring the EU closer to its citizens.

1.4. The Commission aims at achieving a greater degree of harmonisation of the rules that regulate business-to-consumer commercial practices where cross-border restrictions to business-to-consumer trade exist. Consumer contract law issues, which require detailed regulation are not being reviewed here.

1.5. The Commission has invited all interested parties to comment on the Green Paper, and organised a hearing, at which its ideas received a generally favourable reception.

1.6. The central choice revolves around the type of method needed to achieve greater harmonisation. There are essentially two options:

- a specific approach based on the adoption of a series of further directives, which is the approach adopted in most cases for the last two decades; or
- a mixed approach of a comprehensive framework directive, supplemented by targeted directives, where necessary.

1.7. One of the key questions is the scope of the directive if the second option were chosen. The Green Paper offers a choice between the concepts of 'fair commercial practices' or 'misleading and deceptive practices'. Both concepts have some basis in existing EU law.

1.8. In this context, the Green Paper also presents new ideas for the use of self-regulatory codes within a legislative framework. The Commission believes that a framework directive could make it possible to work towards effective EU-wide self-regulation in the field of consumer protection.

1.9. Finally, the Green Paper develops ideas for better enforcement of consumer rights in business-to-consumers transactions. Currently there is no legal framework for inter-governmental co-operation between the bodies enforcing consumer rights in the Member States. Ideas are developed to set-up a system for co-operation between national consumer protection agencies to help consumers to get their rights respected in other EU Member States.

2. General comments

2.1. The Committee welcomes the Commission's initiative which responds in part to ESC proposals for simplification of legislation and a greater commitment to consumer protection⁽¹⁾. The title of the Green Paper is slightly misleading as it covers only commercial practices, and the ideas in it need further clarification. Nonetheless the Committee agrees that consumer and small business participation in the Internal Market⁽²⁾ needs to be encouraged and that enforcement is a sensible target for improvement.

⁽¹⁾ ESC Opinion on Simplification, OJ C 48, 21.2.2002.

⁽²⁾ See also the forthcoming ESC Opinion on sales promotions.

2.2. The Committee sees some scope for simplification and consolidation of existing legislation — without endangering the consumer acquis. The sometimes fragmentary and overly detailed nature of EU legislation points to the need for regulatory reform in parallel with the introduction of any new legal structure. For example the time-share directive quickly became out of date and loopholes emerged. As the proposed regulation on sales promotion is a sectional regulation, the Committee suggests speeding up the process of consultation on the ideas in the Green Paper. Thus the principle of the way forward with co-regulation and a general clause would be determined before finalisation on sales promotions and the two properly coordinated. It is important to avoid a period of confusion and legal uncertainty.

2.3. The Committee has been exploring the options for self regulation and co-regulation and considers that a general requirement for fair commercial practices could provide a basis for a more flexible approach to the detail of consumer protection in this area, although not for contract law. For this reason, the Committee would support the more general proposal rather than a restriction to misleading and deceptive practices. The EU already has the model of a general product safety directive and misleading advertising and Sweden successfully follows this model. It is possible to define fairness. For example, fairness has been defined in the context of the unfair contract terms directive and also in the OECD guidelines on E.Commerce.

2.4. However, the Committee would like to emphasise that the proposal for a framework directive and a general clause cannot be fully assessed on the basis of the Green Paper. The Commission has not yet clarified how this legal system would work at Community level. It should aim for simplification rather than a lot of further legislation. In particular, further details are needed on mechanisms to be put in place to guarantee unified application and a level playing field across the EU. The Committee would propose the use of Article 153. The Committee points to a shortage of coordinated EU research on consumer issues and asks the new Framework Programme on Research to address this.

2.5. The Committee welcomes the option of giving an increased role for co-regulation in the framework of this new approach commercial practices regulation. The role of Codes of Conduct which businesses may voluntarily subscribe to is useful provided that:

- the resulting Codes of Conduct or Codes of Good Practices are of good quality and concentrate on the definition of good practices within the limits of the framework directive and,

- there is monitoring by government and by consumer organisations;
- the Codes of Conduct are associated with redress mechanisms;
- violation of self regulation rules by participants is fully addressed.

2.6. The Committee appreciates the inclusion, in the new approach, of a greater effort in avoiding divergence in the interpretation of existing and future regulations by means of non-binding practical guidance in plain, user-friendly language, for the benefit of consumers, business, judges and enforcement authorities. The role of the regulatory committee needs to be clarified.

2.6.1. The Committee would oppose the idea of using this guidance to expand legislation through a committee. The Committee stresses that the official interpretation of directives or regulations is the exclusive competence of national courts and, at last instance, of the Court of Justice. The aim over time will be to create a clear corpus of consumer rights based on the framework directive.

2.7. In order to ensure the full involvement of the main partners, business and consumers, and the participation of the rest of civil society where required, the Committee would also propose clarifying the role of business-consumer dialogue, under the framework of the new general clause on fair commercial practices, namely in the definition of the guidelines for the interpretation and application of the 'hard' and 'soft' regulations. Payment, or provision of research support will be necessary to ensure full participation of all the players.

2.7.1. The Committee accepts its role in support of the producer-consumer dialogue and would ask governments to ensure a balanced and full representation of consumers on the Committee.

2.7.2. The Committee emphasises that the stakeholders participation can supplement but never replace the role of democratic government. Technical 'effectiveness' or 'coherence' — as stated in the Report of EP on the Commission White Paper on European Governance (A5-0399/2001 final, 15.11.2001) — is no substitute for democratic control.

2.8. The Committee is in favour of much more harmonisation, and considers that protection of consumers in line with Article 153 should be at the highest level.

3. Specific comments

3.1. The Commission asks for specific answers to certain precise questions. The Committee would like to contribute to the discussion of each main question.

3.2. The first question deals with the key elements of a general clause, the general criteria and the core rules for regulating commercial practices.

3.2.1. The Committee agrees that a general clause containing a legal standard is a flexible and suitable instrument to govern marketing behaviour in a very dynamic area, which is constantly developing and undergoing change.

3.2.2. It should be made clear that the concept of fairness incorporates good business ethics and that self-regulatory codes offer interpretative guidance in that respect.

It should include the provision of clear, helpful and adequate pre-contractual information.

3.2.3. The general clause should be complemented by a series of definitions of practices, which should be considered as unfair.

3.2.3.1. This should include:

- incitation to or indulgence in unlawful behaviour;
- misleading presentations, unsubstantiated claims including;
- exploitation (abuse) of children's credulity;
- inertia selling (unsolicited products).

The list should be considered as a non exhaustive and could be amended whenever necessary.

3.2.4. Example of unfair practices are promoting baby milk at the expense of breast feeding, misleading consumers about price savings that can be made by switching service providers and inaccurate advice about work required.

3.2.5. The framework would enable a legal backdrop to protect vulnerable consumers such as to give force to voluntary rating/filtering and 'notice and take down' systems on the Internet to protect children from the harmful content the Committee has shown to be reaching them in large quantities⁽¹⁾. It would also imply safety messages and systems to prevent paedophile approaches and child pornography on-line.

3.2.6. A 'grey' list of practices should also be included, which require vigilance because they could involve unfair practices, under certain defined and precise circumstances. Guidelines should be produced for example on:

- regard for health and safety precautions;
- liquidation, clearance and bargain sales;
- environmental claims;
- promotional sweepstakes and contests;
- financial and non-financial investment offers.

3.2.7. Examples of grey areas where codes could help are the promotion of prizes, which involve hidden costs, the use of premium lines to sell information/entertainment on-line, marketing to children such as the promotion of brands especially sweets/drinks in schools through educational materials, and accepting repeated orders for goods or services from an elderly consumer who is clearly confused. Several countries have self-regulation of premium lines. The UK body, ICSTIS, found half of all its complaints in the year 2000 relating to the Internet concerned downloads by children. One quarter of UK and one-sixth of Austrian children recently surveyed by European Research into Consumer Affairs and LandesAcademie, Lower Austria said that they had bought something over the Internet or that they had paid for games or entertainment.

3.3. The second main question is related to the inclusion in the framework directive of a basis for self-regulation.

3.3.1. The Committee recognises the importance of self-regulation in filling out the definitions of fair trade and good marketing practices, under a legal framework, and, from this perspective, welcomes the inclusion of a basis for self-regulation in the framework directive.

There should be penalties for traders who sign up to codes and then fail to comply.

3.4. The third main question refers to the development of non-binding practical guidance.

3.4.1. The Committee accepts the idea of complementing the framework directive with recommendations adopted by the Commission with non-binding practical guidelines which interpret the meaning of the directive and other regulations and specific directives, in a plain and user-friendly language.

3.4.2. The framework directive should state in a very precise manner the field of application and the ambit of these guidelines. It should also be clearly stated in the framework directive that these guidelines, published through recommendations from the Commission, do not replace single directives and regulations when they are needed, and should not prejudice the existence of the above mentioned lists of unfair practices.

3.5. The last main question is related to the role of stakeholders participation in the development of the non-binding legal guidance.

3.5.1. Provided that the institutionalisation of the 'dialogue' does not mean the subversion of the rule of law and the principles and structural elements of representative democracy, the Committee welcomes the increased participation of business and consumer organisations in the decision making processes which lead to the definition of rules and political orientations in consumer protection.

3.5.2. The framework directive should therefore define accurately the criteria for the representation of trade and consumer organisations and the nature, organisation and functioning of the regulatory body which shall have the power of promoting the dialogue and defining the standards and regulations and their interpretation.

3.5.3. Finally, the framework directive should state clearly that such process of elaborating guidelines would never exclude the possibility of recourse to courts or any other alternative means of dispute settlement, in case of conflict.

⁽¹⁾ Opinion on a Programme for child protection on the Internet, which quotes research by European Research into Consumer Affairs, LandesAcademie, Lower Austria and the Hellenic Consumers' Association under the EU Internet Action Plan, OJ C 48 of 21.2.2002.

4. Enforcement

4.1. The Commission has been working hard to make existing consumer legislation work on the ground and to improve access to justice for consumers in cases of cross-border complaints, but problems remain. Uneven enforcement is a barrier to fair competition and the efficient operation of the Single Market, as well as unsatisfactory for consumers. The Committee regrets also that there have been unnecessary delays in Member States' implementation of consumer laws. Member States must transpose legislation more quickly. The Committee therefore welcomes the proposals to organise regular meetings with the governments on these issues and to establish central national contact points on enforcement. Transnational contacts between local enforcement offices should be encouraged too.

4.2. One problem that needs urgently to be addressed is the fact that many Member States lack any central enforcement body. Member States should be required, when notifying the Commission of their national laws implementing EU legislation, to give details of the relevant bodies responsible for enforcement, along with the range and type of sanctions which are available to it under national laws and sanctions should be harmonised and efficient. A rolling programme of reviews of the implementation and enforcement by Member States of EU consumer protection directives, staff exchange and joint surveillance would ensure more consistent action.

4.3. The Committee has called in the past for more cooperation between enforcement officers across Europe and is encouraged by the establishment in 1999 of IMSN Europe, an informal network of enforcement bodies. Details of cases being pursued nationally could be usefully shared between enforcement authorities, including by means of a shared website. Member States should be under an obligation to give

assistance to each others' enforcement bodies if they require information (already in the public domain) about the activities of companies whose headquarters or main place of business are within their jurisdiction.

4.4. The Commission should consider the establishment of minimum EU standards of enforcement, based on a number of key principles such as efficacy and independence, and monitored by the Commission. The Committee does not advocate uniform standards of enforcement across the EU, as this could lead to a lowest common denominator rather than a general levelling up. The emphasis should be on effective audit procedures to ensure broad equivalence in terms of outcome, rather than in techniques. The Commission should also establish a periodical evaluation of co-regulation and self-regulation schemes, each two/three years, drafting a report on the experiences of self regulation in the member states and suggesting improvements.

4.5. Efforts to help individual consumers obtain redress through EEJ-NET etc. need to be redoubled. The Commission could consider a scoreboard on implementation of consumer legislation similar to that of DG Markt on the Single Market.

4.6. There is also a need to develop European consumer education so that consumers themselves take action to secure their rights. The Committee regrets that the Commission tends to limit the concept of 'consumer protection' solely to 'economic interests'. Information and education are also very important, especially for the disadvantaged. The advent of the Information Society should be capitalised on to provide information to larger numbers of consumers, but the needs of those without regular access should not be overlooked. The Committee hopes that the Commission's proposal will result in more secure funding for consumer education at European level and in cooperative EU level programmes by consumer organisations.

Brussels, 20 March 2002.

The President
of the Economic and Social Committee
Göke FRERICHS