

Opinion of the European Economic and Social Committee on the 'Green Paper on the Review of the Consumer Acquis'

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(2007/C 256/05)

On 8 February 2007, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the *Green Paper on the Review of the Consumer Acquis*.

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 4 June 2007. The rapporteur was Mr Adams.

At its 437th plenary session, held on 11 and 12 July 2007 (meeting of 12 July), the European Economic and Social Committee adopted the following opinion by 55 votes with 2 abstentions.

1. Conclusions and Recommendations

1.1 The EESC takes note of the Green Paper but has doubts that the approach put forward can lead to a high and uniform level of consumer protection across the EU. Ensuring such protection through a simplified, consistent and enforced consumer acquis has been a repeated theme of EESC opinions on consumer safeguards but there are indications in this review process that this may be difficult to achieve. The review of the acquis is therefore a real attempt to implement the 'Better lawmaking' initiative. The foundations and objectives for this should be clear and agreed, in advance, by the parties involved.

1.2 Genuine democratic legitimisation of the revised consumer acquis is necessary together with a clear legal and conceptual basis.

1.3 The EESC would particularly welcome the application of the principles of the acquis to the rapidly growing and poorly regulated digital environment.

1.4 Consumer policy is considered by the EESC not only as an integral part of the EU internal market strategy but also as an important and affirming element of citizenship. The EESC supports implementation of the better regulation principles in consumer legislation. Any proposals for harmonised rules in this field should be backed by a proper impact assessment, and pursue simplification and clarification of existing rules.

1.5 Better enforcement measures and strengthening or introducing clear and simple processes for achieving redress should be emphasised as a priority.

1.6 The Committee encourages the Commission to take account of its Opinion of April 2006 on *The legal framework for consumer policy* ⁽¹⁾ which proposed making it possible to adopt

consumer policy measures in their own right and not only as a by-product of the establishment of the internal market.

1.7 Harmonisation of consumer legislation across the EU must take, as a guiding principle, the adoption of the best and highest level of consumer protection to be found in the Member States. Any 'horizontal instrument' should be based on the highest standards while necessary 'vertical integration' would concentrate on clarifying technical issues. A horizontal instrument could however contain fully harmonised rules in specific fields, such as the right of withdrawal and the definition of consumer as well as abusive clauses, delivery or consumers' right of redress, whereas minimum harmonisation would apply elsewhere. It is to be hoped that this would be a preferred approach, both by the Commission and all Member States.

2. Introduction

2.1 The Commission adopted their long-awaited **Green Paper on the Review of the Consumer Acquis** (consumer rights legislation) at the beginning of February 2007. This concluded what they term the 'diagnostic phase' of the Review. They are seeking views on options to simplify, modernise and harmonise the existing Community legislation on consumer protection. It is argued that by analysing the strengths and weaknesses of the existing legislation and making appropriate revisions both consumers and business can benefit. The Commission also considers the Review to be an opportunity to obtain consistency across Member States and generally improve EU consumer protection legislation, some of which dates back 20 years, particularly by identifying where regulatory differences exist and if they produce internal market barriers to consumers and business — while respecting the principle of subsidiarity. This Opinion, therefore, concentrates on how the underlying themes of the Consumer Acquis are being perceived and presented. As yet only options for changes have been put forward.

(1) OJ C 185 of 8.8.2006.

2.2 Consumer spending represents 58 % of EU GDP but is still largely fragmented into 27 national markets. The internal market could be the largest in the world and the Commission has described its strategy as awakening 'a sleeping giant, the retail side of the Single Market' ⁽²⁾. The Commission currently defines its consumer policy as 'ensuring a common high level of protection for all EU consumers, wherever they live, travel to or buy from in the EU, from risk and threats to their safety and economic interests and increasing consumers' capacity to promote their own interests' ⁽³⁾.

2.3 The objective of ensuring the consistent application of a common framework for consumer rights in the EU is widely supported. Such a framework would provide clear and equitable rights and protection for all consumers whilst simultaneously creating a level playing field for the providers of goods and services. The Green Paper on Consumer Rights explicitly recognises that progress towards such an objective has been slow, inconsistent and obstructed by a wide range of varying national priorities and exceptions. The welcome inclusion of new Member States has further complicated a common understanding of consumer protection. This Review of the Consumer Acquis presents the Commission's view of a process which could lead to greater clarity, consistency and application of existing Directives. But many consumer organisations argue that it also introduces questions about the direction of consumer policy as a whole.

2.4 The Directives that are included within this Review cover a wide range of consumer contract law issues including doorstep selling, timeshare, package travel, distance-selling, sale of goods and unfair contract terms. However, not all Directives dealing with consumer protection are considered in the Review as some are considered too recent to be included, or fall within areas being considered elsewhere by the Commission. The Timeshare Directive has been highlighted in the Green Paper as requiring urgent revision and a revised Directive is expected shortly. A significant new area which is singled-out as requiring inclusion in the principles of the acquis is the digital 'environment' which presents the global challenges of e-commerce.

2.5 The Commission has reviewed the Directives through:

- a comparative analysis of their implementation into national law,
- research into the perceptions of consumers and business,
- workshops with Member State experts and contract law stakeholders.

⁽²⁾ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/320&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁽³⁾ http://ec.europa.eu/consumers/overview/cons_policy/index_en.htm.

2.6 The well-established terminology used by those engaged on consumer protection issues has the potential to create confusion, hence an early explanation of some of the key concepts is included here. 'Minimum harmonisation' is where a Directive imposes a set of minimum requirements to be enforced by the Member State. This leaves open the possibility that stricter requirements than those specified in the Directive can be imposed by the Member State. 'Maximum (or' Full') harmonisation' means that Member States must apply the rules in the Directive and may not go further ('floor and ceiling harmonisation'). Thus many consumer organisations have come to regard full harmonisation as synonymous with a minimum level of consumer protection and minimum harmonisation as offering the possibility of a much greater level of protection.

2.7 The publication of the Green Paper marks the end of the Commission's exploratory phase of the Review. The Commission asked for views on the Green Paper by 15 May 2007. The Commission is now analysing the consultation responses, will produce a summary of views and decide whether there is a need for a legislative instrument, though this will take some months. Any such proposal will be accompanied by an impact assessment. 'At the end of the exercise it should, ideally, be possible to say to EU consumers "wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same"' ⁽⁴⁾.

3. Summary of the Green Paper

3.1 The Green Paper sets out to provide a context in which views from interested parties can be collected on the policy options for the Consumer Acquis and some other specific issues. It defines the main issues as:

- New Market Developments: the majority of directives comprising the Consumer Acquis fail to meet 'the requirements of today's rapidly evolving markets'. Music downloads and on-line auctions are cited as examples as is the exclusion of software and data from the Consumer Sales Directive.
- Fragmentation of Rules: current directives allow Member States to adopt a higher level of consumer protection in national law. On a number of issues, such as the length of a contract 'cooling off' period, there is a lack of coherence between national legislations.
- Lack of Confidence: the majority of consumers believe that businesses in another Member State are less likely to respect consumer protection laws.

⁽⁴⁾ http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf.

3.2 Based on earlier work the Commission then outlines two positive strategies for revision of the Consumer Acquis.

— Option I: the vertical approach, would involve the amendment of existing directives separately and, over time, they would be brought into conformity with each other.

— Option II: the mixed approach, would require identifying and extracting issues common to all directives and regulating them consistently in a 'horizontal instrument'. Some specific 'vertical' adjustment of particular directives would also be required.

3.3 A third strategy, that of 'no legislative action', is briefly mentioned, though it is pointed out that existing problems would not be resolved and inconsistencies between Member States may be increased.

3.4 The Green Paper then deals with the possible scope of a Horizontal Instrument. Three options are suggested.

I. A framework instrument applicable to both domestic and cross-border transactions but which does not supersede existing sector-specific rules, which would remain in force. Financial services and insurance are given as examples.

II. An instrument applying only to cross-border contracts. This would provide greater security and confidence for consumers buying goods and services outside their own country but could lead to different standards between domestic and cross-border protection.

III. A horizontal instrument which only applied to distance shopping — cross-border or domestic. This would replace the Distance Selling Directive but could also lead to fragmentation between distance and face-to-face selling protection.

3.5 The next topic of the Green Paper will, for many, be seen as the pivotal issue in the revision of the Consumer Acquis — **the degree of harmonisation**. At present, Member States can provide for higher levels of consumer protection than is allowed for by the directives. This is known as 'minimum harmonisation'. The focus and priority of consumer protection issues varies considerably between Member States, sometimes with the result of confusing consumers and deterring businesses from cross-border marketing. Two possible options are presented for consideration.

1. Revised and fully harmonised legislation. On issues where full harmonisation would not be possible a mutual recognition clause would apply, 'for certain aspects covered by the proposed legislation but not fully harmonised'.

2. Revised legislation that would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle ⁽⁵⁾.

3.6 Annex I — The Consultation

The majority of the Green Paper contains the detailed and highly structured consultation exercise in which respondents are invited to state their views on a wide range of issues involving general policy questions, matters of definition, matters of contract law, issues of principle, and also questions of scope and detail. The consultation begins with the three 'policy' issues outlined above.

— The general legislative approach.

— The scope of a horizontal instrument.

— The degree of harmonisation.

For each issue the Commission poses a key question and suggests three or four possible ways of response. There then follows 27 specific questions relating to the directives under consideration. The format again is to provide a short introduction to the issue, pose the main question — for example, 'To what extent should the discipline of unfair contract terms also cover individually negotiated terms?' or 'Should the length of the cooling-off periods be harmonised across the consumer acquis?' and suggest three or four possible options where a response could be made.

4. General Comments

4.1 Over many years the EESC has supported, through its work and Opinions, the primary objective of the EU's consumer policy — that a high, uniform and consistent level of protection is available to all. The Committee also supports the secondary objective of enabling consumers to be informed and to make an informed choice in a barrier-free marketplace. The structure of the Green Paper makes it inevitable that the underlying tensions in fully achieving these two objectives are brought to the surface.

⁽⁵⁾ Mutual recognition would mean that Member States would retain the possibility to introduce stricter consumer protection rules in their national laws, but they would not be entitled to impose their own stricter requirements on businesses established in other Member States in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services. Application of the country of origin principle would mean that a Member State would retain the possibility to introduce stricter consumer protection rules in its national law, but businesses established in other Member States would only have to comply with the rules applicable in their home country.

4.2 It is already clear that continuing with the Consumer Acquis in its present form should not be regarded as a long-term option. Variation in law between Member States, inconsistency in definition, the considerable discrepancy in the way existing consumer legislation is applied and enforced and lack of clarity in — or even the existence of — complaints and redress procedures all have some effect in creating barriers to the single market.

4.3 It is also apparent that the Commission see the Review as an opportunity to look at some aspects of consumer policy hitherto regarded as fundamental and explore whether they are consistent with a vibrant single market, particularly one which is competitive in terms of globalisation. In this respect, there are similarities with other reviews being stimulated as a result of implementing the Lisbon Agenda. A high, uniform level of consumer protection is seen by some as an integral part of the European social model and a shift in emphasis to *'redefine EU Consumer policy so it most effectively contributes to two central EU goals — creating economic growth and employment as well as reconnecting Europe to its citizens'* might be regarded as challenging this concept ⁽⁶⁾.

4.4 Although the task will be difficult, the EESC welcomes the Review of the Consumer Acquis and supports the Commission in its stated aims of reducing internal market barriers whilst maintaining a high level of consumer protection. The Committee considers, however, that such efforts should not be confined solely to the eight directives currently under consideration; they should instead cover, in the future, at least the 22 directives set out on the list drawn up by the Commission in May 2003.

4.5 The EESC wishes to participate in this debate actively with the aim of strengthening the internal market for the benefit of all stakeholders — consumers, professionals, companies and citizens.

5. Specific Comments

5.1 Complex issues of policy, principle and law are raised in the Green Paper. Member States have themselves developed a corpus of consumer law which, though often consistent between countries in its broad principles, varies in detail and application. The systematic and extended consultation process

annexed to the document reflects this complexity. This detailed framework solicits responses from the many hundreds of organisational stakeholders who wish to make their views known. In this Opinion, however, the EESC confines its comments to the underlying major policy issues, because it considers that each directive to be reviewed should be commented on separately, as in its Opinion on the directive on distance contracts [Opinion INT/334 on the Commission Communication COM(2006) 514 final, of 21 September 2006].

5.2 The main priority should be in making good the deficits in the existing Directives and co-ordinating them with each other.

5.3 'Minimum harmonisation' combined with a positive approach by Member States to adopt consistently higher standards on consumer protection is likely to form the basis for the major part of the consumer acquis for the foreseeable future. For various (and varying) social and economic reasons Member States will either wish to retain the level of consumer protection they already enjoy or move in a measured way, at a pace of their own choosing, towards a different level of protection. This position respects and is much easier to reconcile with the principle of subsidiarity. Nevertheless, it also recognises the view that various categories of consumers throughout the EU are disadvantaged in their current level of protection or capacity to seek redress and action is needed at both EU and Member State level.

5.3.1 This does not mean that, in a case-by-case examination, in very specific areas in which completion of the internal market is the prime concern, the possibility of maximum harmonisation should not be considered, provided that a higher level of consumer protection is ensured, possibly through regulation.

5.4 The stated aim of putting the consumer in the driving seat — in terms of knowledge of consumer rights, their capacity to take action against suppliers and obtain redress — should not be seen as an alternative to clear and proactively enforced protection through a combination of EU and national law. Information is a very different thing from protection. Indeed, the balance of power in most market transactions normally lies with the supplier and the majority of consumer law is designed to maintain the rights of the purchaser.

Brussels, 12 July 2007.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

⁽⁶⁾ Ms Meglena Kuneva, Commissioner for consumer protection policy
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/256&format=HTML&aged=0&language=EN&guiLanguage=en>.